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INSTITUTIONAL IMPLICATIONS OF WTO ACCESSION FOR CHINA¹

by *Richard H. Steinberg*

INTRODUCTION: WTO MEMBERSHIP, RULES, AND INSTITUTIONAL STRENGTH

FOR FIFTY YEARS, the General Agreement on Tariffs and Trade (GATT) system has fostered the development of liberal multilateralism. Originally a short, fifty-page set of rules that governed trade between just twenty-three Contracting Parties, and applying only provisionally because of the failure of several countries to ratify it, the GATT system has evolved into one of the world's most well-developed international organizations. The GATT's organizational successor, the World Trade Organization (WTO), boasts over 130 Members that have ratified its founding charter and thousands of pages of substantive rules. Perhaps most significantly, the Uruguay Round negotiations bestowed upon the GATT/WTO system revised rules of government, which some have predicted will vastly improve the regime's institutional strength.² With new dispute settlement rules, clarified rules of procedure for decision-making by the Members, and the formal establishment of a genuine secretariat,³ many claim that the world's preeminent trade institution is stronger than ever. Their hope is that this revitalized institution can govern itself effectively, advancing international political order and rules-based liberal multilateralism.

This paper considers the possible effects of China's accession to the WTO on the WTO's institutional strength—how China's accession could affect WTO governmental processes and the extent of political support for the organization from leading Western trading countries. During the past ten years, in which China has (of course) not been a GATT Contracting Party or a WTO Member, there has been substantial "systems friction" between China and some Western trading countries. The term "systems friction," coined by Sylvia Ostry⁴, is usually thought of as political tension between countries attributable to their economic interaction in the context of fundamental differences in the organization and operating principles of their

1

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²During the Uruguay Round, Professor Jackson advocated establishment of a Multilateral Trade Organization, and many of the other organizational reforms that were eventually adopted, on the ground that it would strengthen the multilateral trading system institutionally. See John H. Jackson, *Restructuring the GATT System* (Royal Institute of International Affairs: London, 1990).

³Previously, the GATT "secretariat" existed technically as the staff of the Executive-Secretary of the Interim Commission for the International Trade Organization.

⁴See Miles Kahler, *Regional Futures and Transatlantic Economic Relations* (New York: Council of Foreign Relations Press, 1996) at 43.

respective political-economic structures. There may be different forms of systems friction, depending on whether the interacting political-economic structures can change, how willing countries are to change political-economic structures in order to accommodate other players, and whether the structures simply have not yet been subject to negotiation. The systems friction now associated with China-trade embodies elements of all three forms. This raises the question of whether WTO accession for China is likely to reduce and contain the systems friction, or weaken the WTO as an institution, or both.

The analysis below suggests that the political friction associated with accession of a large, transitional economy like China's, combined with the WTO's current substantive and procedural rules, may weaken the WTO as an international governmental system—and that the extent of such weakening may be minimized by taking preventative action. Chinese accession will expand the territorial scope of the WTO and the level of trade that it governs. It may also help “lock in” the impressive steps China has taken towards economic liberalization over the last two decades. And the accession process has and will continue to provide an external source of support for those within China who favor continued liberalization. But it will also expand the WTO's coverage to include a political-economic system that operates in ways that the WTO's substantive and procedural rules were not designed to govern. This is likely to add to a perception by some powerful trading nations that on crucial issues the WTO suffers from decision-making gridlock, administrative inefficiency, and an ineffective dispute settlement system. This is not to suggest that Chinese accession will fatally (or even substantially) weaken the WTO, but it is likely to marginally weaken its effectiveness as an international governmental system unless corrective action can be taken.

Part II of this paper provides a theoretical prologue that helps frame the analysis. Comparative political theory and international relations theory provide tools for understanding whether the rules of a particular institution are well-suited to effective government of its constituent social units. These theories suggest considering the extent to which an institution's substantive and procedural rules are capable of resolving political conflict among its constituent social units in a way that is acceptable politically to the most powerful members.

Part III analyzes the extent to which WTO substantive rules are not designed to fully intermediate trade and political friction between Western liberal, democratic political economies and China's political-economic system. China is fundamentally different from other WTO members, partly because of its size, but also because of its particular political-economic structure. Some features of the Chinese type of market economy could undermine basic WTO commitments: a continuing large role for state enterprises; a lack of transparency of some domestic rules and rule-making processes; a lack of meaningful competition policy rules; weak regulatory systems, especially pertaining to the environment; and an absence of democratic guarantees. And some other features of the Chinese system raise doubts about its ability to keep its commitments: a judicial system which, on commercial matters, is in the early stages of development and is not always perceived as independent of politics; considerable corruption in some regions; and relatively weak central government authority over commercial matters. These are differences that are not accounted for by WTO rules. And if the political friction associated with these differences can not be addressed in another manner—through WTO constitutional procedures or China's Protocol of Accession—then China's accession is likely to weaken the WTO institutionally.

Part IV of this paper examines relevant WTO constitutional procedures, showing that the WTO's judicial, legislative, and administrative processes are unlikely to yield substantive rules or other solutions that could resolve the tensions likely to arise from China's accession. It is suggested that a broad reading of the Article XXIII doctrine of “non-violation nullification or impairment” would help provide a constitutional solution, but the doctrine has been used sparingly and recent application of it has suggested that WTO dispute settlement panels may demand an implicitly high standard of proof for granting relief, which together imply that the doctrine should not be relied upon to provide a lubricant for the systems friction associated with China's WTO accession—barring express advance agreement on the matter.

Part V concludes by suggesting that China's accession to the WTO according to “typical” terms of accession is likely to generate substantial dissatisfaction by some powerful trading countries with WTO dispute settlement results, and a perception of WTO decision-making gridlock and administrative inefficiency in the secretariat—all of which will undermine support for the WTO. The associated weakening of the WTO as an institution may be minimized or remedied to the extent that China's Protocol of Accession addresses the substantive shortcomings of WTO rules identified above, the doctrine of non-violation nullification or impairment is interpreted broadly when applied to China-trade, and China

continues to develop along capitalist-democratic lines.

THE RELATIONSHIP BETWEEN INSTITUTIONAL RULES, SOCIAL UNITS, AND INSTITUTIONAL STRENGTH: A THEORETICAL PROLOGUE

WHETHER A PARTICULAR set of institutional rules and processes will foster effective government depends not only on those rules and processes themselves, but also on the constituent units of the system. Political scientists and historical sociologists have long studied the relationships between institutional rules and processes, constituent units of the political-economic system governed by that institution, and effective government in the domestic political context.⁵ Whether government is effective depends at least in part on whether procedural and substantive rules fit those participating in the system. If rules and institutions fail to develop along with underlying social or political change, then government suffers, the institutions of government are weakened, and political decay may set in.

At the international level, realist regime theory suggests some analogous relationships. This approach suggests that the underlying distribution of power and interests among states will determine regime rules and processes that will in turn yield international behavior desired by politically powerful countries.⁶ This resembles Marxist arguments that international structures perform functions demanded by capital,⁷ except that (inter alia) realists do not necessarily embrace an underlying economic dynamic, particularly not a Marxist dynamic.

One corollary of realist regime theory must be that if a regime's rules and processes do not yield outcomes favored by powerful states, then those powerful states are likely to withdraw support for that regime. Thus, history is littered with the remains of international institutions that were weakened or collapsed because their rules and processes were not well matched with underlying power and interests. The League of Nations and the International Trade Organization are but two examples of international institutions that were crippled or stillborn because of such rules or processes. And the United Nations General Assembly, the United Nations Commission on Trade and Development, the International Telecommunications Union, and the World Intellectual Property Organization are present-day examples of institutions that have been weakened in their international role because of procedures that do not generate outputs reflecting underlying power and interests.

This corollary may be further refined by considering that there is variance in the character of the nation-states that participate in a given regime. Substantive rules often do not have the same effect on social units with different characteristics, so the outcomes yielded by regime rules and processes depend partly on the character of the states participating in the regime. Hence, the operation of an international institution's constitutional procedures, and the application of its substantive rules to its constituent national political-economic systems, must yield outcomes supported by nation-states with power.

This framework begs the question of whether China's accession to the WTO will strengthen or weaken the institution and its government, given the WTO's existing substantive and procedural rules.

THE WTO'S SUBSTANTIVE RULES AND THE CHINESE TYPE OF MARKET ECONOMY: "SYSTEMS FRICTION" WITHIN THE INSTITUTION

⁵ See, for example, Samuel B. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968); G. Bingham Powell, *Contemporary Democracies: Participation, Stability and Violence* (Cambridge: Harvard University Press, 1982); and Seymour Martin Lipset, *The First New Nation* (New York: W.W. Norton, 1979).

⁶ See Steven D. Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983).

⁷ See Jurgen Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975).

AS SUGGESTED ABOVE, in a Hobbesian state of nature,⁸ the political friction associated with China's entry into the world trading system might be expressed in terms of "systems friction." The nature of that systems friction may be seen through alternative lenses. A strictly formal analysis that compares China's trade regime to WTO disciplines would attribute the current systems friction to standard (i.e., Western) forms of protection (e.g., high tariffs, restrictive quotas, etc.) and other rules in China that contravene WTO disciplines (e.g., China's weak intellectual property regime). More fundamentally, neoclassical economics uses a deductive-axiomatic model to show that free trade between two liberal economies will yield optimally efficient outcomes;⁹ the conclusions are shattered, however, if the assumption of liberal constituent economies is suspended. From a strategic trade theory perspective,¹⁰ trade relations between a laissez-faire system and an economy with strong doses of state intervention are also likely to yield an unsatisfactory outcome, at least from the vantage of policy-makers in the liberal system. Hence, whether embracing a goal of compliance with formalities, optimal efficiency, or national economic welfare as a goal, it is not difficult to understand why some in the West are not completely satisfied with Chinese trade relations.

Concern about these differences in form is exacerbated, in the case of China, by scale and geo-military context. Many current WTO Members have domestic political-economic systems that are sufficiently different in form from an ideal-typical Western, liberal model to generate tension with other Members. But China's economy is much bigger than any of those Members.¹¹ Moreover, the resulting friction will be experienced in a context in which China is perceived as a military rival of some important WTO Members. Thus, the political friction associated with China's entry into the world trading system is explained by the fact that China is different along three dimensions: its political-economic form, the scale of its economic strength, and the strategic-military context in which it will accede.

The impact of this friction on the WTO requires an institutional analysis. Here the question becomes the extent to which the rules and procedures of the international institution will accommodate and effectively liberalize trade between different political-economic systems. If the rules and procedures perform these functions well, then it is likely that the systems friction will not be played out within the institution. However, if the rules do not perform these functions well, then the institution is likely to suffer from the effects of systems friction, experiencing governmental problems and diminished political support from those countries perceiving friction.

WTO Cornerstones and the Typical Protocol of Accession

It is elementary that the WTO system rests on four substantive "cornerstone" principles set forth in the GATT, which are designed to liberalize trade. Two principles prohibit discrimination: Article I provides that Members must afford unconditional most-favored-nation (MFN) treatment to goods from other Members; and Article III provides that Members must afford national treatment to those goods. The other two principles limit the types of border measures that may be used to restrict imports: Article XI prohibits quantitative restrictions, including quotas, on imports from other Members; and Article II limits the tariffs applied to goods from other Members to the rates bound in the Schedules of Concessions. Virtually all other WTO rules and principles may be seen as providing elaboration of these four principles, rules designed to buttress them, or carefully defined exceptions to them.

⁸In the international context, this may take the form of an international system characterized by the absence of meaningful international institutions to order behavior. Some international relations theorists conceive of a specific "state of nature" they call "anarchy," by which they mean that power and authority is decentralized, held only by the constituent units of the system—the states. See generally, Ken Waltz, *Theory of International Politics* (Menlo Park: Addison-Wesley, 1979).

⁹See David Ricardo, "On the Principles of Political Economy and Taxation," in *Works and Correspondence*, ed., Piero Straffa, (Cambridge: Cambridge University Press, 1951), 133–49; and Charles P. Kindleberger and Peter Lindert, *International Economics*, 6th ed. (Homewood, Ill.: R.D. Irwin, 1978).

¹⁰For a simple description of strategic trade theory, see Paul Krugman, *Rethinking International Trade* (Cambridge: MIT Press, 1990).

¹¹Steve Cohen, "Form, Scale and Limits In China's Trade and Development," 8(4) *Journal of Asian Economics* 615–18 (1998).

By acceding to the WTO, China will agree to abide by the four GATT cornerstones and all the rules designed to elaborate and buttress them. It will also agree to abide by Uruguay Round agreements on trade-related issues such as intellectual property and investment. Moreover, if China accedes on typical terms, it will “pay the price of admission” by agreeing to substantially lower its tariffs. By undertaking these obligations in a typical Protocol of Accession and implementing them, China would take actions that will reduce some of the current sources of systems friction.

Unfortunately, many dimensions of China's political-economic system are not accounted for by current WTO rules, so a typical accession protocol that binds China to follow all WTO rules will still permit the Chinese economy to operate in ways that undermines the effectiveness of the four cornerstones identified above. This is not surprising since those who drafted the GATT and participated in the Uruguay Round negotiations did not give much, if any, consideration to how the organization might accommodate relations between Western systems and the Chinese type of market economy. WTO rules and procedures do not fully address at least two sets of factors that could undermine the four cornerstones or otherwise generate political friction within the WTO.

Five Features of the Chinese Type of Market Economy That Might Undermine Typical WTO Commitments¹²

First, even according to the most generous estimates of the extent to which China's market has liberalized, at least 35 percent of Chinese gross domestic product is still produced by state-invested enterprises.¹³ Action by state-invested enterprises has the potential to undermine all four cornerstones of the WTO system. For the most part, the GATT assumes that economic decisions are made by atomistic producers and consumers based on price, but state-invested enterprises do not always make decisions based on price.¹⁴ For example, it is not difficult to see state-invested enterprises that consume computer chips (or steel) deciding to purchase all of their computer chips (or steel) from state-invested chip (steel) manufacturers. This would effectively undermine the GATT's Article III national treatment provision. Similar arguments can be made about how state-invested enterprises may engage in behavior that would undermine the Article I MFN commitment, the Article II commitment to a Schedule of Concessions, and the Article XI commitment against maintaining quantitative restrictions.¹⁵ And these arguments would seem to apply with equal force in the case of local government influence over township-village enterprises (TVEs).

GATT Article XVII was intended to discipline activity by state enterprises¹⁶ but the draftsman could never have anticipated that this article would sufficiently address problems created by the accession of a country as big as China's and with such a big role for the state. The primary requirement of Article XVII is that state enterprises shall make purchases or sales “solely in accordance with commercial considerations.” But this discipline cannot be effective in cases (like those that are sure to be encountered in China) where the reason for purchases or sales by state enterprises is not transparent.

Second, more broadly, the WTO system assumes that members' laws, regulations, and administrative

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In addition to the five features discussed here, others obviously matter, such as distribution rights and non-market economy dumping.

¹³ “State-invested enterprise” includes state-owned enterprises, state-trading enterprises, and any joint venture or other enterprise in which the state has invested.

¹⁴ On this point, generally, see Donald C. Clarke, “GATT Membership for China?,” 17(3) *University of Puget Sound Law Review* 517 (Spring 1993).

¹⁵ For this kind of analysis applied to state-trading enterprises, see John A. Jackson, *The World Trading System* (Cambridge: MIT Press, 1989).

¹⁶ The title of Article XXVII is, “State Trading Enterprises,” but the text makes clear that the article applies to all state-owned enterprises, not just state trading enterprises.

and legislative processes are transparent. This is also crucial to the effectiveness of the GATT's main principles. For example, true national treatment (Article I) requires that both domestic and foreign producers know the rules of the game. Similarly, a lack of transparency about rules or regulations affecting imports could have the same effect as a quantitative restriction (Article XI). The formulation of rules also demands a transparent process so that foreign interests can be represented to ensure that the rule is not discriminatory in its effect. And, as suggested in the preceding paragraph, any meaningful discipline on state enterprises entails transparency.

GATT Article X requires the publication of trade regulations prior to their application, but this discipline is not broad enough to cover all of the kinds of non-transparencies encountered in China. The WTO has requirements of procedural transparency in the context of forming of technical, sanitary, and phytosanitary regulations, standards, and conformity assessment procedures, but relatively few requirements of procedural transparency in other important contexts. More problematic, the existence of transparency is difficult to monitor since, by definition, governments do not broadcast non-transparent directives or "administrative guidance." In short, it is often very difficult to know at any given moment whether a pattern of behavior or outcomes may be explained by an Article X violation.

Third, China lacks any meaningful competition policy and the WTO system does not require a member to have a competition policy. While there are few complaints at this time about anti-competitive activities in the private sector in China, it does not take great imagination to see that such problems could arise in the future. For example, to the extent that China continues to reduce the role of state-owned enterprises, government authorities could decide to give a legal monopoly to certain currently state-owned enterprises, particularly in the early phases of privatization. This is a pattern that has been followed in some other Asian countries and in Eastern Europe. Monopolistic or monopsonistic behavior in the private sector analogue to discriminatory behavior by state-invested enterprises and can eviscerate the effectiveness and meaningfulness of the GATT's four cornerstones just as effectively.¹⁷

Fourth, the WTO lacks rules to ensure minimal standards of environmental and social regulation in member states. This raises the possibility that big differences in the stringency of regulatory regimes across WTO Members may attract investment and jobs away from countries that have relatively stringent standards and towards countries, like China, that have relatively lax environmental or workers rights standards.¹⁸

Fifth, WTO rules do not provide an exception from general WTO obligations for trade actions taken in response gross human rights violations. Article XX(e), which permits trade restrictions relating to the products of prison labor, is about as far as GATT goes. The extent to which China embraces human rights and democracy may have no direct international economic impact,¹⁹ but it has an international political importance because it bears on the extent of U.S. satisfaction with an institution based on unconditional MFN: many in the United States believe that there should be some linkage between U.S.-China trade relations and Chinese progress on human rights and democratization, more generally.²⁰

¹⁷See, generally, Robert Lawrence, "Towards Globally Contestable Markets," Donald Hay, "Anti-competitive Practices, Market Access and Competition Policy in a Global Economy," and Merit E. Janow, "Public and Private Restraints That Limit Access to Markets," in Organization for Economic Cooperation and Development, *Market Access After the Uruguay Round: Investment, Competition and Technology Perspectives* (Paris: OECD, 1996); and Robert Z. Lawrence, "Do Keiretsu Reduce Japanese Imports?" (Washington, D.C.: Brookings, December 14, 1990).

¹⁸See C. Leigh Anderson, Richard R.W. Brooks, and Robert A. Kagan, "Adversarial Legalism, Transaction Costs, and the Industrial Flight Hypothesis," *BRIE Working Paper No. 93* (Berkeley: Berkeley Roundtable on the International Economy, 1997).

¹⁹This statement is not intended to ignore or even address arguments that democracy and freedom are related indirectly to the proper functioning of capitalism. See, e.g., Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962).

²⁰See, as evidence of demand for this linkage, the yearly use of Title IV of the Trade Act of 1974, as amended (the "Jackson-Vanik Amendment"). While its language deals with emigration, the statute has been used in recent years to deal with human rights broadly.

Three Features of the Chinese System That Raise Doubts About China's Ability to Keep Its Commitments²¹

First, the WTO system implicitly expects that members will have an effective and impartial judicial system, which is crucial to the effectiveness of many WTO obligations. For example, it is difficult to see how a country with a judicial system that is slow, corrupt, or not independent of domestic political influence could offer reliable and impartial enforcement of its laws. Yet reliable and impartial contract enforcement may be the sine qua non of equitable trade and investment relationships. A weak judicial system may be less troubling in issue areas where WTO rules require enforcement of particular topics in domestic law (e.g., intellectual property), but even in that context it is unclear whether a WTO dispute settlement panel would be willing to condemn a legal system as ineffective or lacking impartiality. China's legal system is developing quickly, but many observers continue to question its impartiality in cases involving foreigners.

Second, the existence of wide-spread corruption (e.g., bribery, kickbacks, etc.) can also undermine WTO rules if nationals from some countries are permitted to engage in corrupt activities while those from other countries are prohibited from doing so. United States nationals are prevented from engaging in specified corrupt activities under the Foreign Corrupt Practices Act, as amended, whereas nationals from many other countries are not so constrained. The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions will help level the playing field among nationals from OECD countries. However, the absence of WTO disciplines on corrupt practices, combined with restrictions on such activities by nationals of the United States and other OECD countries, can yield patterns of purchasing, investment, procurement, and regulatory administration (including customs) in countries with widespread corruption that are inefficient and undermine crucial GATT rules such as MFN and national treatment. Many U.S. businessmen have alleged precisely such patterns in parts of China, particularly in the southeast.

Third, the relative weakness of a central government with respect to sub-federal entities (such as provinces, states, and local government) is likely to reduce the effectiveness and meaningfulness of WTO undertakings. The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 reiterates the obligation of Article XXIV:12 that each member "shall take such reasonable measures as may be available to it to ensure" observance of the provisions of WTO agreements by regional and local governments and authorities within its territories. However, the failure to define "such reasonable measures as may be available to it," and the impracticability of some central governments doing so, suggests that WTO obligations will be less effective in national systems that are de-centralized in practice than in highly centralized countries. There is evidence that sub-central government authorities often refuse to obey central government rules in China on commercial matters.

In summary, WTO rules are weak or missing on several issues that are likely to be sources of friction between the liberal, Western trading powers and China. Weak or missing rules in these areas may be understood as a relic of the WTO's history: the institution was never expected to intermediate trade relations between Western laissez-faire democracies and a large political economic system like that of China's, which appears to be transitioning from a centrally planned, communist system to something as of yet not fully defined. Thus, the WTO's substantive rules are not equipped to address the political friction that would likely accompany Chinese accession.

WTO CONSTITUTIONAL PROCESSES AS SOLUTIONS TO POLITICAL FRICTION WITH CHINA?

²¹ There are, of course, other features that raise doubts about China's ability to keep its commitments, such as an administrative system that cedes wide authority to administrative authorities to make, interpret, and implement law.

EVEN IF EXISTING substantive rules do not address sources of institutional friction, it is possible that operation of the WTO's constitutional processes could provide a solution. More broadly, in assessing how well an institution is likely to absorb a new social unit, it is important to analyze how that institution's governmental processes will function after the new social unit joins it. The analysis that follows suggests that the WTO's judicial, legislative, and administrative systems will have difficulty resolving the friction associated with China's entry into the WTO. Combined with the WTO's substantive shortcomings, this will create a perception in some Western countries that the WTO is a weak and inadequate institution, providing fodder for those in the United States who would like to see more "unilateral" action, and weakening support for the WTO by at least one major trading power.

The Judicial Process: WTO Dispute Settlement

WTO dispute settlement is unlikely to render decisions that resolve the friction associated with China's participation in the WTO. In cases where a complainant can show that China has violated WTO rules, the WTO dispute settlement system is likely to render decisions that require China to change its behavior and comply; moreover, if compliance is not forthcoming, the Uruguay Round Understanding on Dispute Settlement provides a right to retaliation by the injured WTO Member. But the problem is not with potential violations of WTO obligations by China: it is the weakness or absence of WTO rules in key areas that is likely to yield dissatisfaction with WTO dispute settlement by some countries. WTO dispute settlement is unlikely to provide a remedy for at least some (and perhaps all) of the behavior by China that does not violate a WTO rule, even if that behavior undermines the effectiveness of WTO principles. And the preceding section of this paper identified several categories of such behavior.

GATT Article XXIII:1(b) provides a potential basis for a successful complaint on a theory that another member has imposed a measure that nullifies or impairs a benefit, whether or not that measure conflicts with WTO obligations. Claims based on a "non-violation nullification or impairment" theory have been relatively rare in GATT/WTO jurisprudence. Many commentators and GATT/WTO panel reports have supported a relatively narrow reading of this doctrine. For example, panel reports have stated that the doctrine is intended to protect the balance of tariff concessions, a principle that suggests the complainant must have negotiated a tariff concession with the respondent on the product that is the subject of the claim.²² Even more limiting, the doctrine can be invoked successfully only upon a showing that the complainant had no reasonable expectation of the measure complained of at the time that it negotiated the associated tariff concessions.²³ Most recently, the WTO panel on Japanese measures affecting consumer photographic film and paper rejected several claims of non-violation nullification or impairment allegedly attributable to government action that is not highly transparent (e.g., administrative guidance);²⁴ most claims in the case seem to have been rejected on grounds of insufficient evidence. By applying an implicitly high standard of proof to such claims, that panel adopted an approach that, if followed by later panels, will make it more difficult to sustain claims based on the non-violation nullification or impairment doctrine.

A broad reading of the non-violation nullification or impairment doctrine would provide an important (though incomplete) lubricant for systems friction associated with behavior that is not addressed by WTO rules. Such a reading would not require the losing party to change its behavior, but would authorize "compensation" for the complainant. In contrast, a narrow reading of the doctrine renders the dispute settlement system incapable of resolving the political tension associated with behavior that is not covered by WTO rules. Moreover, since the WTO dispute settlement process permits relatively swift and automatic action against a country that acts unilaterally (i.e., retaliates without WTO authorization), a narrow reading

²²1990 Panel Report on "EEC-Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins." L/6627, adopted on 25 January 1990, 37S/86, 126-127, ¶¶44.

²³See WTO, *Japan - Measures Affecting Consumer Photographic Film and Paper, Report of the Panel*, 31 March 1998, WTO Doc. WT/DS44/R, at 391-94. For a discussion of the basis for this argument, see John H. Jackson, *World Trade and the Law of GATT* at 179.

²⁴WTO, *Japan - Measures Affecting Consumer Photographic Film and Paper, Report of the Panel*, 31 March 1998, WTO Doc. WT/DS44/R, at 391-94.

of the doctrine would leave the United States with the uncomfortable choice of either simply bearing the brunt of political friction or taking unilateral action that contravenes its WTO obligations and would weaken the institution.

The Legislative Process: WTO Consensus Decision-Making

While there are specific voting procedures and proportions required to amend the GATT 1994, to grant waivers, to approve accessions, or take certain other actions, the vast proportion of WTO actions are taken according to the practice of consensus. The WTO body concerned is deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.²⁵ The consensus decision-making practice means, therefore, that very little legislative action can be taken in the WTO if China (or any other country) objects to it.

This decision-making practice is likely to render the WTO legislative process incapable of adopting new rules that would address sources of friction identified in the preceding section. China is likely to block a consensus on any rule that would discipline Chinese practices that contribute to political friction and that are not already disciplined.

In assessing the WTO's constitutional capacity to address this type of political friction, it is important to consider the relationship between the operation of its judicial and legislative processes. In particular, a broad reading of the nonviolation nullification and impairment doctrine, which would result in authorized "compensation" for Western countries facing injury from Chinese practices (regardless of whether the Chinese practices are permitted under WTO rules) would likely facilitate legislative solutions to systems friction—even under the consensus rule. The availability of compensation would provide bargaining leverage for those Members seeking a rules-based solution.

But in the absence of a broadly construed non-violation nullification or impairment doctrine, it is hard to see anything other than legislative gridlock on proposals for meaningful new rules relating to state-invested enterprises, transparency, domestic judicial systems, and other topics that are likely to be sources of tension with China.

The Administrative Process: The WTO Secretariat

WTO accession is not likely to render the WTO Secretariat more efficient or effective. The WTO Secretariat, like its GATT precursor, has not been considered very bold or effective. That is understandable because the Secretariat serves at the pleasure of the Members and cannot afford to take any action, depict any matter, or frame any issue in a manner that a powerful Member or coalition of Members would perceive as contrary to their interests. In so far as China would bring a host of new interests and practices into WTO debates, its accession would marginally water down further the WTO Secretariat's courage and effectiveness. And if China were to insist upon the application of U.N. staffing rules in the WTO, then this effect would likely be magnified.

CONCLUSIONS: CATCHING THE TIGER BY THE TAIL VERSUS CONTAINING IT— ALTERNATIVE PATHS FOR THE WTO

WITHOUT SOLUTIONS to the problems suggested in the foregoing analysis, the systems friction now being experienced with regard to China trade might be transferred into institutional friction when China accedes to the WTO. Ultimately, "systems friction" is a political concept: it is certain to operate even under circumstances that neoclassical economists might find acceptable. Since China is not currently a WTO member, China and Western countries negotiate their trading relationships in an

²⁵ Article IX, Agreement Establishing the World Trade Organization, fn. 1.

international condition that approaches a Hobbesian state of nature.²⁶ This permits some Western countries to threaten retaliation or otherwise demand change in Chinese behavior, regardless of WTO rules. As a political device, this works: Chinese behavior changes marginally and Western government officials gain domestic political cover for maintaining a largely open trade and investment relationship with China.

In the worst case, this changes with China's accession to the WTO. The substantive rules and governmental processes of the WTO are intended to end the state of nature and constrain unilateral behavior, but, in the case of accession for China, WTO rules may attempt to do so without providing adequate procedural or substantive lubricants for systems friction. This creates a risk that the WTO's governmental processes will become deadlocked and incapable of resolving China's trade tensions with some powerful trading countries, undermining the strength of the institution and weakening political support for it.

Some might believe that WTO accession for China would be worth this cost. They might argue that: U.S. unilateralism should be constrained; systems friction should not stand in the way of liberalization; the "lock-in effect" on Chinese reforms associated with WTO accession is far more important than these institutional effects; or that WTO accession for China is likely to help ameliorate systems friction (and adverse institutional developments in the WTO) by virtue of the WTO's normative and cognitive impact on Chinese government officials and Chinese policy.

Regardless of how one strikes this balance, the foregoing analysis makes clear that three sets of factors could reduce systems friction and make the WTO a more effective institution in dealing with China. First, a broad interpretation of the doctrine of nonviolation nullification or impairment would help. It would help some powerful Western trading countries tolerate Chinese accession to an instrument the substantive rules of which do not discipline behavior that is likely to be a source of political friction. Many Chinese practices that are not WTO-illegal, but which do impact trade, could then be addressed by WTO-authorized compensation for liberal countries without condemning Chinese behavior. This would not merely resolve domestic political pressures associated with systems friction: it would also be a source of bargaining leverage for liberal trading countries in negotiations to develop rules-based solutions to China-trade systems friction and would be a source of leverage to those inside of China favoring liberal rules-based reforms.

Second, China's Protocol of Accession (or related instruments) must be tailored to address as many of these problems as possible. Ultimately, the analysis presented here explains why China's Protocol cannot be a typical protocol modeled on those of countries that have preceded it in the GATT/WTO accession queue. Commitments and deadlines pertaining to tariffs, quotas, and non-tariff barriers are not enough. Nor is it enough to also promise to phase in new domestic statutes in China on Uruguay Round topics like intellectual property and investment. China's accession instruments should also include meaningful and verifiable commitments pertaining to features of the Chinese system, identified above, that have the potential to undermine WTO commitments and raise doubts about China's ability to comply with its commitments. To the extent this is not possible, the accession instruments might include import expansion commitments, as were included in Romania's and Poland's accession protocols,²⁷ although some argue that experiment failed. Alternatively, China could declare its acceptance of an interpretation of the non-violation nullification or impairment doctrine that would permit "compensation" to Members in response to Chinese behavior in these areas, thus creating a type of "strict liability" for any Chinese government activity that undermines the market access expected from the Protocol of Accession. Negotiations on these matters will not be easy: China is unlikely to be willing or able to make all of the suggested commitments.

Third, ultimately, of course, the argument here suggests that the best solution to these problems would be if China were to become more like us. China may never end up looking like Kansas, but the faster and more completely China evolves into a system with a small role for state enterprises, a well-developed judicial system, a more modern and effective regulatory system, greater central government control over regions and localities, and a more democratic character, the better it will fit in with existing WTO rules that were designed for countries modeled on Western liberalism. In the short term this is less a solution than a proposal that will be a source of conflict with China. But in the longer term, it is not hard to see a basic

²⁶ See note 7 above.

²⁷ See GATT, *Analytical Index: Guide to GATT Law and Practice* (Geneva: GATT, 1994) at 444-45.

continuation of reforms in China that will place it more in line with Western liberalism, thereby slowly reducing the adverse institutional effects of China's accession to the WTO.