Commentary on ''Trade, Investment and Beyond''

Huang Dongli

In her article, Julia Ya Qin draws conclusions from the accession of China to the WTO which reflects the effects of WTO obligations on China's constitutional law, the development of foreign trade law, the foreign investment regime, intellectual property rights protections and general rule-of-law conditions. With respect to foreign trade law, the foreign investment regime and intellectual property rights protections, it is not difficult to observe the legal consequences the accession has brought and will bring to China. However, Qin's article goes beyond these general observations and provides profound insights on significant effects of the WTO obligations on China's economic reforms as well as rule of law processes. This essay comments on arguments she has presented on these issues.

The Significance of the WTO Obligations to China's Economic Reform

Public ownership was the political foundation of the Chinese Communist Party. Before the open-door policy in 1978, all enterprises, by and large, were owned by the government and private business transactions were illegal. The government controlled the market completely by enforcing a national uniform price policy, conducting strict trade control and making all commercial decisions on behalf of enterprises. During the years from 1978 to the third amendment of China's Constitution in 1993, there were heated political and theoretical debates over whether or not China would allow partial private ownership. These debates reflected the political struggle between the reformers and the conservatives within the Communist Party. Although the 1993 Constitutional Amendment replaced a planned economy with a socialist market economy, domestic economic policies may still be altered for political reasons. However, the accession of China to the WTO has, as Qin points out, made a market-based economy ''no longer merely a matter of [China's] domestic policy, but also a matter of international legal obligation'' and ''so long as China remains a WTO member, it may not negate its market economy commitments without incurring the consequences of breaching WTO obligations.''

The Impact of the WTO Accession on China's Rule of Law Processes

As pointed out by Qin, the WTO accession has played a positive role in improving the rule of law conditions of China. However, her article gives insufficient explanation of the WTO impact on China's rule of law aspect.

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The notion of the rule of law has never been part of traditional Chinese culture. In over 3,000 years, Chinese people have not imagined a possible contractual relationship with their governments. The relationship between the governments and the people has always been that of master to servants. The WTO accession has somehow forced the Chinese government to change the way it manages the country and, more fundamentally, it has actually helped to change how the Chinese people view their relationship with the government. This is an overturning of the traditional national consciousness. It makes possible a true understanding by the Chinese people of the meaning of the rule of law, forming the foundation to the possibility of democracy in China.

Whereas rule of law is not an abstract concept, its realization depends upon certain indispensable conditions including transparency, uniformity and impartiality. These principles are in conflicts with the routine practice of the Chinese government. Thus, any change of status would not be without opposition. It is well accepted that political considerations formed part of China's rationale to accept the harsh demands for WTO accession. The reformers in the Communist Party hoped that external forces would ease opposition to the reforms. And the accession did achieve that goal. Both before and after WTO accession, China made great efforts towards institutional reforms in order to comply with WTO obligations. These included amending and revoking over 2,000 trade-related laws and enacting new laws. Many of the intellectual property laws were enacted just before or immediately after China's accession. At the same time, WTO accession was utilized as an opportunity to promote the rule of law concept. Nationwide education regarding the WTO, including its principles and requirements, was conducted, especially among government officials. Today, such education is still ongoing among government officials working in trade-related fields. Among these efforts, the most important steps the government has taken are measures on "nondiscrimination, fair competition, transparency, due process and judicial review." As pointed out by Qin, "as WTO principles and concepts acquire a normative force in China, their overall impact on the construction of rule of law may well be more profound in the long run than the WTO-conforming changes at the institution level."

In addition, WTO accession makes two other contributions to rule of law construction in China. First, the WTO judicial review requirement helped the Chinese to realize the importance of judicial independence. The requirement triggered intensive nationwide discussions on issues related to domestic judicial review immediately after accession. Secondly, the WTO dispute settlement decisions demonstrate to China how a non-common law system can develop a system in which case law matters. In China, professional incompetence causes technical problems in adequate applications of laws which seriously impede uniformity and predictability of the law and thus the authoritativeness of the judicial system. Some scholars argue that this makes the Chinese judiciary incapable of functioning independently. However, the WTO quasi-precedent and dispute settlement practice has provided a successful model for China,

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countering the argument that Chinese courts cannot adopt a precedent system because China has a civil law system. Respect for precedents and emphasis on case law will require courts to be more careful about their legal reasoning, which may help Chinese courts to gain judicial independence.

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