

China and the World Trading System: Entering the New Millennium, Deborah Z. Cass, Brett G. Williams & George Barker (eds) [Cambridge: Cambridge University Press, 2003, xxiii + 443 pp, hard cover, GBP 65] ISBN 052 181 821 4.

As one of the first books to examine the implications arising from China's accession to the WTO, *China and the World Trading System* has made a serious effort to provide balanced accounts. Its authors include professors of law and economics, as well as civil servants from both national governments and international organisations such as the WTO and the World Bank. Their national origins are equally broad and include, in addition to China and Australia, all of the "Quad" Members, ie the USA, the EU, Japan and Canada. The topics discussed are very diverse. They range from the procedural aspects of the accession to substantive issues; from the systemic concerns to the sector-specific concerns; from the classical trade issues of tariff and non-tariff measures to the non-traditional but equally important issues such as human rights and competition; from highly theoretical discourses on the Marxist theory of labour surplus to down-to-earth discussions on the opening up of markets in service sectors such as professional services, distribution and logistics services, telecommunication services, and financial services. In terms of both depth and breadth, this book sets some important new benchmarks.

The first article in the collection is written by Professor John Jackson. Even though, as Professor Jackson points out at the beginning of his piece, he does not purport to write as an expert on China, the "Father of WTO" has again shown his acumen by pointing out the six major aspects one has to consider when discussing the impacts of China's accession to the WTO. This provides the perfect roadmap for the discussions appearing in the other articles that ensue. The reviewer has therefore chosen to concentrate on these six facets for review. Being scrupulous in academic scholarship, Professor Jackson has intentionally avoided rushing to conclusions on any issues. This is entirely understandable as he presented the paper included in the book at a conference held eight months before China finally acceded to the WTO. With more than four years having passed since China's accession, it now seems to be the perfect moment to further explore some of the issues identified by Professor Jackson.

The first issue raised is the impact of the accession process. The detailed history of the process has been well covered by two later contributions in the same volume. One piece was written by the late Jeffrey Gertler, who, as the secretary to China's Working Party under both the GATT and WTO, is better positioned than anyone else to tell the story. The other piece was written by Graeme Thomson, who, being the former chief negotiator for Australia during China's accession, is also well qualified. Commenting on the most

important bilateral negotiation during the Chinese accession process, Professor Jackson quotes one observer close to Washington as describing the Chinese accession as a “wonderful success” in which the USA “demanded a lot and gave up nothing.” Looking at this from a broader perspective, however, the reviewer is not so sure as to whether this was indeed a success or more of a failure. It has now become all too self-evident that it is in the interests of most, if not all, participants of the multilateral trading system to ensure a rule-oriented rather than power-oriented system. To the reviewer’s mind this is a much better formulation of the concept of constitutionalisation, which is the subject of extensive discussion in the chapter by Deborah Cass. Even though, to some extent, the reviewer agrees with Cass that *having China in the WTO strengthens* the constitutionalisation from both the institutional and metaphysical perspectives, the reviewer would argue that the *accession process per se* has, paradoxically, *weakened* the constitutionalisation because it has failed to deliver the much-needed rule-orientation. Indeed, to many observers, especially those based in China, the WTO Members, especially the major Western countries, has exploited the eagerness of China to enter the WTO to a scandalous level. In some of the recent discussions in China, the WTO accession package has been compared to the “unequal treaties” forced upon China by the Western colonial powers during the late nineteenth century, with Long Yongtu, the former Chief Negotiator for China during accession talks, being labelled a traitor. Even though, as Gertler argues, many would regard the Chinese accession as belonging to a class of its own and thus hardly replicable, the downgrading of China to a second-class citizen to be bound by many terms virtually unheard of in the WTO contributes to the degradation of the WTO itself. The reason is very simple: once WTO members realised they could extract a pound of flesh even from such a powerful country as China, it would become natural for them to attempt to try the same on other applicants. If pushed to the extreme, the price of accession could rise to such a prohibitive level that no new member could, or would want to, come in. While most of the recent accessions after China have been quite smooth, two of them, namely that of Russia and Vietnam, seem to confirm the concern. Vietnam’s accession has taken 11 years, while that of Russia is now at its thirteenth year – soon to challenge the 15-year record set by China. Second, by manipulating, and sometimes even breaking, the WTO rules during the Chinese accession, the Western powers have set a bad example for China. How can they expect China to respect those very rules that they themselves have not complied with? So far, China has generally lived with the WTO rules, including even the discriminatory terms in its accession package. There is no guarantee that this will always be the case, however. Indeed, the reviewer would argue that this is simply because China has been slow to become familiar with the general rules of the WTO, not to mention the complicated accession

terms. Once China starts to realise that neither the WTO rules nor its accession terms are set in stone and could be subject to different interpretations, the other WTO Members will regret their imprudence in having succumbed to their short-term interests at the expenses of their long-term ones.

The second issue is the relationship between the special rules in the protocol and the general rules in the WTO Agreements. Many observers, including the current WTO Director General,¹ have conceded that many of the China-specific provisions in China's accession package, such as the non-market economy status in anti-dumping investigations, alternative benchmark methodology in subsidy-countervailing investigations, as well as the transitional product specific safeguard mechanism and the special textile mechanism, are discriminatory in nature and violate fundamental WTO principles such as MFN. These China-specific provisions raise some really difficult legal questions. First, what is their status in the WTO legal system? The legal validity of some of the provisions seems to be rather questionable. Taking the special textile safeguard measure as an example, China is required to consult with the Member invoking the clause to limit its own exports. This is the very kind of measure that has been explicitly prohibited under Article 11(b) of the Safeguards Agreement, ie, grey area measures which include voluntary export restraints, orderly marketing arrangements or other similar measures. One might argue that the prohibition here does not apply to the Chinese Accession Protocol because Article 11(c) states that the entire Safeguards Agreement does not apply to "measures sought, taken or maintained . . . pursuant to protocols . . . concluded within the framework of GATT 1994." The reviewer would point out, however, that the Chinese Accession Protocol, legally speaking, is not concluded "within the framework of GATT 1994" as the old Accession Clause under the GATT – Article XXXIII – has been replaced by Article XII of the Marrakech Agreement. Thus, it is a protocol concluded within the framework of the Marrakech Agreement, and, as such, does not fall under the carve-out of Article 11(c). Second, many of these provisions are ambiguous and nobody is quite sure as to exactly how they work. This is illustrated by the recent spat between the Chinese and US governments as to whether the USA has properly satisfied the requirements under paragraph 242 of the Working Party Report before applying special textile safeguard measures against Chinese textile products. In this regard, the contribution by Michael Lennard is particularly useful. Using the provision on price comparability in anti-dumping cases as an example, he illustrates which of the many general principles of treaty interpretation under public international law might be useful and how they should be applied in this

¹ Of course, Pascal Lamy did not make this comment after he became the WTO chief. He made this point at a lecture he gave in Hong Kong while being the Commissioner for Trade for the EU in early 2004.

context. After extensive discussions, he concludes that the investigating authorities of the importing country must apply an objective standard in determining the appropriate price of the like product. Even though the reviewer has doubts about how "objective" such standard could be under the context of the broad deferential languages of section 15 (a) of the Accession Protocol and Article 17.6 of the Anti-dumping Agreement, this analytical approach would provide useful guidelines for such cases in the future.

The third issue is China's implementation of the WTO obligations. There are many potential problems, some legal, some political and at both the macro- and micro-economic levels. One obvious legal problem is the status of international treaties in the Chinese legal system and whether such treaties could be directly applied through domestic measures. Qingjiang Kong considers the problem and suggests that fundamental questions still remain about China's ability to implement and enforce WTO agreements. Another problem is that China is a huge country and there are many differences in the various regions across China. Ravi Kewalram considers this problem and argues that, in implementing its WTO obligations, China must remove the inconsistent measures at both the central and sub-national government levels. From a macro-economic level, Ligang Song argues that the implementation requires major structural overhaul. He discusses what has been achieved and what remains to be done in carrying out structural changes, as well as how such changes might affect the state of the Chinese economy. In order to carry out those structural changes, China also needs to reform its trade policy. In their co-authored paper, Elena Ianchovichina and Will Martin discuss the implications of the reforms that have been completed and identify what further reforms are required. Other contributors discuss the problems and prospects of China's implementation of its commitments under individual WTO agreements and specific sectors. Amongst them are Ian Dickson, Ichiro Araki, Christopher Arup, Dene Yeaman, Ian Macintosh, Richard Wu, Angela Gregory, Antony Taubman, Daniel Stewart and Brett Williams. The post-accession experience so far has shown that China has been quite willing, sometimes even eager, to implement its obligations. For example, one of the major concerns during the accession process was whether China could provide independent judicial review of trade-related administrative decisions. In August 2002, the Supreme People's Court issued "Rules on Several Issues in Trying Administrative Cases on International Trade," which provide detailed guidelines on dealing with trade cases according to China's WTO obligations. Overall, the Chinese government, especially the Ministry of Commerce (MOFCOM), has implemented the commitments according to the timeframe set out in the schedule. Some of the commitments, such as the opening up of trading rights, as well as some market opening measures in banking, insurance and tourism services, have even been implemented ahead of schedule. One might wonder the reason behind the smooth implementation. A possible explanation is that this reflects

the power struggle between the many government agencies, with the MOFCOM trying to weaken the powers of its rival ministries by taking away some of their powers in certain sectors.

The fourth issue is the effect on the WTO dispute settlement system. Whilst many observers worry about the emergence of a “case flood” against China after its accession, Professor Jackson doubts that is going to happen because it would be hard to establish violation complaints giving the fluid nature of the transition clauses. The observation is shared by Silvia Ostry, who provides a more practical explanation in her contribution: the foreign firms would decline to make formal complaints for fear of retaliation by the Chinese government. In her view, this would lead to a two-track trading system in which all other WTO Members will be subject to transparent dispute settlement rules while China would have some opaque tailor-made bilateral arrangements. During the four years since China became a WTO Member, it has been involved as a party in only two cases: once a complainant suing the USA, and in the other case as a respondent being sued by the USA.² China won the first case at both the panel and Appellate Body levels and settled the second case with the USA through consultations. These two cases, especially the second case, illustrate another reason that is probably more important in explaining the lack of formal legal disputes: the reluctance of the Chinese government, especially the senior leadership, to engage in WTO dispute settlements. According to the Confucianism philosophy which is deeply rooted in the Chinese society, litigation causes irreparable harm to the normal relationships and should be pursued only as a last resort, or, better still, as the great philosopher himself would have preferred, avoided.³ To a large extent, the Chinese leadership still cannot disentangle the legal issues from political and diplomatic concerns and views the initiation of legal disputes in the WTO as synonymous with the break-up of the diplomatic relationship with the other countries. In an article written by the reviewer last year, it was argued that China should embrace the “Aggressive Legalism” strategy to use the substantive rules of the WTO to counter what it deems to be the unreasonable acts, requests and practices of its major trading partners.⁴

As was stated in that article:

- ² On 30 March, the US and EU filed a third case against China on tax treatments for imported auto parts. It was unclear, at the time this review was written, however, how China would respond to the complaint.
- ³ James Legge, *The Chinese Classics, Volume One: Confucian Analects*, Book XII; Yan Yuan, Chapter XIII, “The Master said, ‘In hearing litigations, I am like any other body. What is necessary, however, is to cause the people to have no litigations.’” The full text is available at <http://www.gutenberg.org/dirs/etext03/cnfnl10u.txt> (last checked on 29 Mar 2006).
- ⁴ Henry Gao, “Aggressive Legalism: The East Asian Experience and Lessons for China”, in Henry Gao and Donald Lewis (eds), *China's Participation in the WTO*, (London: Cameron May Publishers, 2005), at pp 315–351.

“the active use of the WTO dispute settlement system is not in conflict with China’s policy of peaceful development; instead, it should be an integral part of this policy. [T]he major advantage of aggressive legalism is that it turns cross-border disputes from a difficult political, trade or diplomatic issue that might undermine the bilateral relationships of the countries involved into a legal issue that is embroiled in an intricate legal game. Instead of a sensitive issue that can be easily polarized by the popular press, the question now has become a highly technical legal game that is beyond the grasp of the lay people. If the Member wins the case, it was all because the politicians have worked hard to achieve ‘real results’; if the Member loses the case, the lawyers, or more frequently, the ‘incompetent judges in Geneva’ will become easy scapegoats.”

From some of the reviewer’s recent interactions with the officials of MOFCOM, especially the junior and middle-level technocrats from the WTO Division and the Treaty and Law Division, it would seem there is a policy shift towards more active participation in WTO dispute settlement mechanisms. One can trace this to as far back as August 2003, when China started to participate in almost all WTO cases as a third party. More recently, even the top leadership seems to endorse the policy shift. This is well illustrated by the recent controversy over the EU’s anti-dumping action against imported Chinese shoes, in which some top Chinese officials have reportedly threatened to bring a complaint to the WTO. This is in sharp contrast to the 2004 dispute on the Chinese export quota on coke, in which China gave in to the threats of the EU to pursue the case at WTO notwithstanding the fact that China had a perfect case from both legal and moral points of view.⁵

The fifth issue concerns China as a diplomatic leader in the WTO. Recognising that “[i]t is really asking for trouble to try to predict [China’s] role exactly,” Professor Jackson does not provide any definitive answers. Indeed, even today, four years after China’s accession, we still get mixed signals from both directions. On the one hand, China is a power which no WTO Member can afford to ignore. It has continuously affirmed that its interest is aligned with that of developing countries and has been a core member of the major developing country grouping, G20, since its inception in 2003. In his speech at the High-Level Meeting on Financing for Development at the United Nations Summit on 14 September 2005, President Hu Jintao announced an ambitious foreign aid program. This included: zero tariff treatment to certain products from all the 39 Least Developed Countries (LDCs) having diplomatic relations with China, covering most of the China-bound exports from these countries; forgiveness of the loans owed by the Heavily

⁵ For a detailed analysis of this case, see n 3, pp 334–348.

Indebted Poor Countries (HIPC) and LDCs to China; US\$10 billion in concessional loans and preferential export buyer's credit to developing countries to improve their infrastructure and promote mutual cooperation; medical assistance to developing countries, especially African countries; and training of professionals for developing countries within the next three years.⁶ All these seem to indicate that China wants to take on the role as a leader among developing countries. On the other hand, China has consistently taken a low profile in all WTO activities. Be it in the informal green room meetings, the formal meetings of the various committees and councils or the grand sessions of the Ministerial Conferences, China has generally been reticent. So far China has only been vocal on two matters: the annual transitional review and the title of the Taiwan delegation. As to the former, it is China's own show and China must be more active in providing sufficient answers to the questions from other WTO Members. As to the latter, even though Chinese Taipei is, legally speaking, a separate Member in the WTO, China has consistently claimed Taiwan to be one of its separate custom territories and asked Taiwan to behave accordingly. After Taiwan's accession to the WTO, Taiwan established a "Permanent Mission to the WTO" and appointed officials such as Permanent Representative, Minister, Counsellor, First Secretary, Second Secretary and Third Secretary to the mission. China, however, deemed such titles to have sovereign connotations and asked the WTO Secretariat in early 2003 to re-title the Taiwan mission to the same "Economic and Trade Office" as Hong Kong and Macau and remove the references to the diplomatic titles of the Taiwan officials from the WTO Directory. Normally the WTO Secretariat would update its directory twice a year: once in April, and again in October. Due to the unbridgeable differences between China and Taiwan, however, the directory was not updated since October 2002. Finally, in June 2005, two months before the expiration of the term of office for the outgoing Director General Dr Supachai, a compromise was reached and the directory was updated. In the new directory, Taiwan kept the name of its office as "Permanent Mission" and the official title of its Permanent Representative, but formal diplomatic titles of other officials have been removed. Supachai also includes a "Special Note by the Director General," in which he points out that the directory is only for the internal use by the WTO Secretariat and its Members, and does not affect the legal rights and obligations of any delegation in any way. Also, citing Article XII of the Marrakech Agreement, Supachai recalls that separate custom territories which are not sovereign states can also become WTO Members, thus the title of the delegation of such separate customs territories does not create any implications of sovereign rights.

Even though China is now the third largest trading power in the world and is fast approaching second and first place, the reviewer would argue, con-

⁶ For the text of the speech, see <http://www.china-un.org/eng/zt/shnh60/t212916.htm>.

trary to the popular rhetoric made by some scholars, that it would not be good policy for China to claim the leadership role within the WTO for the following reasons. Firstly, the reviewer questions whether it is in the interest of China to be the leader. As a newly-acceded Member, China is required to undertake a lot of commitments, many of which are higher than those of existing WTO members. It is already a humongous challenge for China to try to implement these commitments. After having been in the spotlight for 15 years, what China needs now is some quiet breathing space. Shouldering the leadership role would put China back on the front stage again and encourage other Members to pressure China to make more concessions. Secondly, even if assuming, *arguendo*, it is in the interest of China to be the leader, does China have the experience and expertise to lead the crowd? Unlike other developing country leaders such as India and Brazil, China's experience in the multilateral trading system, even including that of the accession process, is still rather limited. This may seem to have changed after the 1990s, when the number of books published in China on WTO issues probably outnumbered those of all other countries combined together. This is just a false prosperity, however, as most of the books are just introductory in nature and lack substance. The number of people appointed as WTO panellists and Appellate Body members can also be used as an indicator to gauge the level of a country's familiarity with WTO rules. Excluding those from Hong Kong, Macau and Taiwan, so far no Chinese national has been appointed as panellist,⁷ not to mention Appellate Body member. At the same time, countries such as India, Brazil, Egypt, Uruguay, the Philippines and Korea have produced many panellists or even Appellate Body Members. Third, even if assuming, *arguendo*, that China does have the leadership quality, would the other developing countries be content to have China assume the leadership role? The reviewer does not have a crystal ball to predict the future, but history might offer some valuable lessons here. During China's WTO accession negotiation, the WTO Member that held on to the last moment before signing a bilateral agreement was a developing country. Similarly, in anticipation of the expiration of the WTO Agreement on Textile and Clothing (ATC), textile producer groups from many developing countries signed the Istanbul Declaration Regarding Fair Trade in Textiles and Clothing in March 2004 to request the WTO to extend the ATC for another three years, presumably to fend off the threats of the competition from Chinese textile producers.⁸ Thus, if history can be of any guidance, it seems doubtful that developing Members would readily allow China to take on the leadership role. This is entirely understandable. With most of its exports concentrated in labour-intensive or resource-intensive

⁷ Even though China nominated in February 2004 three individuals to the WTO indicative list for Panelists, none of them have been appointed as panelists in any WTO cases yet. See Henry Gao, *Can Chinese Experts Become WTO "Judges"?* Hong Kong Economic Journal Monthly, May, 2004, pp 49-52.

⁸ For the text of the *Istanbul Declaration*, see <http://www.fairtextiletrade.org/istanbul/declaration.html>.

products, China would compete with rather than complement the industrial structure of other developing countries. It is no wonder that other developing countries view China as a competitor rather than a friend. Indeed, notwithstanding that the Chinese government has repeatedly held that China is, and always will be, a developing country, and in spite of the fact that the per capita GDP in China is comparable to that of many LDCs, China is also the third largest trading power in the world and the only one among all developing countries to be among the top five traders worldwide. Thus, on many issues, China's interest is actually closer to that of major developed countries than that of developing countries. Agriculture is one such example: as China imports a large quantity of agricultural products, it is actually not in China's interests to follow the position of most developing countries and demand the elimination of export subsidies. Trade facilitation, one of the four "Singapore Issues," is another such example: as China exports a lot, it is actually in the interest of China to push for the inclusion of trade facilitation in the WTO framework to make the customs process more efficient and cheaper.

The sixth issue is China's role in addressing WTO institutional reforms. Professor Jackson suggests that China might play a role in addressing some of the deficiencies in the multilateral trading system. Ostry holds the same view. So far, however, China has not been very active in discussions on WTO reforms. Instead, like many developing countries, China has been very reluctant to engage in such efforts. The reasons mentioned in the last paragraph might provide some explanation. It may be that China has just been too busy minding its own business, implementation of its accession obligations, to spare time to deal with the broader issues of institutional reform. Also, the lack of expertise in WTO matters means that even if China wants to participate in such negotiations, it does not have the necessary capacity. Another problem relates to the way China conducts its diplomacy. For many reasons, the Chinese government keeps a tight control over diplomatic matters. Very often, the diplomats in Geneva are not authorised to make decisions on many issues, even those of relatively minor importance. Instead, all they can do is to listen to the statements of other Members, read a pre-drafted statement that has been approved by Beijing, and report the latest developments back to capital. Frequently, it takes weeks before they get the orders back from Beijing directing them to the politically correct course of action, but new developments probably would have emerged in the interim, and they have to start another exchange again.

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