

Is China Killing The WTO?

BY SUSAN ARIEL AARONSON

Chinese officials are ignoring both international and local law for companies that produce for export.

For fifteen long years, the members of the GATT/WTO debated whether they would be better off with China as a member. Trade policymakers understood that the international organization could not pretend to govern world trade with such an important trading nation outside of the World Trade Organization. They wagered that China's trade policy would become more predictable, accessible, and transparent. Moreover, they concluded that member states could collaborate, using the WTO's rules, to prod China to act responsibly as a global trader. China acceded to the WTO in 2001.

To some degree that bet has "paid off," producing benefits for the citizens of China and other countries. Trade has helped China lift some four hundred million people out of poverty and has provided more of the Chinese people with greater access to opportunities. Foreign investors and producers now serve China's growing market, while consumers worldwide can purchase a broad range of well-made affordable goods made in China. Meanwhile, Chinese demand for goods and raw materials has created jobs and stimulated economic growth in many developing countries. The World Bank notes that the efficiency and scale of China's manufacturing has pushed down the prices of many manufactured products relative to other goods and services.

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China today is now the world's third-largest trading nation, the world's largest recipient of investment, the world's fastest growing consumer market, and the world's leading provider of manufactured goods. China's regulatory and trade practices can move global markets.

But China's competitive advantage is to some degree based on its inadequate governance—it fails to enforce its own laws in a transparent, evenhanded manner. China's system is broken. And because it is broken, its inadequate governance affects its trade partners—and ultimately, could break the WTO.

On the one hand, China's leaders have tried very hard to comply with the country's WTO obligations. China has changed many of its laws and met most of its market access commitments. On the other hand, it has yet to meet many of the obligations delineated in its protocol of accession. European and American business groups investing in China perceive China as becoming more interventionist and protectionist.

As the world's most populous country, China is in many ways an outlier. It is both an ancient empire and developing country with two key attributes: authoritarian governance and inadequate governance. At the national level, the Communist Party is at times willing to ignore its international commitments in order to maintain power. Moreover, the Communist Party owns and operates, or is tied to, private enterprises in key sectors such as transportation, energy, and banking. Some have described the government as both a market competitor and a referee.

China's inadequate governance at the provincial level also reflects many factors including corruption, a lack of uniformity among rules, and arbitrary abuse of power. Local officials often have financial stakes in the same companies they are supposed to regulate. The Communist Party and business are deeply intertwined, and thus governmental mandates from Beijing may be ignored or circumvented. Finally, China has a culture of noncompliance, where bad actors set the norm, where laws and regulations are often ignored or unevenly enforced, and where many citizens and market actors don't know or can't obtain their rights under the law.

WTO members deliberated a long time before they let China join the WTO. And they used the accession to hold China on a tight leash. The 2001 Protocol on the Accession of the People's Republic of China explicitly calls on China to “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...pertaining to or affecting trade.... China shall establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform

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application.” It also calls on China to ensure that “those laws, regulations, and other measures pertaining to and affecting trade...shall be enforced.” The rule of law was a key element of China's accession agreement because trade policymakers understood that how China was governed could distort trade in many of the sectors in which China competes.

In recent years, China has become infamous for its failure to enforce its own laws, whether those laws related to intellectual property, product or food safety, human rights, or employment. In both its 2006 and 2008 Trade Policy Review at the WTO, member states lauded Chinese trade diplomats for their export prowess, but also complained that China was not transparent, accountable, or sufficiently evenhanded. Nor could they trust Chinese statistics on trade, economic growth, bank stability, intellectual property protection, and other aspects of enforcement.

Despite their frustrations with China and the weakness of the WTO, WTO members have the ability to address its inadequate governance. Scholars such as Robert Staiger, Kyle Bagwell, Petros Mavroidis, and Drusilla Brown have identified a means under WTO rules to challenge China's trade practices. As Brown has noted, “Under GATT Article XXIII, any country in the WTO is entitled to a ‘right of redress’ for changes in domestic policy that erode market access commitments even if no explicit GATT rule has been violated. Such a ‘non-violation’ complaint entitles the aggrieved party either to compensation in the form of other tariff concessions to ‘rebalance’ market access commitments or the complaining partner may withdraw equivalent concessions of its own.” Legal scholars agree with this interpretation. According to Joost Pauwelyn, professor of international law at the Graduate Institute of International Studies in Geneva, “In non-violation cases a WTO panel could, indeed, be called upon to refer to non-WTO rules [...] in its assessment of whether certain governmental measures, though not in violation of WTO rules, have affected the ‘legitimate expectations’ that could have been derived from a trade concession.” A complaint based

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on this argument might proceed as follows: When China joined the WTO, Chinese leaders agreed to enforce their laws and provide duty-free access for our products such as iPods or Heineken beers. We anticipated that you would respect international standards (for consumer safety, product safety or workers rights, for example.) But a wide range of observers—Chinese and foreign—have carefully researched Chinese practices and have reported that Chinese officials ignore both international and local laws in factories that produce for export (such as those that supply foreign companies) as well as Chinese factories that compete with Apple or Heineken. Thus, your country has violated these non-WTO rules, and in so doing has impeded our access to markets; thus, we are requesting compensation for the value of that lost access.

Such a trade dispute may not succeed because it would be hard to prove that market access was undermined by China's failure to enforce its own laws and international standards. But a multilateral approach would bring the issue to global attention and could move China to do a better job of

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educating managers, policymakers, and workers on the importance of the rule of law.

China's membership in the WTO has no doubt provided benefits for the people of the world. But China is exporting its inadequate governance. At the WTO, member states can work collectively to encourage China to change its behavior. And in so doing, they may bolster the WTO. A broken China need not destroy the WTO. ◆