
WTO'S IMPACT ON THE RULE OF LAW IN CHINA

Martin G. Hu

There is no doubt that the WTO will bring China formally and completely into the world trading system. Unlike any other trade agreements, the WTO is unique in that it has a strong dispute settlement system—the so-called DSB (the Dispute Settlement Body), which is given the power under the WTO to adjudicate disputes among member countries, and more significantly to enforce its decisions. Given that the People's Republic of China has never accepted adjudication of an international body, let alone any enforcement against it, China's willingness to accept the DSB shows a huge commitment. In this sense the WTO's impact on the Rule of Law in China is unprecedented.

WTO'S BASIC LEGAL PRINCIPLES

Although numerous principles can be extracted from WTO agreements, the following are the most prominent ones:

- (1) Tariff reduction, which is self-explanatory.
- (2) Fair trade, which prohibits export via dumping or subsidy. (Article 6 and Article 16 of General Agreement on Tariffs and Trade—GATT.)
- (3) Transparency, which requires member countries to timely publish and maintain transparency of trade-related laws, regulations, judicial decisions and administrative rulings. (Article 10 of GATT.)
- (4) Non-discrimination including national treatment, which requires that treatment for foreign products be no worse than that for like domestic products in terms of taxes, charges, and other laws, regulations and requirements. (Article 3 of GATT.) This is indeed the cornerstone of the WTO, which also has triggered most disputes among WTO members.

WTO'S IMPACT

All the above legal principles of the WTO will contribute to the reshaping and development of the Rule of Law in China. One direct consequence of tariff reduction is more trading transactions between China and the rest of the world. All the parties linked with the transaction chain will demand better protection of their property and economic rights in the Chinese legal system. Tariff reduction will also require more competition and reform of the state-owned

enterprises, which I hope can translate into less corruption and more equal protection of all players in the market, whether private-owned or state-owned, foreign-owned or domestic-owned.

The impact of tariff reduction on the Rule of Law in China may seem far-reaching and indirect, but the other three principles (fair trade, transparency and national treatment) will certainly have a more immediate and direct effect.

The economic reform underway in China is largely a reform of a centrally planned economy into a market economy. In this process it is crucial to define the areas where government interference should become unnecessary as well as to “hand over” such areas to the market or private sector with reasonable costs to the society and the individuals so affected. The principle of fair trade (anti-dumping and anti-subsidy) under the WTO, which serves to disentangle the government from the trade activities, will facilitate the process of China’s transformation into a market economy. In turn the market economy itself will demand the Rule of Law.

The principle of transparency, though limited to trade regulations under the WTO, connotes some of the core components of the Rule of Law, as provided by Article 10.3 of GATT:

- (a) *Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article [which requires prompt publication to enable acquaintance of traders].*
- (b) *Each contracting party shall maintain, or institute as soon as practical, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies....*

Such WTO provisions read a lot like law school textbooks on the Rule of Law. As we can see, not only does the WTO require transparency and accessibility of law, it also calls for an independent judiciary review, both of which are the core components of the Rule of Law.

The principle of non-discrimination or national treatment, as many scholars have pointed out, will first encourage local Chinese business to break down the barriers of various forms of protectionism or favoritism before it does so for

foreign companies. Most of the existing protectionism and favoritism cannot be justified either in an economic sense or from the Rule of Law point of view. They have something to do with unjustified and unchecked privileges granted by the government, the process of which is often secretive, arbitrary and capricious. In order to improve the competitiveness of Chinese businesses in the world market, the Chinese government has to break down unjustified protectionism and favoritism. If there have not been sufficient incentives or pressure to do so before, the WTO is now establishing a deadline for China by requiring national treatment and transparency. Here again, market forces and competition, which will be introduced into China by the WTO, will give the Rule of Law a better chance to grow in China, because both the government and the governed will have to draw the legal boundary between them as dictated by market forces.

WTO CALLS FOR JUDICIAL REVIEW

Absent independent judicial review the Rule of Law would become an empty slogan for a society, rather than an achievable reality for individual citizens, regardless of whatever rights may be written down in the constitution or statutes. The great importance of independent judicial review simply lies in the fact that individual citizens need an independent venue to seek equal and fair application of the law. Should the governed feel that the government has crossed the legal boundary between the government and the governed, independent judicial review is the necessary (if not the only) recourse for the governed. If there is no judicial review or if the judicial review is not independent, it would be extremely difficult to ensure that every actor in the society, including ordinary citizens, the government and its officials, is subject to the Rule of Law.

Under the current PRC legal framework, courts are allowed to review specific administrative actions, but not any legislation or administrative regulations even if they conflict with the Constitution or other higher law. The problem with this kind of “judicial review” is very obvious—the protection of legal rights is diminished as citizens and enterprises, in fear of violating the relevant legislation or administrative regulations, usually choose to abstain from exercising the rights that they are otherwise entitled to. As a result, undue burden is placed upon citizens and enterprises in the process of exercising their rights, which certainly erodes the personal rights of individual citizens and increases the transaction costs of enterprises.

Now comes the WTO, which as an international agreement is regarded as having higher legal force than conflicting legislation and regulations according

to the PRC General Principles of Civil Law. Because the WTO is intended to confer rights only on member countries rather than on individuals or enterprises, whether a PRC court should directly apply WTO agreements in resolving such conflicts is subject to academic debate. However, the practical side of such a conflict is that if it is not resolved in China, actions will be taken against China in the WTO. As such, in order to avoid unnecessary actions against China at the WTO level and to avoid politicizing trade disputes among member countries, judicial review should be adopted in China and should extend not only to “specific administrative actions,” but also to legislation and regulations.

As discussed above, the WTO requires independent judicial review at least for trade issues. In addition to such a requirement under the principle of transparency (Article 10 of GATT) as cited above, Article 13 of the Anti-dumping Agreement also calls for judicial review:

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Just like the principle of transparency, the critical requirement here is not the form of the tribunal, which can be judiciary, arbitral or administrative. Rather it is the independent nature of the tribunal that should be maintained by the member countries. However, we all know the judiciary sits in a better position than any other branch of the government to act independently as well as professionally, if the judiciary is given the opportunity to do so.

Unfortunately, contrary to establishing an independent judiciary as dictated by the Rule of Law, the recently passed PRC Legislative Law (passed March 15, 2000) clearly denied the judiciary branch the power of judicial review. Instead the power of resolving conflicts among law and regulations is given to the Standing Committee of the People’s Congress (the legislative branch) and the State Council (the administrative branch). As a matter of fact the lack of an efficient and transparent mechanism in the legislative and administrative branches to resolve conflicts within a prescribed period of time invites most of my criticism, let alone the lack of independence.

Although the Legislative Law deserves praise for its clarification of the hierarchy of laws and the division of respective legislative powers, the provisions denying independent judicial review are a step back from moving

toward the Rule of Law. I certainly hope the WTO's call for judicial review will in the long run reverse the trend.

CONCLUSION

I do not see any possible chance for the Rule of Law to flourish in a society with a centrally planned economy. The reason is not ideological. Rather it lies in the very essence of the Rule of Law, which is to draw a well-defined legal boundary between the government and the governed. In a centrally planned economy where the government plans everything, produces everything, takes everything, and distributes everything, there is indeed no need to draw the legal boundary between the government and the governed, not only from the perspective of the government, but also from that of the governed.

Therefore I believe the external market forces to be introduced into China upon its entry to the WTO will accelerate China's legal reform toward the Rule of Law. China's commitment to the legal principles set forth in WTO agreements, and its acceptance of enforcement of DSB decisions upon China hold the promise that the Rule of Law has never been so close to the Chinese people.

Martin Hu is a founding partner of Boss & Young, a leading Chinese law firm representing foreign investors in China. He holds two law degrees, LL.B. from Wuhan University Law School in Wuhan, China, and LL.M. in tax from Capital University Law School in Ohio, U.S.A. From 1996-99, Mr. Hu served as legal counsel of Philips Electronics China Group in Shanghai. Prior to that, he practiced law for three years in Columbus, Ohio, mainly in the fields of international transactions and tax. As an attorney licensed in both China and the United States, Mr. Hu actively advises multinationals doing business in China and is often invited by Chinese government agencies to consult on legislation and administrative policy concerning foreign investment. Mr. Hu has written articles for a number of legal publications, and he taught Modern Corporate Law at Fudan University Law School in Shanghai. He is a member of the American Bar Association and the Shanghai Bar Association, and currently serves as chairman of the Legal Subcommittee of the British Chamber of Commerce in Shanghai.

