

ARTICLE

CHINA'S TEN YEARS IN THE WTO: ITS PERFORMANCE AND NEW CHALLENGES

*Minyou Yu, * Heng Liu***

Becoming a member of the WTO in 2001 was a historic event of great significance during the process of China's reform and opening up. Since then, China has steadily pushed forward the reform and opening up policy, proactively seizing the opportunities of economic globalization and positively utilizing the multilateral trading system to develop economic and trade relations with other countries, all of which have contributed to the great economic and social achievements during the first decade of 21st century. However, there are different opinions on China's futuristic role in the WTO, and those disagreements resulting from various interest preferences are not only one-sided and limited, but also triggering off the discussions on the criteria to assess China's performance in the WTO.

This article argues that China's activities in the WTO (i.e., implementing WTO commitments, participating in the Doha Round negotiation, the dispute settlement and trade policy review) should be a kind of assessment criteria. Based on comprehensive observation of China's performance in the WTO, it is concluded in this article that China's participation in the WTO system and global trade governance extends the scope of world trade law, improves its effectiveness, constitutes China's new contributions to implement treaty obligations in

* Ph.D in law and Professor, at School of Law, Wuhan University, Wuhan, China. His research covers WTO law, China foreign trade law, international law enforcement and compliance mechanism. Contact: yумы@whu.edu.cn

** Ph.D in law and Assistant Professor, at Institute of European Studies, Chinese Academy of Social Sciences, Beijing, China. His research covers WTO law, EU law, and the law of international organizations. Contact: liuheng@cass.org.cn

This article is one of the works for the project of National Key Research Centre on the Major Legal Issues on Implementation of WTO Agreements in China (no. 01JAZJD820003) and the sub-project of International Trade Disputes Arising from Different Social Systems and Their Settlement of the State Major Research Project on China's Constructive Role in the Settlement of International Disputes and Global Crises (no. 08&ZD055). The authors pay great gratitude for the funding of the two projects.

good faith, resolves peacefully international trade disputes, and maintains substantively the international rule of law. At the same time, it has not only caused new driving forces for international trading system, but also made China face new challenges in the WTO.

| | |
|---|-----|
| INTRODUCTION | 331 |
| I. IMPLEMENTATION OF CHINA'S WTO COMMITMENTS | 336 |
| A. <i>An Expensive Ticket: China's WTO Commitments</i> | 336 |
| B. <i>A Rogue Elephant or a Team Player: Initial Conjecture of China's Performance of Its WTO Commitments</i> | 337 |
| C. <i>A Record Unprecedented: China's Performance on Its WTO Commitments</i> | 338 |
| D. <i>An Admirable New Member: Appraisals of China's Performance on Its WTO Commitments</i> | 340 |
| E. <i>A Mature and Fully Responsible WTO Member</i> | 343 |
| II. PARTICIPATION OF CHINA IN THE DOHA ROUND NEGOTIATIONS | 345 |
| A. <i>An Overview</i> | 345 |
| B. <i>A New Member with a Low Profile: Appraisals of China's Performance in the Doha Round</i> | 346 |
| 1. <i>A Constructive Role</i> | 346 |
| 2. <i>A Low Profile</i> | 347 |
| 3. <i>Negative Appraisals</i> | 348 |
| 4. <i>Summary</i> | 348 |
| C. <i>A Courageous Leader? Expectations of China's Participation in the Doha Round Negotiations</i> | 349 |
| III. PARTICIPATION OF CHINA IN THE WTO DISPUTE SETTLEMENT | 351 |
| A. <i>The Oriental with Litigation-Aversion Nature? Initial Projection of China's Participation in the Dispute Settlement</i> | 351 |
| B. <i>A Different Player? China's Participation in the WTO Dispute Settlement</i> | 352 |
| 1. <i>An Active Third Party</i> | 352 |
| 2. <i>An Easy-Compromise Defendant</i> | 353 |
| 3. <i>A Proactive Complainant</i> | 355 |
| 4. <i>A Role Model in Implementation</i> | 356 |
| C. <i>Causes of China's Changes in the Dispute Settlement Mechanism</i> | 358 |
| 1. <i>Changes of External Conditions</i> | 358 |
| 2. <i>Changes of China's Capacity and Intent</i> | 360 |

| | |
|--|-----|
| IV. PARTICIPATION OF CHINA IN THE WTO TRADE POLICY | |
| REVIEW | 362 |
| A. <i>Transitional Review Mechanism</i> | 362 |
| B. <i>Trade Policy Review Mechanism</i> | 364 |
| CONCLUSION | 368 |
| 1. A New Member in Fulfilling the WTO Obligations | |
| in Good Faith | 369 |
| 2. New Challenges to China in Future | 371 |

INTRODUCTION

Since its accession into the World Trade Organization (“WTO”), the performance of China in this organization is always a major topic throughout the world, including discussions on implementing its obligations, exercising its rights and participating in other affairs of the WTO. The wave to re-observe China’s participation and performance in the WTO is surging with the 10th anniversary of China’s accession to the WTO, which is approaching. A thematic dialogue on “China’s Impact on Global Trade and Growth” was held during the 2011 annual meeting of the World Economic Forum. In the dialogue, Peter Sutherland, the first Director-General of the WTO, Pascal Lamy, the Director-General of the WTO, and Chen Deming, the Minister of the Ministry of Commerce of the People’s Republic of China had heated discussions with respect to the achievements that China has made and the challenges that it has faced in the WTO, especially China’s export growth model and the future of the multilateral trade.¹

A few official reviews on China’s ten years in the WTO have been carried out in the United States since 2010. On 9 June 2010, the US-China Economic and Security Review Commission (“USCC”) held a hearing on “Evaluating China’s Past and Future Role in the World Trade Organization.”² The Committee on Ways & Means (“US House of Representatives”) held two hearings on China’s trade and industry policies on 16 June 2010³ as well as on China’s exchange rate policy on 15⁴ and 16⁵ September 2010. So did the Trade Policy Staff Committee

¹ <http://www.weforum.org/s?s=China+%26+WTO> (last visited Feb. 23, 2011).

² http://www.uscc.gov/pressreleases/latest_pressrelease.php (last visited Jun. 19, 2010).

³ <http://waysandmeans.house.gov/Calendar/EventSingle.aspx?EventID=189839> (last visited Mar. 25, 2012).

⁴ <http://waysandmeans.house.gov/Calendar/EventSingle.aspx?EventID=205417> (last visited Mar. 25, 2012).

⁵ <http://waysandmeans.house.gov/Calendar/EventSingle.aspx?EventID=206492> (last visited Mar. 25, 2012).

(“TPSC”) of the US Trade Representative (“USTR”) on China’s implementation of its WTO commitments on 6 October 2010.⁶ The attendants had heated discussions regarding China’s role and performance in the aforesaid hearings. In December 2010, the USTR filed the 2010 Report to Congress on China’s WTO Compliance.⁷ This is the 9th report prepared pursuant to section 421 of the US-China Relations Act of 2000,⁸ which requires the USTR to report annually to Congress on compliance by the People’s Republic of China with commitments made in connection with its accession to the WTO, including multilateral commitments and any bilateral commitments made to the US. Like the prior reports, this report is structured as an examination of the nine broad categories of WTO commitments undertaken by China. The report also incorporates the findings of the Overseas Compliance Program, as required by section 413(b)(2) of the Act.⁹ Throughout the report, the USTR has attempted to provide a picture of China’s WTO compliance as complete as possible, identify the areas where progress has been achieved and underscore the areas of concern as appropriate, with regard to the commitments that became effective upon China’s accession to the WTO, as well as those commitments scheduled to be phased in over time. The report’s analysis continues to focus on trade concerns raised by the US stakeholders, in the view of the US government, within the WTO context. However, the report does not provide an exhaustive analysis of many areas in which China’s WTO compliance efforts may have or may have not satisfied particular commitments in China’s WTO accession agreement.

In the European Union (“EU”), the Directorate-General for Trade of the European Commission allocated special funding in 2009 to the successful bidders, i.e., the Consortium Emerging Markets Groups (“EMG”), the Development Solutions Ltd. (“DS”), and the Institute for Globalization and International Regulations (“IGIR”) at the University of Maastricht in order to research China’s implementation of its WTO obligations,¹⁰ i.e., (a) describe and assess the extent to which China has implemented and complies with its WTO obligations and identify possible inconsistencies with WTO obligations under the covered agreements as defined in Appendix 1 to the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) and China’s

⁶ <http://www.federalregister.gov/articles/2010/08/03/2010-19066/request-for-comments-and-notice-of-public-hearing-concerning-chinas-compliance-with-wto-commitments> (last visited Oct. 28, 2010).

⁷ See USTR Releases 2010 Report to Congress on China’s WTO Compliance, at <http://www.ustr.gov/node/6408> (last visited Feb. 19, 2011).

⁸ ATL. 106–286, 22 U.S.C. § 6951.

⁹ 22 U.S.C. § 6943(b)(2).

¹⁰ See OJ/S S17, 27/01/2009, 23265-2009-EN, at <http://trade.ec.europa.eu/doclib/html/142713.htm> (last visited Feb. 23, 2011).

Accession Protocol, and the implementation and compliance, referring to both, have adequate legal instruments (measures) in place and the enforcement of those (practices); (b) describe, assess and quantify the economic impact of any non-implementation or non-compliance by China of its WTO obligations in terms of lost opportunities for the EU business in its trade with China, its investment and operations in China, or other economic losses.

There are also academic activities such as seminars, workshops or commentary series about China and the WTO (for ten years), as the 10th anniversary of China's accession to the WTO approaches. For example, the European Centre for International Political Economy ("ECIPE") had a lunch seminar about China's trade policy since its accession to the WTO on 1 March 2011; the Centre for International Governance Innovation ("CIGI") also held an exclusive commentary series entitled as "Looking Back, Looking Forward: China's Accession to the WTO for Ten Years" on 13 June 2011. In addition, there was a roundtable discussion in Geneva on "A Decade in the WTO: Implications for China and Global Trade Governance" organized by the International Centre for Trade and Sustainable Development ("ICTSD") in partnership with the China Society for WTO Studies ("CWTO"), and the Friedrich-Ebert-Stiftung ("FES") Geneva Office on 29 June 2011.

Razeen Sally, the director of the ECIPE, made a stock-take about Chinese trade policy after ten years in the WTO at the beginning of 2011.¹¹ On 13 February 2011, he published an article entitled "China's Trade-off" in the Wall Street Journal.¹² In this article, Sally further summarized his opinions as that: It is almost a decade since China joined the WTO; China's membership of the WTO has been a resounding success; access to the WTO's rules-based system and dispute-resolution process has defused manifold tensions and smoothed China's rapid integration into the global economy.

Back then, China imported "global order": It absorbed pre-existing, mainly US-designed policies, rules, and institutions. It acted rather like a small or medium-sized economy that could only adapt to the international terms of trade. Now China is one of the "Big Three," along with the US and the EU. It is the world's second largest economy and the leading exporter of goods. It is also the biggest post-crisis contributor to global growth. In line with its growing economic size, it will influence international prices and shape global rules. But that will require significant changes in the ways about economic policies, and has

¹¹ See Razeen Sally, *Chinese Trade Policy after (Almost) Ten Years in the WTO: A Post-Crisis Stocktake*, ECIPE Occasional Paper (no. 2/2011), at <http://www.ecipe.org/publications/chinese-trade-policy-after-almost-ten-years-in-the-wto-a-post-crisis-stocktake> (last visited Mar. 25, 2012).

¹² See Razeen Sally, *China's Trade-off*, The Wall Street Journal, Feb. 13, 2011.

resisted those changes to date. China has been a conspicuously passive and marginal player in the Doha Round talks to further liberalize global trade. Its default position is still to react, leaving other major players to take initiatives. Meanwhile, China's historic opening to the world economy has stalled since 2006, although there has been paltry unilateral liberalization beyond China's WTO commitments. Despite, or perhaps because of, China's growing clout, it is unwilling to open markets unilaterally and negotiates hard over reciprocal concessions. This creates uncertainty and instability for China and the rest of the world, and has implications for other state leaders looking to China to play a constructive role in global economic matters.

However, earlier liberalization has left China so deeply integrated into global supply chains that it cannot afford to move too far backward on reforms, and China increasingly cannot afford to stand still as it endeavors to deliver steadily rising prosperity. At this time, the problem that Chinese trade policy faces is either keeping industrial policies and trade reforms at a slow speed or becoming a real global leader. It should proceed with "WTO-plus" reforms that move beyond its accession commitments. But until it finds a way to break this impasse, China will be limited in its ability to exercise meaningful global leadership. This fact calls for some humility from Chinese leaders who otherwise appear increasingly assertive at the global stage, and for realism from foreign leaders who wish China would exercise a greater leadership role at international forums like the International Monetary Fund ("IMF"), WTO, and G-20.

Furthermore, it seems that a trend to criticize or even condemn China as to its performance in the WTO is emerging within European and US academic circles. The critics say that China's attitude to multilateral trade system is unclear, and China assumes little responsibility to maintain the international order in global economic governance. As an emerging global economic superpower, China is a serious challenge to the global economy. In the last ten years, China was noteworthy as an international trade power, and became the second largest trade entity in 2010. However, it has been playing at best a passive role and, at worst, a disruptive role with respect to the global trading system.¹³ Someone condemned China that its performance in the WTO threatens the perception of mutual benefits that underpins the trade regime. China would be broken, and a broken China could break the WTO. Therefore, the WTO's most difficult challenge may be to discipline trade relations among China and other WTO members. All WTO members should work collectively to encourage China to change its behavior. By

¹³ See Rafael Leal-Arcas, *China's Attitude to Multilateralism in International Economic Law and Governance: Challenges for the World Trading System*, 11(2) J. World Investment & Trade 259, 259-73 (2010).

so doing, they may promote the development of the WTO.¹⁴

However, the aforesaid points result from more respective interest preferences rather than normal legal benchmarks. Therefore, they are one-sided and limited unavoidably. So, what are the appropriate criteria for assessing the ten-year performance of China in the WTO? Are they policy expectations of other parties when China joined the WTO or the specific provisions of China's Accession Protocol and covered agreements of the WTO? Are they general standards of implementing obligations of treaties in international law or well-recognized criteria in the WTO? Or are they even other factors, such as the idea of sovereignty, the rule of law, trade development, economic achievements, system building, unified domestic market, regional free trade areas, contributions to world economy, etc.?

As far as we are concerned, China's activities on implementing WTO commitments and participating in the Doha Round talks, the dispute settlement and trade policy review are major factors to observe China's performance in the WTO.

Firstly, implementation of WTO commitments is not only a special obligation assumed by China as a new member of the WTO, but also specifically reflects on performing treaties obligations in good faith in international law.

Secondly, participation of China in the Doha Round talks, the dispute settlement and trade policy review are parts of usual WTO activities which China attends as a regular member in WTO functional areas, as well as the objective bases to examine China's performance in the WTO.

Thirdly, all these respects are under the WTO law. As the 10th anniversary of China's accession to the WTO is forthcoming, we should explore China's performance in the WTO in an objective, fair, comprehensive manner, if based on these activities, which would facilitate to show the facts. By taking these measures, we can predict new challenges for China in the WTO, and study these challenges seriously in order to further push forward its economic reform and improve the level and quality of its opening up.

This article is divided into six parts. Part 1 introduces some overseas appraisals of the ten-year outcome of China's participation in the WTO and puts forward the issue. Part 2 examines China's performance on its implementation of WTO accession commitments, including China's specific commitments, its fulfillments, and some appraisals. Part 3 observes China's participation in the Doha Round negotiations, especially its low profile to date and new challenges that it faces. Part 4 focuses on China's involvement in the dispute settlement mechanism of the WTO, in which it has transformed from a conciliatory

¹⁴ See Susan Ariel Aaronson, *How Disciplining China Could Save the WTO*, Feb. 9, 2010, at <http://www.voxeu.org/index.php?q=node/4581> (last visited Jun. 16, 2010).

defendant and reluctant complainant to a proactive participant for some reasons. Part 5 analyzes China's participation in the WTO trade policy review, including the China-only transitional review mechanism and trade policy review mechanism. Part 6 offers a preliminary conclusion of the discussions in this article. The authors think that China's substantial participation in the WTO system and global trade governance extends the scope of international trade norms and improves its effectiveness, constitutes China's new contributions to perform treaty obligations in good faith, peacefully resolves international trade disputes and maintains the international rule of law. At the same time, it not only brings forward new driving forces of changes to the international trading system, but also makes China face new challenges.

I. IMPLEMENTATION OF CHINA'S WTO COMMITMENTS

A. An Expensive Ticket: China's WTO Commitments

When China became a member of the WTO, according to the provisions of the Protocol on the Accession of the People's Republic of China ("Accession Protocol") and the Report of the Working Party on the Accession of China ("Working Party Report"), it not only undertook the general obligations of the WTO, but also made bold and significant concessions in many areas, including some specific obligations which obviously go against the basic principles of the WTO, such as the principle of non-discrimination. In general, China does not enjoy the preferential treatment and flexibilities offered to developing countries in the WTO. However, its levels of market access commitments are already equal to, or even surpass those of some developing member countries' commitments. China committed to cancel all of its export subsidies to agricultural products — far beyond the levels of the developing member countries' commitments, and beyond what no other member may do even in the Doha Round negotiations. In a word, China has made unprecedented concessions and commitments in the WTO system in terms of industry, agriculture, services, and intellectual property.

Nevertheless, on the basis of the provisions of the Accession Protocol and the Working Party Report and the WTO agreements, after examining the so-called buffering mechanisms under article 15 "price compatibility in determining subsidies and dumping" and article 16 "the transitional product-specific safeguard mechanism" of the Accession Protocol, and the textile-specific safeguard mechanism under paragraph 242 of the Working Party Report, it is not difficult to find the discriminatory and non-beneficial nature of these contingent trade instruments, which constitute the most unfair component of China's accession agreements. In some cases, these China-only instruments go against

some of the fundamental WTO principles. For example, the revivals of grey-area measures and the bilateral approach are fairly evident therein, which are no longer advocated and even prohibited in the WTO system.¹⁵ It is a kind of entrenched systematic discrimination to the non-Western members in the world trading system dominated by the Western members.

*B. A Rogue Elephant or a Team Player: Initial Conjecture
of China's Performance of Its WTO Commitments*

There were some different (even tit-for-tat) opinions about whether China would perform its WTO commitments before and after the time when China acceded to the WTO. In the point of view of Greg Mastel, “[I]f the WTO cannot enforce its rules in members (e.g., the European Union) with a long tradition of the rule of law, how can it hope to succeed in countries (like China) without a rule of law?”¹⁶ However, Lade thought that this point has no ground. According to its performance on implementing trade agreements and its past experience in other international organizations, China not only with the willingness demonstrated a cooperative attitude of a responsible power, but also undertook its international obligations seriously. Moreover, the Chinese government has announced in public many times that China (as a responsible power) would undertake its WTO commitments and obligations seriously.¹⁷

The US clearly has its own assessment. In 2000, the Trade Promotion Coordinating Committee (“TPCC”) of the Department of Commerce asserted in the “National Export Strategies” submitted to Congress that it would launch the biggest agreement-implementing monitoring plan in history in order to ensure that China can perform its WTO commitments seriously. The Act of Public Law, articles 106–286 (entered into force on Jan. 10, 2002) provided that: (a) to establish a Congressional-Executive Commission to monitor and report China’s acts of compliance with human rights (including labor practices and religious freedom); (b) to publish an annual review report by the USTR with the WTO of the compliance by China in its terms of accession to the WTO; (c) to fulfill the anti-surge mechanism defined in the bilateral agreement between the US and

¹⁵ See Michelle Q. Zang, *The WTO Contingent Trade Instruments against China: What Does the Accession Bring?*, 58(2) Int’l & Comp. L. 321, 321–51 (2009).

¹⁶ Greg Mastel, *China and the World Trade Organization: Moving Forward without Sliding Backward*, paper prepared for symposium: The First Five Years of the WTO, at 16 (2000), at <http://www.law.georgetown.edu/journals/gjil/symp00/documents/mastel.pdf> (last visited Aug. 31, 2010).

¹⁷ See Xinquan Tu, *中国在WTO中的定位、作用和策略* (China’s Position, Role and Strategy in the WTO), International Business and Economics University Press (Beijing), at 106–07 (2005).

China concerning China's accession to the WTO, and set forth related procedures for the remedies of importation; (d) to authorize additional findings for monitoring China's implementation of its WTO commitments; (e) to establish a task force on the prohibition of importation of products of forced or prison labors from China.¹⁸

*C. A Record Unprecedented:
China's Performance on Its WTO Commitments*

For entering into the WTO, China carried out the largest scale of law reform in history, which included more than 3,000 laws and regulations related to trade in goods, trade in services, intellectual property rights, and transparency of implementing trade measures as well as uniform application, etc. A comprehensive legal framework based on the market economy (including the principles of rule of law and transparency in domestic governance) was established; and some well-known international conventional and customary norms were adopted into Chinese domestic law.¹⁹ Moreover, the government and academia are engaged in an unprecedented scale of public education of the WTO to citizens all over the country. It is said that “[d]uring this period, the number of books and articles published in China on WTO-related topics may have exceeded those in the rest of the world combined.”²⁰

Major domestic adjustments undertaken by China for performing its WTO commitments include:

(1) Changes to accommodate the General Agreement on Tariffs and Trade (“GATT 1994”), including the liberalization of foreign trading rights, reform of non-tariff barriers, liberalization of customs regulations, reform of state enterprises, and adjustment of fair trading measures. In order to satisfy the requirements of the WTO rules, China has amended the Foreign Trade Law of the People's Republic of China and made substantial changes in terms of foreign trading rights, tariffs, quotas, and state trading entities, technical standards and trade remedies, etc. With regard to the law relating to foreign investment, some

¹⁸ ATL 106–286, 19 USC 2431 note, 67 F.R. 479.

¹⁹ The WTO has been the first sample for foreign academics to observe China's role and change thereof in international legal order, such as James V. Feinerman, *Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?*, 141 *The China Quarterly* 186, 186–210 (1995); Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 *The China Quarterly* 699, 699–715 (2007); Julia Ya Qin, *Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System*, 191 *The China Quarterly* 720, 720–41 (2007).

²⁰ See Qin, fn. 19 at 737.

measures such as easing market access restrictions, eliminating performance requirements, and providing national treatment were adopted for fulfilling its WTO commitments.

(2) Changes to accommodate the General Agreement on Trade in Services (“GATS”), e.g., adoption of the non-discrimination principle, and easing market access restrictions.

(3) Changes to accommodate the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), including the improvement of regulation, protection and enforcement of intellectual property, especially when foreign trade is involved. These changes have brought about profound effects on the regulation of foreign trade, foreign investment, intellectual property rights, and domestic governance in China, promoted the reform of domestic trade governance and the process of the rule of law in the nation by undertaking the commitments and obligations on transparency, judicial review, and uniform administration.²¹

At the same time, some issues of discord continue to exist, e.g., subsidies to state-owned enterprises, protection and enforcement of intellectual property rights, and complex, unclear, and normally weak enforcement of laws and regulations, all of which always concern China’s trading partners and foreign investors. The first report of OECD Reviews of Regulatory Reform of China carried out by the Organization for Economic Co-operation and Development (“OECD”) in 2009 noted that “China has gone further than many WTO members in improving regulatory transparency: It has established an inquiry point to provide authoritative clarification of laws and regulations affecting international trade, and has agreed to publish all laws and regulations in at least one official WTO language in addition to Chinese. These efforts are at an early stage; they will need to be further clarified, refined, and broadened over time.”²²

In general, although the domestic systemic inertia and the strong protectionism pressures resulting from the 2008 financial and economic crisis have increased the possibilities of slowing down the development of its openness and liberalization, China has made remarkable progress in the internationalization of its market-based laws and trading system, as well as substantial increase in its participation in the international legal system and trade regime since its accession to the WTO in 2001,²³ which builds a solid base for China’s further trade liberalization, market openness, and (consequent) compliance with international rules. OECD indicated that the market opening

²¹ Id. at 720–41.

²² OECD Reviews of Regulatory Reform-China: Defining the Boundary between the Market and the State, at <http://www.oecd.org/dataoecd/35/45/42390089.pdf>, at 21 (last visited Nov. 4, 2010).

²³ See Ling-Ling He & Razeen Sappideen, *Reflections on China’s WTO Accession Commitments and Their Observance*, 43(4) *J. World Trade* 847, 847–71 (2009).

and other reforms driven by China's accession into the WTO have spurred not only a boom in foreign trade and foreign direct investment ("FDI"), but also the improvement of their quality.²⁴

Ultimately, the most profound benefits from China's accession into the WTO are likely to be those on the overall reform process, and its accession is viewed as integral to the development of a competitive market economy by its authority. The commitments that China made to its international partners have solidified and improved the credibility of plans for its further opening of domestic markets and businesses to global competition. In addition, the changes in laws and regulations on competition, intellectual property rights protection, and other areas mandated by the WTO, are as essential and beneficial to domestic businesses as to foreign businesses.²⁵

Thus, China's accession to the WTO, on the one hand, locked achievements obtained from the reform and opening policy, made a market-based economy reform "no longer merely a matter of domestic policy, but also a matter of international obligation," and "so long as China remains a WTO member, it may not negate its market economy commitments without incurring the consequences of breaching WTO obligations."²⁶ On the other hand, it has created a favorable international legal environment for China's continuing reform and opening up.

D. An Admirable New Member:

Appraisals of China's Performance on Its WTO Commitments

Undoubtedly, as a new member of the WTO, China performs its WTO commitments quite seriously. The EU has delivered a very positive appraisal on China's performance in the transitional review mechanism that "[i]f all WTO governments would make similar efforts, the WTO would win any popularity contest amongst international organizations."²⁷ In 2006, the Director-General of

²⁴ China has become the world's leading exporter of information and communications equipment, and its firms are moving beyond simple assembly of imported parts into processes requiring higher skilled labor and greater technology inputs. The opening of the services sectors has already brought tangible benefits, notably in distribution where the entry of several major international retail chains has helped to improve efficiency and lower costs in the retail sector. Refer to: *OECD Reviews of Regulatory Reform-China: Defining the Boundary between the Market and the State*, at 19, at <http://www.oecd.org/dataoecd/35/45/42390089.pdf> (last visited Nov. 4, 2010).

²⁵ *OECD Reviews of Regulatory Reform, China: Defining the Boundary between the Market and the State*, at 55, at <http://www.oecd.org/dataoecd/35/45/42390089.pdf> (last visited Nov. 4, 2010).

²⁶ See Qin, fn. 21.

²⁷ World Trade Organization, Minutes of Meeting, WT/GC/M/77 (Feb. 13, 2003), at 10.

the WTO, Pascal Lamy, stated that China's reform progress, despite its being only five years since its accession to the WTO, are all encouraging in all bound areas, including trade, trade-related investment measures and protection of intellectual property rights, and marked A+ to China's performance on its commitments.²⁸ Alan William Wolff, the former deputy US trade representative, indicated, before the hearing of the USCC in 2010, that the width and depth of China's commitments are unprecedented, including some legalized discrimination to its exportation.

It is probably safe to conclude that no country has made as many changes to its laws and regulations and to its economy as China committed to do, and in very many cases did do, in order to join the WTO. Thousands of measures were amended to comply with WTO requirements and with the commitments that China made in the course of the accession negotiations. This required not a gradual shift toward accommodation to the WTO rules, but, in most cases, adherence either immediately, or after a relatively short delay.²⁹

However, different opinions of China's performance in the WTO were made on the basis of different motivations, concerns, and standards. These disagreements mainly showed in two situations.

On the one hand, different people or bodies made different evaluations of China's performance in the same period. For instance, in 2002, the former Director-General of the WTO, Supachai Panitchpakdi, said that, according to the information transmitted from the transitional reviews of China carried out by committees and subcommittees, most of them are satisfied with China's performance. In 2003, Robert Zoelick, the USTR at that time, praised that China's fulfillment of its WTO commitment is pretty good and it is changing well at an unimaginable speed. The European Union Chamber of Commerce in China ("EUCCC") also stated that there is no problem about China's performance on its WTO commitments. However, almost in the same period, the White Book published by the US Chamber of Commerce in China ("AmCham-China") in August 2003 indicated that American companies were increasingly dissatisfied with the slow step of China's undertaking of its WTO commitments. USTR also criticized China's weak measures to fulfill its commitments in the second annual report on China's WTO Compliance to Congress in the same period.

²⁸ <http://www.chinareviewnews.com/doc/1002/4/7/7/100247785.html?coluid=7&kindid=0&docid=100247785> (last visited Apr. 4, 2010).

²⁹ See Alan Wm. Wolff, *China in the WTO*, Testimony of Alan Wm. Wolff, Hearing on *Evaluating China's Role in the World Trade Organization Over the Past Decade*, before the US-China Economic and Security Review Commission, Washington, D.C., Jun. 9, 2010, at http://www.uscc.gov/hearings/2010hearings/written_testimonies/10_06_09_wrt/10_06_09_wolff_statement.pdf (last visited Aug. 20, 2010).

On the other hand, the same parties may deliver different (even opposite) evaluations of China's performance at different times. For example, AmCham-China gave a very positive evaluation of China's performance in September 2002, whereas, less than one year later (as mentioned above), its attitude turned 180 degrees. This similar case applied to what the USTR has done in this regard.

In addition, there even appeared some radical opinions as follows: As China is the world's third largest trading nation, the world's largest recipient of investment, the world's fastest growing consumer market, and the world's leading provider of manufactured goods, its regulatory and trade practices can shake global markets. It is no doubt that China's growth has led to global growth which has benefited investors, consumers, and taxpayers all over the world. Yet its competitive advantage is (to some degree) based on its inadequate governance. China was required to enforce the rule of law throughout all its territories as part of its accession commitments to the WTO; however, it failed to enforce its own laws in a transparent, even-handed manner. "Whether those laws related to intellectual property, product or food safety, human rights, or employment ... it will damage the whole WTO",³⁰ its fundamental economic and political systems are at odds with the basic premise on which the WTO was founded. Its WTO accession has had negative consequences for the US economy; its legal system and ability to manipulate the WTO system to its own advantage undermine the effectiveness of the WTO, and present a serious threat to the WTO system.³¹

After the five-year transitional period, the USTR reported to Congress that China had taken impressive steps to reform its economy over the previous five years via implementing a sweeping set of WTO accession commitments, which required it to reduce tariff rates, eliminate non-tariff barriers, provide national treatment and improve market access for goods and services imported from the US and other WTO members, and protect intellectual property rights and improve transparency. Although it still does not appear to be complete in every respect, China's implementation of its WTO commitments has led to the increases of the US export to China, deepening China's integration into the international trading system and facilitating and strengthening the rule of law and the economic reforms.³² A survey conducted by the US-China Business Council

³⁰ Susan Ariel Aaronson, *How Disciplining China Could Save the WTO*, Feb. 9, 2010, at <http://www.voxeu.org/index.php?q=node/4581> (last visited Jun. 16, 2010).

³¹ See Robert E. Lighthizer, Jun. 9, 2010, *Testimony before the US-China Economic and Security Review Commission: Evaluating China's Role in the World Trade Organization over the Past Decade*, at http://www.uscc.gov/hearings/2010hearings/written_testimonies/10_06_09_wrt/10_06_09_lighthizer_statement.pdf (last visited Aug. 20, 2010).

³² See US Trade Representative, *Report to Congress on China's WTO Compliance (2007-2009)*, at <http://www.ustr.gov> (last visited Mar. 25, 2012).

(“USCBC”) in the same year (2006) showed that US companies continued to give China cautiously positive marks on its implementation of WTO commitments. The 83% of respondents said that China had done a “fair” or “good” job in implementing its WTO commitments. The 4% of respondents found China’s WTO implementation efforts to be “excellent,” while 5% rated China’s efforts as “poor.”³³ James Bacchus, the former Chairperson of the WTO Appellate Body, expressed that “[w]e are inclined to focus on where China may have fallen short, so far, in reshaping Chinese ways to a full consistency with WTO obligations. This is especially so during the time of economic distress and continuing economic tension. But a focus on how far China still has to go, should not blind us on how far China has already come, in such a short time. This does not mean that we should excuse and overlook WTO violations by China — any more than we should expect China to excuse and overlook any WTO violation by the US.”³⁴ In the third review of the trade policy of China in 2010, the representative of Pakistan said that the turn of this century witnessed two important developments in the multilateral trading system: (a) launching of a development round in Doha, and accession of China to the WTO; (b) China’s growth bears the testimony of the success of rule-based multilateral trading system. China set an example for all the WTO members.³⁵

E. A Mature and Fully Responsible WTO Member

The USTR emphasized that the terms of its accession called for China to implement numerous specific commitments over time. All of China’s key commitments should have been phased in by 11 December 2006, which meant the end of the transitional period of China as a new member of the WTO. Consequently, since China is no longer a new WTO member, the US and other WTO members have been regarding China as a fully responsible member of the international trading system, placing a strong emphasis on China’s adherence to WTO rules.³⁶

³³ US-China Business Council, *China’s Implementation of Its World Trade Organization Commitments*, at <http://www.uschina.org/public/documents/2006/09/uscbc-wto-testimony.pdf> (last visited Aug. 17, 2010).

³⁴ See James Bacchus, *Testimony of James Bacchus to the US-China Economic and Security Review Commission*, Jun. 9, 2010, Washington, D.C., at http://www.uscc.gov/hearings/2010hearings/written_testimonies/10_06_09_wrt/10_06_09_bacchus_statement.pdf (last visited Aug. 19, 2010).

³⁵ See World Trade Organization, *Trade Policy Review, China, Record of the Meeting, WT/TPR/M/230*, Jun. 29, 2010, at 13–14.

³⁶ See the US Trade Representative, *Report to Congress on China’s WTO Compliance (2007–2009)*, at <http://www.ustr.gov> (last visited Mar. 25, 2012).

Nevertheless, although in some areas China has yet to fully implement its important commitments, significant questions have arisen in other areas regarding China's adherence to ongoing WTO obligations, including those core WTO principles. Frequently, as in recent years, these problems can be traced to China's pursuit of industrial policies that rely on excessive, trade-distorting government intervention which intended to promote or protect China's domestic industries. This government intervention is still evident in many areas of China's economy, which is a reflection of China's historic, yet unfinished, transition from a centrally-planned economy to a free-market economy governed by the rule of law.

As previously reported, China has made noteworthy progress in adopting economic reforms that facilitate its transition towards a market economy after its accession to the WTO. However, since 2006, progress towards further market liberalization began to slow down. It became clear that some departments and ministries of the Chinese central government had not yet fully embraced the key WTO principles of market access, non-discrimination, and transparency. Differences in views and approaches between China's central government and its provincial and local governments also continued to frustrate the economic reform efforts; China's difficulties in fully implementing the rule of law further exacerbated this situation.³⁷ Therefore, the US will continue to take further steps to enforce China's adherence to its international trade obligations, including its full implementation of China's WTO accession commitments, and full adherence to the fundamental obligations that China has taken on as a WTO member. The US will be dedicated to reducing the extents of trade-distorting government intervention, constantly focusing on some priorities, e.g., intellectual property rights, industrial policies, trading rights and distribution services, agriculture, services, concerning over China's legal framework (incl. uniform administration of laws and regulations, judicial review, and transparency).

As it has demonstrated on several occasions, when bilateral dialogue is not successful in resolving WTO-related concerns, the US will not hesitate to invoke the WTO dispute settlement mechanism where appropriate. Similarly, when the US interests are being harmed by unfair trade or surging imports from China, the US will continue to rigorously enforce the US trade remedy laws in accordance with WTO rules, including China's WTO accession commitments. The USTR reported that one of the critical issues for the international trading system would be to ensure that China's leadership does not retreat from the substantial progress of economic reform made to date.³⁸

³⁷ 2009 *Report to Congress on China's WTO Compliance*, at <http://www.ustr.gov/node/4375/207,9/0> (last visited Mar. 25, 2012).

³⁸ *Id.*

II. PARTICIPATION OF CHINA IN THE DOHA ROUND NEGOTIATIONS

A. An Overview

The Doha Round negotiations is not only a round in which the related areas are widest and the numbers of the members involved are largest, but also the first multilateral trade negotiations that China has attended as a WTO member. Furthermore, it marks a transition from the old governance of the old trade order to the new governance of a new trade order.³⁹ A successful conclusion of the Doha Round will facilitate the creation of a more open and fair international trade environment, and promote the recovery and sustainable development of the world economy.

During the negotiations, China joined in several important negotiating groups, such as G-20, whose major members are consist of developing member countries of the WTO, and G-33. Very few member countries can put forward proposals for a sort of complete modality on their own. However, at the early stage of Non-Agriculture Market Access (“NAMA”) negotiations, China proposed a formula of cutting non-agricultural products, which drew much attention from other member countries. China has fully participated in the negotiations of all related areas, and submitted over one hundred proposals. Some of them were concerning sunset clauses in anti-dumping, fisheries subsidies, trade facilitation, and dispute settlement mechanism, which gained emphases and favorable comments from other member countries. China made substantial contribution to pushing the negotiations forward at the technical level, and offered substantial concessions on tariffs-cutting, i.e., tariffs of agricultural and industrial products will be cut by 30% or so; there are also some new commitments in services.

In addition, China took active part in the negotiations and consultations at the ministerial and the senior official levels. For example, it hosted the Dalian Mini-Ministerial Conference 2005, and played a bridging role at the 6th WTO Ministerial Conference held in Hong Kong at the end of 2005. In 2008, China was invited to intervene in the small consultations of seven parties in the July Meeting, which was the first time for China to enter into the core circle of the WTO decision-making. China kept the common interests of all member countries in mind and did not give up the efforts to facilitate the negotiations for bridging different gaps and reaching the consensus. The negotiations finally broke out and the role of China was recognized by all the members. In order to break the

³⁹ Pascal Lamy, *The Doha Round marks a transition from the old governance of the old trade order to the new governance of a new trade order*, Oct. 1, 2010, at http://www.wto.org/english/news_e/sppl_e/sppl173_e.htm (last visited Oct. 5, 2010).

impasse and push the negotiations forward, China put forward in a timely manner the three principles of the ongoing negotiations in 2009, i.e., “respecting the mandate, locking the progress made, and based on the multilateralism,” which obtained the recognitions and supports from most of the WTO members, and was embodied in the G-20 Summit Declaration. On the 7th Ministerial Conference held in late 2009, China called on improving and enhancing the multilateral trading system represented by the WTO, promoting all members to jointly signal a positive message of “open, forward and reform.”⁴⁰

China claims that it will always actively push forward the Doha Round, and cooperate closely with all other WTO members to achieve a fair and balanced outcome in the WTO Doha negotiations for realizing the developmental goals.⁴¹ Whereas, as one of the recently acceded members (“RAMs”), China lacks of experience in the multilateral trade negotiations, and the abilities of its negotiating staff also need to be further enhanced.⁴² To sum up, China, along with other WTO members, has not only seriously and actively participated in the Doha Round, but also has played and continues to play a constructive role in the Doha Round, and to make positive contributions to the earlier conclusion of the negotiations and its developmental goals.

*B. A New Member with a Low Profile:
Appraisals of China's Performance in the Doha Round*

Not totally inconsistent with China's statement that its performance in the Doha Round negotiations is constructive, some appraisals show that it is a story of low profile, and some show it negatively. However, the predictions that China would become a “trouble-maker” to the WTO did not come true.

I. A Constructive Role. — In the eyes of Bernard Hoekman, China's presence in the Doha Round negotiations has (to some extent) changed the balance between the developed and the developing member countries, and enhanced the participating capacities of the developing member countries.⁴³ At the Cancun

⁴⁰ The Ministry of Commerce of China, 中国与世贸组织: 回顾与展望 (China and the WTO: Retrospect and Prospect), at http://www.gov.cn/gzdt/2010-07/22/content_1661180.htm (last visited Oct. 4, 2010).

⁴¹ *Id.*

⁴² Zhenyu Sun, 中国在多哈回合谈判中发挥的作用与影响 (Role of China and Its Effect in the Doha Round Negotiations), in China Society for World Trade Organization Studies, 中国世界贸易组织年鉴 2008 (China World Trade Organization Yearbook 2008), China Commerce and Trade Press (Beijing), at 22 (2008).

⁴³ Bernard M. Hoekman, *Cancun: Crisis or Catharsis?* (A revised version of a paper presented to the Brookings-George Washington Roundtable on Trade and Investment Policy), at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Hoekman-CancunCatharsis-092003.pdf> (last visited Oct. 4, 2010).

Ministerial Conference in 2003, China joined the G-20, and resisted, together with the G-90, the attempt of some developing member countries to introduce some issues that were at odds with the theme of development and the interests of developing countries into the negotiations. At the Hong Kong Ministerial Conference in 2005 (two years later), China played a significant coordinative role with regard to the compromise on elimination of all forms of export subsidies on agricultural products by the end of 2013.

2. *A Low Profile.* — Many observers think that China keeps a low profile in the Doha Round negotiations. The reasons why China keeps a low profile in the Round are as follows: (a) China's participation in the multilateral trade system is short, therefore, its participating capacities (including negotiating experience and staff) are insufficient. From the point of view of China, the US and the EU shall play a leading role and show their good political will for finishing the Round successfully soon as they are the major beneficiaries of the Doha Round negotiations. (b) China has undertaken significant and bold WTO accession commitments when acceding to the WTO. For instance, it has made huge concessions on agriculture, which meant that it has given the Doha Round offer in advance in agriculture, one of the most important sectors, and it has no more effective bargaining chips.⁴⁴ (c) China wishes the Doha Round to be a success and participates in the negotiations actively, and with willingness to make unique and significant constructive contributions to the Doha Round.

However, at the outset, it was of the more defended position and took the 4L strategies (i.e., less scope, lower obligation, longer period, and later implementation).⁴⁵ In recent years, it has made some adjustment and started to take an aggressive strategy in some favorable areas. As to the Green Room meeting, China experienced a process from the initial resistance and absence, to lukewarm attendance later, and active attendance now. In general, from the perspective of China, participation in the Doha Round negotiations is constantly a process of participating, learning, and making progress.

It is said that China was a spectator (other than negotiator) in the initial years just because of the implementation of its accession commitments.⁴⁶ Having made significant and deep commitments in several areas as a part of its accession to the WTO, Chinese negotiators are understandably reluctant to engage more actively in the ongoing Doha Round, for fear of being asked to make additional commitments as a key negotiator.⁴⁷ What is more, as a new member of the WTO,

⁴⁴ See Tu, fn. 17 at 178–79.

⁴⁵ Xiangchen Zhang, 中国在经济全球化中的利益与责任 (China's Interests and Responsibilities in Economic Globalization), 27(1) 外交评论 (Foreign Affairs Review) 29, 30 (2008).

⁴⁶ Suparna Karmakar, *Rescuing the Doha Development Round: Role of India and China in Multilateral Trade Governance*, XIII Taiwanese J. WTO Stud. 55, 84 (2009).

⁴⁷ Id. at 80–81.

China needs time to improve its techniques and abilities of conducting WTO affairs. In a word, China keeps a low profile in the WTO. Most of the studies about China and the WTO do not concentrate on the influences of China on the WTO, but the changes which China needs to make for being a member of the WTO.⁴⁸

3. *Negative Appraisals.* — It is said that China's role in the Doha Round negotiations was generally regarded as disappointed by most observers who believe that there are merits in the WTO system.⁴⁹ Compared with India or Brazil, with whom China is on a par economically, and in terms of new leading and emerging economic powers, China's role in the world trading system is rather passive both at the WTO's dispute settlement and in the Doha Round of multilateral trade negotiations.⁵⁰ Even someone thought what China had demonstrated that it was not yet a responsible stakeholder in global trade governance.⁵¹ China's performance in the Doha Round negotiations is not a satisfactory story. China seems to do nothing except be interested in the favorable part of public goods provided by the US and the EU; it has no trade policy other than that of national security.⁵² They are calling for China to become a leader rather than a follower. The leader should not a spokesman of developing member countries but a supplier of global public goods in line with other global players.⁵³ China, as a great power, has a role to play in managing world affairs, and in setting up rules of engagement.⁵⁴

4. *Summary.* — As stated above, the Doha Round negotiations are the first multilateral trade negotiations in which China participates as a member of the WTO. Given the limited influences of the Round to China's substantial interest, its capacity and willingness as well as its status and power to speak, China plays a coordinative and bridging role between the developed and the developing

⁴⁸ John Humphrey & Dirk Messner, *Unstable Multipolarity? China's and India's Challenges for Global Governance*, German Development Institute, Briefing Paper, 1/2006, at [http://www.die-gdi.de/CMS-Homepage/openwebcms3_e.nsf/\(ynDK_contentByKey\)/ENTR-7BRDBE/\\$FILE/1%202006%20EN.pdf](http://www.die-gdi.de/CMS-Homepage/openwebcms3_e.nsf/(ynDK_contentByKey)/ENTR-7BRDBE/$FILE/1%202006%20EN.pdf) (last visited Jun. 16, 2010).

⁴⁹ See Andrew L. Stoler, *China's Role in the World Trade Organization and the Doha Round of Multilateral Trade Negotiations*, at http://www.iit.adelaide.edu.au/speech/paper_fin_al_210906_shanghai_sass_v2_1408.pdf (last visited Aug. 31, 2010).

⁵⁰ Rafael Leal-Arcas, *A New Era in Global Economic Governance*, at http://www.inter-security-forum.org/index.php?option=com_content&view=article&id=75:a-new-era-in-global-economic-governance&catid=49:global-issues-a-governance (last visited Mar. 25, 2012).

⁵¹ See Report on CIGI's 2008 Annual Grouping of Trade Experts, *Down and Almost Out in Geneva: A Time for Reflection on the Future of the Multilateral Trading System*, at 6, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535674 (last visited Apr. 4, 2010).

⁵² See Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45(1) *Tex. Int'l L. J.*, 109–15 (2009).

⁵³ *Id.*

⁵⁴ Gerald Chan, *China and the WTO: The Theory and Practice of Compliance*, 4 *Int'l Rel. Asia-Pacific* 47, 54 (2004).

members as an advocate of the Doha Development Agenda most of the time. It is said, whether China will be a serious, active, responsible and significant negotiating party in a constructive role depends on the balance made by China amongst the following factors: (a) benefits from the multilateral trading system, (b) domestic politics, (c) regionalism as an alternative policy, (d) WTO dispute settlements as a possible alternative to negotiation, and (e) relationship with developing countries.⁵⁵

*C. A Courageous Leader? Expectations of
China's Participation in the Doha Round Negotiations*

Financial crisis and global economic recession resulting from the 2008 US subprime mortgages crisis put international trade into an age of crisis. As a victim of this crisis, global trade contracted in volume terms by around 12% in 2009 — the sharpest decline since the end of the World War II.⁵⁶ International financial and economic crisis and the international trade contraction, accompanying rampant smart protectionism together push the Doha Round into an impasse on the one hand, and make new driving forces for the Doha Round and the reform of global trade governance on the other hand.

Given China's increasing economic power and its high-profile and effective measures and actions in addressing financial and economic crisis, the calling for China to undertake more responsibilities is increased, requiring China to play a more proactive and positive role in the Doha Round negotiations. China should stand out bravely, make bigger substantial concessions, and lead all to stride forward at the crucial moment of "leadership deficit" caused by "interests deficit" of both the US and the EU in the negotiations.⁵⁷ China should also understand that with "greater political power and a greater voice comes greater responsibility."⁵⁸

Having taken the lead in ensuring the speedy conclusion of the Doha Round, these new change-agents would get to wield a stronger economic and hegemonic clout in determining the evolving global economic architecture, as well as in setting the future agenda for the multilateral trading system and its governance.⁵⁹ China should take more responsibilities in the delayed and stalled Doha Round negotiations and play a more prominent role in the international economic institutions and governance.⁶⁰ It needs to take a more aggressive and

⁵⁵ See C. L. Lim & Jiang Yu Wang, *China and the Doha Development Agenda*, 44(6) J. World Trade 1309, 1309–31 (2010).

⁵⁶ http://www.wto.org/english/news_e/sppl_e/sppl148_e.htm (last visited Apr. 4, 2010).

⁵⁷ See Karmakar, fn. 46 at 55–100; Leal-Arcas, fn. 50.

⁵⁸ See Leal-Arcas, fn. 13 at 273.

⁵⁹ See Karmakar, fn. 46 at 83–96.

⁶⁰ See Leal-Arcas, fn. 50.

accommodating stance in the coming negotiations, for instance, by offering more radical market-opening commitments in services and agriculture.⁶¹ Some even stated that the world community was waiting for leadership from the emerging developing countries like China in order to resolve the present impasse of the Doha Round, which needs to re-work its negotiating priorities, show progress, and make sufficient concessions to get the talks going, and exercise economic leadership and hegemony. In fact, “no global solution will be possible without China.”⁶²

In the 2009 Public Forum of the WTO, a participant from India ridiculed China as faint-hearted, who should stand up and take the responsibilities bravely. During the third review of China’s trade policy, the EU representative indicated that “with that power come responsibility and the need to contribute. There is still a mismatch between the two. We should thus expect that China not only fully abides by WTO rules and observes all the commitments made in the run-up of its accession, but also shoulders its responsibilities reflecting its weight as a leading trading member. For this organization to continue to function it is important that leading members like China honor its membership in spirit and in letter. China has benefited enormously from the multilateral trading system, so we can only expect that China continues its reform process steadily, opens its markets to less developed countries, and contributes to the multilateral trading system by providing courageous leadership in the DDA negotiations.”⁶³

Recently, the deputy USTR said “[m]ultilaterally, we are working with China to get an ambitious and balanced outcome in the WTO Doha negotiations. We can only achieve success in these negotiations if China and other advanced developing economies play a role and make commitments commensurate with their position in the world economy. We are disappointed with China’s contribution to date. China has come up short and continues to leave the United States and its global trading partners waiting for more serious engagement and a more serious contribution to the WTO negotiations. The role in the global economy that China has aspired to, and now plays, comes with commensurate responsibilities. That means stepping up on such issues as Doha.”⁶⁴ It seems that the whole world has a new expectation of China’s role in the WTO. It is no doubt that this is a new challenge for China.

⁶¹ *China: A Revisionist Rather than a Revolutionist*, at <http://www.g7.utoronto.ca/newsdesk/pittsburgh/tu.html> (last visited Jun. 16, 2010).

⁶² See Leal-Arcas, fn. 13 at 271.

⁶³ http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146211.pdf (last visited Aug. 18, 2010); see also World Trade Organization, Trade Policy Review, China, Record of the Meeting, WT/TPR/M/230, Jun. 29, 2010, at 21.

⁶⁴ <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2010/remarks-ambassador-demetrius-j-marantis-china-whats> (last visited Oct. 31, 2010).

III. PARTICIPATION OF CHINA IN THE WTO DISPUTE SETTLEMENT

A. The Oriental with Litigation-Aversion Nature?

Initial Projection of China's Participation in the Dispute Settlement

Traditionally, it is thought that the Oriental legal culture in China is litigation-averse. The past practices of China also showed that it is more likely to settle disputes by diplomatic means and bilateral negotiations rather than resorting to regular judicial means. After China's WTO accession, on the one hand, dispute settlement and the likelihood of its non-compliance seemed inevitable in terms of China's rapidly growing economic strength, given the enormous legal commitments associated with its WTO accession, as well as the striking gap between its economic, legal, and cultural norms, and those embedded in the WTO. On the other hand, China's legal culture and historical rejection of international adjudication tend to support a policy of avoiding WTO dispute settlement.⁶⁵ Accordingly, for China, the dispute settlement mechanism is probably more symbolic than practical.

China's performance in the WTO dispute settlement in the transitional period seemed to have confirmed the above assertion. One of the most prominent characteristics was that China frequently presented in the dispute settlement as a third party rather than a complainant or respondent. It has participated only in two cases as a complaint or respondent. One case was the charge with US's safeguard measures on imports of certain steel products, together with seven other members of the WTO⁶⁶ in 2002, which was more like a free-rider than a complaining party. The other was the US-alleged issue concerning China's preferential value-added tax for domestically-produced or designed integrated circuits in 2004,⁶⁷ in which China reached an agreement with the US to terminate the proceedings in the dispute settlement mechanism promptly. Indeed, at first, China proved to be a conciliatory defendant and reluctant complainant.⁶⁸ It has been taking a backseat at the WTO since it does not make much use of multilateral instruments to solve trade disputes.⁶⁹ However, there is a sudden

⁶⁵ Marcia Don Harpaz, *Sense and Sensibilities of China and WTO Dispute Settlement*, Hebrew University International Law Research Paper (no. 02-10), at <http://ssrn.com/abstract=1599563> (last visited Apr. 4, 2010).

⁶⁶ *US — Definitive Safeguard Measures on Imports of Certain Steel Products*, Mar. 26, 2002, WT/DS252.

⁶⁷ *China — Value-Added Tax on Integrated Circuits*, Mar. 18, 2004, WT/DS309.

⁶⁸ See Don Harpaz, fn. 65.

⁶⁹ See Leal-Arcas, fn. 13 at 272.

change from the 6th year after China's accession to the WTO. As of 17 February 2012, the records are 31 cases in which China is either the complainant (8 cases), or the respondent (23 cases).⁷⁰

B. A Different Player?

China's Participation in the WTO Dispute Settlement

To date, starting from the US-Safeguard Measures, China is ranked the 5th in all WTO members: 8 cases as a complainant, 23 cases as a respondent, and 88 cases as a third party.⁷¹ As aforesaid, taking the end of the five-year transitional period as the dividing point, China has completely showed a different attitude towards the WTO dispute settlement mechanism. It was bland before 2006, but after that it erupted. The disputes that China participated in as a party so far are that: 3 cases in 2006, 5 cases in 2007, and 6 cases in 2008. The year of 2009 was called "China's Year" of the WTO dispute settlement since China was involved in half of the cases of that year (7 of 14 cases in total: 3 cases as the complainant, and 4 cases as the respondent), and accordingly, took the first rank in that year in the WTO dispute settlement. Moreover, China has been involved in five cases (1 case was as the complainant, and 4 cases as the respondent) in 2010 and three cases in 2011 to date.

1. An Active Third Party. — China is regarded as flat in the dispute settlement mechanism in the transitional period, but actually it has participated in the proceedings frequently as a third party. To date, China is one of the most vigorous third parties in the dispute settlement mechanism.⁷² China has attended 88 cases as a third party (61 of 88 cases were in the initial five years), and ranked Top 4, just following Japan (117 cases), the EU (113 cases), and the US (93 cases).⁷³

Why did China involve itself in the dispute settlement of the WTO mainly as

⁷⁰ http://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Feb. 17, 2012).

⁷¹ *Id.*

⁷² Minyou Yu, 中国参与WTO争端解决活动评述 (Comment on China's Participation in the WTO Dispute Settlement), 16(5) 世界贸易组织动态与研究 (World Trade Organization Focus) 18, 20 (2009).

⁷³ As of Feb. 17, 2012, they are DS108, DS174, DS207, DS212, DS243, DS245, DS248, DS249, DS251, DS253, DS254, DS257, DS258, DS264, DS265, DS266, DS267, DS268, DS269, DS270, DS273, DS276, DS277, DS280, DS281, DS282, DS283, DS285, DS286, DS287, DS290, DS291, DS292, DS293, DS294, DS295, DS296, DS299, DS301, DS302, DS308, DS312, DS315, DS316, DS317, DS320, DS321, DS322, DS323, DS327, DS331, DS332, DS334, DS335, DS336, DS337, DS341, DS343, DS344, DS345, DS347, DS350, DS353, DS366, DS369, DS371, DS375, DS376, DS377, DS381, DS384, DS386, DS389, DS391, DS396, DS400, DS401, DS402, DS403, DS404, DS412, DS415, DS416, DS417, DS418, DS421, DS423, DS426.

a third party during the first several years? Some observers think that China's behavior was mainly based on the following factors.⁷⁴

Firstly, in order to train personnel. The lack of the expertise and professionals is the first and utmost obstacle for China, as a new member, to take part in the dispute settlement of the WTO. Lack of experience of the dispute settlement would frustrate the intention of the litigation. However, the third party system provides good and convenient chances to intervene substantially in the dispute settlement proceedings, and, accordingly, accumulate corresponding experience for this country.

Secondly, in order to learn from other members. The third party system of the WTO could not only protect the substantial interests of the third parties from damages, but also let the third parties go to the site to observe the strategies and tactics of the parties involved to disputes and learn experiences and lessons from other members.

Thirdly, in order to collect information. As a trading power, China has a wide range of interests in trade. Participating in the proceedings of the dispute settlement in the name of a third party, in general, may get a great deal of information concerning international trade and trade regulatory regimes of other members, including their provisions of laws and regulations, and their practices.

Fourthly, in order to participate in the WTO governance. A third party could monitor the operation, maintain and uphold the multilateralism characteristic of the WTO dispute settlement, as well as to be involved in the interpretation and application of WTO rules. There is no need to worry about assuming pressure and taking a risk of failure, but there will be a lot of fun affecting the process of the dispute settlement and promoting the evolution of the WTO law, if participating in the WTO dispute settlement as a third party. In practice, the quality of the materials submitted by China is quite high, and China's points were recognized by panels or the Appellate Body in most of the cases in which it was concerned.⁷⁵

2. *An Easy-Compromise Defendant.* — The other members, especially the US, were probing China's attitude and policy prospect to the WTO dispute settlement by exploiting casual conflicts, and incidentally monitoring the implementation of China's WTO commitments and obligations, while China was taking some precautions. In the first five years, the US alleged against China only once in the WTO, which is the value-added tax case.

However, since 2006, the US, the EU, Canada, Mexico and Guatemala filed,

⁷⁴ See Yu, fn. 72 at 20–21.

⁷⁵ Baihua Gong, 中国参与WTO争端解决机制实践的评述 (Comment on the Practice of China's Participation in the WTO Dispute Settlement), 39(1) 福建政法管理干部学院学报 (Journal of Fujian College of Political Science & Law) 20, 21 (2009).

separately or jointly, twenty cases against China in the dispute settlement mechanism in terms of imports of automobile parts (2006), measures of granting refunds, reductions, or exemptions (2007), protection and enforcement of intellectual property rights (2007), trading rights and distribution services for certain publications and audiovisual entertainment products (2007), financial information services (2008), grants, loans, and other incentives (2008), measures related to the exportation of various raw materials (2009), provisional anti-dumping duties on certain iron and steel fasteners (2010), electronic payment services (2010), countervailing and anti-dumping duties on grain oriented flat-rolled electrical steel (2010), wind power equipment (2010), definitive anti-dumping duties on x-ray security inspection equipment (2011), and anti-dumping and countervailing duty measures on broiler products (2011).⁷⁶

Among these, two cases concerning measures granting refunds, reductions, or exemptions, three cases on financial information services, and three cases regarding grants, loans, and other incentives were concluded respectively by the mutually agreed solutions in the form of memoranda of understanding at the stage of consultations. The three cases about auto parts reviewed by both a panel and the Appellate Body, and finally the Dispute Settlement Body (DSB) found that China's related measures did not conform to the provisions of the WTO agreements. China informed the DSB that it had implemented the recommendations and rulings in September 2009. The DSB adopted the panel report of the intellectual property case on 20 March 2009. Both parties did not appeal. China reported that it had completed all necessary domestic legislative procedures for implementing the DSB recommendations and rulings in March 2010. The reports of both the panel and Appellate Body of the audiovisual services case were adopted in January 2010. It is in the process of

⁷⁶ China/Measures Affecting Imports of Automobile Parts (DS339/340/342), China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments (DS358/359), China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights (DS362), China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (DS363), China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (DS372/373/378), China — Grants, Loans and Other Incentives (DS387/388/390), China — Measures Related to the Exportation of Various Raw Materials (DS394/395/398), China — Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union (DS407), China — Certain Measures Affecting Electronic Payment Services (DS413), China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (DS414), China — Measures concerning wind power equipment (DS419), China — Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union (DS425) and China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (DS427).

implementation by China. The Appellate Body issued the reports of three cases concerning raw materials export on 30 January 2012, and other cases are in the stage of consultations or the panel.

The range of issues alleged by other members in the WTO are from trade in goods, intellectual property to trade in services, which demonstrated that Chinese government's policies on trade in goods, intellectual property and trade in services (and so on) have significant influences on the development of world trade (for China as a trading power); in addition, it showed that the WTO members, in particular, the key members and the important trading partners of China (US, EU, Canada, and Mexico) are especially concerned with the governmental trade regulatory measures, which are the core of Chinese trade policies.⁷⁷

3. *A Proactive Complainant.* — On 14 September 2007, China alleged against the US in the WTO dispute settlement mechanism against its preliminary anti-dumping and countervailing duty determinations on coated free sheet paper from China,⁷⁸ which was the first instance of China filing separately a case in the WTO. It could be deemed a milestone of China's participation in the WTO dispute settlement, and demonstrated the substantive end of the pure learning stage of China as a new member of the WTO in dispute settlement.⁷⁹

Later on, China initiated the dispute settlement mechanism for six cases, including: US — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (2008), US — Certain Measures Affecting Imports of Poultry from China (2009), European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (2009), US — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China (2009), European Union — Anti-Dumping Measures on Certain Footwear from China (2010), and US — Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from China (2011).⁸⁰

The WTO published four reports of panels (DS379, DS392, DS397 and DS399), the rest of the cases are reviewed by respective panels or in

⁷⁷ See fn. 72 at 22.

⁷⁸ US — *Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, Sept. 14, 2007, WT/DS368.

⁷⁹ At least the auto parts case was the turning point in China's behavior in the WTO dispute settlement, because despite that China was a complainant, it is the first case in which China took a calculated decision to fight to the finish. See Don Harpaz, fn. 65.

⁸⁰ US — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (DS379), US — Certain Measures Affecting Imports of Poultry from China (DS392), European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (DS397), US — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China (DS399), European Union — Anti-Dumping Measures on Certain Footwear from China (DS405) and United States of America — Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from China (DS422).

consultations. Among these, the case submitted on 31 July 2009 was the first case initiated by China against the European Communities, which is one of China's major trading partners after suing the US; the case submitted on 4 February 2010 was the first case against the EU (after the Lisbon Treaty entered into force on 1 December 2009), in which the EU was officially awarded the international legal personality.

There are two apparent characteristics with respect to the seven cases (including the US Safeguard Measures on Iron and Steel in 2002) filed by China: (a) All cases are against the two largest trading partners of China, i.e., the EU and US; (b) in addition to those of the US poultry case, all alleged measures belong to three trade remedies measures, i.e., anti-dumping, countervailing, and safeguard measures.

These facts revealed that China can now not only positively resolve conflicts with other WTO members by the WTO dispute settlement mechanism, but also firmly maintain the seriousness and authority of the multilateral trading system, and promote the rule of law in the field of trade as well.⁸¹

4. A Role Model in Implementation. — Firstly, the auto parts case (DS339/340/342). This was the first case in which China should implement the recommendations and rulings of the DSB. On 12 January 2009, with respect to DS339, the DSB adopted the Appellate Body report and the Panel report as upheld by the Appellate Body report. On the same day, with respect to DS340 and DS342, the DSB adopted the Appellate Body reports and the Panel reports as modified by the Appellate Body reports. At the DSB meeting on 11 February 2009, China informed the DSB that it intended to implement the DSB recommendations and rulings and that it would require a reasonable period to do so. On 27 February 2009, China and the EC, the US, and Canada, notified the DSB that they had agreed that the reasonable period would be seven months and twenty days. Accordingly, the reasonable period expired on 1 September 2009. At the DSB meeting on 31 August 2009, China informed the DSB that on 15 August 2009, the Ministry of Industry and Information Technology, and National Development and Reform Commission, had issued a joint decree to stop the implementation of relevant provisions concerning the importation of auto parts in the Automobile Industry Development Policy. On 28 August 2009, the General Administration on Customs and relevant agencies had promulgated a joint decree to repeal Decree 125. As all these new decrees would come into effect on 1 September 2009, China declared that it had brought its measures into conformity with the DSB recommendations and rulings.⁸² No members questioned the

⁸¹ See Yu, fn. 72 at 22.

⁸² http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds339_e.htm (last visited Apr. 4, 2010).

implementation of China.

Secondly, the protection and enforcement of intellectual property rights case (DS362). At the meeting on 20 March 2009, the DSB adopted the panel report. On 15 April 2009, China informed the DSB that it intended to implement the DSB recommendations and rulings and that it would need a reasonable period to do so. On 29 June 2009, China and the US informed the DSB that they had agreed that the reasonable period for China to implement the DSB recommendations and rulings shall be 12 months from the adoption of the report. Accordingly, the reasonable period expired on 20 March 2010. China reported that on 26 February 2010, the Standing Committee of the 11th National People's Congress had approved the amendments of the Copyright Law of the People's Republic of China and that on 17 March 2010 the State Council had adopted the decision to revise the Regulations for Customs Protection of Intellectual Property Rights. Thus, it had completed all necessary domestic legislative procedures for implementing the DSB recommendations and rulings. The US said that it was not yet in a position to share China's claim that it had implemented the DSB recommendations and rulings. On 8 April 2010, China and the US notified the DSB of Agreed Procedures under articles 21 and 22 of the DSU.⁸³

Thirdly, the audiovisual products case (DS363). At the meeting on 19 January 2010, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report. At that time, although this case is very sensitive, Don Harpaz said: "Based on China's past records, it is likely to follow all the procedures required to comply."⁸⁴ It did happen soon. At the DSB meeting on 18 February 2010, China informed the DSB of its intention to implement the DSB recommendations and rulings. This dispute involved many important regulations on cultural products. China would need a reasonable period to implement the DSB recommendations and rulings. On 12 July 2010, China and the US informed the DSB that they had agreed that the reasonable period for China to implement the recommendations and rulings of the DSB shall be 14 months from the date of adoption of the Appellate Body and panel reports. Accordingly, the reasonable period expired on 19 March 2011.⁸⁵ On 13 April 2011, China and the US notified the DSB of Agreed Procedures under articles 21 and 22 of the DSU.⁸⁶

⁸³ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm (last visited Apr. 4, 2010).

⁸⁴ See Don Harpaz, fn. 65.

⁸⁵ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited Aug. 8, 2010).

⁸⁶ *Id.*

Fourthly, the appraisals of China's implementation. Comparing the non-implementation of the US,⁸⁷ together with the delayed implementation of the Quad (the US, the EU, Canada, Japan), plus Australia,⁸⁸ it is safe to regard China as a role model on implementing the recommendations and rulings of the DSB — there is nothing else that may attest this than the above-mentioned three cases. Taking into account that the implementation of all cases involved legislative measures that normally are more difficult than executive measures, any worry about and doubt to China's implementation are bias. Compliance with the DSB recommendations and rulings appeared to be a norm that China has accepted.⁸⁹ The serious implementation of the DSB's recommendations and rulings by China not only manifests China's high faith in (and respect for) the WTO dispute settlement mechanism, but also is the specific indicator of China's image as a responsible power which carries out its international obligations faithfully.

C. Causes of China's Changes in the Dispute Settlement Mechanism

In less than five years, China transformed from a conciliatory defendant and reluctant complainant⁹⁰ to an active party to both the defending and complaining cases, becoming the 8th biggest user of the WTO dispute settlement currently (its rank will be the 5th, plus the third party cases). The reasons for this change are as follows.

1. Changes of External Conditions. — The rapid growth of China's economy and trade inevitably adds the probabilities of conflicts between China and its trading partners according to the regular rules, as there is a positive relation between trade frictions and trade volumes. Moreover, Chinese products are always of an indicator of domestic political and economic situations of its major trading partners. In January 2010, China became the largest exporting country by overtaking Germany, and the latest figures indicate that China has surpassed Japan and became the second largest economy of the world in the second quarter

⁸⁷ As the Secretariat's report points out, to date six of seven WTO DSB rulings have remained on the table as a surveillance matter for years for the U.S. to implement. See Jeanne J. Grimmett, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, Jan. 29, 2010, Congressional Research Service, 7-5700, RL32014, at http://assets.opencrs.com/rpts/RL32014_20100129.pdf (last visited Oct. 15, 2010).

⁸⁸ See Minyou Yu, *WTO Disputes Settlement — China's Performance and Proposals on Its Improvement*, 4(4) *Front. Law China*, 601, 601–32 (2009).

⁸⁹ See Don Harpaz, fn. 65.

⁹⁰ The former Deputy Director-General of the WTO Andrew L. Stoler addressed in a lecture in 2006 that "China is behaving well in dispute settlement and is generally playing the role of a good WTO citizen, and has played a conservative and constructive game." See Stoler, fn. 49.

of 2010. All these developments made China step into a period of frequent trade conflicts with its trading partners.

As of the policy adjustments of the principal trading partners, although the US and the EU intentionally made things more complicated and made wild speculation on China's accession to the WTO, their objective to introduce China into the multilateral trading system was not doubted. For seeking to enter into the WTO, China assumed a great number of significant and bold commitments. Some of them even exceeded the obligation levels of some other developing member countries.

During the five-year transitional period, the US and the EU showed (to some extent) their restraint on China's performance. Their attentions were mainly focused on the transitional review mechanism to supervise China's implementation of its WTO commitments, and thus could help China to integrate into the world trading regime smoothly. Within the transitional period, China conscientiously fulfilled its WTO commitments. However, the end of the transitional period also means the end of the honeymoon between China and its major trading partners, which need adjustments of policies to China of the US and the EU at least. It is said that in order to help China to integrate into the world trading regime as soon as possible, the US has always accommodated China in some respects, such as regarding intellectual property rights.

China's successful accession to the WTO and its excellent performance on its implementation of the WTO commitments woke up the US and realized its objective. Hence, the US put forward its requirements to China in light of China's status (i.e., the fastest growing and the second largest global economic country, the second global trade country, the largest recipient of foreign direct investment and the largest foreign exchange reserve in the world). The protection and enforcement of intellectual property rights was regarded as the mark that the honeymoon between China and the US was over.⁹¹ After the transitional period, the USTR emphasized by the reports of China's WTO Compliance (submitted to Congress) that they deem China as a mature member with full accountabilities of the WTO, and the application of WTO dispute settlement mechanism will be a key tool to require China to implement its commitments and comply with the WTO obligations.

There are changes in the global economic and trade environment. The international financial and economic crisis, together with the subsequently sharp contraction of international trade, has caused rampant protectionism in the world. Accordingly, the uniquely thriving China, unfortunately, became a thorn on protectionism's side. China's major trading partners are using trade remedies to

⁹¹ See Donald P. Harris, *The Honeymoon Is Over: The US-China WTO Intellectual Property Complaint*, 32(1) *Fordham Int'l L. J.* 96, 96–187 (2008–2009).

contain China's products within the domestic market, and exploiting the dispute settlement mechanism in the WTO to force China to further open its own market, for seeking to mitigate the unemployment and social pressures brought about by the financial and economic crisis.

Yet China's responding acts are negative defensive measures for defending protectionism; and its complaining acts are proactively aggressive measures for fighting protectionism. What China has done not only manifested its position to support free trade against protectionism, but also cautioned its principal trading partners that China would not compromise and yield blindly. It is impossible to let China be the scapegoat of international financial and economic crisis.

The aforesaid are the objective factors of China's changes in practice of the WTO dispute settlement. The subjective reasons are the changes of China's capacity and intent to take part in the WTO dispute settlement.

2. *Changes of China's Capacity and Intent.* — As mentioned above, during the first five years, China was a new member of the WTO, thus it lacked the capacity to deal with disputes in the WTO dispute settlement mechanism, including the lack of professionals and no practical experience. China needed time to train its professionals which can tackle disputes in the WTO, familiarize the procedures and features of the WTO dispute settlement mechanism, and observe the policy preference on the dispute settlement of the principal WTO members, panels as well as the Appellate Body. After five years, China has the basic capacity of participation in the WTO dispute settlement.

The intent of China to take part in the WTO dispute settlement relies on at least two factors: (a) the general attitude of China toward the WTO dispute settlement, and (b) the self-assessment of China on its abilities to intervene and affect or control the process and result of the settlement of dispute as well as assume the consequences, including those of the whole and each staff involved in the dispute. At first, China did not totally accept international third party adjudication in the past based on the Confucianism culture, such as "peace is the best" (和为贵) and "litigation-aversion" (厌讼). The previous practice of China also indicated that it was a conciliatory defendant and a reluctant complainant. Recently, however, its profile in dispute settlement has shifted to a more proactive one, leading some observers to label its behavior "aggressiveness." This change, it is said, exhibits a new willingness to accept binding international adjudication, admits the authority of the DSB and its panels as well as the Appellate Body, respects for international rules as well as its faith in Western legal norms and institutions.⁹² This point should be further examined in future.

Firstly, the traditional culture of litigation-aversion does not necessarily bring about distrust of international third-party adjudication. Admittedly, it would

⁹² See Don Harpaz, fn. 65.

impose some pressures on China from submitting a dispute to international judicial proceedings. However, China is a country which dares to claim the revolutionary request to international legal order dominated by the West after the World War II. Thus, the attitude of China towards international third party adjudication cannot be explained only by cultural factors.

Since the 1980s, pragmatism is deemed as one of fundamental principles of China dealing with its domestic and international affairs, such as the case-by-case method, economy, and trade as priority, combined principles and flexibilities. China's attitude to the WTO dispute settlement mechanism is just an embodiment of these kinds of flexible and practical policies. It is true that, even if China is more active in the WTO dispute settlement, it does not mean a significant shift of China's attitude to all international dispute systems, especially the international judicial system; the attitude depends on the assessments and analysis made by China about the necessity and plausibility to participate in the settlement of disputes, and its abilities to affect and control the process and result, as well as assume the consequence of the dispute settlement.

Secondly, in the initial years since its accession, China did not participate in the WTO dispute settlement because it lacked the capacity which the US and the EU, as well as some other developing member countries (such as India, Brazil, and South Africa), have. It involved in the dispute settlement as a third party with a positive attitude of studying seriously and training personnel. It made some preparations for future activities, and was looking for an appropriate time to fully intervene in the dispute settlement by an appropriate means in the meantime. By the end of the transitional period, at the objective level, China will be shifted from negative to proactive action. The increasingly deep involvement in the WTO dispute settlement⁹³ enhanced further the Chinese government's understanding of the WTO dispute settlement mechanism and its confidence of using the mechanism to resolve trade conflicts. China now views the WTO

⁹³ After China's accession to the WTO, eleven Chinese experts in total are listed in the Indicative List of the WTO Dispute Settlement Panel, i.e., Yuqing Zhang, Lingliang Zeng and Lanye Zhu (since Feb. 2004), Shizhong Dong and Yuejiao Zhang (since Nov. 2006), Zhongzhou Li, Liyu Han, Guohua Yang, Defeng E, Liping Zhang and Yongsha Li (since Feb. 2010). Yuejiao Zhang was elected as a member of the Appellate Body in March 2008, and her first term of office is from 1 June 2008 to 31 May of 2012. That Yuejiao Zhang holds a post of the Appellate Body in the WTO is viewed as one of the significant achievements of China's participation in WTO global trade governance, which not only means that the West from then on may listen frequently to Chinglish and Chinese-French at Geneva, the Hague, and Hamburg, but also shows that the West needs to take Chinese culture, law and pattern of thinking underlying Chinglish and Chinese-French seriously, including but not limited to Chinese fable, allusion, proverb, idiom, and slang. China also actively takes part in the regular meeting of the DSB once every two months, and puts forward proposals for revising the DSU and other activities of the WTO dispute settlement.

dispute settlement mechanism more consciously as a chief instrument to implement domestic trade policies as well as an approach to participate in (and influence effectively) the WTO global trade governance. It could not only manifest its positive attitude to maintaining the multilateral trading system, but also obtains some significant benefits by maintaining the WTO norms and rules.

Furthermore, what has been done by China showed its policy orientation to resolve trade frictions by legal means and promote the rule of law in the field of international trade.⁹⁴ Consequently, some asserted that “the WTO dispute settlement system is playing an important role in socializing China.”⁹⁵ However, others think that it is a test for the WTO dispute settlement mechanism in that China uses the mechanism more than before,⁹⁶ and it might result in an overloaded mechanism.⁹⁷ In the mind of a Western scholar, Leal-Arcas, “[s]ince 2006, China’s interactions with the world trading system have shown a marked shift from an initial focus on amending domestic legislation in order to comply with WTO rules and disciplines, to a more confrontational stance.”⁹⁸

IV. PARTICIPATION OF CHINA IN THE WTO TRADE POLICY REVIEW

There are two trade policy review mechanisms for China in the WTO, i.e., one is the Transitional Review Mechanism against China only; and another is the Trade Policy Review Mechanism for all members.

A. Transitional Review Mechanism

Article 18 of the Accession Protocol entitled as the “Transitional Review Mechanism” provides that, after China’s accession each year (for 8 years), the General Council and around 17 subsidiary bodies of the WTO shall review annually the implementation by China of the WTO Agreement and of the related provisions of the Protocol. A final review will be in the 10th year, or at an earlier date decided by the General Council.

The Transitional Review Mechanism (“TRM”) is one part of China-specific obligations and the legalized discrimination against China. It is a discriminatory

⁹⁴ See Yu, fn. 72 at 22.

⁹⁵ See Don Harpaz, fn. 65.

⁹⁶ <http://wto.mofcom.gov.cn/aarticle/ddfg/waimao/201003/20100306804566.html> (last visited Oct. 5, 2010).

⁹⁷ Henry Gao, *Taming the Dragon: China’s Experience in the WTO Dispute Settlement System*, 34(4) *Legal Issues of Economic Integration* 369, 389 (2007).

⁹⁸ See Leal-Arcas, fn. 13 at 271.

treatment against China, proposed by the US for the necessity to strictly monitor China's implementation, since China is yet a non-market economy and its economic system is in the process of transition.⁹⁹ No other member is subject to a similar strict mechanism; it is unlikely that newly acceding countries will be subject to it in the future.¹⁰⁰ Even during the 1960s and the 1970s, when Poland, Hungary, and Romania joined the GATT in the name of communist countries, they were not subjected to such a "preferential treatment." The TRM indicated some members, especially the dominant members of the WTO, distrust China and its implementation of the WTO commitments and obligations. It is quite rare in international law to establish a multilateral monitoring mechanism on the implementation of multilateral treaty obligations against a specific contracting state. Yet it is a real story for China.

In practice, the TRM has increased the burden of the Chinese central government to carry out its WTO commitments. It must spend a great deal of human, material, and financial resources to tackle what amounts to seventeen trade policy review meetings which would last more than four months in each year, while China is implementing its WTO accession commitments. Notwithstanding, China does not treat the TRM passively, and takes it seriously for this discriminatory nature. From the perspective of China, the TRM is a special mechanism for diagnosing China's economic and trade policies, and it is also a good opportunity to familiarize the internal governance procedure of the WTO and its practical operation to participate in the review. Through the review, China can learn, in a timely manner, about other members' concerns about China's trade policy, and clarify some of them, as well as study how to adjust policies which are inconsistent with the WTO rules and disciplines.

Other members could also get prompt knowledge about the determinations of the Chinese government to implement its WTO commitments, and the improvements and achievements of the reform of China's economy and trade.¹⁰¹ The General Council and other subsidiary bodies related to the WTO conducted the 8th annual transitional review in 2009. At the meetings, the WTO members awarded high appraisals for China's efforts on implementing the WTO commitments and complying with the WTO rules and progress made accordingly.

⁹⁹ Weitian Zhao ed., *中国入世议定书条款解读* (Commentaries on China's WTO Accession Protocol), Hunan Science and Technology Publishing House (Changsha), at 121 (2006).

¹⁰⁰ Esther Lam, *China and the WTO: A Long March towards the Rule of Law*, Kluwer Law International (London), at 80 (2009).

¹⁰¹ See Wenhua Ji & Liyong Jiang, *WTO争端解决规则与中国的实践* (The Rules of WTO Dispute Settlement and China's Practice), Peking University Press (Beijing), at 306 (2005).

B. Trade Policy Review Mechanism

The Trade Policy Review Mechanism (“TPRM”) is one of the results of the Uruguay Round of Multilateral Trade Negotiations. It aims to make regular and collective assessment of trade policies and practices of the members, as well as its effects on the multilateral trading system, and promote all members to comply better with the rules, disciplines, and commitments provided in the multilateral trade agreements and the plurilateral trade agreements. The value of the TPRM is of two dimensions (as follows).

Firstly, it is the unique place for all the other members of the WTO to review all aspects of trade policies and practices of one WTO member. The other members may make an objective and independent assessment about trade and economic situations of the reviewee; they may also get much information and clarification, and discuss and express their concerns.

Secondly, the reviewee also benefits much from the trade policy review. For many members, a review is helpful in facilitating the cooperation between different domestic bureaus on trade-related issues.¹⁰²

China attended trade policy reviews of the WTO actively, even while it was experiencing the transitional review. As a member of the WTO, China is entitled to participate in any trade review of other members conducted by the Trade Policy Review Body (TPRB), and may express its viewpoints and raise its questions on economic and trade policies and practices of the member reviewed; as a trading power, China is subject to the review made by the TPRB. It needs to submit its governmental policy statement, together with the report prepared by the WTO Secretariat, as the basis of review. Since 2004, China has been examined approximately once every two years for it was becoming one of the four biggest global traders in the WTO that year. The first trade policy review of China was held in 2006. After that, the second and third reviews were conducted in 2008 and 2010 respectively, and were successfully passed.

The first trade policy review of China held in April 2006 paid attention to China’s performance on its WTO accession commitments. The WTO members raised around 1100 questions on China’s trade policies and practices, and they highly commended China’s efforts and achievements on implementation of its WTO commitments and continued trade liberalization, congratulated China for its progress in terms of economic development, foreign trade, increasing of the

¹⁰² See Xiaolin Chai, *WTO对中国贸易政策审议——2008年WTO第二次对华审议情况* (The WTO Reviews China’s Trade Policy — the Second Trade Policy Review of China in 2008), in *China Society for World Trade Organization Studies, 中国世界贸易组织年鉴 2009* (China World Trade Organization Yearbook 2009), China Commerce and Trade Press (Beijing), at 33 (2009).

living standard of citizens, as well as elimination of poverty. The discussant of the review, H. E. Burhan Gafoor, the ambassador of Singapore to the WTO, stated that the world economy is experiencing a revolution, because Asia, led by China, is re-playing its central role as had been done previously in history.¹⁰³

The second trade policy review of China was held in May 2008. Members of the WTO complimented China on its significant progress in terms of economic and social development, its policy of reform and opening up, and its positive and constructive role played in the world economy and multilateral trading system. Notwithstanding these remarkable achievements, some members (such as the US, the EU, and Japan) had expressed concerns on the issues of China's industrial policies, technical standards, protection of intellectual property rights, and transparency of trade policies, government procurement and export restrictions. They required China to keep its market open, and provide fair and non-discriminatory market access to all other members in the light of the WTO rules.

The second trade policy review of China showed that priorities concerned by the principal members of the WTO, which had started to make the conformity between China's domestic economic and trade policies with the WTO rules, as well as China's role in the world economy and the multilateral trading system. They asked China to play a leading role in the Doha Round negotiations. In their minds, some significant economic and industrial measures increasingly become the pedometer to measure the steps of China's reform and opening up. Meanwhile, with the rapid rise of China in global trade, the US and the EU started to be aware that China constitutes a challenge (or even threat), on the one hand, to their advantages and its economic and social developmental model in the long run; on the other hand, some problems arise from bilateral trade relations between China and the developing members, including the least developed countries.¹⁰⁴

The latest trade policy review of China was convened from 31 May to 2 June of 2010. This review was conducted in the context of new circumstances of the world economic environment, and the status of China in world trade (since the founding of the People's Republic of China over sixty years ago, and the launch of reform and opening up policy over thirty years ago) had been changed substantially and significantly. It is not only helpful to learn about the continuing perfection of China's economic regimes and trade policies for the whole world, but also contribute to concluding historic achievements and planning future economic and trade policies.¹⁰⁵ At the meetings, the Chinese delegations, led by

¹⁰³ Id.

¹⁰⁴ Id. at 34–35.

¹⁰⁵ Zhongxiu Zhao & Ying Fan, 详解WTO对华第三次贸易政策审议 (Comments on the Third Trade Policy Review of China), 国际商报 (International Business Daily), Jun. 4, 2010.

Vice Minister Yi Xiaozhun, discussed widely and carefully with other WTO members, and answered in writing more than 1500 questions raised by them, such as transparency of trade regime, tax rebates and subsidies, export restrictions, enforcement of intellectual property rights and government procurement, etc.

As indicated by Yi, it showed members' high concerns about China's trade policies and practices by putting up over 1500 questions to China. The main reasons for this are close economic links increasingly between China and the rest of the world, increasing volumes of China's foreign trade, increasing foreign investment, and increasing effects of China's trade policies and practices in the world. China appreciated all questions and has done its best to answer those questions seriously. In the viewpoint of the Chinese government, open trade can promote economic growth remarkably, and the Chinese trade policy will be constant adherence to the principles of open, free, and mutual benefits, as well as a win-win effect. China has fully implemented its WTO accession commitments, and its total level of tariffs is the lowest among the developing member countries.

Furthermore, China eliminated most of its non-tariff import regulatory measures, e.g., all quotas and licensing measures. During the past two years, despite the huge impact of financial crisis on its economy, China managed to maintain its import growth by a package of projects to stimulate domestic consumption, which has helped creating an enormous market for China's trading partners. China stood firm for its commitments made in the G-20 Summits and the WTO, and it did not take any new trade and investment protect measures inconsistent with the multilateral rules in the crisis.

In addition, when the international financial crisis was most severe, China organized thirteen investment and trade promotion delegations to go abroad to purchase commodities and enlarge investment cooperation in order to help its trading partners to run out the plight of low exports, which brings about significant stimulating effects on the recovery of the world economy. Unfortunately, while China was combating the crisis and making its contributions to the world economic recovery, it became the primary target of trade protectionism. In 2009, twenty-two WTO members initiated 116 trade remedy investigations against Chinese products, accounting for 43% of the total in the world, and the value involved hit a record high, representing a growth of 102% from the previous year. Chinese products were targeted by 40% of new restrictive trade measures from the members of G-20 after the crisis. All of these made Chinese workers suffer painfully.

Concluding remarks by the chairperson, H. E. Bozkurt Aran, ambassador of Turkey to the WTO, stated that the members welcomed China's constructive role in resisting protectionist pressures and instead boosting global demand during the recent economic downturn. And, the members commended China's constructive role in the WTO and noted that a well-functioning multilateral trading system has

helped China to sustain its economic growth and development. The members appreciated China's efforts to enhance domestic transparency, and welcomed China's ongoing efforts to review, revise, and amend its trade and related laws, as well as hoped that China kept its development road of reform and opening up. In the meantime, concerns were raised about China's trade barriers, enforcement of intellectual property rights, and liberalization of services, and the like.¹⁰⁶

Undoubtedly, it is noteworthy that some members began to dissatisfy with the "constructive role" played by China in the WTO after the second trade policy review of China in 2008. In detail, as far as the developed members (e.g., the US and EU) are concerned, China, as a ten-year member of the WTO, shall comply with not only its WTO accession commitments, but also the general WTO obligations; it shall not only comply with the general WTO obligations, but also keep its domestic legal framework, policies, and measures in conformity with the WTO rules; it shall not only keep its laws and regulations conforming to the WTO rules, but also let the application and implementation of its laws and regulations comply with the top requirements of the WTO legal norms; it shall not only comply with the fundamental disciplines of the WTO, but also behave in good faith in the light of the fundamental spirits of the WTO system; not only the Chinese central government shall comply with the WTO rules, but also the provincial and local authorities shall do so; not only border measures of China shall be kept in conformity with the WTO rules, but also the domestic policies shall do so; China shall not only comply with the WTO rules within the WTO framework, but also behave in the light of the WTO rules out of the WTO framework; not only shall Chinese trade policy and practice comply with the provisions of the WTO agreements, but also Chinese development planning and economic policy shall be kept in conformity with the WTO rules; China not only is entitled to get the benefits from a well-operating multilateral trade system, but also shall make more contributions to the system; China is no longer a new member of the WTO, but a fully responsible member of the multilateral trading system; China shall not only play a constructive role in the multilateral trade system, but also play a leading role and shoulder corresponding responsibility in the world.

Like other members of the WTO, China regards the TPRM as a platform for promoting its economic and trade policies. Meanwhile, it can find its shortcomings and accordingly promote its domestic reform. The TPRM not only is an obligation of a member to be under review, but also is the right of a member to review other members' trade policies and practices. Thus, through the mechanism, China could monitor other members and challenge the consistency

¹⁰⁶ World Trade Organization, Trade Policy Review, China, Record of the Meeting, WT/TPR/M/230, Jun. 29, 2010, at 65–66.

of their policies and practices with the WTO rules, and refer to their experience in the meantime.

In the past several years, China has participated in the meetings of trade policy review of some members (like the US, the EU, Japan, and other members), which have close economic and trade relationships with China. In the review, China expressed some of its targeted concerns in order to urge other members to implement respective commitments, rules, and disciplines of the WTO. In 2008, China attended the 9th review of the US, raised over 160 questions on the US's trade policies and practices in written form. It also indicated some problems concerning implementing multilateral obligations by the US, filed comprehensively its concerns and claims about China-US economic and trade relations.¹⁰⁷ At the meetings of the 10th trade policy review of the US held from September 29 to October 1 of 2010, Ambassador Sun Zhenyu urged the US to change its protectionist practices, to fulfill its international obligations, and to comply with the WTO rules.¹⁰⁸

CONCLUSION

After its accession to the WTO in 2001, China has been effectively implementing its commitments, exercising its rights conscientiously and participating actively in the WTO activities. As of 2010, China has fully implemented its WTO accession commitments, built up an economic and trade system which is consistent with the WTO rules. The Chinese market is one of the most open markets in the world. The Chinese central government declares that China is always a firm supporter of the multilateral trading system, loyal defender of free trade, as well as an active promoter of the Doha Round negotiations. China will continue to stand for the fundamental principle of mutual benefits and a win-win situation, make joint efforts with other members against protectionism and push the multilateral trading system towards a more democratic, more effective and fairer, more balanced system.¹⁰⁹ This reveals that China neither seeks to change the WTO nor attempts to become a leader of the Doha Round negotiations, but enthusiastically plays a constructive role in the

¹⁰⁷ Xiaolin Chai, *WTO 贸易政策审议机制：一面镜子的双向作用* (The Trade Policy Mechanism of the WTO: A Mirror with Double-Way Roles), in *China Society for World Trade Organization Studies, 中国世界贸易组织年鉴 2008* (China World Trade Organization Yearbook 2008), China Commerce and Trade Press (Beijing), at 34–35 (2008).

¹⁰⁸ 中国常驻世贸组织代表敦促美国放弃贸易保护主义 (China's Permanent Representatives to the WTO Urges the US to Abandon Its Trade Protectionism), Oct. 2, 2010, at http://www.gov.cn/jrzg/2010-10/02/content_1714725.htm (last visited Oct. 5, 2010).

¹⁰⁹ See fn. 40.

WTO system.

However, as stated previously, China is suffering not only criticism and blame from the developing member countries, but also misunderstandings from some developing members. Therefore, in the WTO, China is facing a new challenge to determine its developing role within the multilateral trading system, and accordingly, shifting from a new member implementing obligations in good faith to this new role (to be specified as follows).

1. A New Member in Fulfilling the WTO Obligations in Good Faith. —

(1) Implementing the WTO commitments seriously. During the years after its accession to the WTO, China has always done its best to perform its WTO accession commitments, even if the commitments were (to some extent) beyond the tolerable limit of a regular member. China undertakes the obligations under article 2 of the Accession Protocol which shall apply the provisions of the WTO Agreement and the Accession Protocol to its entire customs territory, including border trade regions, minority autonomous areas, special economic zones, open coastal cities, economic and technical development zones and other areas, where special regimes for tariffs, taxes, and regulations are established, and apply and administer in a uniform, impartial, and reasonable manner all its laws and regulations and other measures of the central government of China, as well as its local regulations, rules, and other measures issued or applied at the sub-national level pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights, or the control of foreign exchange. As known, despite China being a unitary state, its domestic structures of governance are complicated. Furthermore, with continuing decentralization since 1978, local authorities enjoy considerable powers in terms of economic and trade affairs that make the uniform application and administration of the WTO agreements very difficult. The Chinese central government does not require any extra transitional period or preferential and differential treatment, but faces this challenge and deals seriously with any problem that may appear in practice.

(2) Adhering to the WTO rules strictly. China's will and capacity to comply with the WTO rules are trialed by the WTO legal system which is rooted in the Western political, economic, legal, and cultural traditions. However, in fact, China not only expresses its goodwill to comply with the WTO rules, but also ensures its laws, regulations, rules, and other measures to be in conformity with the WTO rules by domestic measures, especially by legislative measures.

(3) Implementing the DSB's recommendations and rulings conscientiously. The performance of China's implementation in the auto parts case, the protection and enforcement of intellectual property rights case, and the publications and audiovisual products case have clearly demonstrated this point.

(4) It is not only an indicator of its excellent traditions of integrity and the needs of its economic development, but also an external embodiment of China's

trade runs towards the rule of law that China has respect for and complies with the WTO agreements, and conscientiously implements its WTO accession commitments.

Firstly, integrity (诚实守信) is the primary criterion of humans in the Confucianism tradition. Chinese stresses integrity, and advocates “truth in speech and resolute in action” (言必行, 行必果). It may prevent and eliminate international dispute by strict compliance with international rules and faithful implementation of international commitments and obligations.

Secondly, integrity is the peaceful settlement of international disputes. It shall settle any international dispute in a peaceful manner at an appropriate level in accordance with international law, such as the provisions of article 33 of the Charter of the United Nations and the DSU of the WTO.

Thirdly, integrity is the management of disputes in good faith. In the process of the dispute settlement, both sides of the dispute shall maintain and develop normal relations in good faith, and avoid deterioration of the dispute and creation of a new dispute. China’s participation in the TPRM is obviously an act to avoid trade frictions with its trading partners; China’s compliance with the WTO commitments and rules aims to reduce conflicts with its trading partners, and China’s participation in the dispute settlement mechanism could peacefully settle international disputes as well as manage disputes in good faith.

Fourthly, a stable and open international market is crucial to the sustainable development of China. The WTO is an important global forum on which China may take initiative in fierce international competition. As claimed by the Ministry of Commerce of China, China makes effective use of the WTO as a multilateral means, grasps the historical opportunities of globalization, and will accordingly become a model in terms of the integration of developing countries into globalization. China always performs its commitments in a responsible and trustworthy manner and makes contributions to enhancing the multilateral trading system. All of these not only energize the economic and social development of China itself, but also obtain wide praises from the WTO members and international society.¹¹⁰ Pascal Lamy, the Director-General of the WTO, addressed that China’s accession to the WTO benefited both China itself and the rest of the world at a flag-raising ceremony to inaugurate the WTO Day at the 2010 Shanghai World Expo on 22 July 2010. Meanwhile, China’s accession into the WTO brought enhanced credibility and made the organization much more a “World” Trade Organization.¹¹¹

Fifthly, the excellent performance of China in terms of strict implementation of the WTO rules and international obligations in good faith enhances the

¹¹⁰ Id.

¹¹¹ Pascal Lamy, *China’s WTO membership is “win-win,”* Jul. 22, 2010, at http://www.wto.org/english/news_e/sppl_e/sppl162_e.htm (last visited Oct. 31, 2010).

legitimacy of the multilateral trading system based on international law, and constitutes a major part of state practice of China on implementing and complying with international law. The performance of China's WTO compliance is not only the contribution made by China to good performance of international obligations as well as the rule of law in the field of international trade, but also an external embodiment of the rule of law on the domestic affairs.

2. *New Challenges to China in Future.* — On 11 December 2001, China became the 143rd member of the WTO, which marked the integration of the People's Republic of China into the world trading system at the economic level. It is a historic event in the process of China's reform and opening up. The ten-year presence in the WTO confirms that the decision of the Chinese central government to join the WTO is a profound historic decision with the nature of "stand high and watch far" which is in the light of China's national conditions.¹¹²

Regarding the global economic recession since 2008, China is regarded as the savior who may lead the world out of the economic crisis to some extent. That the US and China ("G-2") jointly rule the world has become a new hotly-debated issue of global media. The G-20 London Summit in April 2009 was regarded as a starting point of a new era in which China would play a leading role in the world economy.¹¹³ On the one hand, the international society increasingly asks China to take on more responsibilities and play a greater role in WTO global trade governance. On the other hand, China itself is not satisfied with its status as a passive taker of international rules.¹¹⁴ It is specified in details below.

(1) Making efforts to shift from a taker to a maker of international trade rules. Although China is obviously faced with huge challenges in terms of legal norms and practices, its accession to the WTO, together with the implementation and compliance with its WTO commitments and obligations, demonstrates its acceptance of international legal norms, especially the principles of transparency and the rule of law in global trade governance which are embodied in the spirit of liberal capitalism underlying the GATT/WTO system.

As to dumping and anti-dumping cases, China has long been a regular target for anti-dumping actions by its trading partners before its accession to the WTO. Article 16 of the Accession Protocol, one of "WTO-plus" obligations borne by China permits WTO members to treat China as a non-market economy until December 2016 for anti-dumping purposes based on their respective standards. That means that other members could enjoy the discretionary pricing power of Chinese products against China; China shows high degree of sincerity in this regard. Legislatively, China has issued a new separate anti-dumping regulation,

¹¹² See fn. 40

¹¹³ See fn. 61.

¹¹⁴ See Hongying Wang & James Rosenau, *China and Global Governance*, 33(3) Asian Perspective 5, 5–39 (2009).

which was amended in 2004 under the schedule of concessions and commitments.

In practice, it heightens transparency and the rule of law on initiation and determination of anti-dumping investigation and anti-dumping decision pursuant to the relating provisions.¹¹⁵ In order to join the WTO, China proactively or passively forwent all special and differential treatments, which should be granted by the TRIPS as a developing country. The obligations borne by China are stricter than those of other developed countries as WTO members. To ensure compliance with the TRIPS, new amendments have been made to all major intellectual property laws, including the Trademark Law, the Patent Law and the Copyright Law, and new regulations have been issued on the protection of computer software, layout-design of integrated circuits, and new plant varieties. A vigorous legal system for protection of intellectual property rights was established, and the enforcement of intellectual property rights was also enhanced unprecedentedly.

With respect to the settlement of disputes, based on openness and deliberation, on the one hand, China argues strongly in order to defend its lawful rights in the WTO; on the other hand, China also respects for the authority of the WTO dispute settlement mechanism. It rectified in a timely manner the provisions and measures which were inconsistent with the WTO rules (found by the DSB). Needless to say, through its accession to the WTO and its compliance with the WTO commitments and obligations, China has substantially integrated into the international trade legal system; accordingly, the scope of legal norms of international trade was expanded and their effectiveness was improved both in foreign countries and China.

Meanwhile, over the past three decades, as a result of the dramatic increase in contact with the outside world and rapidly increased economic strength, China's attitude towards the outside world has become incrementally more active, open-minded, and flexible. China has evolved successfully from a resister, to a taker and a defender of international system and become a firm supporter of multilateralism. China clearly stakes its claim at the WTO and the UN, on its international climate policy and plays a key role in shaping global governance.¹¹⁶ During the international financial and economic crisis, China took some active measures focusing on domestic consumption to address the crisis as a trading power and continued to keep its market open and took practical action against trade protectionism without adopting any protectionist measure at the same time. China is the only major economy that registered with an increase in imports in volume (by 2.8%) in 2009 during the crisis, which helped to create an enormous

¹¹⁵ See Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 *The China Quarterly* 699, 699–715 (2007).

¹¹⁶ See Humphrey & Messner, fn. 48.

market for its trading partners against a sluggish global demand and high unemployment rate, and contributed considerably to the recovery of the world economy. China not only attended all financial summits at the global level, but also formulated its policies on how to improve international financial governance and to enhance global governance.

During the meetings of the third trade policy review of China, the EU stated that China's integration into the global economy has driven its economic transformation and its rapidly growing role in international trade, and anchored its WTO membership. Today, as the world's largest exporter, second largest importer, and a rising actor in foreign direct investment, China has moved from an emerging economy to a global economic power with unquestionable economic and commercial clout in today's global environment. The corollary is that China's domestic policies and measures increasingly affect economic and trading trends globally.¹¹⁷

With the increase of China's comprehensive power and international clout, the external pressures also increase progressively. In recent years, China has issued indigenous innovation policies, adjusted the exchange rate of the RMB, investment environment, etc., which have become hot and continuing topics of the rest of the world, it shows that China's further opening faces a very complex external environment. So, what the Chinese government is thinking is that one of its primary tasks is to do its best to shift from a participant to a maker of international economic and trade rules by its increasing international status and clout, and to defend its economic and trade interests by actively planning and fully exploiting all kinds of multilateral mechanisms.¹¹⁸ China will take part in international rule-making with a responsible attitude for a world economic structure which is more reasonable in the division of labor, more balanced in finance and trade, more rational in resources allocation and more equitable in interest-sharing. This will facilitate a sustainable and balanced development of the world economy.¹¹⁹

(2) Making efforts to shift not only from a trading power to a global trading power, but also from a new WTO member to a leading WTO member. China opened its market to the world in 2001 through joining the WTO, and embarked

¹¹⁷ http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146211.pdf (last visited Aug. 18, 2010); see also World Trade Organization, Trade Policy Review, China, Record of the Meeting, WT/TPR/M/230, Jun. 29, 2010, at 18.

¹¹⁸ Deming Chen, 全面提升开放型经济水平 (Upgrade the Levels of Open Economy Comprehensively), *经济日报* (Economic Daily), Sept. 29, 2010.

¹¹⁹ Jintao Hu, 共同发展共享繁荣——在亚太经合组织工商领导人峰会上的演讲 (Towards Common Development and Shared Prosperity, Speech by President Hu Jintao of the People's Republic of China at APEC CEO Summit 2010 Yokohama), Nov. 13, 2010, at <http://www.fmprc.gov.cn/eng/zxxx/t769616.htm> (last visited Nov. 15, 2010).

on a new long march towards Chinese great revival. Nowadays, the world economy is undergoing a profound and positive transformation, and the emerging dynamic Asian economy as a whole is seen as the Asian engine of global change that is reshaping the world, and leading the world into a new “global-Asian” age, starting the process of “Eastphalia” replacing “Westphalia.”¹²⁰ The very high trade intensity of China’s growth makes the big-country effect particularly prominent in this case.¹²¹ Faced with increasing expectations and opportunities, and encouraged by its new self-confidence, the Chinese government has gradually and carefully raised its voice as a reformer of the international financial system.¹²² China ensures that its significant role played in global finance will extend to other areas, such as global politics and security areas. China should therefore play a more prominent multilateral role not only in the WTO but also in the International Monetary Fund (“IMF”) and the World Bank, as well as in international economic governance.¹²³ The time creates a precious opportunity for China. Today, the whole world expects China to play a greater role in global governance, and being both a maintainer and a reformer of the global order.¹²⁴

Admittedly, there are some factors which would restrict China from playing a greater role in global governance. China takes up only about 6% of world income and just takes up about 10% of the world’s exports, so its individual influence is limited. China cannot rescue the world economy by itself.¹²⁵ Due to the reasons: (a) Chinese mentality to the conception of global governance rooted in the Western culture (such as multi-layered subject of governance, the concept of weakening the sovereignty) may be an obstacle. (b) China’s identities are multiplied and the position that it occupies is ambiguous in the international system. (c) China may have insufficient instruments to assume a greater role in global governance for the time to come. (d) A serious challenge for China as it seeks to be a major player in global governance is the gap between its rhetoric words and its practice.¹²⁶ China has brought forward ideas on the reform of

¹²⁰ See Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17(1) *Ind. J. Global Legal Stud.* 27, 27–45 (2010).

¹²¹ Raphael Kaplinsky, *The Impact of China and India on the Developing World*, at <http://www.ifo.de/pls/guestci/download/CESifo%20Forum%202007/CESifo%20Forum%201/2007/forum1-07-focus3.pdf> (last visited Apr. 4, 2010).

¹²² See Wang & Rosenau, fn. 114 at 27.

¹²³ See Leal-Arcas, fn. 13 at 273.

¹²⁴ Zhongying Pang, *New Power for Global Change? Some Approaches to Boosting China’s Pivotal Role in Tackling Global Challenges*, Friedrich Ebert Stiftung, Dialogue on Globalization, Briefing Paper 6, May 2007.

¹²⁵ Manmohan Agarwal, *Developing Countries — even China — Cannot Rescue the World Economy*, The Center for International Governance Innovation, Policy Brief (no. 18), Jan. 2010.

¹²⁶ See Wang & Rosenau, fn. 114 at 5–39.

international institutions, but it is not trying to overturn the existing system and does not yet have its own blueprint for the future of global governance. It is trying only to correct some deficiencies that conflict with its own interests and values.¹²⁷ (e) China's ability to participate in global governance needs to be enhanced. Some observed that China's experience in the WTO, in their perspectives, was a mixture of monitored adaptation, eagerness to peruse, aspiration to change, which in fact boils down to the ability to learn. There is glory and frustration. What is more important are the lessons learned from its experience in the WTO, the Doha Round, and beyond. The issue at stake is how to balance between compliance and reform, and how to prioritize between adaptation and exploration. China should learn, at the first step, how to assess and calculate interests and costs.¹²⁸

Despite these restrictive factors, as a beneficiary and a reformer of the multilateral trading system, China is an important driving force for the recovery of the global economy and the reform of international economic order. Given its total economic and trade volumes, the scale of foreign direct investment received, and the self-claimed position of "a responsible power" as well as the need of peaceful development as foreign strategies, China shall make a determination of shifting from a new member to a co-leader in the WTO.

The co-leadership means that China will actively participate in global economic governance and regional cooperation to promote development, deepen reform, and encourage innovation by opening up, and to vigorously create new advantages for participating in global economic cooperation and competition.¹²⁹ The co-leadership also means that China should consolidate its position of an emerging trade power, facilitate the process of becoming a trade power in the WTO global trade governance.

On the one hand, China needs to work together with the other emerging powers, such as India, Brazil and South Africa, etc., to pay more attention to concerns and defend benefits of the developing members, and push the necessary reform of the WTO forward for building a new fairer, and more balanced legal framework of global trade governance in which all developing countries, especially the least developed countries can share the benefits of globalization.

On the other hand, China also needs to work together with all major members of the WTO hand in hand, including (but not limited to) the US, the EU, Canada,

¹²⁷ See fn. 61.

¹²⁸ Yongnian Zheng & Qingjiang Kong, *China in the WTO: From Accession to the Doha Failure*, EAI Working Paper (no. 147), at <http://www.eai.nus.edu.sg/EWP147.pdf> (last visited Nov. 1, 2010).

¹²⁹ 中国共产党第十七届中央委员会第五次全体会议公报 (Communique of the 5th Plenum of the 17th CPC Central Committee), Oct. 18, 2010, at <http://www.idcpc.org.cn/english/events/101018-2.htm> (last visited Mar. 25, 2012).

Japan, and Australia for perfecting rules and functions of the WTO, advancing trade liberalization, promoting sustainable development, broadening its clout over other important international coordinating mechanisms, and assuming a greater responsibility and role in governing the global economy.

The most pressing matter at this moment is, along with the international community, to advocate and support free trade, oppose all protectionism, properly handle trade frictions by dialogues and consultations, promote the Doha Round to gain a comprehensive and balanced result on the basis of locking the outcome achieved in order to realize the goals of the development round and facilitate the establishment of an open and free global trading system.

China should also strengthen its capacity of global trade governance through deepening and completing of domestic reform and promoting economic and social development, and should perfect the safeguard mechanism of openness, increase the ability to control the market openness, enhance the coordination of domestic and international economic policies, reinforce the coordination between trade policies and financial, monetary, and industrial policies, make the risk-aversion system more sound, and should perfect the preliminary warning system for industry damages and trade frictions reaction system, improve the ability to tackle trade frictions and remedies. China should further transform the government functions, reduce the administrative approvals, improve the administrative transparency, accelerate the training of professionals, and provide a strong basis of organizational and human resources.¹³⁰

¹³⁰ See Chen, fn. 118.