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0521818214 - China and the World Trading System: Entering the New Millennium

Edited by Deborah Z. Cass, Brett G. Williams and George Barker

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Introduction

China and the reshaping of the World Trade Organization

DEBORAH Z. CASS, BRETT G. WILLIAMS AND
GEORGE BARKER

A brief history

11 December 2001 marks a key date in the calendar of world trade. On that day, the sixth-largest economy in the world, representing a population of some 1.3 billion people, and reflecting a unique political and economic system consisting of a hybridization of Marxism and free-market principles, joined the rules-based international trading system, by acceding to the World Trade Organization (WTO). Even in the shadow of the momentous events of 11 September that year, China's entry to the WTO sealed a critical moment in international trade, and indeed in international law and relations of the new millennium.

China's entry to the WTO was generally greeted with approval as an event whose time had come, and yet also with a little disbelief. A brief history will explain why. In 1948, the Bretton Woods Agreement set out to establish a tripartite international economic structure consisting of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD or World Bank) and the International Trade Organization (ITO). The ITO subsequently failed to come into existence owing to US Congressional disapproval. China signed on as one of only twenty-three original Contracting Parties to the provisional framework agreement for trade liberalization, the General Agreement on Tariffs and Trade (GATT). However, after the defeat of the Kuomintang nationalist forces by Chinese communist forces in 1949, the nationalist government in Taiwan withdrew from the GATT. Thereafter China remained officially outside the multilateral trading system for over forty years. From 1986 the People's Republic of China sought, unsuccessfully, to revive its dormant position by becoming a

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Excerpt

[More information](#)

founding member of the World Trade Organization, the new international trade body to be established as part of the Uruguay Round package of agreements. However, negotiations to include China faltered, and in 1995, at the conclusion of the Uruguay Round, a new deal was sealed, the WTO was established and China, once again, remained on the outside.

China's lack of membership of the GATT did not preclude it from becoming an active member of the international trading community. Especially since the introduction of an open door policy in the late 1970s, and the appointment of Deng Xiaoping as paramount leader in 1986, China has pursued a vigorous trade policy. In the last twenty years it has undertaken economic reform aimed at freeing up its imports and exports and encouraging foreign investment. In short, China has undergone extensive political change, and conducted major reform of its legal system, both of which contributed to it increasing its slice of the international trade pie.

But China was still excluded from the international trading system. Until China entered the WTO in 2001 it had been limited in its ability to participate on the same terms as Member States in the negotiation of new standards relevant to trade; it was precluded from resolving international trade disputes under the judicialized process of the WTO, and, unlike most other states, it was subjected to the annual ritual of scrutiny by the US Congress in order to gain most favoured nation (MFN) status in the United States.

Nevertheless, despite its formal exclusion from the WTO, China and its trading partners have sought ways to facilitate its involvement in the organization, at two levels. Bilateral agreements for increased market access were concluded with forty-four countries. Simultaneous with the bilaterals, multilateral negotiations were conducted under the auspices of the GATT Working Party and then the WTO Working Party on China's Accession, which was required to negotiate the terms under which China's accession would occur. These terms were ultimately included in the Schedules of Commitments on goods and services, which, along with the Working Party Report, were annexed to the Protocol on the Accession of the People's Republic of China to the WTO. The accession process has thus acted as a continual spur for China's legal, administrative and judicial system reform.

In 1999 the major bilaterals were finally coming to a close, and the Working Party was moving towards its final stages, when international events intruded. US forces accidentally bombed the Chinese Embassy in Belgrade

Cambridge University Press

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Excerpt

[More information](#)

INTRODUCTION

3

killing a number of people, and a Chinese national working in a US defence establishment was accused of spying. Negotiations were briefly suspended. However, in November 1999 the US bilateral was finally concluded, with the European Union following soon afterwards in May 2000. By September 2001 the issues in dispute had reduced to a few narrow but controversial matters. However, after the attack on the World Trade Center in New York on 11 September, and a brief day adjournment of the Working Party which followed, these outstanding matters were quickly resolved and the WTO announced that the conditions of membership were now satisfied.

Finally, in November 2001 the stage was set for China's accession. Many hoped it would coincide with the launch of a new round of trade liberalization at the Doha (Qatar) Ministerial, a goal that was deemed particularly desirable after the failure of the Seattle Ministerial in 1999, and the World Trade Center attack. Pressure from the latter events led to a widespread view that improvements in international security were, in part, dependent not just upon international economic growth but upon a fairer distribution of the benefits of that growth. Increased market access by industrialized countries to developing-country products, especially in agriculture and textiles; links between trade and the environment; implementation of Uruguay Round commitments; and resolution of intellectual property rights over pharmaceuticals deemed necessary for public health: these were some of the issues discussed at the Ministerial. China's accession was incorporated into an agenda for a nascent round, an agenda that was to be christened by some as the development round. After three days of discussions in Doha, a new series of trade liberalization negotiations were launched and China's long-awaited entry to the World Trade Organization was approved on 10 November 2001. A day later China signalled that the Standing Committee of the People's Congress had approved the terms of the accession. Following GATT rules, thirty days later, on 11 December 2001, China became the 143rd member of the World Trade Organization. In February 2002 China instituted its first complaint at the WTO against the European Union in relation to food-safety regulations.

Structure of the book and key arguments

The aim of this collection of essays is to address the implications of China's entry to the WTO. In chapter 2 Sylvia Ostry, a respected and artful observer of the international trading system, criticizes commentators, academics and

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Excerpt

[More information](#)

trade officials for their failure to consider the effect of China's entry on the WTO system. She derides economists for their 'breathless' calibration of the pace of Chinese liberalization while ignoring this wider issue of the effect of accession on the international trading system. This collection of essays addresses some of those critical, unanswered questions by examining four key areas affected by China's accession: the accession process; the WTO in its rule-making and dispute settlement capacities; the domestic economy in China, and the international trading system as a whole. Based on papers given at a conference held at the Australian National University in March 2001,¹ this collection is the first to conduct a global examination of these four related areas in order to trace the evolving contours of an international trade system with China as a member.

The book is divided into a number of parts, each of which discuss a different aspect of China's entry to the WTO: the international trading system generally (Part I), the accession of China (Part II), China's internal economy (Part III), and the WTO (Parts IV–VII respectively on goods, services, TRIPs and dispute settlement). The underlying thesis of the collection is that China's accession has untested potential to alter the shape, structure and content of the international trading system as a whole and to facilitate a new role for China in international geo-political affairs. It will also spur dramatic legal and economic reform in China and effect changes to the WTO's decision-making, dispute settlement and rules-based structures. Each chapter speculates on the nature of one or more of these changes and gauges their impact. Like a weathervane on the field of international trade, the collection, as a whole, directs the reader to a number of directions those effects might take.

Several themes emerge from the work. First, the WTO, its rules, institutions, policies and processes, will be modified by China's accession. Secondly, the domestic effects of accession in China will be positive for China's long-term economic growth but raise significant political, social and distributional challenges. Thirdly, the accession package negotiated between China and WTO Member States represents a substantial commitment by China to the disciplines of the international trading system. And fourthly, the broad landscape of the international trading system – which has changed dramatically in the last twenty-five years, and is currently

¹ The conference was a culmination of a research project funded jointly by the Australian Research Council in partnership with the Australian Department of Foreign Affairs and Trade and located at the Australian National University.

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Excerpt

[More information](#)

undergoing a period of unsettled renegotiation – will be further altered by China's entry to the WTO and its concomitant need to forge a new role for itself in international relations. The remainder of this chapter introduces these themes, all of which can be found woven through each Part of the book, not necessarily corresponding in any linear fashion to the Part headings, but nevertheless informing all aspects of the discussion.

The implications of China's entry to the WTO

The world trading system

Part I examines the impact China's accession will have upon the overall architecture of the world trading system. It suggests that China's entry to the WTO has the potential to have a significant impact upon the world trading system precisely because it occurs at a time when many of the old verities of geo-politics and law, and law and diplomacy, are being questioned. The emergence of unconventional security threats, the (re)assertion of unilateralism to protect state security, and an increased emphasis on religious difference have all occurred at a time in which conventional wisdom had it that the demise of state communism, the contraction of absolute state sovereignty, the pluralization of the centres of legal and state authority and growth of transnational networks would lead, inevitably, to a new ordering of the international system, of which the World Trade Organization would be a key part.

However, a clutch of factors have buffeted these assumptions, and with it the international trade system. In an atmosphere of heightened strategic uncertainty China's entry to the WTO carries additional weight. The announcement in February 2002 by Chinese Premier Jiang Zemin after meeting with US President George W. Bush that China and the United States now have 'more rather than less shared interests, and more rather than less common responsibility for world peace'² was an indication of the increasing importance placed by both states upon their new closeness, forged in part by mutual trade interests. In addition to new security threats, structural changes to the world economy continue apace in the form of changes in technologies, information transmission, communication and transport. Consumerism is rising; financial markets are expanding; multisourcing by

² John Gittings, 'Terror is ingredient binding U.S. and China', *The Guardian*, 22 February 2002, available at www.guardian.co.uk/archive/.

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Excerpt

[More information](#)

corporations is on the increase and there is an increased focus on environmental considerations as an integral part of economic calculations. Issues of food safety have achieved international notoriety (BSE, GMOs) and human rights awareness has increased at the same time as abuse continues.

In order to respond to these changes a new vocabulary, to which international trade is a great contributor, has been invented. Terms such as globalization, constitutionalization, even deterritorialization, have become commonplace. Deborah Cass examines the constitutionalization of the international trade system and argues that China's entry to the WTO has the potential to influence the phenomenon, whether constitutionalization is conceived of as expanding the trade 'rights' recognized by international trade, strengthening its institutions, or creating a new *demos* or community to legitimize the system.

Even prior to the current uncertainties of international political economy, the landscape of international trade was unsettled. Sylvia Ostry vividly portrays the scene China confronts entering the world trading system in 2001 instead of at the conclusion of the Uruguay Round in 1995. Instead of the North–South bargain that characterized Uruguay, in which developing states won increased market access in agriculture and textiles in exchange for inclusion of 'new' issues such as services and intellectual property, Ostry notes that the international community is facing a more precarious dynamic between North and South in which even the launching of a new round in Doha is perceived as successful simply because it averted complete failure such as that which occurred at the Seattle Ministerial in 1999. She argues that the old-fashioned notions of market access have expanded since Uruguay, from requiring states to simply remove border barriers to a focus on domestic regulatory policy. States, including China, are more frequently obliged to shift from an emphasis on negative regulation to positive regulation, in relation to, for example, intellectual property protection. Similarly, China, like all Member States, is facing an international context for free trade in which formerly domestic issues, such as environment and food-safety regulation, are examined for their trade restrictive impact.

On a similar theme, John H. Jackson's chapter argues that China may begin to exercise a role as diplomatic leader at the WTO, especially if it participates in the resolution of a number of key policy questions currently facing the organization. These include the extent to which the WTO is a member-driven organization, the role of consensus decision-making, and questions of participation, transparency and involvement of civil society.

Cambridge University Press

0521818214 - China and the World Trading System: Entering the New Millennium

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Excerpt

[More information](#)

INTRODUCTION

7

Similarly, Ostry believes that China may forge a new position for itself by becoming vocal on matters including the use of *amicus* briefs in dispute settlement proceedings or ‘participatory legalism’ as it has been labelled. Moreover, she suggests China could play a critical role in relation to issues such as creation of a policy forum to discuss the intersection between international trade rules and legitimate domestic policy intervention, and the role of non-state actors in international trade. In short, both the landscape of international trade, and China’s role within it, stands to shift in the context of China’s accession to the WTO.

The accession

Part II examines the accession process and outcomes in detail. Jeffrey Gertler, secretary to the Working Party on the Accession of China to the WTO, gives a fascinating bird’s-eye account of the ‘longest and most arduous’ accession negotiation in GATT/WTO history. The primary theme that emerges is that the accession package negotiated between China and other Member States of the WTO represents a significant commitment by China to the disciplines of international trade.

Graeme Thomson, who led Australia’s negotiation with China, outlines the broad parameters of the package and comments on the ‘tremendous’ nature and range of China’s various commitments. Apart from improvements in transparency, judicial review and uniform administration of trading rules, China has committed itself to massive liberalization of tariffs to about 80 per cent of goods³ (for detail see Appendix to Thomson’s chapter, and chapter 4, by Gertler). China has also agreed to: a reduction of industrial product non-tariff measures and elimination of all quotas, tendering and import licensing by 2005; participation in the WTO Information Technology Agreement; improved market access in the services sector, substantially deregulating both the conditions of entry and the scope of operation for businesses in China in sectors such as telecommunications, insurance, banking, accountancy, legal services, education and architecture; improvements in conformity-assessment procedures for technical barriers and sanitary and phytosanitary measures; and improved trading rights generally.

³ For a summary of the services negotiation, see Brett G. Williams and Deborah Z. Cass, ‘Legal implications for regulation of trade in services of China’s accession to the WTO’, in Ligang Song (ed.), *Dilemmas of China’s Growth in the 21st Century* (Asia Pacific Press, Canberra, 2002), pp. 73–119.

Cambridge University Press

0521818214 - China and the World Trading System: Entering the New Millennium

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Excerpt

[More information](#)

Thus in respect of all the key foundational principals of the WTO – non-discrimination, liberalization, transparency and predictability, and removals of distortions to trade – China’s accession is impressive. Gertler writes that ‘the breadth and depth of the cuts [to tariff barriers and non-tariff barriers] are there for all to see’. In relation to service liberalization, he says the willingness of China to open up services is ‘undeniable’, noting that China ‘made a more comprehensive set of initial commitments than those offered by most developed countries during the Uruguay Round’. To sum up, both authors, experienced observers of the accession process, conclude that China’s willingness substantially to commit itself to the world trade system is clearly present in the final package negotiated.

China’s internal arrangements

The third theme of the book concerns the way in which the accession to the WTO will affect China in its domestic sphere. Various chapters, principally in Part III, but also in other Parts of the book, examine the internal effects of WTO membership in relation to aspects of the Chinese economy, legal system and rights culture. It is anticipated that China’s accession will be positive for its long-term economic growth but, like all complex institutional changes, controversy remains as to the precise nature of its effects.

The complexity and controversy over the domestic effects of WTO membership are, in part, simply due to the unique nature of the Chinese state. As Thomson points out, China is a difficult country to generalize about, having the characteristics of a developing country and yet also possessing massive industrial and agricultural potential as well as significant technological and intellectual property capability. Moreover, as Gertler puts it, although all accessions are unique, China’s accession ‘is in a class of its own’.

In particular sectors, changes wrought by WTO membership will be relatively swift and highly visible. In relation to service liberalization one of the key areas is telecommunications. Ian Macintosh provides a detailed analysis of the relationship between China’s regulation of the telecommunications industry and commitments under GATS, focusing on mobile services, internet service providers and telecommunications regulation generally. Similarly, Dene Yeaman sets out the radical overhaul of retailing, wholesaling and logistics to which China has committed itself in its services commitments. He describes the way that many of these commitments have

Cambridge University Press

0521818214 - China and the World Trading System: Entering the New Millennium

Edited by Deborah Z. Cass, Brett G. Williams and George Barker

Excerpt

[More information](#)

INTRODUCTION

9

already been implemented in Chinese law. Access to foreign legal-services provision is also to be widened. In a state in which there is only a limited tradition of using lawyers to settle disputes, Christopher Arup argues that China's entry to the WTO will lead to an increase in formal and legalized dispute settlement and will pressure China to remove restrictions on foreign legal firms doing business in China. Arup, Alice Tay, Angela Gregory and Mark Williams all point out the gap between law-in-practice and the law-in-theory, and argue that WTO membership has the potential to bring about major changes in attitudes to traditional methods of decision-making and of doing business, but all also question whether China has the personnel and culture necessary to make a western-style legal and regulatory system work. On the specific subject of trademark counterfeiting, Angela Gregory observes that significant change can only be expected in the context of gradual change of the operation of the Chinese legal system.

Alice Tay and Hamish Redd consider linkages between trade and human rights. They remind us that China has almost no history of government under law and that the developing nature of the legal system means that many protections taken for granted in the West are either absent or impractical within China. They assess the mixed evidence of a move towards the rule of law, noting the influence that WTO membership could potentially have.

Of course, the impact of WTO membership will flow not only directly from China's new legal obligations. Some possible transformations in China may come more as a result of the more liberal environment that WTO accession will bring, rather than as direct results of implementing WTO obligations. For example, financial services face an uncertain future. Richard Wu discusses the pressure to allow banks and other financial institutions to become 'one-stop shops', able to compete with the range of services offered by overseas institutions. Like Mark Williams, he questions whether China has the experience and expertise available to staff the regulatory institutions that the new environment will require. In a chapter on competition law and policy, another field marked for change, Williams argues that new pressure will be placed on China's embryonic competition law to regulate the growing internal market, to eliminate the practices of administrative monopoly and internal local protection and to protect fledgling Chinese companies from elimination by larger and more experienced overseas companies. Some of these aims are potentially in conflict, but, as Williams reminds us, conflicting aims are not unusual in competition law and policy internationally.

Cambridge University Press

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Excerpt

[More information](#)

In relation to goods, China's textile sector also stands to make considerable gains from accession, although these may take some time to emerge. Ian Dickson points out that, in relation to textiles exports, the initial benefits of WTO membership for China will not be great, although over the longer term they will improve. He suggests that a complex of factors including a reform process under the WTO Agreement on Textiles and Clothing that is based on existing quota growth rates, an implementation backlog and availability of various safeguards to other WTO members will impede immediate export gains to China's textile industry.

Membership of the WTO will also lead to significant alteration to some of the basic institutions of Chinese inter-state trade in goods. Ichiro Araki's chapter provides a succinct and insightful account of the negotiating history of technical barriers to trade arrangements, showing how China's two-tier inspection system for domestic and imported products will eventually be abolished. In yet other respects, China's commitments, although controversial during the negotiation of the accession, may have little or no effect. For example, Gertler observes that the 8.5 per cent cap on subsidies agreed to by China, in a departure from WTO rules for developing countries, will probably not have any detrimental effects domestically since it still represents a lower figure than total project budget outlays.

Two of the discussions on intellectual property in Part VI contain rather different analyses of the impact of the TRIPs Agreement on China. Angela Gregory emphasizes some of the differences between China and other countries in which trademark law operates effectively. By contrast, Antony Taubman emphasizes the similarities between the organic development of intellectual property law in China and in other countries. He challenges the commonly accepted view of China and other developing countries as being burdened by the imposition of western standards. Instead, Taubman argues that intellectual property law is being increasingly utilized in China and that substantial gains to China will result.

WTO accession will, however, have long-lasting effects on basic constitutional questions in China. The decentralization of law to China's sub-national entities is examined by Ravi Kewalram. He argues that as an essentially unitary state China will be obliged to take reasonable measures to bring WTO-inconsistent measures at the sub-national level into conformity with its WTO obligations, including removal of the offending measure. Implementation and enforcement of international agreements may change as a result of WTO practice. Qinjiang Kong also elaborates this difficult