

# The Sixth Anniversary of China's WTO Accession: Reflections on Commitments and Compliance

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## I. Introduction

The history of China and the World Trade Organisation (WTO), as well as its predecessor, the General Agreement of Tariffs and Trade (GATT), is a chequered affair.<sup>2</sup> In 1948, the Republic of China (ROC) was a founding member of the GATT, only to withdraw in 1950, after the establishment of the People's Republic of China. Subsequently, the Kuomintang-run ROC gained observer status in 1965, only to lose it again in 1971 as a result of the PRC having been recognised, by the United Nations (UN), as the sole legitimate government of China.<sup>3</sup> In 1982, the PRC was granted observer status at the GATT. A formal application to become a GATT contracting party was made in 1986. However, by the time the GATT was superseded by the WTO in 1995, accession proceedings had not yet been concluded. It took another six years until the PRC finally joined the WTO on 11 December 2001. A few weeks later, on 1 January 2002, the ROC joined the WTO as a separate customs territory under the name of "Chinese Taipei".

The sixth anniversary of Chinese accession presents a timely opportunity to reflect on the current state of affairs. In this regard, the present study will focus on the PRC (hereinafter: China). China's WTO membership is a complex matter that entails numerous aspects worthy of discussion, ranging from China's institutional and economic preparedness for membership to the adequacy of market access levels. In the context of reviewing the story of Chinese membership so far, two issues have frequently stood out as the most absorbing.<sup>4</sup> First, there is the discussion on the levels of market liberalisation achieved by China and whether these are adequate. Second, there are concerns with respect

to the transparency of administrative measures in China and whether accession commitments have been satisfied in this respect. Academic commentary, as well as reports by other WTO members who are monitoring China's implementation of her commitments, are increasingly placing more emphasis on the latter issue.<sup>5</sup> One of the most common points raised in this regard is the continuing dichotomy which seems to exist between the laying down of WTO-compliant laws and regulations by the Central Government in Beijing and the failure of local governments to implement and enforce such the rules.<sup>6</sup>

After six years of membership, China can no longer be considered a new member. In fact, the implementation period for China to comply with her WTO commitments was, in many areas, fixed at five years. Accordingly, the present study represents more than a mere intermediary review. This study will attempt to draw a picture of the current state of China's compliance with her accession commitments, and in particular, the continuing problems involving distribution services, subsidies, intellectual property rights and the associated lack

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<sup>2</sup> For a more detailed overview see: Wang Guiguo, China's Return to GATT: Legal and Economic Implications, *Journal of World Trade* 3 (1994), pp. 51-65; James Feinerman, China's Quest to Enter the GATT/WTO, *American Society of International Law Procedure* (1996), pp. 401-5; Raj Bhala, Enter the Dragon: An Essay on China's Accession Saga, *American University International Law Review* (2000), pp. 1469-1538.

<sup>3</sup> United Nations General Assembly Resolution 2758, adopted on 25 October 1971.

<sup>4</sup> See e.g., Karen Halverson, China's WTO Accession: Economic, Legal and Political Implications (Spring 2004), *Boston College International and Comparative Law Review*, pp. 319-370; Wang Jiangyu, The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development, *Singapore Journal of Legal Studies* (2004), pp. 374-389; Sarah Biddulph, China's Accession to the WTO: Legal System Transparency and Administrative Reform, in: Sylvia Ostry/Alan S. Alexandroff/Rafael Gomez, China and the Long March to Global Trade, Routledge, London (2002), pp. 154-191; Ulric Killion, Post-WTO China and Independent Judicial Review, *Houston Journal of International Law* (2004), pp. 507-551; Hung Mei-Ying Veron, China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform, *American Journal of Comparative Law* (2004), pp. 77-132.

<sup>5</sup> US Report to Congress on China's WTO Compliance, 2007, published December 11, 2007, [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2007/asset\\_upload\\_file625\\_13692.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/asset_upload_file625_13692.pdf); Peter Mandelson, Growing trade, shared challenges, EU-China Business Summit, Beijing, 27 November 2007; Jose Manuel Barroso, The EU and China: Painting a Brighter Future Together, Chinese - Academy of Sciences, Beijing, 15 July 2005.

<sup>6</sup> Paolo Farah, Five Years of China's WTO Membership, *Legal Issues of Economic Integration* 2 (2006), pp. 263-304; Pitman Potter, China and the WTO: Tensions between Globalized Liberalism and Local Culture, *Canadian Business Law Journal* (1999), pp. 440-462; Sarah Biddulph, The Legal Structure of Decision Making in Chinese Police Enforcement Powers: Some Preliminary Issues, in: Veronica Taylor (ed.), *Asian Law Through Australian Eyes*, Lawbook Co, Sydney, 1997, p. 207.

of transparency, both in terms of the legal framework and in terms of enforcement at the provincial level. These areas have been chosen for closer scrutiny as they are the subject of ongoing dispute settlement proceedings at the WTO.

This paper will begin by recounting the commitments China entered into upon her accession to the WTO in 2001. Particular attention will be paid to the question of the Chinese Central Government's legal obligations in respect of its responsibility for the actions of local authorities. The compliance levels envisaged six years ago will then be compared to the present situation in respect of the specific areas alluded to above. A resume will be drawn as part of the concluding remarks.

## II. China's Accession Commitments

As is usual practice during accession negotiations, existing WTO members negotiate bilaterally with the prospective member on matters such as tariff levels and other market access commitments. In reliance on the Most Favoured Nation (MFN) principle, the most favourable terms agreed in such negotiations are then incorporated into the respective Schedules of the new member for the benefit of all other members. In China's case, negotiations with the European Union (EU) and the United States (US) proved to be the most significant. In addition to market access levels, China also needed to agree on the rules that would govern its trade within a multilateral forum, the Working Party on China's accession. The results of these negotiations were reflected in the Protocol of Accession.<sup>7</sup>

From 11 December 2001, the date of accession, China<sup>8</sup> had committed herself to both opening up her markets and to reforming her legal system to provide a more predictable and transparent environment for traders. For instance, in respect of transparency China promised to enforce only those laws and regulations which other members had been made aware of and that such rules would be published in a designated official journal.<sup>9</sup> Aside from these commitments, all members are required to embrace the WTO's general principles, such as MFN and National Treatment, as well as the various multilateral agreements, including the Agreement on Agriculture, the Anti-dumping Agreement and the Agreement on Technical Barriers to Trade. Although implementation was not required immediately, most of the respective transitional periods had expired by 2007. Additionally, given the large

volume of Chinese trade and the expected negative impact this would have on manufacturers elsewhere, China was also asked to consent to China-specific rules, such as the special safeguard provisions which provide other members with more leeway to restrict Chinese imports than would otherwise be available under the Agreement on Safeguards.<sup>10</sup> For instance, instead of the usual serious injury requirement for invoking safeguard measures, mere market disruption suffices where Chinese trade is involved. This less rigid criteria is available until late 2013. Similarly, China-specific rules apply to safeguards on textiles (available until late 2008), to the methodology applied in calculating the dumping margin in anti-dumping cases (available until late 2016), as well as to the methodologies used for assessing subsidisation levels.<sup>11</sup> Lastly, China also had to allow the establishment of a Transitional Review Mechanism which was designed to review Chinese compliance with WTO commitments on an annual basis.<sup>12</sup> While it is clear that China has faced more burdensome commitments as compared to other new members<sup>13</sup>, the added obligations are indicative of China's trading prowess and the fear which this still evokes in leading industrialised countries. Although the degree of additional burdens imposed on China may seem unparalleled, a noteworthy precedent is evidenced in the story of Japan's accession to the GATT in 1955.<sup>14</sup> At that time, many of the other signatory parties refused to extend MFN status, the GATT's most fundamental principle, to Japanese goods.

### 1. The Central Governments Responsibilities

Amongst China's accession commitments and related issues, one question deserves particular scrutiny as it is integral to growing concerns about the failure of local governments to adopt and put WTO rules into effect. Local governments are often not willing to observe rules laid down by the Central Government in Beijing. Such non-compliance can, for instance, be traced to the dichotomy between the transparency requirements mandated by WTO rules and the prevailing system of administrative discretion as practiced by local governments in China.<sup>15</sup> As an example, local govern-

<sup>7</sup> Protocol on the Accession of the People's Republic of China, WTO Doc WT/L/432.

<sup>8</sup> Report of the Working Party on the Accession of China, WTO Doc WT/ACC/CHN/49 + Corr.1 WT/MIN(01)/3.

<sup>9</sup> Supra note 7, Part I, para. 2(C)(1), (2).

<sup>10</sup> Supra note 7, Part I, para. 16; see also *Lee Yong-Shik*, The Specific Safeguard Mechanism in the Protocol on China's Accession to the WTO: A Serious Step Backward from the Achievement of the Uruguay Round, *The Journal of World Intellectual Property* 5 (2), pp. 219-231.

<sup>11</sup> Supra note 7, Part I, para. 15; see also *Silke Trommer*, Special Market Economy: Undermining the Principles of the WTO?, *Chinese Journal of International Law* 3 (2007), pp. 565-599.

<sup>12</sup> Supra note 7, Part I, para. 18.

<sup>13</sup> *Bernard Hoekman/Michel Kostecki*, The Political Economy of the World Trading System: The WTO and Beyond (2001), Oxford, pp. 403-5.

<sup>14</sup> *Aaron Forsberg*, The Politics of GATT Expansion: Japanese Accession and the Domestic Political Context in Japan and the United States, 1948-1955, 27 *Business and Economic History* 1 (1998), pp. 190-3.

ments are often dependent on tax revenues generated from local companies and this therefore provides an incentive to treat such firms preferentially, in violation of WTO rules.<sup>16</sup> Other causes for widespread contraventions of WTO provisions on the provincial level can be found in existing customs and practices, such as the tendency to negotiate rather than follow pre-set rules which, in turn, may lead to favouritism in administrative decisions.<sup>17</sup> Additionally, one must also consider the role of language and the possibility that the translation of technical WTO terminology is adding to difficulties in implementation.<sup>18</sup>

Even before Chinese accession, other WTO members seem to have been acutely aware of such problems, as evidenced in the Working Party report which states that "some members expressed concerns about whether the Central Government could effectively ensure that trade-related measures introduced at the sub-national level would conform to China's commitments in the WTO Agreement"<sup>19</sup>. It is therefore pertinent to ask in how far the Central Government in Beijing is responsible for the conduct of sub-national government entities? One may also ask whether the commitment levels entered into by China in this regard exceed those of other countries. In respect of trade in goods, the general rule relating to responsibility for sub-national authorities is enumerated in Article XXIV(12) of the GATT:

"Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories."<sup>20</sup>

As part of the Uruguay Round trade negotiations which took place between 1986 and 1994, this section was explicated in a supplementary agreement.<sup>21</sup> Although the original text is still in force, this new stipulation is designed to clarify the extent of members' obligations:

"Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable

measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory."<sup>22</sup>

Then as now, the key term is encapsulated in the words "reasonable measures". In other words, the responsibility of a national government in ensuring that sub-national entities comply with GATT obligations only extends to taking "reasonable measures" to prevent and remedy breaches. This general rule applies to all members. Accordingly, it could be argued that the Central Government has taken all "reasonable measures" to ensure compliance if, given the callow nature of China's institutional framework and other limitations in restraining the conduct of governmental agents, any instances of non-compliance on the local level are plausibly beyond the sphere of control of authorities in Beijing.

However, as alluded to above, there are areas of WTO law in which the obligations incurred by China exceed those applicable to other countries. In respect of the conduct of local authorities, the Chinese Protocol of Accession seems to set out commitments which go beyond the provisions of Article XXIV and its supplementary agreement. Specifically, Article 2 of the Protocol states, inter alia, that "(t)he provisions of the WTO Agreement and this Protocol shall apply to the entire customs territory of China, including border trade regions and minority autonomous areas"<sup>23</sup> and further, that "China's local regulations, rules and other measures of local governments at the sub-national level shall conform to the obligations undertaken in the WTO Agreement".<sup>24</sup> In particular the latter part, which avails itself of the "shall conform" terminology, seems to impose a higher burden than the "reasonable measures" criteria which applies to other members. However, it should be noted that the "shall conform" criteria applies only to the implementation of WTO rules in sub-national regulations, rules and measures. In contrast, the "reasonable measures" standard, encompassing an arguably more active role for government, seems to apply to the actual enforcement of such regulations and rules, as well as scrutinising the effectiveness of measures taken.

China seems to have readily accepted these added responsibilities as evidenced in the Working Party report: "The representative of China confirmed that China would in a timely manner annul local regulations, government rules and other local measures that were inconsistent with China's obli-

<sup>15</sup> Supra note 6 (Farah).

<sup>16</sup> Ibid., p. 276.

<sup>17</sup> Supra note 4 (Killion), p. 551.

<sup>18</sup> Claudia Ross, Lester Ross, Language and Law: Sources of Systemic Vagueness and Ambiguous Authority in Chinese Statutory Language, 31 University of British Columbia Law Review 1 (1997), pp. 205-253.

<sup>19</sup> Supra note 8, para. 69.

<sup>20</sup> The Results of the Uruguay Round of Trade Negotiations - The Legal Texts, GATT Secretariat (1994), Article, General Agreement on Tariffs and Trade, Article XXIV(12).

<sup>21</sup> Ibid., Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade, paras. 13-15.

<sup>22</sup> Ibid., para. 13.

<sup>23</sup> Supra note 7, Part I, Article 2(A)1.

<sup>24</sup> Ibid., Article 2(A)3.

gations. The representative of China further confirmed that the Central Government would ensure that China's laws, regulations and other measures, including those of local governments at the sub-national level, conformed to China's obligations undertaken in the WTO Agreement".<sup>25</sup> However, it also appears as if the Chinese accession negotiators managed to moderate the rigidity of their obligations by stating that "when non-uniform application was established, the authorities would act promptly to address the situation utilizing the remedies available under China's laws, taking into consideration China's international obligations and the need to provide a meaningful remedy."<sup>26</sup> The term "remedies available under China's laws" seems more akin to the "reasonable measures" standard applicable to other countries, while the qualifier "taking into consideration" seems to suggest a soft-law approach to the application of international commitments. Further, in respect of the phrase "under China's laws", Chinese negotiators also "stated that local regulations, rules and other measures were issued by local governments at the provincial, city and county levels acting within their respective constitutional powers and functions"<sup>27</sup> which leaves open the question as to the extent of such "powers and functions" and whether relevant decisions are remediable.

Overall, it is clear that China is subject to more stringent requirements under WTO law than are other members. This applies in particular to the rules on safeguards and anti-dumping. It is also fair to say that such additional burdens apply to China's international obligations in respect of the implementation and observance of WTO rules on a sub-national level. However, in reality, given both the practical constraints dictated by China's underdeveloped institutional framework and the vagueness of some of the language used by Chinese accession negotiators, the concrete implications of this commitment are unclear.

### III. Areas of particular concern

There are many areas in which China still falls short of complying with her WTO obligations, ranging from agriculture and subsidies to trading rights, distribution services, investment measures and intellectual property.<sup>28</sup> This study will focus on those areas in which other WTO members have initiated dispute settlement procedures, namely subsidies, trading rights and distribution services, as

well as intellectual property rights and the associated problem of sub-national law enforcement.

To date, China has had to respond to eight cases initiated by other members in accordance with the WTO's Dispute Settlement Understanding.<sup>29</sup> A trend is discernible in that seven of these cases have been initiated since March 2006, with four cases being brought in 2007. China herself has been a complainant in two cases.<sup>30</sup> Of the cases brought against China, three are still pending. These are the auto parts case brought by Canada, the EU and the US,<sup>31</sup> and the cases on the protection and enforcement of intellectual property rights<sup>32</sup> and on trading rights and distributions services, both brought by the US. The other cases, involving alleged discriminatory treatment of foreign goods and services, and in particular, breaches of the rules on subsidies, were resolved before a panel had to render any decision. One of the pending cases, concerning the tariff levels charged for car parts, also involves alleged breaches of subsidy rules.<sup>33</sup> The other two remaining cases entail the protection and enforcement of copyrights and trademarks on a number of products and restrictions on the importation and distribution of audiovisual products.<sup>34</sup> Both these cases involve intellectual property rights and related issues. In addition, the former case alleges defects in China's legal regime, while the latter contends discrimination in relation to trading rights and distribution services. These specific areas will be discussed individually in the following sections, whereby the broader topic area of compliance by sub-national entities will also be discussed where applicable.

#### 1. Subsidies

Two subsidies cases have been resolved amicably, while one is subject to panel proceedings. This suggests both that subsidies are a crucial point of contention in respect of Chinese trade, and that conflicts in this area are resolvable.

<sup>29</sup> China - Value-Added Tax on Integrated Circuits, WT/DS309 (6 October 2005); China - Measures Affecting Imports of Automobile Parts, WT/DS339 (20 March 2006), WT/DS340 (30 March 2006), WT/DS342 (13 April 2006); China - Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments, WT/DS358 (2 February 2007), WT/DS359 (26 February 2007); China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362 (10 April 2007); China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363 (10 April 2007).

<sup>30</sup> United States - Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS252/AB/R (10 November 2003); United States - Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China, WT/DS368 (14 September 2007).

<sup>31</sup> WT/DS339, WT/DS340, WT/DS342.

<sup>32</sup> WT/DS362.

<sup>33</sup> WT/DS339, WT/DS340, WT/DS342.

<sup>34</sup> WT/DS362, WT/DS363.

<sup>25</sup> Supra note 8, para. 70.

<sup>26</sup> Ibid., para. 75.

<sup>27</sup> Ibid., para. 74.

<sup>28</sup> Supra note 4 (Halverson), note 5 (USTR), note 6 (Farah).

WTO rules on subsidies are found in various of the covered agreements, but the main provisions are contained in a specific accord on subsidies and countervailing measures.<sup>35</sup> Accordingly, both the granting of subsidies and the use of countervailing measures (which have the objective of cancelling out subsidies provided by other governments) are covered. As yet, China has not availed herself of the countervailing measures instrument. However, in respect of providing subsidies, China did promise that all prohibited subsidies would be removed by the accession date.<sup>36</sup> The covered subsidies include export subsidies and import substitution subsidies.<sup>37</sup> As alluded to above, China is bound by additional burdens in respect of WTO rules on subsidies.<sup>38</sup> Specifically, in respect of loan payments to Chinese firms by their government, importing members can assess the level of the benefit conferred by reference to criteria other than the prevailing Chinese benchmarks. Subsidies provided to state-owned enterprises are also subject to special rules.<sup>39</sup>

In 2006, in accordance with the mechanisms of the Subsidies Agreement, the EU, US and other countries, including Canada and Mexico, formally put questions to China regarding allegedly illegal subsidies.<sup>40</sup> Not satisfied with the answers given, nor with the outcome of the subsequent consultation process, in July 2007 the US and Mexico requested the establishment of a panel to settle the dispute in respect of the alleged illegal refunding of taxes by the Chinese government. However, before the panel was able to adjudicate in this matter, the case was settled and China agreed to eliminate the offending measure by the beginning of 2008.<sup>41</sup> In respect of the Auto parts case,<sup>42</sup> the panel hearings were held in May and June 2007 and a decision is expected shortly.<sup>43</sup>

Meanwhile, the US Commerce Department has started to initiate its own countervailing measure investigations against allegedly subsidised imports from China. While some of these investigations are ongoing, the finding that paper imports from China were being illegally subsidised was usurped by the International Trade Commissions finding that related imports were not causing any injury.<sup>44</sup> One

interesting new development is the entry into force of China's new Enterprise Income Tax Law.<sup>45</sup> Whether this law will give rise to new WTO disputes or aid to resolve existing ones remains to be seen.

Overall, given the indication that China is willing to compromise on illegal subsidies, it seems as if this issue will not become a major impasse in Sino-Western trade relations. It is more likely that China will continue on her the path towards WTO compliance in this area. However, with respect to the issue of measures taken by sub-national entities, the US government has, in its most recent report on China's WTO compliance, pointed out that China has up to now failed to disclose subsidy payments made by local authorities.<sup>46</sup> Although this issue may become the subject of a future dispute, past history suggests that the problem will be resolved amicably. Moreover, it is unlikely that other member countries will pursue the topic of subsidies vigorously, given their own cultures of subsidisation and WTO-related problems.<sup>47</sup>

## 2. Intellectual Property Rights

The protection of intellectual property rights remains one of the most contentious issues plaguing Sino-Western trade relations. Upon accession, China became a party to the Agreement on Trade-Related Aspects Intellectual Property Rights (TRIPS)<sup>48</sup> and is thus bound by its provisions. However, no added burdens were imposed and the level of China's obligations in this respect is the same as that of other members. On a regulatory level, China has overhauled its intellectual property laws to make them conform to WTO requirements.<sup>49</sup> While other members acknowledge advances in this area, they continue to find faults with the record of implementation and enforcement.<sup>50</sup>

<sup>44</sup> Supra note 5 (USTR), p. 44.

<sup>45</sup> "New corporate tax offers level playing field", China Daily (3 September 2007), [http://www.chinadaily.com.cn/china/2007-03/09/content\\_823387.htm](http://www.chinadaily.com.cn/china/2007-03/09/content_823387.htm) (last viewed on 24 January 2008).

<sup>46</sup> Supra note 5 (USTR), p. 43.

<sup>47</sup> See e.g., United States - Domestic Support and Export Credit Guarantees for Agricultural Products, WT/DS365 (11 July 2007); United States - Subsidies and Other Domestic Support for Corn and Other Agricultural Products WT/DS357 (8 January 2007); European Communities - Export Subsidies on Sugar WT/DS283/AB/R (28 April 2005).

<sup>48</sup> Supra note 20, Agreement on Trade-Related Aspects Intellectual Property Rights.

<sup>49</sup> Peter Yu, From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China, American University Law Review 4 (2006), pp. 901-1000.

<sup>50</sup> See e.g., WT/DS362; "EU Toughens Stance In Dealings With China", Wall Street Journal (29 November 2007) [http://online.wsj.com/article\\_print/SB119624851446506470.html](http://online.wsj.com/article_print/SB119624851446506470.html) (last viewed on 28 January 2008); see also supra note 5 (USTR), p. 76.

<sup>35</sup> Supra note 19, Agreement on Subsidies and Countervailing Measures.

<sup>36</sup> Supra note 7, Part I, Article 10.

<sup>37</sup> Supra note 35.

<sup>38</sup> Ibid., Article 15.

<sup>39</sup> Ibid., Annex 1A, Part II, Article 4.

<sup>40</sup> Supra note 34, Articles 8, 24, 25.

<sup>41</sup> WT/DS358/14 (4 January 2008).

<sup>42</sup> Supra note 33.

<sup>43</sup> Note that due to the complexity of the case, the panel determined that it would take longer than the six month period usually allowable to issue a report.

These shortcomings have been the subject of various informal discussions between China and her trading partners. A more exacting and formalised process of seeking to redress the perceived enforcement problems was commenced by Japan, Switzerland and the US in October 2005, whereby an Article 63.3 request under the TRIPS Agreement was made, asking China to supply information on enforcement activities.<sup>51</sup> Not satisfied with China's response, the US initiated further bilateral discussions through the US-China Joint Commission on Commerce and Trade (JCCT),<sup>52</sup> as well as the US-China Strategic Economic Dialogue (SED).<sup>53</sup> The annual TRIPS Council meeting has also been used by WTO members to voice their concerns about China's compliance in the area of intellectual property. In 2007, still dissatisfied with China's compliance efforts, the US brought a complaint under the WTO's dispute settlement procedures.<sup>54</sup> As its focal point, this complaint alleges that China is in breach of her WTO commitments under Article 61 TRIPS, which addresses the requirement to apply criminal procedures and penalties in some cases of intellectual property violations.<sup>55</sup> Canada, the EU, Japan and Mexico have since joined the US complaint as third parties. It has also been estimated that about 90 percent of all copyrighted products sold in China are pirated and that there have been no noticeable improvements in the past three years.<sup>56</sup> Since consultations did not prove successful, a WTO panel was established in September 2007 and a further eight countries have joined the complaint as third parties. It is particularly interesting to note that the EU, having previously insisted on resolving disputes with China diplomatically, decided to join the US case against China.<sup>57</sup>

Article 41 of the TRIPS Agreement obliges China to "ensure that enforcement procedures (...) are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."<sup>58</sup> In other words, this

requirement reinforces the general obligation which the Chinese government undertook in respect of Article XXIV(12) of the GATT, relating to the conduct of sub-national governmental entities. Although the US, as the initial complainant, agrees that the Central Government has largely fulfilled its obligations in respect of introducing pertinent laws, it is maintained that these laws remain ineffectual given the "lack of coordination among Chinese government ministries and agencies, lack of training, resource constraints, lack of transparency in the enforcement process and its outcomes, and local protectionism and corruption."<sup>59</sup> If these claims made by the US can be substantiated, and there is no evidence to the contrary, then it would seem as if China is in breach of her commitments under both Articles 41 and 61 of the TRIPS.

The question remains, however, whether the Central Government bears responsibility for lack of enforcement on the provincial level. The general obligations in this regard, as discussed above, seem to place China in a more burdensome position than other members. Yet, it must also be noted that the main thrust of these additional commitments relate to the conformity of China's sub-national laws and regulations with WTO rules.<sup>60</sup> Therefore, if and where relevant laws have been enacted, the issue then moves to one of whether and to what extent the Central Government authorities are responsible for the enforcement of such laws. As discussed above, it is not clear in how far the added responsibilities incurred by China upon accession extend to actual law enforcement, rather than just the implementation of WTO norms. While the term "implementation" is broad in nature and incorporates aspects of enforcement, it could be argued by China that the modalities of actual enforcement are a matter which is beyond the pervasive control of the Central Government. While the Working Party report on accession includes a section on enforcement commitments, the specifics of these obligations are not sufficiently explicit to warrant applying a special standard to China in this respect.<sup>61</sup> The claimants must have been aware of these difficulties proving any case of alleged non-enforcement since the legal foundations of the case relate to the laws themselves, in particular the high threshold for criminal penalties, rather than lack of enforcement thereof.

Overall, it is interesting to note that the legal case against China differs from the case put forward to the general public by the US administra-

<sup>51</sup> [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/asset\\_upload\\_file115\\_8232.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/asset_upload_file115_8232.pdf) (last viewed on 24 January 2008).

<sup>52</sup> [http://trade.gov/press/press\\_releases/2006/jcct\\_outcomes\\_041106.pdf](http://trade.gov/press/press_releases/2006/jcct_outcomes_041106.pdf); [www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2007/asset\\_upload\\_file239\\_13686.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file239_13686.pdf); (last viewed on 28 January 2008).

<sup>53</sup> <http://www.treas.gov/press/releases/hp205.htm> (last viewed on 28 January 2008).

<sup>54</sup> WT/DS362.

<sup>55</sup> *Supra* note 19, Agreement on Trade-Related Aspects Intellectual Property Rights, Article 61.

<sup>56</sup> *Supra* note 4 (USTR), p. 82.

<sup>57</sup> Dialogue key to resolving IPR disputes, *People's Daily*, 18 April 2007, [http://english.peopledaily.com.cn/200704/18/eng20070418\\_367526.html](http://english.peopledaily.com.cn/200704/18/eng20070418_367526.html) (last viewed on 28 January 2008).

<sup>58</sup> *Supra* note 19, Agreement on Trade-Related Aspects Intellectual Property Rights, Article 41(1).

<sup>59</sup> *Supra* note 4 (USTR), p. 82.

<sup>60</sup> *Supra* note 7, para. 70.

tion. While the public position highlights aspects such as protectionism at the provincial level and limited education and awareness, the legal case focuses on defects of the laws themselves.<sup>62</sup> In the long term, assuming the laws themselves are WTO-compliant, this poses the question as to whether the WTO dispute settlement mechanism is the appropriate forum for addressing enforcement difficulties. Ultimately, the issue boils down to whether or not the Central Government has taken "reasonable measures" to ensure that WTO-compliant laws are observed at the local level.

### 3. Trading Rights and Distribution Services

The third major area which has seen the initiation of the WTO complaints procedure is that of trading rights and distribution services. Such rights encompass the ability to trade in all goods<sup>63</sup> as well as engage in distribution on both the wholesale as well as retail levels.<sup>64</sup> Before accession, these matters were subject to various limitations, often mandating the utilisation of recognised firms and local intermediaries. One of the conditions of accession was that China had to commit herself to full liberalisation within three years of joining the WTO.<sup>65</sup> Three further years have passed since that deadline and the US in particular is claiming that some of these obligations have not been met.

While foreign companies and individuals are no longer compelled to act through intermediaries or use local distribution networks in respect of both importation and exportation, the US is claiming that trading restrictions remain.<sup>66</sup> The alleged restrictions are now the subject of WTO panel proceedings.<sup>67</sup> Australia, the EU, Japan and Korea have joined proceedings as third parties.<sup>68</sup> Specifi-

cally, breaches of WTO commitments are alleged in two areas.

First, in respect of trading rights, it is claimed that China is restricting imports of audiovisual products and other publications. Reference is made to theatrical movies, DVDs, magazines and newspapers, as well as electronic publications. In respect of such products, there are a number of regulations and measures in place in China which are said to contravene WTO rules. For instance, the Administrative Regulations on Publishing, issued by the State Council in December 2001, entail that approval from the relevant publication administrative authorities must be sought before publication.<sup>69</sup> The effect of these measures and regulations is that trade in products concerned is in fact carried out by state owned enterprises. It is noteworthy that the products in question are both of a copyright-, as well as of an information policy-sensitive nature. Given that China has by and large fulfilled her obligations in respect to other goods and services, it can be assumed that it is the sensitive and potentially political nature of the products concerned which is causing the difficulties. According to the Working Party report on China's accession, there do not appear to have been specific discussions in respect of these sensitive areas. Although China expressed reservations in respect of continued exclusive trading rights for state trading enterprises, these pertain to items such as tobacco, food and cotton. No such provisions were made in respect of audiovisual and print media.<sup>70</sup>

In addition to alleged breaches of specific accession commitments,<sup>71</sup> the US is basing its case on non-compliance with the National Treatment principle, as well as the imposition of quantitative restrictions contrary to Article XI of the GATT. As it appears that such breaches are present, it is likely that China will invoke general exceptions contained in the WTO agreements to justify the violations. Specifically, the exceptions relating to the protection of public morality and the maintenance of public order could be used.<sup>72</sup> Put another way, China may argue that in order to maintain security, it is unavoidable that limitations are placed on the dis-

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<sup>61</sup> See, e.g. *supra* note 8, para. 288: "The representative of China stated that the measures for cracking down on intellectual property piracy were always severe in China. In judicial aspects, courts at all levels were continuously paying attention to the trial of IPR cases. As for administrative aspects, the administrative authorities at all levels were putting emphasis on strengthening anti-piracy work. In addition, the administrative authorities were also enhancing the legal publication and education of the general public in a bid to ensure that the legal environment of China would be able to meet the requirements for enforcing the TRIPS Agreement."

While the Working Party deemed this to be commitments on the part of China, it can also be argued that these statements of intent merely amount to soft-law.

<sup>62</sup> See e.g., *supra* note 5 (USTR), p. 84; <http://usinfo.state.gov/ei/Archive/2005/jul/11-454689.html> (last viewed on 28 January 2008); <http://www.mac.doc.gov/China/Docs/BusinessGuides/Intellectual-PropertyRights.htm> (last viewed on 28 January 2008).

<sup>63</sup> Subject to the exceptions listed in Annex 2A of the Protocol of Accession, *supra* note 7.

<sup>64</sup> *Ibid.*, Part I, Article D(5)1; *supra* note 7, para. 83.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Supra* note 5 (USTR), p. 15.

<sup>67</sup> WT/DS363/1.

<sup>68</sup> WT/DS363/4.

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<sup>69</sup> Further regulations and measures which are mentioned in the case brought before the WTO include the Regulations on Administration of the Films Industry (issued by the State Council in December 2001), the Provisional Rules on the Entry Criteria for Operating Film Enterprises (issued by the State Administration of Radio, Film and Television (SARFT) and the Ministry of Commerce (MOFCOM) in October 2004), the Catalogue for Guidance of Foreign Investment Industries (issued by the National Development and Reform Commission (NDRC) and MOFCOM in November 2004) and Measures for the Administration of Import of Audio and Video Products (issued by the Ministry of Culture and the General Administration of Customs in April 2002).

<sup>70</sup> *Supra* note 8, Annex 2A.

<sup>71</sup> *Supra* note 64.

<sup>72</sup> *Supra* note 20, Article XX (GATT), Article XIV (GATS).

tribution of audiovisual and other publications. While this may be a successful strategy in terms of restricting newspapers and other politically sensitive materials, it is less likely to succeed in relation to other publications, such as films and books. The fact that the products in question are also copyright-sensitive would tend to strengthen the US case.<sup>73</sup> Specifically, the limitations put in place by the Chinese government may encourage breaches of copyright as consumers are not given the opportunity to purchase the genuine and legitimate products.

Second, in respect of distribution services, it alleged that measures imposed by the Chinese government are discriminatorily restricting foreign firms who wish to engage in the distribution of audiovisual products and of printed publications. Although China has, in the opinion of the US government, implemented most of its commitments in respect of distribution services,<sup>74</sup> problems are said to persist in other areas. However, as is the case in respect of trading rights, the current WTO dispute focuses on audiovisual products and print media.

Specifically, it is claimed that the existing arrangements for distributing such products in China favour local firms, in breach of China's obligations under the National Treatment principle.<sup>75</sup> The legal reasoning is expected to be analogous to that evidenced in regard to trading rights. Similarly, the reason why China seems not to have been more restrictive in this sector as compared to other types of distribution services is likely based in the politically sensitive nature of the subject matter.

#### IV. Concluding Remarks

While China has come a long way in fulfilling its WTO obligations, some areas remain problematic. Subsidies, intellectual property and restrictions on foreign enterprises are areas of particular concern. In and of themselves, these issues do not seem intractable. Indeed, these topics have been the subject of discussion for many years. However, the difference now is that WTO disputes are being brought against China. The recent flurry of WTO disputes is indicative of the growing unease amongst Western countries about trade deficits and, by extension, China's ascent to superpower

status. Depending on the outcome of the cases currently pending, more disputes may be in the pipeline. The role of the Central Government in ensuring enforcement of WTO-compatible rules on the provincial level is already, if only tangentially, an issue in present cases and there is a strong possibility that this area will see further litigation. The question to be answered is whether the Central Government is taking such "reasonable measures" as to ensure not only implementation of laws, but also their enforcement. Enforcement of intellectual property law will continue to be a focal point. Further, so long as China remains under authoritarian rule, there will be disputes such as the one involving the sale and distribution of audiovisual products and other publications. Future reviews of China's implementation of her WTO commitments may find that while the accession process was long, the implementation process may be open ended.

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<sup>73</sup> See *supra* note 8, paras. 257-9.

<sup>74</sup> See e.g. in respect of automobile distribution services: Rules for the Administration of Brand-Specific Automobile Dealerships (issued by Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) in February 2005); Rules for the Evaluation of Eligibility of Auto General Distributors and Brand-specific Dealers (issued by MOFCOM in January 2006).

<sup>75</sup> *Supra* note 20, General Agreement on Trade in Services, Articles XVI, XVII.