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CHINA ON THE WORLD STAGE: A TRADE LAW PERSPECTIVE

*By Henry Gao**

Before China's accession to the WTO, many observers predicted that the inclusion of the emerging trade power will change the pre-existing power structure in the multilateral trading system. Some even went as far as suggesting that China will become the leader of developing countries in the crusade against developed countries, which have dominated the organization during most of the history of the GATT/WTO. Now that China has been in the WTO for almost nine years, has it really emerged as the leader of developing countries as predicted? In this short essay, I will argue that while China has seen itself transformed from a rule-taker to a rule-shaker and possibly even a rule-maker in the most powerful international organization in the world, its ascent has not followed nicely the path that has been sketched out by commentators. To the contrary, the ways China participated in different activities in the trading system has come rather as a surprise to many observers. It is important that we correctly understand the contours of China's progress so far, as this will definitely bear upon how it will help shape the multilateral trading system in the future.

Generally speaking, there are three main channels for a country to participate in global trade governance: multilateral trade negotiation, multilateral dispute settlement, and bilateral and regional agreements. The major trading nations usually participate actively in all three activities. However, this has not been the case for China. Instead, as I will argue below, China's participation has been uneven on the three fronts: in the Doha Negotiations, it has played little role; regarding WTO disputes settlement, it has shifted from a passive or even reluctant player to an active and aggressive player; as to Regional Trade Agreements (RTAs), it has been active all along.

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WTO NEGOTIATIONS

While there have been many calls for it to shoulder more responsibilities in the WTO, China has so far remained largely silent in the Doha negotiations.¹ To be fair, China has submitted some proposals on certain issues, but neither the quantity nor the quality of these submissions meets the expectations of that of “the leader of the developing countries.” Why hasn’t China been more active in the Doha Round? In my view, the reasons are the following:

First, after having been under the spotlight for fifteen years in one of the longest accession negotiations in the history of the GATT/WTO, China wanted some quiet breathing space for it to digest and implement the heavy accession commitments. Moreover, according to China, its concessions on both trade in goods and services exceed those of other WTO Members, most of which have not changed since the conclusion of the Uruguay Round. Thus, China argues that it, along with other “recently acceded Members” (RAMs), should not be required to make the same level of concessions as the founding WTO Members. Unfortunately, as the Doha Round dragged on longer and longer, fewer and fewer Members are willing to give free rides to those Members that acceded nine years ago. So far, the prevailing consensus seems to be that flexibility will be extended not to RAMs, but only to “very recently acceded Members,” i.e., those that acceded to the WTO after the Doha Round was launched. Therefore, it seems unlikely that China will be spared.

Second, China’s economic interests and political positions are not well aligned. While China calls itself a developing country and is a founding member of the “Group of 77,” the fact remains that China is one of the most important traders in the world. Thus, on many issues, China’s true interests actually lie closer to those of developed countries than those of developing countries. Take agriculture for example: one of the major demands of developing countries is the elimination of export subsidy and reduction of domestic support. As one of the largest importers of many agricultural commodities such as wheat, cotton and soybeans, however, China would probably find itself becoming the primary victim of the price hike that comes with the end of subsidies. Another example is trade facilitation: while many developing countries are against the inclusion of the issue, given its position as one of the top exporters in the world, it is actually in China’s interest to push for the inclusion of trade facilitation in the WTO framework to make the customs process more efficient and cheaper. At the same time, as Chinese leaders have repeatedly stated that “China is and will always be in the developing country camp,” it would be politically awkward for China to openly deviate from the developing country “party-line.” Thus, the best strategy seems to be staying quiet.

WTO DISPUTE SETTLEMENT

In contrast to its reticence in WTO negotiations, China has made great strides in its participation in WTO dispute settlement, which can be divided into three stages:

First, November 2001 – February 2006: Rule-taker. During this period, China has taken a cautious approach towards WTO litigation. As a newcomer that was unfamiliar with the WTO legal rules, China has put more emphasis on learning WTO rules rather than winning specific disputes. In an effort to discourage litigation, China usually settled the dispute quickly with the complainant once a case is filed or threatened, even if it might have some

¹ For more on the issue, see Henry Gao, *China’s Participation in the WTO: A Lawyer’s Perspective*, SINGAPORE Y.B. INT’L L. 41-74 (2007).

good arguments.² To better understand the dispute settlement process, China has also actively participated in real WTO cases as third parties. For example, from August 2003 to 2006, China has joined as a third party in almost every panel established during the period. Through these cases, China gained invaluable understanding of the WTO dispute settlement system and boosted its confidence in participating in the system as a main party.

Second, March 2006 - August 2008: Rule-shaker. This is the period when China started to actively use the WTO rules to protect its legitimate interests. The representative cases are the *Auto Parts* case, *TRIPS* case, and the *Publications and Audiovisual Products* case. In all these cases, China tried to shake or even bend the existing rules by aggressively making legal arguments that put its position in best light. Settlements are still made, but they are much rarer now. Instead, in most cases, China is ready to fight along all the way from consultations to panel and even Appellate Body proceedings.³

Third, September 2008 – the present: Rule-maker. As the price for its accession, China accepted some rather harsh terms, such as the product-specific safeguard mechanism, non-market economy status in antidumping investigations and the alternative benchmark methodology in subsidy-countervailing investigations. When China later discovered the real-world implications of these discriminatory terms, it had the following choices: (1) withdraw from the WTO and seek new accession on more equitable terms; (2) seek amendment of its Accession Protocol; or (3) change the rules through the WTO dispute settlement system. The first option is obviously not feasible. The second option is not very attractive either due to the difficulty in obtaining the consensus required for amendments. This left China with only the last option. Among the five cases filed by China during this period, four (*United States - Anti-Dumping and Countervailing Duties*, *European Union – Steel Fasteners*, *United States – Tires*, and *European Union – Footwear*) were aimed at changing the rules, especially the provisions in the Accession Protocol. For example, in the *AD-CVD* case, China claimed that the United States violated China's Accession Protocol by failing to follow the proper methodology for the determination of the existence and amount of subsidy benefits. Similarly, both the tires safeguard case against the United States and the two antidumping cases against the European Union involve claims on violation of the respective clauses authorizing such measures in China's Accession Protocol. As the panel and Appellate Body have not been particularly fond of trade remedy measures, there is a good chance that the ambiguous terms used in the Accession Protocol will be interpreted in a way that would restrict the utility of these provisions in the future. Should this be the case, China will have effectively changed the rules through WTO dispute settlement process.

RTAs

While China is now an active player in WTO dispute settlement, it still took more than five years for it to “warm up” initially. In contrast, China didn't waste any time in negotiating RTAs and has been driving on the Regionalism Highway at full speed since the very beginning. Starting with the FTA with ASEAN in 2002, China has concluded RTAs with nine partners. Furthermore, about a dozen other countries are now waiting anxiously in line to be graced with the honor of entry into the coveted club of China's RTA partners. While political considerations seem to override economic benefits in many of these RTAs, China

² See Henry Gao, *Aggressive Legalism: The East Asian Experience and Lessons for China*, in *CHINA'S PARTICIPATION IN THE WTO* 315-51 (Henry Gao & Don Lewis eds., 2005).

³ See Henry Gao, *Taming the Dragon: China's Experience in the WTO Dispute Settlement System*, 34 *LEGAL ISSUES ECON. INTEGRATION* 369-92 (2007).

has also been trying to make new rules through these RTAs.⁴ These rule-making efforts cover both the structural aspects and the substantive rules of RTAs. In terms of the structure, China's RTAs tend to have a narrower coverage than those used by other major players, such as the United States, European Union or Japan. Normally, China would start with an agreement on trade in goods only and would only expand to services after the commitments on goods have been substantially implemented. Moreover, China's RTAs normally do not include binding commitments in nontraditional areas such as TRIPs, environment protection, or investment. As to the substantive rules, China has insisted on the recognition of its market economy status by potential RTA partners as a precondition in virtually every RTA that it has signed. As mentioned earlier, the issue of market economy status has great significance for China in antidumping investigations. Here again, China has tried to change the WTO rules from the side.

WHAT LIES IN THE FUTURE?

As we can see from the discussions above, China has gradually emerged on the central stage of the multilateral trading system. What are the implications of China's ascent? How will China behave in the future? I don't have the crystal ball but here are my preliminarily thoughts:

First, in WTO negotiations, if the Doha Round ever concludes and a new round is launched, we will probably see a more active China at work. This is not only the result of China's rising economic clout – China is already the third largest trader now and might climb further up to number two or even number one by then – but, more importantly, a reflection of China's growing prowess in international diplomacy and a realization by the Chinese leadership that they need to make new rules that reflect China's own interests.

Second, in WTO dispute settlement, again we will see more cases involving China as either respondent or complainant. In a way this is simply the continuation of established patterns in the WTO: over the history of the GATT/WTO, it is rare to find cases that the two largest Members, *i.e.*, the United States and European Community, are not involved in some capacity. It is only natural that we would find China, the next big trader, receiving the same treatment. On the other hand, as some of the past cases, such as the audiovisual case, the subsidies case, and the ongoing debate on China's currency policy, have shown, many of the disputes are not just the garden-variety clash between giants. Instead, they reflect the inherent tension between the economic and political systems of China and the fundamental principles of the WTO, which were designed by and for economies that operate under vastly different environments.

Third, for the near future, China's RTA frenzy would probably slow down for the following reasons: First, the non-market economy status clause in China's Accession Protocol will expire soon in 2016, leaving China with no need to reward countries with RTAs just for recognizing its market economy status. Second, if we look around, most countries which are willing to negotiate RTAs with China have already done so, making it harder to find new candidates. Third, as the recent protests against China in Malaysia and Indonesia have shown, there might be backlash against China when the RTA commitments kick in. This would probably make China more cautious in signing RTAs.

⁴ See Henry Gao, *The RTA Strategy of China: A Critical Visit*, in CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL PREFERENTIAL AND REGIONAL AGREEMENTS 55-66 (Ross Buckley, Vai Io Lo & Laurence Boule eds., 2008).