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## The WTO and the Rule of Law in China

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### I Introduction

Jonathan Spence's classic study, *To Change China*, offers a cautionary tale of Western efforts to reshape the Middle Kingdom.<sup>1</sup> Spence recounts the story of a Jesuit missionary, Adam Schall, predicting a solar eclipse in the late summer of 1644 and requesting Chongzhen, the last emperor of the Ming dynasty, to have the Board of Rites test Schall's prediction.

Chongzhen issued the decree, which called for both Schall and the imperial scientific advisers to make their predictions and test them against the actual eclipse. In the event, only Schall accurately predicted its timing and phases. Schall's success led to his being retained by the emperor as an adviser, where Schall integrated himself deeply into Chinese culture.

But Schall's mission to convert the Chinese to Catholicism failed. In the end, China changed Schall and his fellow Jesuits, rather than the Jesuits changing China.

Critics of China's accession to the World Trade Organization ("WTO") suggest a similar fate has befallen the institution. In their view, rather than changing China, the WTO has been "swallowed" whole by what is now the world's largest trading nation.<sup>2</sup> Some go further, accusing proponents of China's accession of "hubris" in assuming China's accession would "inevitably" lead the People's Republic to "embrace democracy and capitalism."<sup>3</sup>

<sup>1</sup> Jonathan Spence. *To Change China – Western Advisers in China*. Little Brown & Company (1969).

<sup>2</sup> Jacob M. Schlesinger. 'How China Swallowed the WTO'. *The Wall Street Journal*. November 1, 2017.

<sup>3</sup> See, e.g., Ambassador Robert E. Lighthizer. *Evaluating China's Role in the World Trade Organization Over the Past Decade*. Testimony Before the U.S.-China Economic and Security Review Commission. June 9, 2010. 25–26 ("Lighthizer Testimony").

Those arguments do not withstand serious scrutiny.<sup>4</sup> Concrete commercial considerations, rather than hubris or misguided beliefs, guided the negotiators and the political debate over China's accession.<sup>5</sup> To the extent the reforms China undertook to join WTO expanded the degrees of freedom individual Chinese citizens could exercise, that consequence was incidental to the WTO members' negotiating objectives.<sup>6</sup>

Yet, nearly two decades after its accession, there is little doubt China finds itself in "an increasingly tense standoff with the U.S. and Europe that

<sup>4</sup> The critics' arguments are, in fact, disingenuous. Ambassador Lighthizer's testimony, for example, cites no contemporaneous statement by US policymakers for his claim regarding the hubris of US policymakers. He relies instead on extensive quotations from Francis Fukuyama's 1989 essay, "The End of History?" and an opinion piece penned by Congressman Tom Delay of the US House of Representatives. *Id.* Fukuyama's piece was written more than a decade before China's WTO accession and focused on the portents of the Soviet Union's collapse, not China. Francis Fukuyama, *The End of History, The National Interest* (Summer, 1989) 3–18. Fukuyama played no role in either the negotiation of China's accession or the US Congress' passage of legislation granting China "permanent normal trade relations," which allowed US negotiators authority to agree to China's entry into the WTO. Tom Delay's opinion piece, published in 2001 – more than a year after Congress' action – supported renewal of the US president's trade negotiating authority. Delay's piece never mentions China. The Honorable Tom Delay, *Economic Expansion Via Trade Promotion*, *The Washington Times* (December 6, 2001).

<sup>5</sup> In testimony before the House Ways and Means Committee on China's accession, former U.S. Trade Representative and principal U.S. negotiator, Ambassador Charlene Barshefsky, attested to the negotiations' focus on commercial concerns. There, she explained, "In a sense, this decision presents us with a simple choice. Last November, after years of negotiation, we reached a bilateral agreement with China on WTO accession which secures broad-ranging, comprehensive, one-way trade concessions on China's part." Testimony of Ambassador Charlene Barshefsky, U.S. Trade Representative (May 3, 2000), Hearing before the committee on Ways and Means, House of Representatives, 106th Cong., 2d Sess., U.S. Government Printing Office (2001); see also Opening Statement of William V. Roth, Jr., Chairman of the Senate Committee on Finance, *China's Application for Accession to the World Trade Organization*, Hearing Before the Committee on Finance, United States Senate, S. Hrg. 106–286 (Apr. 13, 1999) ("The Finance Committee will have to determine if an agreement meets the specific needs of U.S. manufacturers, farmers, service providers, and workers. This hearing presents an opportunity to examine the agreement as a trade agreement. There will be other opportunities to address the other issues that affect our bilateral relationship with the Chinese. The question before us, however, is whether common standing alone, an agreement on accession is in the United States interest.").

<sup>6</sup> Ambassador Barshefsky expressly rejected those claims in testimony before the Ways and Means Committee of the U.S. House of Representatives, making clear the accession agreement "[was] not a human rights policy," even while acknowledging it represented "a remarkable victory for economic reformers within China and for our own efforts to give the Chinese people more control over their own destiny and more ability to meet and exchange ideas with the outside world." Testimony of Ambassador Charlene Barshefsky. U.S. – China Bilateral Trade Agreement and the Accession of China to the WTO. Hearing before the Committee on Ways and Means, House of Representatives, 106th Cong., 2d Sess. February 16, 2000.

threatens to undermine the WTO's authority as an arbiter of global trade.<sup>7</sup> And, there is one respect in which the critics are right. China has not, in fact, met the expectations of WTO members that agreed to its accession, either with respect to economic reform or progress toward the rule of law.

Having served as the Majority Chief Trade Counsel to U.S. Senate Finance Committee during the final negotiations over the protocol of accession, I can personally attest to the attention given to the economic and legal reforms under way in China at the time. The members of the Finance Committee paid particularly close attention to China's progress toward the rule of law.<sup>8</sup> More generally, the reforms proved instrumental in persuading policy makers to agree to China's accession.<sup>9</sup>

<sup>7</sup> Id.

<sup>8</sup> See, e.g., Statement of Senate Finance Committee Chairman William V. Roth, Jr., on the Administration's Proposal to Grant China Permanent Normal Trade Relations (March 8, 2000) ("China's entry into the World Trade Organization augurs profound changes both in China's economic practices and in its society. It is not just a question of accelerating economic reforms or a departure from socialism. These changes mark a profound departure from centuries of Chinese history. China has essentially conceded the fact that their own prospects are directly linked to an open market economy based on the rule of law. In so doing, the Chinese government is also accepting the basic underpinnings of a society based on the rule of law, something that represents a far more profound change than the economic reforms launched by Deng Xiao Ping two decades ago."), [www.finance.senate.gov/chairmans-news/roth-statement-on-the-administrations-proposal-to-grant-china-permanent-normal-trade-relations](http://www.finance.senate.gov/chairmans-news/roth-statement-on-the-administrations-proposal-to-grant-china-permanent-normal-trade-relations).

<sup>9</sup> Statements of members of both U.S. political parties in the Senate debate over the passage of legislation granting permanent normal trade relations to China bear that out. See, e.g., Statement of Senator Ted Kennedy (D-MA), 46 Cong. Rec. N0. 111, 106th Cong., 2d Sess. (Sep. 19, 2000) at S8690 ("By integrating China into this global, rules- based system, the international community will have procedures never available in the past to hold the government of China accountable for its actions, and to promote the development of the rule of law in China."); Statement of senator John Kerrey (D-MA), Id. ("The Chinese people will benefit from the spread of the rule of law, from increased governmental transparency, and from the economic."); Statement of Senator John McCain (R-AZ), Id., at S8690-8691. ("The economic reforms initiated by the late Premier Deng Xiao-ping began a process that has benefited millions of ordinary Chinese and has held out the greatest hope for prosperity and, ultimately, political freedom that country has ever known ... Opponents of engaging China in trade should be aware that membership in the World Trade Organization carries with it responsibilities that are at variance with Communist Party practice. That is why Martin Lee, chairman of the Democratic Party of Hong Kong, noted that China's participation in the WTO would 'bolster those in China who understand that the country must embrace the rule of law.'"); Statement of Senator Joe Biden (D-DE), Id., at S8717 ("China's growing participation in the international community over the past quarter century has been marked by growing adherence to international norms in the areas of trade, security, and human rights. If you want to know what China looks like when it is isolated, take a look at the so-called Great Leap Forward and the Cultural Revolution."); Statement of Senator Tom Daschle (D-SD), Id., at S8719 ("By agreeing to these terms, China is, in fact, agreeing to

Moving from the U.S. Congress to serve as the Under Secretary of Commerce for International Trade in the George W. Bush administration in 2001, I was part of the U.S. delegation to the WTO ministerial meeting in Doha where China finally acceded to the WTO. As Under Secretary, I became deeply involved in ensuring China's compliance with its WTO obligations.<sup>10</sup> China's progress on economic and legal reform remained a significant part of both the administration's agenda and Congressional oversight throughout my tenure.<sup>11</sup>

Those experiences highlighted for me the difference between China's WTO accession and the Jesuits' experience in Imperial China. The WTO did not seek to change China. Rather, China pursued accession of its own volition, with President Jiang Zemin and Premier Zhu Rongji using WTO accession as "a lever for promoting domestic economic reform."<sup>12</sup> Following in the footsteps of Deng Xiaoping, they aimed to lift the dead hand of Mao's mercurial one-man rule and end the anarchy and economic disarray left behind by the Cultural Revolution.

Leaving the Mao era behind required fundamental changes in the way China operated. In that, Jiang and Zhu succeeded. Their efforts led to a retreat by the state from the market, "a major downsizing and restructuring of state-owned companies ... and a significant opening of the economy to external competition, paving the way for China's entry into the World Trade Organization."<sup>13</sup>

live by the rule of law. And while that agreement may be limited – for now – to trade issues, eventually it is likely to be extended to other areas as well – including human rights."); Statement of Senator William Roth (R-DE), Id., at 8720 ("a China fully immersed in the global trade regime, subject to all the rules and sanctions applicable to WTO members, is far likelier to live under the rule of law and to act in ways that comply with global norms.").

<sup>10</sup> In that capacity, I served as the Executive Director of the U.S.-China Joint Commission on Commerce and Trade, the main bilateral avenue for raising and resolving concerns with respect to China's compliance. I also served on the congressionally mandated commission responsible for oversight of the U.S.-China trade relationship and China's ability to comply with the WTO rules.

<sup>11</sup> See, e.g., 2003 Report to Congress on China's WTO Compliance, Office of the United States Trade Representative (December 11, 2003); Human Rights in China in the Context of the Rule of Law, Hearing Before the Congressional-Executive Commission on China, 107th Cong., 2d Sess. (Feb. 7, 2002). GPO 78-790, U.S. government printing office (2002); Opportunities to Improve U.S. Government Efforts to Ensure China's Compliance with World Trade Organization Commitments, United States General Accounting Office, GAO-05-53 (October 2004) (assessing U.S. executive branch oversight of China's WTO compliance compliance).

<sup>12</sup> Nicholas R. Lardy, *Issues in China's WTO Accession*, The Brookings Institution (May 9, 2001) ("Lardy, Issues in China's WTO Accession").

<sup>13</sup> Nicholas R. Lardy, *The State Strikes Back*, Peterson Institute for International Economics (2019) ("Lardy, The State Strikes Back").

Jiang and Zhu's reforms extended to China's legal regime as well. According to Chinese state media, the two leaders viewed WTO accession as a means of "cleaning up of laws, regulations, and policies" and establishing an "impartial, efficient judicial system."<sup>14</sup>

In that, Jiang and Zhu's reforms formed the backdrop of China's efforts to accede to the WTO. Their reforms, including the changes to China's legal regime, played an instrumental role in convincing WTO members to accept the resulting protocol. The reforms shaped WTO members' expectations of the benefits that would accrue from China's accession and its agreement to abide by the WTO rules.

Since then, however, Xi Jinping has set China on a fundamentally different course – one that departs sharply from the path Deng Xiaoping charted and reverses many of the reforms Jiang and Zhu introduced. It is fair to describe Xi's approach as retrenchment, both economically and institutionally. Xi's reinflation of the state-owned sector not only diminished the scope for free and open competition in China's market, but it also expanded the scope for "guanxi" – the age-old Chinese use of connections with the powerful to advance one's economic interests and the local favoritism it entails. As has been widely reported, commercial success in Xi's China depends less on price or quality than it does on political access and a willingness to embrace the Communist Party's line.

In parallel, Xi has reneged on Jiang and Zhu's commitment to expanding the reach of the rule of law. Rather than openly abandoning Jiang and Zhu's stated goal, Xi has simply redefined the rule of law to suit his and the Party's purpose.<sup>15</sup> Under the rubric of a "socialist rule of law with Chinese characteristics," Xi has stripped away any pretense of progress toward the rule of law in favor of a vision of unchallengeable central authority demanding obedience from "a law-abiding population."<sup>16</sup>

Xi's expansion of the state-owned sector has had its own ramifications for the reach of the rule of law. Just as economic reform and downsizing the state-owned sector created the need for stronger legal institutions and legal reform to govern relations between enterprises and consumers

<sup>14</sup> Lardy, *Issues in China's WTO Accession*.

<sup>15</sup> See, e.g., Maya Wang, *Xi is Bending Chinese Law to His Will – How a Public Good Became a Tool of Personal Power*, *Foreign Affairs* (Nov. 24, 2021).

<sup>16</sup> Moritz Rudolf, *Xi Jinping Thought on the Rule of Law – New Substance in the Conflict of Systems with China*, SWP Comment No. 28, *Stiftung these Wissenschaft und Politik, German Institute for International and Security Affairs* (April, 2021) ("Xi Jinping Thought on the Rule of Law"); see also Sam Crane, *Why Xi Jinping's China is Legalist, Not Confucian – The Philosophical Basis of China's "New Era"*, *Los Angeles Review of Books – China Channel* (Jun. 29, 2018).

in private markets, re-inflating the state-owned sector has expanded that part of the market that has remained resolutely outside the scope of law in China throughout the reform.<sup>17</sup> Under Xi, the distinction between state-owned and private enterprises has, moreover, become increasingly blurred.<sup>18</sup>

The changes Xi wrought, including his retrogression of the rule of law, have significant implications for China's ability to comply with its WTO obligations. As will be discussed in greater detail below, the WTO represents a contract among its members – one that reflects a balance of advantages achieved through negotiation. The acid test is not in compliance with the “letter of the law” alone. The issue is whether the expectations of the parties with respect to the benefits derived from negotiation have been met.

China, in my view, has failed to satisfy that standard. It would do well to recommit itself both to economic reform and progress toward the rule of law in its own interest as well as in the interests of WTO compliance. The following discussion explains why.

The discussion is divided into two parts. The first puts the Chinese legal system and its progress toward the rule of law in a historical context, including the post-Mao reforms and Xi Jinping's more recent retrenchment. The second part explains why China's progress on economic reform and the rule of law matters in terms of WTO compliance.

## II China's Legal Regime and the Impact of Xi's Reforms

China's legal culture derives from two competing traditions – the precepts of Confucius and the “legalist” imperative introduced at the outset of the

<sup>17</sup> As Stanley Lubman explained as early as 1999, “The state sector of the economy, only partially reformed, continues to face difficult obstacles to economic and legal reform. Twenty years after reform began, bargaining rather than rules still determines outcomes in relations between the center and locality and between administrative superiors and inferiors.” Stanley Lubman, *Bird in a Cage – Legal Reform in China After Mao*, Stanford University Press (1999) 106; see further Che Luyao, Legal Implications of the Deepened Reform of Chinese State-Owned Enterprises: What Can Be Expected from Recent Reforms?, 8 *Tsinghua China Laura view* 171 (2016). (Noting, in a comment on proposed 2015 reforms, “[s]ince the early stage of economic reform, an unclear separation between entrepreneurial and administrative issues has been often described as a weakness of SOEs” and the weakness will remain in the absence of investing state-owned enterprises with full, legal personality, a move the CCP has resisted in practice.)

<sup>18</sup> See, e.g., Curtis Milhaupt and Wentong Zheng, Beyond Ownership: State Capitalism and the Chinese Firm, 103 *Geo. L. J.* 665 (2015) (“The boundary between public and private enterprises is even more blurred in China, a country with long tradition of state dominance

Qin dynasty.<sup>19</sup> Confucius aimed to create a harmonious society through norms and ritual practices.<sup>20</sup> The norms he advocated were designed to ensure proper conduct, rather than obedience to rules.<sup>21</sup> They wove a web of reciprocal obligations designed to bind the Chinese together in service to their families, their community and, ultimately, the state.<sup>22</sup> Under those circumstances, the ruler could rule by virtue, rather than law and enforcement.<sup>23</sup>

The legalist imperative, associated with the Qin dynasty and the first emperor's adviser, Shang Yang, started from the opposite premise. In the legalists' view, a "well-ordered society [could] be maintained only through a set of formal, publicly promulgated rules." The ruler's duty was to establish and enforce the law "with uniformity, certainty, celerity, and severity."<sup>24</sup> The legalists viewed the law as a system of rewards and punishments designed to control the citizenry.<sup>25</sup>

in the economy, underdeveloped legal institutions, and relatively inchoate conceptions of property rights. In practice, the ownership types of many firms in China are ambiguous.").

<sup>19</sup> Peerenboom *Long March*. There were, of course, other schools of thought and other traditions. One, the syncretic blend of legalism and Daoism advocated by Huang-Lao, called for the "impartial application of publicly promulgated, codified laws," but also sought "to constrain the power of the ruler" by invoking the Way as the ultimate universal authority that even the ruler must obey. Id.

<sup>20</sup> Asked how to govern, Confucius famously replied, "Let the ruler be a ruler, the subject be a subject, a father be a father, a son be a son." *The Analects*. 12.11.

<sup>21</sup> As Confucius put it, "[i]f you guide the people with ordinances and statutes and keep them in line with [threats of] punishment, they will try to stay out of trouble but will have no sense of shame. If you guide them with exemplary virtue [de] and keep them in line with the practice of the rites [li], they will have a sense of shame and will know to reform themselves." Confucius. *The Analects*. 2.3. Penguin Publishing Group. 2014. ("The Analects").

<sup>22</sup> Confucius saw reciprocity as virtuous, rather than corrupting. See *The Analects*. 6.30. ("A humane person wishes to steady himself, and so he helps others to steady themselves. Because he wishes to reach his goal, he helps others to reach theirs.") Confucius believed "li" governs all social relationships, "designat[ing] behavioral norms, and defining one's "moral responsibilities to others." See *Xin Ren*.

<sup>23</sup> *The Analects*. 2.1. ("To rule by virtue is like the way the North Star rules, standing in its place with all the other stars revolving around it and paying court to it.")

<sup>24</sup> *Xin Ren*. Shang Yang insisted that rule by law is fundamental to governing and that "nothing is more basic for putting an end to crimes than the imposition of heavy penalties." Id. See also *The Book of Lord Shang*. 17.3. ("[T]o prohibit depravity and to stop transgressions nothing is better than to make punishments heavy. When punishments are heavy and [criminals] are inevitably captured, then the people dare not try [to break the law].").

<sup>25</sup> John Delury and Orville Schell. *Wealth and Power: China's Long March to the Twenty-first Century*. Random House Publishing Group. ("Legalism emphasized the law as a way for the state to control its people, including government officials, through strict punishment, and thereby maintain order ... in other words, the rule of law had nothing to do with protecting people's rights against the state.") ("Delury & Schell").

Although Confucianism became the organizing principle of succeeding Chinese dynasties beginning with Han's ouster of the Qin,<sup>26</sup> legalism did not disappear.<sup>27</sup> With Confucianism, it continues to shape China's legal culture today. The resulting legal system retains a mixture of the two traditions.<sup>28</sup>

Hu Jintao's notion of a "harmonious society," first put forward in a speech before the Central Party School in February 2005, plainly draws on Confucian thought.<sup>29</sup> Hu called for a society built on the ideas of "democracy, the rule of law, fairness, justice, sincerity, trustworthiness, amity, full vitality, stability, orderliness, and harmony between mankind and nature." With the notable exceptions of democracy and the rule of law, Hu's speech otherwise runs the gamut of traditional Confucian values.

The recent crackdown on the tech sector in China, on the other hand, has the hallmarks of legalism. The means are legalist – the elements of the crackdown include, *inter alia*, "scrutinizing the initial public offerings of major internet companies, proposing broad new rules to limit overseas public listings, and introducing sweeping data security laws" as a means of bringing China's tech sector to heel.<sup>30</sup> The intent is legalist as well – the government aims "to rein in Chinese technology firms and shore up its political power over private enterprises" more generally.<sup>31</sup>

<sup>26</sup> Xin Ren, *supra*. (Explaining Confucianism became "the dominant official orthodoxy endorsed by generations of imperial rulers," beginning with the Eastern Han Dynasty (A.D. 25-220), when imperial law "under[went] a process of Confucianization as it incorporated the idealistic vision of the Confucian 'superior man' who is motivated by piety and good example, not by fear of the law.")

<sup>27</sup> Peerenboom Long March. ("The Imperial system showed clear signs of both Legalist and Confucian influence. The former was most apparent in the emphasis on codified laws and punishment.... The Legalist concern for constraining the power and discretion of officials is also evident in the large number of regulations governing the behavior of officials.")

<sup>28</sup> Xin Ren, *supra*. ("the Chinese legal tradition is not limited to the influence of Confucianism but is a combination of both philosophies. Even today's legalization process is the continuation of the long struggle between Legalism-rule by law or "rule under the law"-and Confucianism-rule by man or "rule above the law").

<sup>29</sup> Delury & Schell. ("traditional Chinese thinking esteemed the Confucian adage *hewei gui* ... "[t]here is nothing more precious than harmony").

<sup>30</sup> Josh Bramble. Beijing's Tech Sector Crackdown Sends a Clear Warning to Companies Going Global. Center for Strategic and International Studies. October 4, 2021.

<sup>31</sup> Id. Didi, the Chinese ride-hailing service, offers a paradigmatic example of the crackdown. The firm and other Chinese internet companies "grew big and powerful by learning to thrive in regulatory gray zones." Raymond Zhong; Li Yuan. The Rise and Fall of the World's Ride-Hailing Giant. The New York Times. Aug. 27, 2021. Chinese regulators tolerated Didi's behavior, in part, because of its reputation as "the homegrown hero that stopped Uber's global expansion in its tracks." Id. In early July, 2021, two days after Didi went public in New York, China's internet regulator ordered it to stop signing up new

Beyond Confucian principles and the legalist tradition, the legal regime reflects the advent of the Chinese Communist Party (CCP) and its 1949 victory in China's civil war. Early in Mao's rule, legal developments "followed the Marxist view that law should serve as an ideological instrument of politics."<sup>32</sup> But, even that limited concept of law gave way amidst the anarchy of the Cultural Revolution and Mao's praise of "lawlessness."<sup>33</sup> The Cultural Revolution's cruelty and chaos resulted in "a deep 'crisis of faith' among the people," who "openly questioned the benefits conferred on them by a rigid, aloof, and seemingly insensitive Communist Party."<sup>34</sup>

In response, the post-Mao Chinese leadership invoked the rule of law to mark a departure from Mao's mercurial one-man rule and the institutional and economic disarray that followed the Cultural Revolution he led. As Yuhua Wang of Harvard puts it –

The post-Mao leadership believed that installing a reliable legal system in which there are constitutional checks on individual power would prevent political disasters such as the Cultural Revolution from happening again. More systematic legal reforms, in which building a professional, efficient, and fair legal system was the essential goal, started in the 1990s as market reforms deepened.<sup>35</sup>

The process of reform began with Deng Xiaoping's speech to the Third Plenum of the Eleventh Central Committee Congress in December 1978.<sup>36</sup>

users while officials examined its cybersecurity practices. Id. As part of the crackdown, China's internet regulator shut off the availability of Didi's apps online. Raymond Zhong. China Orders Didi Off App Stores in an Escalating Crackdown. *The New York Times*. July 4, 2021. Didi was, along with other internet firms, also the target of an investigation by Chinese authorities for violations of China's anti-monopoly laws. See Raymond Zhong; Peter Eavis. Didi's Regulatory Troubles Might Just Be Getting Started. *The New York Times*. July 7, 2021.

<sup>32</sup> Eric W. Orts, The Rule of Law in China, 34 *Vand. J. Transnatl. L.* 43, 57 (2001) (indicating Chinese jurists "adopted the recommendations of Stalinist legal theorists who believed that 'the Communist Party, as the representative of the ruling proletariat, should enjoy absolute control over the creation of positive law by the organs of the state,'" quoting Perry Keller, Sources of Order in Chinese Law, 42 *Am. J. Comp. L.* 711, 720 (1994).

<sup>33</sup> Id. Citing Laszlo Ladany, "Law and Legality" in China: The Testament of a China Watcher 35, 57 (1992) and Albert H.Y. Chen, Toward a Legal Enlightenment – Discussions in Contemporary China on the Rule of Law, 17 *UCLA Pac. Basin L. J.* 125, 126 (Fall 1999–Spring 2000).

<sup>34</sup> Richard Baum, *Burying Mao: Chinese Politics in the Age of Deng Xiaoping*, Princeton University Press, Kindle Edition 3 (1994) ("Baum").

<sup>35</sup> Yuhua Wang at 10.

<sup>36</sup> For an absorbing first-hand account of Deng's historic speech, see You Guangyuan, *Deng Xiaoping Shakes the World – An Eyewitness Account of China's Party Work Conference in the Third Plenum*, Eastbridge Signature Books (2004) 141–148.

The Plenum's response included a mandate to overhaul China's legal system.<sup>37</sup> Peng Zhen, a close associate of Deng Xiaoping installed as chairman of the National People's Congress Legislative Affairs Commission, seized the opportunity of his first public appearance since being purged by Mao in 1966, to "denounce[ ] the legal anarchism spawned by the Gang of Four and strongly asserted the need to restore socialist legality and the rule of law."<sup>38</sup>

That view was reflected in one of the signal pieces of legislation passed by the NPC in 1979 – a new code of criminal procedure that declared "the law is equally applicable to all citizens" and affirmed "no special privilege whatever is permissible before the law."<sup>39</sup> That said, the broad statement of principle was limited by other language reducing the scope of judicial due process and permitting arbitrary government action in a variety of instances.<sup>40</sup>

Further signaling a shift from the Mao era, China adopted an entirely new constitution in 1982 that incorporated basic elements of the rule of law. Article 5 of the constitution provided "No organization or individual may enjoy the privilege of being above the Constitution and the law."<sup>41</sup> Like the 1979 criminal procedure law, however, the protections afforded by Article 5 were limited by caveats tucked elsewhere in the constitution, including a broad escape clause stating the "exercise by citizens . . . of their freedoms and rights may not infringe upon the interests of the state, of society, and of the collective, or upon the lawful freedoms and rights of other citizens."<sup>42</sup>

China did, nonetheless, introduce a means of challenging agencies' administrative decisions as part of its Administrative Litigation Law ("ALL"), which was enacted in 1989, three years into the negotiations on China's eventual accession to the WTO.<sup>43</sup> In the ensuing decade, Chinese citizens made active use of the new rules to challenge agency action.

<sup>37</sup> Baum at 84.

<sup>38</sup> *Id.* Despite his comment, Peng would not prove an ardent supporter of legal reform. To the contrary, Peng became leading voice opposing any effort toward democratic reform, including with respect to the rule of law. See generally Merle Goldman, *Sowing the Seeds of Democracy in China – Political Reform in the Deng Xiaoping Era*, Harvard University Press (1994).

<sup>39</sup> *Id.*, at 84–85.

<sup>40</sup> *Id.*, at 85.

<sup>41</sup> Constitution of the People's Republic of China (1982), art. 5.

<sup>42</sup> Baum at 150.

<sup>43</sup> Chris X. Lin. A Quiet Revolution: An Overview of China's Judicial Reform. *Asian-Pacific Law & Policy Journal*. Summer, 2003.

According to Vice-Chief Justice Li Guoguang of the Supreme People's Court, Chinese courts heard nearly 600,000 cases involving judicial review of agency action in that timeframe, with the plaintiff's prevailing in 40 percent of those decisions.<sup>44</sup>

The process of legal reform continued throughout the 1990s as the WTO accession negotiations ground toward their conclusion. In 1996, President Jiang Zemin reinforced the commitment made in Article 5 of the constitution, promising the Party and the state would rule in accordance with the rule of law.<sup>45</sup> Jiang's promise was later codified as part of China's constitution in 1999 as the accession negotiations approached their end.<sup>46</sup>

Premier Zhu Rongji similarly emphasized the need for progress toward the rule of law in statements contemporaneous with the negotiations over China's accession. In remarks during a 1992 high-level inspection tour of Guangdong, Zhu indicated China had yet to "guide[ ] all economic activities onto the path of rule of law," leaving too much room for arbitrary "interference with enterprises."<sup>47</sup> Similarly, in the area of finance, Zhu emphasized in 1995 the need for the impartial application of the law in terms of financial oversight, warning, "If finance doesn't get on track and recognize the rule of law, there won't be any order in the entire national economy."<sup>48</sup>

Thus, just like China's reform of state-owned enterprises and its shift toward a greater reliance on markets to organize economic activity, progress toward the rule was significant, if incomplete. China had created what Professor Randall Peerenboom refers to as a "thin" version of the rule of law.<sup>49</sup>

<sup>44</sup> Id.

<sup>45</sup> Jiang Zemin, Report to the 15th National Congress of the Communist Party of China (1996).

<sup>46</sup> Yuhua Wang, *Tying the Autocrat's Hands – The Rise of the Rule of Law in China*, Cambridge Studies in Comparative Politics, Cambridge University Press, Kindle Edition 17 (2015) ("Yuhua Wang").

<sup>47</sup> Zhu, Rongji, Guangdong's Practice Demonstrates the Success of the Policy of Reform and Opening Up, Remarks During an Inspection Tour of Guangdong After Listening to Reports by the Provincial Party Committee and Provincial Government, September 28, 1992, in Zhu Rongji on the Record 102, 105, Brookings Institution Press, Kindle Edition (2013).

<sup>48</sup> Zhu, Rongji, A Memorable Two Years as Governor of the Central Bank, Remarks During a Discussion with Attendees at an Advanced Seminar on Financial Law Organized by the People's Bank of China, August 28, 1995, in Zhu Rongji on the Record 286, 289, Brookings Institution Press, Kindle Edition (2013).

<sup>49</sup> See Statement of Randy Peerenboom, Professor of Law, University of California Los Angeles Law School What's a Liberal to Do? The Pursuit of Non-liberal Rule of Law in

By the time of the final negotiation of China's protocol of accession late in the 1990s, the direction of both economic and legal reform was evident to China's interlocutors in the WTO and persisted through China's accession in 2001. Jiang and Zhu's successors, President Hu Jintao and Premier Wen Jiabao, continued the reform effort in the years following China's WTO accession.

The continuing overhaul of China's legal regime took a substantial step forward in 2004 with the national people's Congress approval of thirteen amendments to the constitution.<sup>50</sup> Those amendments made general commitments to human rights and private property, although they did not limit the government's ability to repress speech or public protests deemed inimical to national security.<sup>51</sup>

The "partial withdrawal" by the party allowed "the development of a 'rule of law with Chinese characteristics,'" as Jiang had promised.<sup>52</sup> As one commentator notes, "it is no exaggeration to state that, across the span of more than a century, Chinese citizens had not enjoyed such a degree of legal protection and security," despite the caveat that the state might intervene where its "core interests" were at stake.<sup>53</sup>

Reforms in the legal regime led Chinese citizens to make use of the courts to enforce their rights. While they were often disappointed, the outcomes galvanized social protests, which not infrequently led to significant concessions on the government's part.<sup>54</sup> These "mass incidents" led to revised legal and regulatory decisions and further amendments to the law itself.<sup>55</sup>

China, Congressional-Executive Commission on China Roundtable (April 1, 2003). ("Conceptions of rule of law generally come in two varieties. A thin conception stresses the formal or instrumental aspects of rule of law – those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic. Although proponents of thin conceptions of rule of law define it in slightly different ways, there is considerable common ground. The key features are that there must be rules for lawmaking and laws must be made in accordance with such rules (including by the courts through precedent) to be valid; laws must be general, public, prospective, relatively clear, consistent, stable, impartially applied and enforced so that the gap between law and practice is relatively small.")

<sup>50</sup> Klaus Mühlhahn, *Making China Modern*, Harvard University Press, Kindle Edition 590 (2019).

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Id., at 590–591.

<sup>55</sup> Id.

What that suggests is progress toward the rule of law continued well into the Hu and Wen era in the years immediately following China's accession to the WTO. But the process of reform overall began to slow as conservative forces within the CCP sought to limit further change. That period coincided with the rise of the so-called "princeling generation" (the sons and daughters of the early leaders of the CCP) to leadership positions within the party and the Chinese economy.<sup>56</sup> In addition to jockeying for leadership positions in the Party hierarchy and state-owned enterprises, the princelings, unsurprisingly, resisted reform that diminished their privilege and position.<sup>57</sup>

While styling himself as a reformer, Xi Jinping has proved as resistant to further reform as any of the other princelings. In sharp contrast to Deng, Jiang, and Zhu, Xi pursued retrenchment, rather than reform, with the state playing an increasing, rather than diminishing, role in the economy and the lives of Chinese citizens.<sup>58</sup> Under Xi, China has witnessed greater state intervention in the economy and the consolidation and reinforcement of state-owned enterprises relative to the private sector.<sup>59</sup> In terms of economic policy, the China of today is not the China that joined the WTO two decades ago.

The same holds true in terms of China's legal regime. As noted at the outset, Xi has pursued a vision of "socialist rule of law with Chinese characteristics" fundamentally inconsistent with Jiang Zemin's 1997 vision.<sup>60</sup> Toward that end, the Central Committee of the CCP recently adopted a five-year plan to establish the rule of law in China consistent with "Xi Jinping Thought."<sup>61</sup>

<sup>56</sup> See, e.g., Cheng Li, *Rule of the Princelings*, Brookings Institution (February 10, 2013) ("It has been widely noted that large numbers of prominent party leaders and families have used their political power to convert state assets into their own private wealth. The unprecedentedly strong presence of princelings in the new [Politburo Standing Committee] is likely to reinforce public resentment of how power and wealth continue to converge in China. Chinese politics thus seem to be entering a new era characterized by the concentration of princeling power at the top."); David Barboza and Sharon LaFraniere, "Princelings" in China Use Family Ties to Gain Riches, *The New York Times* (May 17, 2012) (Illustrating "how the Communist Party shares the spoils, allowing the relatives of senior leaders to cash in on one of the biggest economic booms in history").

<sup>57</sup> See, e.g., Ian Johnson, *Dynasty of Different Order Is Reshaping China*, *The New York Times* (Nov. 13, 2012) (Highlighting instances in which the princeling generation have become obstacles to further economic reform).

<sup>58</sup> Lardy, *The State Strikes Back*.

<sup>59</sup> *Id.*

<sup>60</sup> Xi Jinping Thought on the Rule of Law.

<sup>61</sup> *Id.*

The overall theme of the plan reinforces Elizabeth Economy's impression of Xi and China's "neo-Maoist moment."<sup>62</sup> The plan summarizes Xi's thoughts on the rule of law as "[s]trengthening the CPC's centralized and unified leadership, 'scientific legislation', strict law enforcement, fair trials, a law-abiding population."<sup>63</sup> Xi plainly "appreciates the legitimating power of law," regularly promising "law-based governance," even while strengthening the CCP's "absolute" control over the legal regime.<sup>64</sup> Notably absent are concepts like an independent judiciary or the principle of separation of powers, which China's leadership regards as "erroneous western thought."<sup>65</sup>

From the perspective of western legal tradition, Xi's formulation misstates the rule of law, which entails "meaningful restraints on the state and individual members of the ruling elite."<sup>66</sup> To those familiar with China's long legal tradition, the summary will nonetheless sound familiar – it represents rule by law, rather than the rule of law.

With that in mind, we turn to the WTO implications of Xi's "counter-reformation."

### III The WTO's Role and the Concept of Nullification and Impairment

At a distance of twenty years, it is easy to forget how significant China's concessions actually were. To join the WTO, China assumed the obligations of more than twenty existing multilateral agreements; reduced tariffs substantially on industrial and agricultural goods; liberalized its service sector significantly; consented to the creation of special safeguard mechanisms for the benefit of industries in other WTO member countries; and

<sup>62</sup> Elizabeth Economy, *China's Neo-Maoist Moment – How Xi Jinping Is Using China's Past to Accomplish What His Predecessors Could Not*, *Foreign Affairs* (Oct. 1, 2019).

<sup>63</sup> Xi Jinping Thought on the Rule of Law.

<sup>64</sup> Jamie Horsley, *Party Leadership and the Rule of Law in the Xi Jinping Era – What Does an Ascendant Chinese Communist Party Mean for China's Legal Development?* *Global China*, Brookings Institution (September 2019).

<sup>65</sup> *Id.*

<sup>66</sup> Randall Peerenboom, *China's Long March toward Rule of Law*. Cambridge University Press, (2002) ("Peerenboom Long March"). See further Randall Peerenboom. *A Government of Laws Democracy, Rule of Law, and Administrative Law Reform in China* in Zhao Suisheng – *Rule of Law vs. Democratization* (ed.). *Debating Political Reform in China*. Routledge, (2015). ("In a rule of law state, law is not just a tool to be used by the ruling regime to control the people or promote the interests of the privileged few. Law also binds government leaders and officials. One of the main purposes of rule of law is to limit the arbitrary acts of the government and impose meaningful constraints on the ruling elite.")

undertook systemic reforms designed to promote transparency, predictability, and fairness in commercial dealings.<sup>67</sup>

Critics of China's WTO accession rarely acknowledge the extraordinary effort the Chinese government undertook to ensure compliance with China's protocol of accession and the underlying WTO rules.<sup>68</sup> In addition to the substantive changes to China's legal regime necessary to comply with the WTO rules and China's protocol of accession, China also agreed to make a series of significant systemic reforms that bear directly on its commitment to the rule of law.<sup>69</sup> Those changes, as implemented, imposed limits on the Chinese government as a matter of domestic, as well as international, law.<sup>70</sup>

Just as important, however, China's economic reforms expanded the contestability of its market, and Jiang and Zhu's commitment to expanding the rule of law promised greater certainty of market access, ensuring the bargain reached at the WTO negotiating table, rather than intervention or favoritism by the Chinese government, would determine market outcomes. In the absence of those reforms, China's WTO trading partners

<sup>67</sup> Accession of the People's Republic of China, Decision of 10 November 2001, WTO/L/432, 23 November 2001.

<sup>68</sup> Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, Washington University Global Studies Law Review (January, 2003) (According to Clarks, the Chinese trade ministry alone had, prior to China's accession, reviewed "over 1400 laws, regulations, and similar documents, including six statutes (of which five were revised), 164 State Council regulations (of which 114 were to be repealed and 25 amended), 887 of its own ministry regulations (of which 459 were to be repealed and 95 amended), 191 bilateral trade agreements, 72 bilateral investment treaties, and 93 tax treaties." Various other ministries and certain commissions of the State Council reviewed "some 2300 laws and regulations, of which 830 were identified as in need of repeal and 325 as in need of revision.") ("Clarke").

<sup>69</sup> The reforms pertinent to the rule of law included publication in official journals of all laws, regulations and other measures affecting commerce, as well as their effective dates and the agencies or authorities responsible for their implementation; procedures for providing notice and comment on proposed legislation and regulations; universal and impartial application of the law at all levels of government; and the availability of judicial review with respect to certain regulatory actions and administrative decisions. Accession of the People's Republic of China, Decision of 10 November 2001, WTO/L/432, 23 November 2001.

<sup>70</sup> The changes introduced in Chinese administrative law to provide independent judicial review of agency determinations under China's anti-dumping and countervailing duty laws offer a concrete example. The scope of review and the decisional rule to be applied by Chinese courts in their review of antidumping and countervailing duty actions broke significant new ground, as did the specific requirement of independent and impartial review, leading some Chinese legal scholars to hail the "rules as China's first step toward real judicial review."

would have asked for stronger explicit guarantees as part of the protocol of accession.

Why does this matter? Is easy to think of the WTO as an institution – the sturdy Centre William Rappard overlooking Lac Lemman in Geneva. But, by its nature, WTO represents a contract among the signatories. China's protocol of accession offers a concrete example.

As is true of contracts in domestic law, the WTO agreements contain specific binding commitments, violation of which create legal consequences. But, again like domestic contract law, a cause of action also lies when a WTO member's actions frustrate the purpose of the contract, even though they may not violate a specific WTO rule or trade liberalizing commitment.<sup>71</sup>

In that, the WTO is about expectations – in this instance, the expectations of market access that would reasonably accrue from China's protocol of accession. For that reason, the acid test of China's compliance with its WTO obligations lies not just in its adherence to the letter of WTO law, but whether its policies and practices afford the market access its WTO trading partners reasonably expected would accrue from China's accession. In so far as it relates to the rule of law, China's compliance depends on the extent to which it –

fosters a broader respect for the rule of law within China, a far lesser role for the state and the Communist Party in the operation of the Chinese economy, and the steady erosion of the system of *guanxi* – the connections that dominate both China's politics and its commerce.<sup>72</sup>

<sup>71</sup> See, e.g., Uniform Commercial Code § 1-304 – Obligation of Good Faith: “Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.” The UCC defines “good faith” as “honesty in fact and the observance of reasonable commercial standards of fair dealing.” UCC § 1-201 (2); Restatement (Second) of the Law of Contracts § 205 – Duty of Good Faith and Fair Dealing (indicating “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement,” which implies an injunction against practices such as “evasion of the spirit of the bargain” and “willful rendering of imperfect performance”); see also Catherine Pastrikos Kelly, *What You Should Know about the Implied Duty of Good Faith and Fair Dealing*, Practice Points, American Bar Association (Jul. 26, 2016). (“In general, every contract contains an implied duty of good faith and fair dealing. This duty requires that neither party will do anything that will destroy or injure the right of the other party to receive the benefits of the contract.”)

<sup>72</sup> Testimony of the Honorable Grant D. Aldonas, *Ten Years in the WTO: Has China Kept Its Promises?*, Congressional-Executive Commission on China (December 13, 2011) (“Aldonas 2011 Testimony”).

Seen in that light, Xi Jinping's retrenchment in economic reform and his pursuit of a "socialist rule of law with Chinese characteristics" has significant implications for China's WTO compliance. Explaining how and why requires an understanding of the concept of nullification and impairment embodied in Article XXIII of the General Agreement on Tariffs and Trade 1994 as interpreted by subsequent dispute settlement panels and the WTO Appellate Body.

The WTO rules allow for two types of claims in dispute settlement. One cause of action lies in clear violations of the rules.<sup>73</sup> The other allows for a claim of "nullification and impairment" when a member's actions frustrate the bargain the parties reached through negotiation regardless of whether the actions violate specific WTO rules or commitments.<sup>74</sup>

In the relevant part, Article XXIII provides –

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as the result of ...

b. the application by another contracting party of any measure, whether or not it conflicts with the provisions of this agreement ...

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.<sup>75</sup>

The purpose of Article XXIII:1(b) is "to protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member's legitimate expectations of benefits from tariff negotiations."<sup>76</sup> In that, Article XXIII does no more than vindicate the core principle of

<sup>73</sup> In Article 3 of the Understanding on Dispute Settlement concluded as part of the Uruguay Round of multilateral negotiations, WTO members "affirm[ed] their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947." See Art. 3:1, Understanding on Dispute Settlement. Article XXIII:1 authorizes a WTO member to request consultations and begin the dispute settlement process where it considers that "any benefit accruing to it directly or indirectly" is being "nullified or impaired or that the attainment of any objective of the agreement is being impeded as a result of ... (a) the failure of another contracting party to carry out its obligations under this Agreement...." Art. XXIII:1 (a), GATT 1994.

<sup>74</sup> Art. XXIII:1 (b), GATT 1994.

<sup>75</sup> Id.

<sup>76</sup> Japan – Measures Affecting Consumer Photographic Film and Paper, Report of the Panel, para. 1050, WT/DS44/R, World Trade Organization (31 March 1998).

international treaty law – *pacta sunt servanda* – the obligation to implement a treaty in “good faith.”<sup>77</sup>

Drawn from the work of the League of Nations on international trade in the 1920s and bilateral trade agreements of the 1930s,<sup>78</sup> the provision of “non-violation nullification and impairment” formed a part of the originally suggested charter of the International Trade Organization and, ultimately, Article XXIII of the GATT 1947.<sup>79</sup> The clause satisfied the recognized need for a “more general provision which would address itself to any other government action that produced an adverse effect on the balance of commercial opportunity.”<sup>80</sup>

As explained by Frieder Roessler, former Director of the GATT’s Legal Affairs Division, and his colleague at the Advisory Centre on WTO Law, Petina Gappah –

The possibility of bringing complaints relating to perfectly legal measures was introduced into the GATT because its founders realized that the intended effect of a tariff negotiation could be easily frustrated by measures that the GATT did not regulate ... As the GATT did not contain any substantive commitments on such internal measures, a procedure for the adjustment of tariff concessions following the introduction of such measures was required. The purpose of Article XXIII:1(b) was to provide such a procedure.<sup>81</sup>

Although non-violation nullification impairment disputes have proved rare, the decisions in those cases have featured prominently in GATT and WTO jurisprudence. The first non-violation dispute, a Chilean action raising concerns with respect to Australian subsidies affecting ammonium

<sup>77</sup> Art. 26, Vienna Convention on the Law of Treaties (adopted and opened to signature on 23 May 1969; entered into force on 27 January 1980). The Vienna Convention is recognized by non-ratifying parties, such as the United States, as a restatement of customary international law and binding upon them as such.

<sup>78</sup> James Durling and Simon Lester, Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy, 32 *Geo. Wash. J. Int’l L. and Econ.* 212 (1999) at 216–219, 225–230.

<sup>79</sup> See John Jackson *World Trade in the Law of GATT*, The Miche Company (1969) 166–171.

<sup>80</sup> Robert Hudec, *The GATT Legal System and World Trade Diplomacy*, 2nd ed., Butterworth Legal Publishers (1990) 24 (citing the work of trade experts at the London Monetary and Economic Conference of 1933, League of Nations, Reports Approved by the Conference on 27 July 1933 and Resolutions Adopted by the Bureau and the Exec. Comm. (Official No.: C.435.M. 220. 1933.II. Spec 4) at 30).

<sup>81</sup> Frieder Roessler and Petina Gappah, A Re-Appraisal of Non-Violation Complaints Under the WTO Dispute Settlement Procedures, in *The World Trade Organization: Legal, Economic and Political Analysis* (2005) 1371–1387.

sulfate, arose shortly after the GATT's inception and established the basic elements of a non-violation cause of action.<sup>82</sup>

Australia had granted war-time subsidies to local distributors for the purchase of fertilizers, including sodium nitrate fertilizers exported by Chile. The subsidies remained in force when, in 1947 as part of the negotiations leading to the launch of the GATT, Australia granted a tariff concession to Chile affording Chilean exports duty-free treatment. When Australia subsequently removed the subsidy on Chilean fertilizer, while leaving the subsidy to competing products in place, it created a competitive advantage for suppliers of the competing goods.

The panel report found in favor of Chile, explaining nullification or impairment existed "when the action of the Australian government ... resulted in upsetting competitive relationship" between Chile's exports and the competing fertilizers, an action which "could not reasonably have been anticipated but the Chilean government, taking into consideration all pertinent circumstances and the provisions of the General Agreement" at the time it was negotiated.<sup>83</sup>

The panel based its decision on the need to maintain the balance of advantages achieved at the negotiating table.<sup>84</sup> Professor Robert Hudec explained the panel's rationale in the following terms –

The purpose of the nullification impairment remedy is to preserve the balance of the original exchange of values. If some new commercial disadvantage measure can be foreseen, at the time of negotiations, the country receiving concessions is able to discount the possibility in advance by paying a lesser value for the concessions affected. If that is so, then the actual occurrence of the foreseen disadvantage will not upset the balance, for it will already have been taken into account. Conversely, if the new commercial disadvantage cannot be anticipated, the country receiving the concessions is more likely to pay full value and thus suffer an imbalance when the commercial advantage is later reduced.<sup>85</sup>

Subsequent litigation under both the GATT and WTO followed the same logic. In the EEC – Oilseeds dispute, the United States complained European Economic Community ("EEC") subsidies afforded producers and processors of oilseeds nullified or impaired tariff concessions previously granted American oilseed exports by the EEC as part of the 1960

<sup>82</sup> Australia – Measures Affecting Ammonium Sulfate, GATT/CP. 4/39, GATT BISD II/188 (3 April 1950).

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> Hudec at 163.

Dillon Round of GATT negotiations.<sup>86</sup> The panel endorsed the rule established in the Australian ammonium sulfate dispute, affirming that nullification or impairment resulted when benefits reasonably expected to accrue from previous negotiations were undercut by unforeseen actions or measures of another party.<sup>87</sup> Following up on its earlier decision, the Oilseeds panel also held that complainants in non-violation cases need not demonstrate an actual impact on levels of trade to prove their case, finding “the subsidies concerned had impaired the tariff concessions because they upset the competitive relationship between domestic and imported oilseeds, not because of any effect on trade flows.”<sup>88</sup>

The panel report in Japan – Film, the first non-violation complaint under the WTO dispute settlement rules, similarly found nullification and impairment occurred when unforeseen actions by one WTO member designed to “strengthen the competitiveness of certain distribution or industrial sectors through non-financial assistance” undermine benefits reasonably expected to accrue from prior negotiations.<sup>89</sup> The United States had complained that a series of actions by the Japanese government nullified or impaired the benefits of tariff concessions previously granted on black and white and color photographic film and paper.<sup>90</sup> Those actions included the creation of an exclusive distribution sector, restrictions on the growth of large stores, and restrictions on the use of sales promotions.<sup>91</sup> While the panel found the United States failed to satisfy its burden of proof, it emphasized that non-trade measures such as those raised by the United States could nullify or impair benefits the United States reasonably expected to accrue from previous negotiations.<sup>92</sup>

The logic established in the panel decisions cited above applies with equal force to Xi Jinping’s retrenchment from economic reform and his abandonment of progress toward the rule of law. China made its initial request to accede to the GATT in 1986, in the midst of Deng Xiaoping’s

<sup>86</sup> Panel Report on European Economic Community Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, Jan. 25, 1990, GATT BISD (37th Supp.) (1991).

<sup>87</sup> *Id.*

<sup>88</sup> Follow-up on the Panel Report on Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, Apr. 30, 1992, GATT BISD (39th Supp.) at 115 (1993).

<sup>89</sup> WTO Report of the Panel on Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS 44/R (March 31, 1998).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

push for economic reform and barely four years after the introduction of China's new constitution in 1982.<sup>93</sup> The negotiations took place against the backdrop of Deng's reforms and those of his successors, Jiang Zemin and Zhu Rongji, including Jiang's pronouncement at the 14th National Congress of the Communist Party identifying a "socialist market economy" as the goal of China's reforms.<sup>94</sup>

The negotiations, furthermore, did not conclude until a decade after significant changes were made in China's legal regime, such as the introduction of judicial review of agency action. Reinforcing those reforms, China agreed in the final protocol of accession to ensure the impartial administration of justice.<sup>95</sup> It agreed, as well, to introduce a judicial review of "all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative review rulings of general application" under certain aspects of its trade laws and include the opportunity for appeal to the Chinese courts.<sup>96</sup>

With that as context, China's WTO trading partners had reason to expect that China would continue on the path toward economic and legal reform. They could not reasonably have foreseen Xi's resurrection of Mao-like one-man rule or his appeal to a mix of Marx, Mao, and Confucianism in lieu of the rule of law. His consolidation and reinforcement of state-owned enterprises have fundamentally altered the basis of competition in a number of industries relative to the conditions that prevailed at the time of accession. The inability of the government under Xi to curtail government violations of private property rights has made doing business far more uncertain. Xi's actions (or inaction) have made significant parts of the Chinese market less contestable than China's trading partners could

<sup>93</sup> The process of requesting accession began with the following missive – China Status as a Contracting Party: Communication from the People's Republic of China, GATT Doc. L/6017 (Oct. 26, 1984).

<sup>94</sup> Jiang Zemin, Accelerate Steps of Reform and Opening Up and the Development of Modernization, Seize Greater Success in the Endeavor on Socialism with Chinese Characteristics, Report at the 14th National Congress of the Communist Party, [www.gov.cn/test/2007-08/29/content\\_730511.htm](http://www.gov.cn/test/2007-08/29/content_730511.htm) (Oct. 12, 1992).

<sup>95</sup> The Protocol on the Accession of the People's Republic of China provides "China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub national level (collectively referred to as 'laws, regulations and other measures') pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights ("TRIPS") or the control of foreign exchange." Accession of the People's Republic of China, Decision of 10 November 2001, WTO/L/432, 23 November 2001.

<sup>96</sup> *Id.*

have foreseen at the time of China's accession. And Xi's efforts to erode even the thin version of the rule of law that previously prevailed has cast a pall of uncertainty over access to the Chinese market.

To make the argument more concrete, consider the economic effect of the increasing subsidies that both the national and local governments in China have bestowed on select industries and enterprises during Xi's tenure. Subsidies are usually decried as a benefit to China's exporters that distorts trade and injures industries in the importing country. But those same subsidies are the equivalent of tariffs in terms of the protection they afford local Chinese companies in their home market. The increased subsidies offered under Xi's aegis undercut China's tariff bindings – the most basic commitment China made as a part of its accession.

Xi's abandonment of reform and retrogression in terms of the rule of law can, as a consequence, quite fairly be said to have nullified or impaired China's trading partners' reasonable expectation of market access. Indeed, it is highly likely the WTO membership would have rejected China's request for accession in the absence of the reforms Xi has unwound. At a minimum, China's trading partners would have bargained for more in the way of rules guaranteeing market access, ensuring it is determined by price and quality, rather than *guanxi* and connections to the *Zhongnanhai* in Beijing.

China cannot, moreover, claim it failed to appreciate its obligation to maintain the contestability of its market. Not only is the claim of nullification and impairment plainly set out in Article XXIII, but the negotiation of China's protocol of accession took place against the backdrop of high-profile litigation over the issue between the United States and the European Union and the United States and Japan.<sup>97</sup> The legal standard of "reasonable expectations of market access" played a core role in both of those high-profile cases.<sup>98</sup>

In sum, thinking in terms of nullification and impairment casts the question of China's compliance in an entirely different light. The question becomes whether the Chinese market is more contestable today than it was when China acceded to the WTO. Considering the changes President Xi has made to the Chinese economy over the past ten years, the answer is clearly no – Xi's retrenchment on economic and legal reform has led to a far less open and contestable market and less certain market access.

<sup>97</sup> See discussion of EEC – Oilseeds and Japan – Film disputes above.

<sup>98</sup> *Id.*

#### IV Conclusion

I am under no illusion that General Secretary Xi or the rest of the current Chinese leadership would currently be inclined to return to the path of reform. But political currents do change. Should Xi and the CCP leadership confront growing demands in China for a new era of reform, the prospect of facing a WTO dispute settlement case that asserted Xi's retrenchment had nullified and impaired the benefits China's trading partners reasonably expected would accrue from China's accession could offer the Chinese leadership a reason to pursue reform once again.

As a matter of trade diplomacy, the wise thing for China's trading partners to do would be to lay the groundwork – developing the legal and economic basis for a claim of non-violation nullification and impairment – to discuss with their Chinese counterparts. As a part of that process, China's trading partners should make clear what their expectations are in terms of solution (i.e., what it would take on China's part to ameliorate the injury caused by its measures or, alternatively, the “compensation” in terms of trade concessions they believe are due).

China's trading partners should make clear their preference for reform, rather than concessions, while recognizing Xi and his generation are unlikely to take that path, at least initially. But China confronts challenges of its own that only economic and legal reform can fundamentally address. The aim of China's trading partners should be to open the door China's leaders must eventually walk through. While making China's own challenges more tractable, returning to the path of reform would go some considerable distance toward addressing the concerns raised by China's trading partners. That alone would serve China's foreign policy interests by removing an already boiling pot from the stove.