

# China and the WTO: Joining the Competition—Playing to Win

JEREMY PALTIEL

China's accession to the World Trade Organization (WTO) can be viewed through different lenses. One lens looks at China's specific performance, views accession as a contract, and looks for evidence of specific compliance or derogations. Another lens views WTO accession as part of a process in the integration of China in global regimes to see how far accession redirects domestic policies toward the norms and constraints imbedded in the WTO regime. The first approach sees the WTO regime as a pattern or cookie-cutter and matches the regime against the outlines of China's current policy and law.<sup>1</sup> The second approach sees WTO accession as being on a trajectory of conformity with international regimes and compares the commitments under the accession agreements against China's past governance practices.<sup>2</sup> This asks not "how far does China comply" but

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**Jeremy Paltiel** is Associate Professor of Political Science at Carleton University, Ottawa, Ontario, Canada. He is currently engaged in a three-year project on "China, Sovereignty, and Global Governance" supported by the Social Sciences and Humanities Research Council of Canada. Some of the results will be published in a forthcoming book by Palgrave entitled *The Empire's New Clothes*. Some arguments in this paper were earlier presented in a paper entitled "Hinges and Latches on the Open Door: The Normative Parameters of China's WTO Accession" presented to the joint Fudan University-Queen's University conference "Globalization and China's Reforms: An IPE Approach" (Fudan University, Shanghai, China, May 21-25, 2002). Dr. Paltiel can be reached at <jpaltiel@ccs.carleton.ca>.

<sup>1</sup>This is the approach initially taken in the Report to Congress of the U.S.-China Security Review Commission (July 15, 2002), "The National Security Implications of the Economic Relationship Between the United States and China," available at <[http://www.uscc.gov/ch3\\_02./htm](http://www.uscc.gov/ch3_02./htm)>.

<sup>2</sup>For this approach see, for example, Pitman B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture* (New York: Routledge, 2001), esp. 125-42. Potter specifically warns against expecting specific compliance (p. 141). See also Sylvia Ostry, "China and the WTO: The Transparency Issue," *UCLA Journal of International Law and Foreign Affairs* 3, no. 1 (Fall 1998): 1-22.

"what has changed" and "how do the changes mandated by WTO reorient Chinese governance on a sustainable course of market opening."

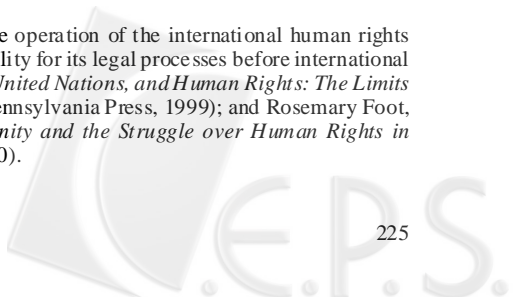
*Accession alone is unlikely to change China's governance practices. Only by fitting the trend of domestic change can WTO rules and norms become a template for reform of China's domestic institutions.* Commitment to the "rule of law" and a "socialist market economy" by China's leadership predates WTO accession based on a rationale outside the international trade regime. These reforms occurred not because they were "mandated" by external actors but because they express trends in China's own development formalized in new institutions. For China, externally speaking, WTO accession represents membership in a world organization that makes and adjudicates trade law, consolidates market access, and institutionalizes most-favored-nation (MFN) status (now called permanent normal trade relations or PNTR), especially in the crucial U.S. market. Internally, WTO accession consolidates China's transition to a market economy and mandates the completion of the institutional framework of a market regime.

### **WTO and the Direction of China's Domestic Reform**

The most important achievement of WTO accession is to create around Chinese performance a structure of international accountability that China cannot ignore and whose legitimacy China has recognized in advance. China now accepts external monitoring of its domestic governance structures, including the performance of its legal institutions. China's position in relation to the WTO regime stands in almost direct opposition to the stance Beijing has taken to the international human rights regime.<sup>3</sup> WTO accession corresponds to a "neo-liberal turn" in China's economic

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<sup>3</sup>China's consistent position with respect to the operation of the international human rights regime has been to resist any direct accountability for its legal processes before international bodies. For details see Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* (Philadelphia: University of Pennsylvania Press, 1999); and Rosemary Foot, *Rights Beyond Borders: The Global Community and the Struggle over Human Rights in China* (Oxford: Oxford University Press, 2000).



policy with partial impact on the normative contours of China's cultural development. Accession corresponds to the "double-edged sword" of globalization. On the one hand, accession represents participation in the mainstream of international economic life; on the other, a strategy of competition, premised on a struggle against the prevailing global order led by the West with the United States at its head. People take different stands with respect to these two points of emphasis. Even strong partisans of infant industry protection and a comprehensive strategy of national economic growth insist on proceeding in line with the rules of the WTO and establishing an appropriate legal framework.<sup>4</sup>

Long Yongtu (龍永圖), China's chief negotiator for accession to the WTO, stated in a seminar he headed at the Central Party School of the Chinese Communist Party (中共中央黨校) that

The market system is a rule of law system.... The first obligation and responsibility that we will have after we join the WTO will be to obey the rules.... Some comrades have asked me: "What is the most important thing you have learned in taking part in negotiations after so many years?" My answer is, my greatest realization is simply this: it is not easy to establish a market economy in China.<sup>5</sup>

The line between instrumental adoption of WTO norms and cognitive acceptance of these norms has already become blurred. For example, when the Standing Committee of the Shanghai Municipal People's Congress (上海市人大常委會) discussed revisions to the temporary regulations of one of the city's high-tech development zones (高新技術開發區) (to bring these into conformity with national treatment provisions), a delegate introduced a motion to repeal the provisions altogether.<sup>6</sup> Express linkage was made between WTO accession, streamlining regulations, and democratic participation. WTO accession is not the "source" of new norms, nor is

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<sup>4</sup>Cao Jianming and He Xiaoyong, "Jiaru WTO yu woguo duiwai jingmao lifa" (WTO accession and our country's foreign trade legislation), *Zhongguo faxue* (China Legal Studies), 2000, no. 1:3-12.

<sup>5</sup>Long Yongtu, "On the Question of Our Joining the WTO," translated in *Chinese Economics* 32, no. 1 (January-February 2000): 15, 31.

<sup>6</sup>Xie Weiqun, "Shanghaishi renda changweihui weihe qiyong dongyiquan" (Why did the Shanghai People's Congress Standing Committee use its power to make legislative motions?), available at <[www.people.com.cn/GB/shizheng/19/20020205/662949.html](http://www.people.com.cn/GB/shizheng/19/20020205/662949.html)>.

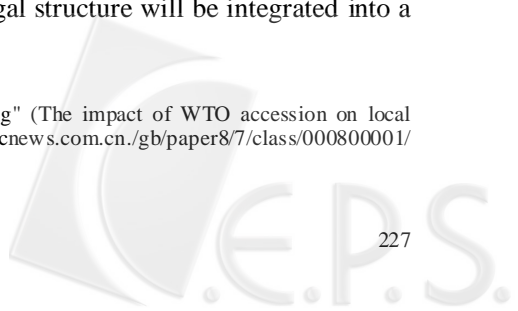
WTO accession in itself the major constraint; instead, WTO accession acts as a standard of universality by legitimating procedural fairness, transparency, generality, and accountability on the basis of commitments undertaken by China's own leaders.

WTO accession places much more emphasis on legislative activity, both as a means of establishing a regulatory framework which is consistent with WTO rules, and also as a way of reinforcing central control over the legal regime for trade activities. There is not only an "elective affinity" between the market and law, but also an "elective affinity" between the interests of the central government and the international community. The WTO impacts the rule of law in China not just at the level of legislation, but also at the level of procedure. WTO compliance expressly forbids local protectionism. Local authorities are not only forbidden to enact discriminatory regulations, but any enactment of secret local rules is explicitly outlawed and rendered without legal force.<sup>7</sup> This not only helps to enforce international law, but serves to create a national market by limiting the ways in which local authorities exercise official discretion. WTO accession represents for the Chinese central government a functional equivalent of the Trade and Commerce Clause of the U.S. Constitution. To some, accession even represents something of the "equal protection" clause of the Fourteenth Amendment to the U.S. Constitution. Needless to say, the actual legal impact, not to speak of the behavioral impact, of joining the WTO will be more modest. Still, in serving the interests of centralization, of "nationalizing" legislative power, WTO accession parallels, rather than counters, the interests of economic nationalists.

China was required to introduce judicial review of administrative actions as a condition of accession. This review process, coupled with China's involvement in the dispute resolution tribunals of the WTO, will place an additional layer of scrutiny over China's domestic legal procedures. For the first time, Chinese legal structure will be integrated into a

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<sup>7</sup>"Rushi dui difang fazhi jianshe de yingxiang" (The impact of WTO accession on local lawmaking), available at <<http://www.npcnews.com.cn/gb/paper8/7/class/000800001/hwz181974.htm>>.



supranational superstructure of judicial procedure.<sup>8</sup> With respect to trade-related law, China will be forced to confront what Beijing has steadfastly resisted with respect to human rights—the evaluation of domestic procedure in the light of externally mandated norms. This is not without precedent in the evolution of China's reforms.<sup>9</sup> Chinese legal norms (with distressing distinction to Chinese legal practice) have been evolving and adapting to the norms common in Western legal practice.<sup>10</sup>

WTO accession has shaped an environment where Chinese, both official and nonofficial, have come to perceive important interests as being best protected through a system of generally applicable and impartially administered rules. Long Yongtu has said himself:

... in order for us to mitigate, or even eliminate the "China threat" theory and to create, for the benefit of our own country, a benign international environment, we must, in our international dealings, pledge to follow international rules and do things in accordance with these international rules and regulations and become a responsible member of the international community.<sup>11</sup>

Long Yongtu compares Chinese legal performance with international sports competitions at the Olympics. He argues that just as China does not claim special rules for Chinese basketball players because of the different average height of Chinese, Beijing should also not claim exceptions as part of the competition in international trade.<sup>12</sup> Long does not conceal China's competitive purpose. He makes an analogy between China as a deputy section head in a bureau, with the European Union and Japan as deputy bureau heads and the United States as the bureau chief. Viewing the world as a hierarchy, Long argues in typical Chinese fashion that the deputy section chief in a bureau should not go around touting his ambition to be the

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<sup>8</sup>Again this was recognized by Chinese scholars. See Yu An, "Fazhan fuhe Shijie maoyi zuzhi guifan de woguo xingzhengfa" (Developing our country's administrative law in accordance with WTO norms), *Xinhua wenzhai* (New China Digest), February 2000, 5-6.

<sup>9</sup>See Jeremy Paltiel, *The Empire's New Clothes*, chap. 2: "China and the International Rule of Law" (Forthcoming).

<sup>10</sup>See, for example, He Jiahong, "Si fa gongzhenglun" (On judicial fairness), *Zhongguo faxue*, 1999, no. 2:11-19.

<sup>11</sup>Long, "On the Question of Our Joining the WTO," 33.

<sup>12</sup>*Ibid.*, 35.

bureau chief, as that would arouse suspicion among his senior colleagues. Instead, he should pledge to live according to the existing framework—even if his ambition is to become the chief of the bureau.<sup>13</sup>

"National treatment" is now formally entrenched in China's accession to the WTO. This does not mean that China is without recourse to shape the interactions that result. Rather, as China's own analysts have pointed out, the Organization requires China to take countermeasures similar to those taken by other states. The literature on China's WTO accession is replete with examples: Japan, South Korea, Mexico, Chile, and Brazil are all countries that have adopted such countermeasures.<sup>14</sup>

### **Inconsistencies and Gaps in China's Domestic Framework**

China's governance practices still fall well short of the institutional requirements of market regulation. As acknowledged in a recent OECD (Organization for Economic Cooperation and Development) report, these include deficiencies in the private property regime, corporate governance, and competition law.<sup>15</sup> These findings stem from the continued operation of the *nomenklatura* system of personnel appointment, a system recently reaffirmed in "The Regulations for the Selection and Appointment of Leading Cadres of Party and Government" (黨政領導幹部選拔任用工作條例).<sup>16</sup> Appointments to state-owned enterprises (SOEs) remain within the purview of Party committees and Organization departments. Regulations specifically authorize rotation of cadres to SOE posts (Art. 52.4). Hence in addition to the obstacles to an independent judiciary implied in

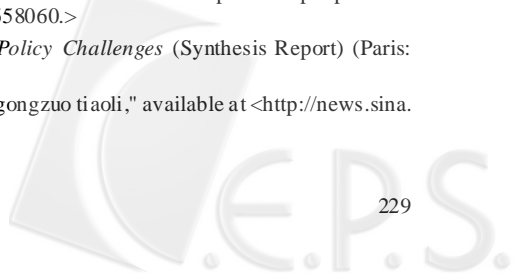
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<sup>13</sup>Ibid., 33-34.

<sup>14</sup>See, for example, "Jinru WTO, women xiang taguo xue shenmo?" (After entering the WTO, what should we learn from other countries?" available at <<http://www.people.com.cn.GB/guandian/183/6103/6104/20020129/658060.>>

<sup>15</sup>*China and the World Economy: Domestic Policy Challenges* (Synthesis Report) (Paris: OECD, 2002), 46-59.

<sup>16</sup>"Dangzheng lingdao ganbu xuanba renyong gongzuo tiaoli," available at <[>](http://news.sina.com.cn/c/2002-07-23/1341646066.html).



the unified management of judicial officials by the Party, the lack of independent corporate governance strengthens the tendencies that engender local protectionism. One commentator has even proposed the creation of a higher-level Party-government institution to overcome the entrenched administrative habits that promote local protectionism and the perceived weakness of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC 對外貿易經濟合作部) as a bureaucratic actor.<sup>17</sup> As the OECD points out, however, the deficiencies of China's market mechanisms stand as a barrier to not only national treatment and non-discrimination principles imbedded in the WTO, but more importantly, exacerbate interregional imbalances and obstruct the reallocation of resources and capital to more efficient use.<sup>18</sup> Therefore, reforms in line with WTO requirements would help correct the most important social challenges facing China today. Thus, while the challenges documented by Gordon Chang in *The Coming Collapse of China* are very real,<sup>19</sup> the way forward is consistent both with WTO accession and the framework of China's own reforms.

Quite plainly, the *nomenklatura* system of unified cadre management is inconsistent with the main thrust of China's reform—whether in the area of market regulation or with respect to the rule of law. At some point in the near future, domestic actors in search of a larger economic space and a more level playing field will join external corporate, governmental, and multilateral actors in demanding the same thing. The needs of market reform pit the territorial principle of Party personnel management against the national principle of rules of general applicability necessary both for market regulation and WTO compliance. WTO accession has been consistent with the desire of the central government to wrest back centralized

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<sup>17</sup>"Opening up China to meet its WTO commitments, the country needs high-level institutions that will overcome local trade barriers, says Susan Shirk," *Financial Times*, May 13, 2002.

<sup>18</sup>OECD, *China and the World Economy*, 29-46.

<sup>19</sup>Gordon G. Chang, *The Coming Collapse of China* (New York: Random House, 2001). Chang pinpoints the problems of the state-owned industries, the banking system, and the weaknesses of China's financial markets as institutional complexes made more vulnerable by WTO accession. For critiques of his argument—and Chang's direct response to his critics, see the special book review section in this issue.

control from local government given up during earlier phases of China's economic reform.<sup>20</sup>

Future development will involve a clearer choice between Party policies aimed at maintaining power through the national allocation and territorial supervision of personnel, and government policies aimed at managing society through the uniform application and implementation of impartially administered laws. Since the accession documents were signed, Chinese officials have professed earnest sincerity in the pursuit of impartiality and transparency to the outside world.<sup>21</sup> China has often published draft laws and regulations and especially recently has also engaged in public consultations, as mandated by WTO accession rules; in other important respects, however, the process of implementing new rules will have to change. Following the transitional arrangements specified for different sectors, WTO rules will restrict Beijing's capacity to designate "test points" (試點, or *shidian*) subjected to different rules from the rest of the country.

Ordinary Chinese citizens have begun to react to the official propaganda about WTO accession in unexpected ways, publicly complaining about practices incompatible with the norms embodied in the WTO (not necessarily the rules themselves).<sup>22</sup> It will be interesting to see how the regime will mediate between the norms of fairness symbolized by WTO accession and the exclusive prerogatives managed by territorial Party committees.

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<sup>20</sup>See Susan Shirk, *The Political Logic of China's Economic Reform* (Berkeley and Los Angeles: University of California Press, 1993).

<sup>21</sup>See, for example, "China Undergoes Conceptual Changes After WTO," available at <[http://english.peopledaily.com.cn/200201/17/print/20020117\\_88806.html](http://english.peopledaily.com.cn/200201/17/print/20020117_88806.html)>.

<sup>22</sup>One reader of the *People's Daily* asked whether it was proper for the education authority to be the exclusive marketer of test review materials and for the civil affairs authority to be the sole marketer of cremation urns in the light of WTO accession. The norm he saw violated is "how can you both be the athlete and the referee?" See Cao Qing, "Jiaru shimaole, guhui hai yao 'zhuanying'?" (Having entered the WTO, must cremation urns still be "monopoly controlled"?), available at <<http://peopledaily.com.cn/GB/guandian/26/20020322/692552.html>>.



## Conclusion

Nothing suggests that China's leaders have fundamentally abandoned a neo-mercantilist approach to world trade and economic development. WTO accession is first and foremost a strategic tool, not a sign of capitulation or assimilation to Western dominance. Thomas Moore has coined the term "global nationalism" to describe China's competitive integration into the global economy.<sup>23</sup> Chinese writings focus on WTO as a *challenge* and on the need to shift the *mode* rather than the goal of national economic security.<sup>24</sup> Chinese commentators primarily view WTO norms of transparency, non-discrimination, and national treatment as instrumental *means* to the goal of national economic competitiveness rather than ends in themselves.

Almost no one in China views the WTO as "the solution" to China's economic problems. All are more or less focused on the improvement of national competitiveness at the level of the nation-state over improvement of material welfare:

The goal of economic development in our country is an open economy. An open economy can fully exemplify the comparative advantage of each country, and raise the effectiveness of resource utilization. An open economy raises the pressure of competition on domestic industry and forces enterprises to use advanced technology and to improve operational management; at the same time, an open economy engages enterprises in resource allocation in the international economy, forming international competitiveness. Only with opening to the outside can the competitiveness and viability of the national economy be manifested. Any means of isolation will lead to that country falling behind. This is the lesson of economic development of various countries.<sup>25</sup>

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<sup>23</sup>Thomas G. Moore, "China and Globalization," *Asian Perspectives* 23, no. 4 (1999): 88.

<sup>24</sup>See, for example, Yu Xindong, "Zhongguo jiaru WTO hou chanye baohu he chanye anquan yanjiu ji duice" (The study of and countermeasures for manufacturing protection and manufacturing security following China's accession to the WTO), *Xuexi yu tansuo* (Study and Exploration), no. 127 (2000): 4-11.

<sup>25</sup>Tan Dizhou, *WTO guanmao chongjibo: fuguan zhilu he Zhongguo jingji mianling de ji yu yu tiaozhan* (The WTO tsunami: The road to re-entering the GATT and the opportunities and challenges faced by the Chinese economy) (Tianjin: Tianjin renmin chubanshe, 1998), 252-53.

It is not Chinese who are made better off by WTO accession, but China:

With the globalization of production as a background, we must link the readjustment of our domestic economy with the readjustment of the global economy, to establish a new plan for readjusting the manufacturing structure and the choice of strategic industries in order to benefit the overall international competitiveness of our industry. Secondly, on the basis of our own overall strength and comparative advantage, our country should wrest a strategic advantage in one or more high-tech, high value-added industries in the context of globalized production.<sup>26</sup>

Adoption of liberal economic norms is therefore contingent on the correspondence between these norms and Chinese national economic goals:

Without a doubt, globalization—alongside the nationalism produced through mutual interaction—represents historical progress. However, only by keeping hold of one's political fate in one's own hands can the accomplishments which the nation-state derives from the advance of globalization be made meaningful and dependable. Moreover, the means to holding one's fate in one's own hands is not money in itself ... but the strength and the military and defense power that can be deployed to protect national interests on a global scale by transforming money in a timely manner.<sup>27</sup>

Liberal economic norms will become increasingly institutionalized, so long as these do not clash with the purposes of the Chinese regime. The first of Jiang Zemin's (江泽民) cherished "three represents" (三個代表) requires the Chinese Communist Party (CCP) to represent the forces of advanced material and technological production.<sup>28</sup> This incorporates (albeit instrumentally) liberal economic norms into the ideology of the CCP. Despite a neo-mercantilist mind-set, acceptance of globalization as

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<sup>26</sup>Wang Shuying and Jiang Yan, "Lun chanye quanqiu hua he woguo chanye zouxiang quanqiu hua de zhengce xuanze" (On the globalization of production and policy choices of our country on the way to globalization), *Shijie jingji yu zhengzhi* (World Economy and Politics), no. 254 (October 2001): 44-49, at 49.

<sup>27</sup>Zhang Wenmu, "Minzu, guojia yu quanqiu hua" (Nation, state, and globalization), *Zhongguo guoqing guoli* (China: National Conditions and State Capacity), July 2000, 1.

<sup>28</sup>The other two "represents" are representing the interests of "the forward advancement of Chinese culture" and "the basic interests of the overwhelming majority of the people." See the report of Jiang Zemin's inspection of work in Guangdong (廣東) in *Renmin ribao* (People's Daily), February 26, 2000, 1.

the context of domestic and foreign policy decision-making by China's leaders has real world consequences. The pursuit of a "comprehensive industrial system" has been abandoned in favor of strategic choices informed by comparative advantage. Globalization will promote "industrial champions" (in both scale and technology) and strategic sectors. Relying on improved estimates of China's own competitive position, leaders have accommodated the ideal of competition within a rules-based multilateral order into a world view that defines international relations as a competitive arena of nation-states.

While the terms of WTO accession will be most faithfully implemented when seen as a template for China's domestic reform, they will be vigorously resisted where viewed as restrictions on China's sovereignty uniformly favoring external over domestic actors. Chinese policymakers are acutely sensitive to reciprocity, and respond directly to behavior perceived as "bullying" or "arrogant."<sup>29</sup> Where they see China aggressively singled out (as recommended by the U.S.-China Security Review Commission), they will react.<sup>30</sup> At the same time, the process of accession shows that China will bargain its way out of a difficult situation, even when this entails compromising previously cherished principles. In the course of negotiating accession, China gave up the cherished claim of blanket exemptions as a developing country and negotiated China-specific transitions to general WTO rules. Moreover, China's performance is also subjected to mandatory review. So long as WTO accession does not become identified with interests hostile to the continued survival of the Party-state, there is room for new institutions and principles to spread their roots in heretofore inhospitable soil. To paraphrase Long Yongtu, when a Chinese "bureau chief" finds himself in the top office, s/he will look out of a very Western-style building.

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<sup>29</sup>This is confirmed by the results of Zhu Rongji's (朱鎔基) April 1999 visit to Washington. See Zong Hairen, "Zhu Rongji in 1999," Part I in *Chinese Law and Government* 35, no. 1 (January-February 2002): 38-48.

<sup>30</sup>See note 1 above at 18-19.