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Henry S. GAO

Singapore Management University, henrygao@smu.edu.sg

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The WTO Transparency Obligations and China

Henry Gao

When it acceded to the WTO in 2001, China accepted comprehensive transparency obligations as well as substantive commitments covering both market access and rules issues. Initially designed to deal with the opaque trade law regime, the transparency obligations were also expected to help democratize the legislative process and promote the development of the rule of law in China. Now that more than 15 years have passed, have the transparency obligations fulfilled their original promises? This article answers the question by reviewing how the transparency obligations have worked in practice. It notes that, while transparency has improved in some areas, it is still lacking in other areas. The article discusses the reasons for the uneven progress, and concludes with some advice on how transparency may be further enhanced.

I. Transparency Obligation in the WTO

1. History of Transparency in the Multilateral Trading System

Transparency has long been one of the most fundamental principles of the multilateral trading system. The original General Agreement on Tariffs and Trade (GATT) 1947, for example, includes Article X: Publication and Administration of Trade Regulation, which sets the basic transparency obligation for GATT contracting parties. Steve Charnovitz pointed out that the origin of the provision can be traced back to the 1923 International Convention Relating to the Simplification of Customs Formalities,¹ but Padideh Ala'i argued that, as the US proposed the language, the Article was heavily influenced by the US Administrative Procedure Act (APA), which was passed in June 1946.² According to Ala'i, as the APA has made the US administrative processes more transparent for foreign traders to conduct business in the US, the US proposed Article X in the GATT to level the playing field for US traders who often faced opaque and informal administrative structures in foreign markets.³

The US draft, initially entitled "Publication and Administration of Trade Regulations--Advance Notice of Restrictive Regulations", was first incorporated as Article 38 in the Havana Charter for the International Trade Organization.⁴ When the ITO failed to come into being, it was inherited by the GATT as Article X under a slightly different title - "Publication and Administration of Trade Regulations".⁵ Notwithstanding the minor change in title, the

¹ Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 *Rutgers L. Rev.* 927 (2004), at p. 929.

² Padideh Ala'i & Mathew D'Orsi, *Transparency in International Economic Relations and the Role of the WTO*, in Robert G. Vaughn (eds.), *Research Handbook on Transparency*, Edward Elgar, 2014, at p. 370.

³ *Id.*

⁴ Sylvia Ostry, *China and the WTO: Transparency Issue*, 3 *UCLA J. Int'l L. & Foreign Aff.* 1 1998-1999, at p. 3.

⁵ *Id.*

substantive content of the article remained the same.⁶

However, the provision was rarely used in the GATT era. As noted by Charnovitz, in the history of the GATT, the only instance where a trade measure was challenged under Article X and found illegal was the 1989 case of European Economic Community –Restrictions on Imports of Apples (EEC-Apples), a complaint brought by the United States.⁷ Moreover, even in that case, transparency was not the main claim and was instead only incidental to the main claims on quantitative restrictions under Articles XI and XIII.⁸ According to Ala’i, the reason for the low usage during the GATT period is because the focus of trade negotiations in GATT, at least for its first two decades, was mainly on reduction of tariffs.⁹ As tariff is the most transparent trade measure, there is not much need to invoke the transparency obligation. Interestingly, this also explains why Article X was invoked in the EEC-Apples case, as it is mainly concerned with import quota, which by its nature is among the most opaque and non-transparent trade measures.

With the establishment of the WTO, things have changed. The trade negotiations conducted under the auspices of the GATT was so successful that, by 1994, the average tariff for industrial countries have been drastically reduced from 20-30% in 1947 to less than 4%.¹⁰ Instead of focusing on tariff reductions alone, the WTO has greatly expanded its scope to include many non-tariff barriers such as trade remedies measures, technical barriers, sanitary and phyto-sanitary measures, services regulations, and intellectual property rights measures. Because most of these measures concern behind-the-border regulatory measures that are difficult to police, transparency has become “an indispensable element of the multilateral trading system”, as noted by the WTO in its official publication commemorating the 20 Year Anniversary of the WTO.¹¹

Transparency is not only important for existing issues already covered by the WTO legal framework, but also for new issues yet to be incorporated into the multilateral trading system. For example, in the Doha Declaration, the WTO Members repeatedly emphasized the important role played by transparency in addressing new issues such as investment, competition and government procurement.¹²

2. Defining Transparency

⁶ *Id.*, at pp. 3-4.

⁷ Charnovitz, *supra* note 1, at pp. 933-934.

⁸ GATT Panel Report, European Economic Community – Restrictions on Imports of Apples – Complaint by the United States, L/6513, adopted 22 June 1989, BISD 36S/135, available at https://www.wto.org/english/tratop_e/dispu_e/88appleu.pdf.

⁹ Ala’i & D’Orsi, *supra* note 2, at p.368.

¹⁰ World Trade Organization, 2007 World Trade Report: Six Decades of Multilateral Cooperation, What Have we Learnt? Geneva: WTO, at pp. 207-209.

¹¹ WTO, The WTO at Twenty: Challenges and Achievements, Geneva: WTO, 2015, at p. 51.

¹² WTO Ministerial Conference, Fourth Session, Doha, 9 - 14 November 2001, Ministerial Declaration, Adopted on 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, at paras. 20, 22, 25 and 26.

While the growing interests on transparency in recent years is a welcome development, it also leads to confusions as the transparency concept has been expanded to cover a wider range of issues. As noted half-jokingly by Sylvia Ostry, the word transparency is the “most opaque in the trade policy lexicon.”¹³ Thus, for the purpose of our discussion, it is important to clarify its meaning and differentiate the different types of transparency.

Broadly speaking, the modern literature on transparency in the WTO can be divided into two categories: The first is domestic or regulatory, which covers the transparency of domestic trade-related laws and regulations of WTO members. This is the classical concept of transparency as embodied in Article X and the focus of the discussion in this paper. In recent years, however, more and more commentators started to focus on the transparency of the WTO itself as an international institution. They criticized the decision-making mechanism of the WTO as being too secretive and calls for more transparency in the WTO negotiation and dispute settlement process.¹⁴ I would classify this as international or institutional transparency, which is beyond the scope of this paper.

In turn, the obligations on regulatory transparency in the WTO framework can be further divided into the following two categories:

A. General obligations that are universally applicable across many different sectors and range of measures. The primary example for this is Art. X of the GATT, which covers all trade measures affecting trade in goods. Similarly, GATS Art. III and TRIPS Art. 63 set out the transparency obligations for trade in services and trade-related intellectual property rights respectively. As these two provisions are modelled after Art. X, we will concentrate on Art. X in our discussions.

Titled “Publication and Administration of Trade Regulations”, Art. X includes three paragraphs, two of which are relevant to the transparency obligation. Under the first paragraph, WTO Members are required to publish promptly all trade-related “laws, regulations, judicial decisions and administrative rulings of general application” and international trade agreements. Under the second paragraph, WTO Members may not enforce measures “effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor ... before such measure has been officially published”.

B. Agreement-specific obligations that set out transparency obligations in various sector or measure-specific agreements. They mainly focus on due process and notification

¹³ Ostry, *supra* note 4, at p. 1.

¹⁴ Many non-governmental organizations such as Greenpeace, Public Citizen and Third World Network have criticized the WTO for being too secretive and un-democratic. See e.g., Lori Wallach & Patrick Woodall, *Whose Trade Organization? A Comprehensive Guide to the WTO*. New York: New Press, 2004; Greenpeace, *Why is the WTO a Problem?*, 2003, available at <http://www.greenpeace.org/international/en/publications/reports/why-is-the-wto-a-problem/>; Martin Khor, *Developing Countries Decry WTO’s Secretive Talks*, Third World Network, available at <http://www.twn.my/title/1972.htm>. For a good academic discussion of these criticisms, see Charnovitz, *supra* note 1.

requirements. For example, under Art. 6 of the Anti-dumping Agreement and Art. 12 of the Subsidies and Countervailing Measures (SCM) Agreement, the investigating authorities shall not only provide public notices on the key stages in the investigation process but also give interested parties opportunity to supply information and participate in the investigation process. As noted by the WTO, these requirements “intended to increase the transparency of determinations, with the hope that this will increase the extent to which determinations are based on fact and solid reasoning”.¹⁵ As to the notification requirements, they can be found in almost every agreement ranging from the Technical Barriers to Trade (TBT)¹⁶ and Sanitary and Phytosanitary (SPS) measures Agreements¹⁷ to the Agreement on Trade-Related Investment Measures (TRIMS).¹⁸

As these transparency obligations differ in nature and effect, we can also divide them into the following two categories:

A. Passive or paper transparency, which is mainly about the obligation to provide the information so as to help the traders to understand the various government regulations affecting trade. This include the publication obligation and the notification obligation as mentioned above.

B. Positive or participatory transparency, which require the authorities to provide the information to various stakeholders to enable these actors to assess the implications and even influence policy making. Such provisions go beyond the narrow one-way publication and notification requirements under the previous category, and instead prescribe a two-way process whereby the authorities would provide the information to the stakeholders first, then the stakeholders are given an opportunity to comment on the information, and the authorities will then make the decision on the basis of the feedbacks from the stakeholders. Such requirements apply not only to the drafting of trade-related laws and regulations,¹⁹ but also to the decision-making process in administrative proceedings such as anti-dumping and subsidy investigations.

II. China-specific Transparency Obligations

In China’s accession process, transparency was regarded as one of the most problematic areas. As summarized in the Working Party Report,

“some members noted the difficulty in finding and obtaining copies of regulations and other measures undertaken by various ministries as well as those taken by provincial and other local authorities. Transparency of regulations and other measures, particularly of sub-national authorities, was essential since these authorities often provided the details on how the more general laws, regulations and other measures of the central government would be implemented and often differed among various jurisdictions. Those members emphasized the need to receive

¹⁵ WTO, Technical Information on Anti-dumping, available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

¹⁶ TBT Agreement, Art. 10.

¹⁷ SPS Agreement, Art. 7.

¹⁸ TRIMS Agreement, Art. 6.

¹⁹ See *e.g.*, SPS Agreement, Annex B, para. 5; TBT Agreement, Art. 2.9.2 and Annex 3, para. L.

such information in a timely fashion so that governments and traders could be prepared to comply with such provisions and could exercise their rights in respect of implementation and enforcement of such measures. The same members emphasized the importance of such pre-publication to enhancing secure, predictable trading relations.”²⁰

To address these concerns, China agreed to the following China-specific obligations in addition to the general transparency obligations already contained in the existing agreements of the WTO:

1. Publication obligation

This is contained in Section 2.(C).1. of the Accession Protocol, which notes the following:

“China undertakes that only those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange that are published and readily available to other WTO Members, individuals and enterprises, shall be enforced. In addition, China shall make available to WTO Members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange before such measures are implemented or enforced. In emergency situations, laws, regulations and other measures shall be made available at the latest when they are implemented or enforced.”

This obligation goes beyond the normal publication obligation under GATT Art. X by adding the following elements. First, GATT Art. X.1 only requires the trade regulations to be “published promptly in such a manner as to enable governments and traders to become acquainted with them” and does not set a specific deadline. In contrast, by stating that only trade regulations “that are published and readily available to other WTO Members, individuals and enterprises, shall be enforced”, Section 2.(C).1 essentially requires the publication takes place at least before the entry into force of the regulation.

Second, while GATT Art. X.2 also requires certain trade regulations to be officially published before they are enforced, such obligation only applies to a very small set of trade regulations, *i.e.*, those “effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor”. Section 2.(C).1, however, greatly expands the scope of application by applying it to all “laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange”. This is even stricter than the transparency obligation under GATS Art. III.1, which, though requiring the publication of GATS regulations “by the time of their entry into force”, still provides for the exemption in emergency situations.

Third, under GATT Art. X, a WTO Member is only required to publish the trade regulations, and the burden of finding such information is still on the foreign governments or

²⁰ WTO Ministerial Conference: Fourth Session, Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001, at para. 324.

traders. In contrast, Section 2.(C).1 requires the Chinese government to make such information available to WTO Members upon request from such Members. In other words, once the other WTO Members make a request, the burden of providing the information shifts to China. Under GATS Art.III.4, a WTO Member is also required to “respond promptly to all requests by any other Member for specific information” on services regulations. However, the obligation to respond is more procedural in nature and not as substantive as making available such regulations. Among the general publication obligations in the WTO Agreements, the closest to the Chinese obligation we can find is TRIPS Art. 63.3, which require a WTO Member to supply TRIPS-related regulations to another Member. Yet even the TRIPS provision here falls short of the Chinese obligation in two important aspects. First, under the TRIPS, the obligation is only triggered by a written request, while the Chinese obligation does not specify this, which means that, at least in theory, even informal oral requests would work. Second, Section 2.(C).1 requires the regulations to be provided before such measures are implemented or enforced, or in emergency situations, at least when they are implemented or enforced. Again, such stringent pre-implementation requirement cannot be found under the corresponding provisions in the GATT, GATS or TRIPS.

While such detailed publication obligation is viewed by some commentators as discriminatory, it is badly needed for a country like China, which has been plagued by the widespread use of normative documents beneath the formal system of laws and administrative regulations.²¹ While their legality is questionable, they have been used extensively by administrative bodies, especially at the local level.²² As most of them are not published, they are especially problematic for foreign traders and firms. This problem is even recognized by Chinese President Jiang Zemin, who exhorted officials to use published and uniform laws and regulations rather than unpublished internal documents to exercise the government’s function to manage the economy.²³ By casting a wide net with the publication obligation under Section 2.(C).1, other WTO Members finally have a way of pinning down these minor yet important documents and examining them.

2. Official journal & comment

Under Section 2.(C).2. of the Accession Protocol, China shall “*establish or designate an official journal dedicated to the publication of all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange and, after publication of its laws, regulations or other measures in such journal, shall provide a reasonable period for comment to the appropriate authorities before such measures are implemented, except for those laws, regulations and other measures involving national security, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement. China shall publish this journal on a*

²¹ Ostry, *supra* note 4, at p. 13.

²² *Id.*

²³ Jiang Zemin, Zai Jilie de Guoji Jingzheng zhong Zhangwo Zhudong (Seize the Initiative amidst Intense International Competition), in Jiang Zemin Wenxuan (Selected Works of Jiang Zemin), Vol. III, Renmin Chubanshe (People’s Publishing House), Beijing, 2006, at p. 454.

regular basis and make copies of all issues of this journal readily available to individuals and enterprises.”

Again these two obligations cannot be found in the general transparency provisions in the GATT, GATS and TRIPS. While they all require the publication of trade regulations, none of them requires that the publication must be made in one specific official journal or that opportunity to comment is provided before the implementation of the regulations. Instead, the right to comment obligation most likely draw its inspiration from the specialized agreements such as the TBT & Anti-dumping Agreements, which provides the right to comment in the formulation of technical standards,²⁴ conformity assessment procedures,²⁵ standards,²⁶ adoption of provisional anti-dumping measures,²⁷ and consideration of acceptance of price undertakings.²⁸

The obligation to establish an official journal specifically addresses the difficulty experienced by some WTO Members in “finding and obtaining copies of regulations and other measures undertaken by various ministries as well as those taken by provincial and other local authorities”, as noted in the Working Party Report.²⁹ While the Ministry of Trade and Economic Cooperation (MOFTEC) tried to eliminate them by establishing its own gazette for publication of all laws, regulations and administrative rules related to foreign trade and investments in October 1993, the gazette does not include state and local laws or normative documents.³⁰ This is confirmed by the response to the Working Party by the representative of China, who noted that such regulations have to be found instead in a motley collection of publications: "Almanac of Foreign Economic Relations and Trade" and "The Bulletin of MOFTEC" published by MOFTEC; "Statistical Yearbook of China" published by the State Statistical Bureau; "China's Customs Statistics (Quarterly)" edited and published by the Customs; the "Collection of the Laws and Regulations of the People's Republic of China"; "The Treaty Series of the PRC"; the "Directory of China's Foreign Economic Relations and Trade Enterprises"; "China's Foreign Trade Corporations and Organizations"; Gazette of the Standing Committee of the National People's Congress of the People's Republic of China; Gazette of the State Council of the People's Republic of China; Collection of the Laws of the People's Republic of China; Collection of the Laws and Regulations of the People's Republic of China; Gazette of MOFTEC of the People's Republic of China; Proclamation of the People's Bank of the People's Republic of China; and Proclamation of the Ministry of Finance of the People's Republic of China.³¹ As such jungle of publications is difficult to navigate even for native Chinese, one could well imagine the relief that the foreign governments and traders must feel when China agreed to have one single Official

²⁴ TBT Agreement, Art. 2.9.

²⁵ *Id.*, Art. 5.6.

²⁶ *Id.*, Annex 3, para, L.

²⁷ Anti-dumping Agreement, Art. 7.1.

²⁸ *Id.*, Art. 8.3.

²⁹ Working Party Report on the Accession of China, *supra* note 20, at para. 324.

³⁰ Ostry, *supra* note 4, at p. 13.

³¹ Working Party Report on the Accession of China, *supra* note 20, at paras. 325-330.

Publication for all these regulations.

3. Enquiry point

Under Section 2.(C).2. of the Accession Protocol, China shall “*establish or designate an enquiry point where, upon request of any individual, enterprise or WTO Member all information relating to the measures required to be published under paragraph 2(C)1 of this Protocol may be obtained. Replies to requests for information shall generally be provided within 30 days after receipt of a request. In exceptional cases, replies may be provided within 45 days after receipt of a request. Notice of the delay and the reasons therefor shall be provided in writing to the interested party. Replies to WTO Members shall be complete and shall represent the authoritative view of the Chinese government. Accurate and reliable information shall be provided to individuals and enterprises.*”

While the establishment of one Official Journal solves the problem of having to weed through various publications by many different agencies, it is still a daunting task to sift through the Journal as a foreigner is unlikely to know which volume or issue of the Journal he shall consult to find the specific regulation that addresses his particular problem. This explains the rationale for the obligation on the establishment of the enquiry point, which provides a much more efficient way to obtain information on specific measures compared to the wild goose chase a foreign trader may have to conduct on his own.

Again this obligation cannot be found in the original Art. X of the GATT. Instead, its origin may be traced to Art. III.4 of the GATS, as well as similar articles under the TBT and SPS Agreements.³² At the same time, the provision also made further refinements as follows:

First is the expansion of the scope of beneficiaries. Under both the GATS and SPS agreement, a Member is only obliged to provide information to other WTO Members. Even though the TBT agreement expands the coverage to “interested parties in other Members”, one may argue that this only covers parties in other Members and does not include parties which are present in the Member with the enquiry point. In other words, foreign investors might not benefit from this clause as they are already in the host country and thus are not “interested parties in other Members”. In contrast, such ambiguity would not arise under Section 2.(C).2, as it explicitly grant the right to request information to any individual or enterprise, without limitation on the location of the parties. Taken literally, this could even include purely domestic persons and firms from China.

Second is the strict time limit. Under Section 2.(C).2, China shall provide reply to information requests within 30 days after receipt of a request. In exceptional cases, this could be extended to 45 days, but notice of the delay and the reasons shall be provided in writing to the interested party. Such strict time limit cannot be found in any of the WTO Agreements and is another innovation in the Accession Protocol. It ensures that the purpose of establishing the enquiry point would not be defeated by the delay tactics often resorted to by the bureaucracy. Even in cases of delay, the need to provide written notice and reasons also put pressure on the

³² See TBT Agreement, Art. 10.1; SPS Agreement, Annex, para. 3.

agency to provide a response in due course.

The third feature is the most interesting, as it tries to specify the quality of the information. While the strict time limit mentioned above ensures that a reply will be provided in time, it alone cannot prevent the bureaucrats from providing information that is incomplete, inaccurate or ambiguous. To solve this problem, the Accession Protocol took the bold step by including a substantive safeguard that focuses on the quality of the information. Depending on who is the party making the request, the level of quality required is also different. For requests made by the government of a WTO Member, the reply shall be “complete” and “represent the authoritative view of the Chinese government”. This prevents the problem created by standard disclaimers such as “this only reflects the personal view of the official and does not represent the official view of the government”. A lower standard of quality applies to replies to requests by individuals and firms, but such replies should still be “accurate and reliable”.

4. Translation

Unlike the other obligations, the translation obligation is contained in para. 334 of the Working Party Report, which provides that:

“The representative of China confirmed that China would make available to WTO Members translations into one or more of the official languages of the WTO all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of forex, and to the maximum extent possible would make these laws, regulations and other measures available before they were implemented or enforced, but in no case later than 90 days after they were implemented or enforced.”

This obligation is noted in paragraph 342 of the Working Party Report, which incorporates it as part of paragraph 1.2 of the Accession Protocol. It addresses the lack of translations of trade regulations, which is a long-standing problem troubling foreign governments and traders. Without this obligation, the above-mentioned transparency obligations were largely worthless as the Chinese government could simply provide the Chinese version of the regulations. When the foreigners tried to translate these regulations, they were often told that their translations are inaccurate and does not correctly convey the original meaning in Chinese. With the addition of the translation obligation, the foreigners now have access to an official translation done by the Chinese government itself, which will be highly useful in their dealings with China. Moreover, the translation should be provided on a timely basis, normally before the implementation and latest no more than 90 days after the implementation.

5. Transitional Review Mechanism

The final obligation is the transitional review mechanism established by Section 18 of the Accession Protocol. This obligation applies on top of the normal Trade Policy Review Mechanism (TPRM) with the following additional features:

First, the bodies conducting the reviews are different. The normal TPRM is conducted by the Trade Policy Review Body, which is established as a separate body according to the TPRM

Agreement³³ but in practice is the General Council exercising the function of trade policy review.³⁴ In contrast, the transitional review is conducted by the General Council and the “subsidiary bodies of the WTO which have a mandate covering China's commitments under the WTO Agreement or [the Accession] Protocol”.³⁵ To avoid confusion, the Accession Protocol further lists the bodies as including the three main councils, *i.e.*, Council for Trade in Goods (CTG), Council for Trade-Related Aspects of Intellectual Property Rights, Council for Trade in Services (CTS); and 13 committees, which include the Committee on Balance-of-Payments Restrictions under the General Council, the Committee on Trade in Financial Services under the CTS, and all of the 11 committees under the CTG, *i.e.*, Committees on Market Access (covering also ITA), Agriculture, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Rules of Origin, Import Licensing, Trade-Related Investment Measures, and Safeguards. As these councils and committees each specializes in separate agreements, they are more likely to have subject-matter expertise and the discussions will be more fruitful.

Second, the scopes of reviews are also different. The TPRM reviews “individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system”. The Transitional Review Mechanism (TRM), on the other hand, covers not only China's commitments under the WTO Agreements but also those in the Accession Protocol. In other words, even if a matter is not covered by the WTO Agreements but have been included in China's Accession Protocol, it will be included in the Transitional Review. The latter includes, for example, China's commitments to liberalize trading rights³⁶ and to remove export taxes.³⁷

The third difference lies in the formats and procedures of the reviews. The TPRM has well established procedure, which starts with the preparation of a policy statement by the country under review and a report by the Secretariat, which are distributed before the review meeting.³⁸ The Members also submit written questions to the Members under review, which often provide written answers. At the review meeting, the Member under review will start with an opening remark, followed by the initial remark by a discussant, and then the floor is open for discussions. After the meeting, the Secretariat's report and the policy statement are released, and the minutes of the meeting is also posted online. In contrast, the Transitional Review Mechanism does not specify any procedure. All it requires is for China to provide relevant information to the subsidiary bodies mentioned above before the review, and for the subsidiary bodies to report the result of the review to the relevant Council and General Council.³⁹ The only exception is the

³³ TPRM Agreement, Art. C.(i).

³⁴ Agreement Establishing the World Trade Organization, Art. IV.4.

³⁵ WTO, Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001, Section 18.1.

³⁶ *Id.*, Section 5.

³⁷ *Id.*, Section 11.3.

³⁸ WTO Trade Policy Review Body, Rules of Procedure for Meetings of the Trade Policy Review Body, WT/TPR/6/Rev.3, 31 January 2012.

³⁹ Protocol on the Accession of the People's Republic of China, *supra* note 35, Section 18.1.

review conducted by the General Council, which, pursuant to Annex 1B, shall follow the usual Rules of Procedure of the General Council. Annex 1A of the Accession Protocol lays down a very detailed list of information China shall provide, which includes a total of 7 categories and 56 sub-categories. However, this seemingly onerous requirement is watered down by a footnote therein, which states that China may use the information it has already provided under the general notification requirements. Overall, compared to the normal TPRM, the Transitional Review Mechanism seems more like an *ad hoc* mechanism to address specific problems encountered by WTO Members rather than an institutionalized mechanism to review China's trade policy in a systemic manner.

Fourth, the frequencies of the reviews are also different. Under the TPRM, the frequency of review is determined by the share of world trade of the Member under review.⁴⁰ The four largest traders are reviewed once every two years, the next four every four years, and the rest of the Membership every six years, with additional allowance for LDCs.⁴¹ When China joined the WTO, it ranked number six in world trade, which means it should be reviewed once every four years under the normal TPRM. Under the TRM, however, China will be reviewed every year for the first eight years, with a final review on the tenth year of its accession.⁴² This arrangement apparently reflects the concerns of WTO Members on whether China may smoothly implement its WTO obligation, especially in the first few years of the post-accession period.

The fifth difference is the relationship of the review mechanisms with the dispute settlement mechanism. As the objective of the TPRM is to provide an opportunity to improve the transparency and understanding of the trade regimes of WTO Members, the TPRM Agreement explicitly states that the review is not “intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures”.⁴³ In contrast, the TRM takes the contrary approach by stating that “[c]onsideration of issues [under the TRM] shall be without prejudice to the rights and obligations of any Member, including China, under the WTO Agreement or any Plurilateral Trade Agreement, and shall not preclude or be a precondition to recourse to consultation or other provisions of the WTO Agreement or this Protocol”.⁴⁴ In other words, the TRM could well provide an opportunity for WTO Members to collect information they might need to launch a complaint against China under the WTO dispute settlement system.

As discussed above, these obligations go beyond the normal requirements under the WTO Agreements. Moreover, many of the transparency obligation in China's Accession Protocol are highly intrusive. Such approach is in marked contrast to the rather cautious approach adopted in the WTO Agreements, which is summed up well by the acknowledgment in the TPRM Agreement that “the implementation of domestic transparency must be on a voluntary

⁴⁰ TPRM Agreement, Article C(ii).

⁴¹ *Id.*

⁴² Protocol on the Accession of the People's Republic of China, *supra* note 35, Section 18.4.

⁴³ TPRM Agreement, Article. A(i).

⁴⁴ Protocol on the Accession of the People's Republic of China, *supra* note 35, Section 18.3.

basis and take account of each Member's legal and political systems".⁴⁵ Why then, does the WTO Members choose to adopt such a bold approach towards China? Some commentators argued that there was no reason at all.⁴⁶ However, in the view of the author, such stringent obligations reflect the deep concerns by WTO Members over the lack of transparency in China. By including these lengthy and meticulous obligations, the Members hope to beef up the transparency obligation with specific guidelines on the implementation. If implemented well, these transparency obligations could benefit China itself too. However, as we will see in the next Section, the expectations do not always match up with the reality.

III. China's Implementation Record

Upon its accession to the WTO, the most urgent task facing China was the implementation of the substantive obligations, including reducing goods tariffs, removing non-tariff barriers, and opening services markets.⁴⁷ To implement these obligations, the Chinese government also conducted a comprehensive review and revision of the trade related laws and regulations. The work is coordinated by the WTO Legal Affairs Leading Group, which was established in early 2000 and led by then MOFTEC Minister Shi Guangsheng.⁴⁸ The detailed work was conducted by the WTO Legal Affairs Team, which was established in late 2000 and composed of lower-level officials. There were two phases in the work: the first phase was mapping of existing laws and regulations, which totalled 1,413 regulatory documents and includes 6 laws, 164 administrative regulations (including 110 internal regulations), 887 departmental rules (including 195 internal documents), 191 bilateral trade agreements, 72 bilateral investment agreements, and 93 double taxation treaties.⁴⁹ In the second phase, these regulatory documents were reviewed by the Team, which decided to repeal, revise, retain them or enact new legislations. When the Team completed its work in August 2002, it has revised 210 regulatory documents, while 559 and 450 such documents were repealed and retained respectively.⁵⁰

Similar work was also conducted at the local government level pursuant to the Advice on Adapting to out WTO Accession Process and Clean Up Local Regulations, Rules and Other Policy Instruments issued by the General Office of the Central Committee of the CCP and the

⁴⁵ TPRM Agreement, Article. B.

⁴⁶ See *e.g.*, Julia Ya Qin, 'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System - An Appraisal of the China Accession Protocol. *Journal of World Trade*, Vol. 37, No. 3, pp. 483-522, 2003, at p.510; Chen, Sijie, *China's Compliance with WTO Transparency Requirement: Institution-Related Impediments* (2012). *Amsterdam Law Forum*, Vol. 4, No. 4, pp. 25-50, 2012, at p. 37.

⁴⁷ See Shi Miaomiao, *China's Participation in the Doha Negotiations and Implementation of its Accession Commitments*, in Henry Gao & Donald Lewis (eds.), *China's Participation in the WTO*, Cameron May, London, 2005, at pp. 28-33.

⁴⁸ Yang Guohua, *Shijie Maoyi Zuzhi Yu Zhongguo* (World Trade Organization and China), Qinghua Daxue Chubanshe (Tsinghua University Press), Beijing, 2015, at p. 133.

⁴⁹ *Id.*

⁵⁰ *Id.*

General Office of the State Council.⁵¹ The work was completed in June 2002 with more than 190,000 local regulations, rules and other policy instruments revised or repealed.⁵²

In contrast, the implementation of procedural commitments such as the transparency obligation took the back seat. While it is undeniable that the transparency of its trade regime has been gradually improving since accession, most of the progress were achieved due to persistent nudging and even complaining by other WTO Members, led by the US and EU. Overall, 15 years after China's accession, it is fair to say that China is now largely in compliance with its transparency obligations, but problems still remain in some areas. In this section, we will examine in detail the implementation of the individual obligations.

1. Official journal & publication

As mentioned earlier, at the time of accession, China did not have an official journal dedicated to trade laws and regulations. Instead, the information on trade laws and regulations are scattered through newspapers, websites and journals published by many different agencies.

To implement the obligation, MOFTEC could either establish a new journal, or use the existing MOFTEC Gazette as mentioned earlier. MOFTEC decided to choose the latter option. However, there is a problem with this approach: as the MOFTEC Gazette is a publication by MOFTEC, it would not have the power to collect and publish the laws and regulations made by other agencies and local governments, which are parallel to MOFTEC in the administrative hierarchy. To solve the problem, MOFTEC proposed to the State Council to rename the "MOFTEC Gazette" as "China Foreign Trade and Economic Cooperation Gazette". On June 3, 2002, the State Council approved the renaming request by MOFTEC and designated the Gazette as the official journal.⁵³ This is not just a simple change of name. Instead, as the establishment of the Gazette is sanctioned by the State Council and the name now starts with "China", the Gazette has been elevated from the publication of a Ministry into an official publication of the Chinese government. While the Gazette is still edited and distributed by MOFTEC,⁵⁴ it now has the power to request information on trade-related laws and regulations from other Ministries, local governments, which have been urged by the State Council to "provide positive support and cooperation".⁵⁵

On October 18, 2002, the first trial issue of the China Foreign Trade and Economic

⁵¹ *Id.*, at p. 155.

⁵² *Id.*, at p. 156.

⁵³ Guowuyuan Bangongting (State Council General Office), Guanyu Luxing Woguo Jiaru Shjie Maoyi Zuzhi Yidingshu Toumingdu Tiaokuan Youguan Wenti de Fuhan (Reply on Issues concerning the Implementation of the Transparency Provision in China's WTO Accession Protocol), Guobanhan [2002] No. 42, June 3, 2002, available at http://www.gov.cn/gongbao/content/2002/content_61584.htm.

⁵⁴ *Id.*, para. 1.

⁵⁵ *Id.*, para. 2.

Cooperation Gazette was published.⁵⁶ After 12 trial issues in 2002, the Gazette became a formal publication in 2003.⁵⁷ Since then, the Gazette has been regularly published with 80 issues every year. However, as late as 2005, foreign governments and lawyers still complained about the failure of China to implement the obligation to establish the official journal, as many of them are not aware of the Gazette.⁵⁸ According to some studies, the problem is that the Gazette doesn't include the laws and regulations by local governments, and foreigners still have to scourge many different sources for such information.⁵⁹

To address this issue, the State Council issued the Notice on Further Improving the Relevant Work on the Implementation of the Transparency Provisions in China's WTO Accession Protocol on March 30, 2006.⁶⁰ The first paragraph of the Notice reaffirmed the status of the Gazette as the Official Journal of the Chinese government in publishing trade-related laws and regulations. The second paragraph further clarifies the ambiguous language of providing "positive support and cooperation" in the 2002 reply by explicitly requiring all central government agencies and local governments shall "forward to MOFCOM copies of trade-related laws and regulations either at the time of publication of such regulations or when the drafts are released for public comments so that they can be published in a timely manner in the Gazette." In the last paragraph, MOFCOM is also asked to "actively coordinate and cooperate with relevant parties to implement the transparency commitments fully and timely."

Notwithstanding the high-level exhortation from the State Council, however, the implementation of the Official Journal and Publication obligations have remained uneven until today. The first problem is the lack of coverage of sub-central governmental measures.⁶¹ For example, of the 80 volumes of the Gazette published in 2016, only two mentioned local regulations.⁶² On the other hand, at the Central Government level, the Gazette usually covers

⁵⁶ MOFTEC, *Zhongguo Duiwai Jingji Maoyi Wengao Shikanhao Jinri Chuban Faxing* (Trial Issue of China Foreign Trade and Economic Cooperation Gazette Recently Published), October 18, 2002, available at <http://www.mofcom.gov.cn/article/ae/ai/200210/20021000043894.shtml>.

⁵⁷ *Id.*

⁵⁸ Paolo D. Farah, *Five Years of China WTO Membership: EU and US Perspectives About China's Compliance With Transparency Commitments and the Transitional Review Mechanism*, *Legal Issues of Economic Integration*, Kluwer Law International, Vol. 33, No. 3, pp. 263-304, August 2006, at p. 281.

⁵⁹ *Id.*, at pp. 281-282.

⁶⁰ State Council General Office, *Guowuyuan Bangongting Guanyu Jinyibu Zuohao Luxing Woguo Jiaru Shijie Maoyi Zuzhi Yidingshu Toumingdu Tiaokuan Xiangguan Gongzuo de Tongzhi* (Notice on Further Improving the Relevant Work on the Implementation of the Transparency Provision in China's WTO Accession Protocol), *Guobanfa* [2006] No. 23., March 30, 2006, available at http://www.gov.cn/gongbao/content/2006/content_283942.htm.

⁶¹ United States Trade Representative (USTR), *2016 Report to Congress on China's WTO Compliance*, January 2017, at p. 163.

⁶² MOFCOM General Office, *2016 nian Zhongguo Duiwai Jingji Maoyi Wengao Zongmulu* (Master Table of Contents for the 2016 China Foreign Trade and Economic Cooperation Gazette), available at <http://www.mofcom.gov.cn/article/b/g/201601/20160101244294.shtml>. The two mentioning local regulation are Volumes 43 and 45.

only the regulations made by agencies with close working relationship with MOFCOM, such as Customs Administration, National Development and Reform Commission (NDRC), Ministry of Finance, General Administration of Quality Supervision, Inspection and Quarantine and State Food and Drug Administration. Moreover, even for the trade-related measures by the covered agencies, the Gazette usually only publishes regulations and departmental rules, and rarely publishes other legal instruments such as opinions, circulars, orders, directives and notices.⁶³

2. Public comment

In a way, China's efforts to implement the obligation on public comment started even before its accession to the WTO. The Law on Legislation (LL) enacted in March 2000, for example, include several provisions on collecting public comments through various means.⁶⁴ Closer examination reveals, however, that the provisions in the Law fall short of meeting China's WTO commitment in several ways. First, the LL only provides for public comment process for laws made by the NPCSC and Administrative Regulations made by the State Council. Second, under the LL, public comment is not mandatory in the legislative process. Third, under the LL, public comment process is not a pre-condition for the implementation of the relevant laws and regulations. Therefore, the public comment process has rarely been used. In the eight years following the enactment of the LL, public comments have only been sought on the drafts of five laws.⁶⁵

To address these problems, the State Council issued two administrative regulations on Nov 16, 2001, 5 days after China signed its Protocol of Accession. The first regulation, Regulations on the Procedures for the Formulation of Administrative Regulations,⁶⁶ specifies the legislative procedure for administrative regulations made by the State Council. The second regulation, Regulations on Procedures for the Formulation of Rules,⁶⁷ applies to departmental rules made by the Ministerial-level agency under the State Council, or the local rules made by local governments at the provincial-level or major municipal level. Of the two, the second regulation is more interesting as it expands the scope of the public comment process to departmental and local rules. It also provides more specific guidelines on the organization of public hearings in Article 15. However, the two regulation share the same weakness as the LL, *i.e.*, the public comment process is still not mandatory and not a pre-condition for the implementation of the relevant regulations. Thus, it is not surprising that little has changed with

⁶³ USTR, *supra* note 61, at p. 163.

⁶⁴ Law on Legislation, enacted by the third meeting of the Ninth People's Congress and promulgated by the No. 31 Order by the President on March 15, 2000, Arts. 34, 58.

⁶⁵ They are Law on Marriage (Amendments), Law on Property, Law on Labour Contracts, Law on Promotion of Employment, Law on Prevention of Water Pollution. See Li Shishi, Guanyu Quanguo Renda Changweihui de Lifa Gongzuo (On the Legislative Work of the NPC Standing Committee), available at http://www.npc.gov.cn/npc/xinwen/2013-06/25/content_1798343.htm.

⁶⁶ State Council, Xingzheng Fagui Zhiding Chengxu Tiaoli (Regulations on the Procedures for the Formulation of Administrative Regulations), State Council Order No. 321, November 16, 2001.

⁶⁷ State Council, Guizhang Zhiding Chengxu Tiaoli (Regulations on Procedures for the Formulation of Rules), State Council Order No. 322, November 16, 2001.

the introduction of these two regulations. As noted by the USTR, the relevant agencies usually would only consult with other agencies, Chinese firms and experts.⁶⁸ Occasionally, selected foreign firms might be consulted, but the drafts would not be shared with them.⁶⁹

In November 2003, MOFCOM issued Interim Measures on Administrative Transparency in the MOFCOM.⁷⁰ Article II states that, in principle, draft regulations of MOFCOM shall be published to the public. Article IV(i)(3) further provides that, if any MOFCOM draft regulations or rules directly affect the substantive interests of citizens, legal persons or other organizations, and relevant citizens, legal persons or other organizations have major disagreements over certain provisions of the draft, the MOFCOM shall publish the draft through governmental website and collect comments and suggestions from such individuals and organizations. This provision could be a major step forward in the implementation of the public comment obligation, as at least arguably, all trade regulations can be said to directly affect the substantive interests of individuals or firms. However, as the provision also requires major disagreements over the draft by such individuals or firms, it falls short of complying with the public comment obligation, which requires comment process for all regulations.

On April 15, 2008, the Standing Committee of the 11th NPC decided at the 2nd Chairman's Meeting that, to further promote scientific legislation and democratic legislation, all draft laws to be reviewed by the NPCSC shall normally be published to collect public comments.⁷¹ Starting from the draft Food Safety Law, which was published on April 20, all draft laws have since been published on the website of the NPC and some important laws have also been published in the major news media.⁷² With this decision and the subsequent publication of draft laws for public comments, China has essentially implemented its public comment obligation with regard to national laws.

In October 2010, the State Council issued Opinions on Strengthening the Building of a Government Ruling by Law,⁷³ which provides that, except those made confidential by law, the drafts of all administrative regulations and departmental and local rules shall be published for public comment, and provide feedbacks on whether such comments are adopted through appropriate means. In July 2011, the State Council Legislative Affairs Office (SCLAO) published Interim Measures on Solicitation of Public Comment on Draft Laws and Regulations

⁶⁸ USTR, *supra* note 61, at p.165.

⁶⁹ *Id.*

⁷⁰ MOFCOM, Shangwubu Guanyu Yinfu "Shangwubu Zhengwu Gongkai Zanxing Banfa" de Tongzhi (MOFCOM Notice on the Issuance of Interim Measures on Administrative Transparency), Shangbanfa [2003] No. 444, November 25, 2003.

⁷¹ Ai Zhihong, Quanguo Renda Changweihui xiang Shehui Gongbu Falu Caoan Gongzuo de Huigu yu Sikao (Reflections on the Work on Publishing Legislative Drafts to the Public by the NPC Standing Committee), March 27, 2014, available at http://www.npc.gov.cn/npc/xinwen/rdltd/rdjs/2014-03/27/content_1857231.htm.

⁷² *Id.*

⁷³ State Council, Guowuyuan Guanyu Jiaqiang Fazhi Zhengfu Jianshe de Yijian (Opinions on Strengthening the Building of a Government Ruling by Law), Guofa [2010] No. 33, October 20, 2010.

and the Notice on Related Issues Regarding Solicitation of Public Comments on Draft Departmental Rules,⁷⁴ and further refined the details for the public comment process. According to the Interim Measures, the draft laws, administrative legislations and departmental rules shall be published on the website of China Government Law Information, which is maintained by SCLAO.⁷⁵ It also provides that the commenting period for draft administrative regulations shall normally be no less than 30 days except in cases of emergency.

The introduction of these detailed rules has gradually established the public comment procedure. Nowadays, the system seems to be working well for the public comment process on laws and regulations. However, problems still remain for departmental rules. For example, during the public comment process for the draft Internet Domain Name Administration Rules made by the MIIT in 2016, many netizens reported that they either could not vote at all, or even if they could vote, the results and number of votes didn't change after they click the vote button.⁷⁶ This episode illustrates how hard it is to change the old habits of the bureaucrats and fully implement the public comment obligation.

Another problem is normative documents, which are regulatory documents that do not fall into the category of administrative regulations or departmental rules. While their legality is dubious as they do not follow the normal legislative procedure, they can have major effect on individuals and firms.⁷⁷ While a relic from the pre-reform era, they are still widely used today, especially at the local government level. The US has repeatedly pushed for the use of public comment procedure for these documents, but China is still rather reluctant to follow the advice.⁷⁸

Also, at the local government level, the implementations of the public comment obligation vary across different regions. In general, the more developed coastal regions tend to have better track records than the backward inland areas. For example, Guangzhou and Beijing has introduced transparency requirements for normative documents.⁷⁹ Another example is Shenzhen, which in November 2000 became the first city in China to hold a hearing on a draft local regulation according to detailed hearing procedure.⁸⁰ In May 2016, Shenzhen went even

⁷⁴ State Council Legislative Affairs Office, Guowuyuan Fazhi Bangongshi Falu Fagui Caoan Gongkai Zhengqiu Yijian Zanxing Banfa (Interim Measures on Solicitation of Public Comment on Draft Laws and Regulations and the Notice on Related Issues Regarding Solicitation of Public Comments on Draft Departmental Rules), July 22, 2011.

⁷⁵ Article 2.

⁷⁶ Cao Guoxing, "Hulianwang Yuming Guanli Banfa" Zhengqiu Yijian Wangye bei Dongshoujiao Buxu Fandui (Commenting Page on "Internet Domain Name Administration Rules" Compromised and No Objections Allowed), Radio France Internationale, March 30, 2016.

⁷⁷ For a good discussion of the problem of normative documents, see Chen Sijie, *supra* note 46, at pp. 44-47..

⁷⁸ USTR, *supra* note 61, at p. 167.

⁷⁹ Chen, *supra* note 46, at pp. 46-47.

⁸⁰ Li Guiru, Shenzhen Shoukai Lifa Tingzhenghui (Shenzhen became the First City in China to hold a Legislative Hearing), China Youth Daily, November 30, 2000, available at <http://www.people.com.cn/GB/channel1/11/20001130/332147.html>.

further by holding China's first legislative hearing through Wechat, the most popular social messaging app in China.⁸¹ Moreover, to ensure the compliance of the local regulations with the substantive obligations of the WTO, Shenzhen also issued the Rules on the Review of the Consistency of the Trade Policies of Shenzhen City with WTO Rules in 2012.⁸² According to the Rules, the Shenzhen government shall submit draft trade-related regulations for review by the Shenzhen WTO Affairs Centre.⁸³ The Shenzhen Rules was the first in the nation and has also inspired the State Council and MOFCOM to issue the nationwide Trade Policy Compliance Rules in 2014.⁸⁴

3. Enquiry points

Compared to the other commitments, the obligation to establish enquiry points is much easier to implement as it is a one-off exercise and does not involve substantive issues. On November 1, 2001, MOFTEC announced the establishment of China WTO Notification and Enquiry Centre, a Departmental level agency along with two others: Department of WTO Affairs and Department of Fair Trade.⁸⁵ On January 1, 2002, MOFTEC published the Interim Measures on Enquiries to the China WTO Enquiry Centre and specified the objectives, scope, method and response time for the enquiries.⁸⁶ According to the Interim Measures, the enquiry shall be submitted in written form, and a written response will be given in 30 working days. To ensure the accuracy and authoritativeness of the enquiry response, MOFTEC also formed an Expert Group for the Enquiry Work composed of WTO experts and scholars from MOFTEC, other governmental agencies and relevant research institutes.⁸⁷ On January 14, the Enquiry Centre started its operations.⁸⁸ To further facilitate the submission of inquiries, on September 12, 2002,

⁸¹ Zhang Wei, Shenzhen jiang Juxing Weixin Lifa Tingzheng, Ciju wei Guonei Shoushi (Shenzhen to hold Legislative Hearing Through Wechat, The First of Its Kind in China), Southern Daily, May 5, 2016, available at http://www.fzgd.org/fzcj/sz/201605/t20160505_768384.htm.

⁸² MOFCOM Special Commissioner's Office in Shenzhen, Shenzhen Maoyi Zhengce Hegui Gongzuo de Shijian Tansuo (Experiments in the Trade Policy Compliance Work of Shenzhen), November 23, 2015, available at http://sms.mofcom.gov.cn/article/zt_myzechgz/lanmufive/201511/20151101192419.shtml.

⁸³ Shenzhen Municipal Government General Office, Guanyu Yinfa "Shenzhenshi Maoyi Zhengce Fuhe Shijie Maoyi Zuzhi Guize Shencha Banfa" de Tongzhi (Notice on the Issuance of "Rules on the Review of the Consistency of the Trade Policies of Shenzhen City with WTO Rules") Shenfuban [2012] No. 42, July 25, 2012, Article 5.

⁸⁴ See State Council General Office, Guowuyuan Bangongting Guanyu Jinyibu Jiaqiang Maoyi Zhengce Hegui Gongzuo de Tongzhi (Notice on Further Improving the Trade Policy Compliance Work), Guobanfa [2014] No. 29, June 9, 2014, available at http://www.gov.cn/zhengce/content/2014-06/17/content_8887.htm; MOFCOM, Maoyi Zhengce Hegui Gongzuo Shishi Banfa [Shixing] (Implementing Rules on Trade Policy Compliance Work [Interim]), December 12, 2012, available at <http://www.mofcom.gov.cn/article/b/c/201412/20141200833105.shtml>.

⁸⁵ Xinhua News Agency, Zhongguo Jiaru WTO Yizhounian Dashiji (Major Events During China's First Year in the WTO), December 10, 2002, available at http://news.xinhuanet.com/fortune/2002-12/10/content_655140.htm.

⁸⁶ MOFCOM, Zhongguo Zhengfu WTO Zixundian Zixun Banfa [Shixing] (Interim Measures on Enquiries to the China WTO Enquiry Centre), January 1, 2002.

⁸⁷ Zhongguo Jiji Luxing Jiaru Shimao Zuzhi Chengnuo (China has Diligent Implemented its WTO Accession Commitments), October 31, 2005, available http://www.gov.cn/ztl/content_87694.htm.

⁸⁸ *Id.*

MOFCOM also established a dedicated website: MOFTEC WTO Enquiry Website (www.chinawto.gov.cn).⁸⁹ In 2006, the website also added the function of enquiries on China's Free Trade Agreements (FTAs) and was renamed WTO/FTA Enquiry Website, with the URL also changed to <http://chinawto.mofcom.gov.cn>.⁹⁰

In addition to this, other ministries and agencies have also established enquiry points for issues within their respective jurisdiction. The works of these enquiry points are generally regarded as satisfactory. For example, in its 2016 Report, the USTR noted that “[s]ince the creation of these various enquiry points, U.S. companies have generally found these various enquiry points to be responsive and helpful, and they have generally received timely replies.”⁹¹ However, problems still remain in particular issue areas, especially those that fall under the jurisdiction of different agencies. One example is TBT notifications. The main agency in charge here is the State Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), which has a TBT inquiry point. According to the USTR, the inquiry point does a good job in notifying measures by AQSIQ, as well as those by the National Certification and Accreditation Administration and Standardization Administration of China.⁹² However, the notification is lacking for measures by other agencies such as Ministry of Health, Ministry of Industry and Information Technology, the State Environmental Protection Administration and State Food and Drug Administration.⁹³

4. Translations

Among all transparency-related obligations, translation is one of the hardest to implement, as it is a continuous obligation involving sustained efforts. Moreover, unlike other obligations such as publication, public comment and enquiry points, the translation obligation by its nature only benefits foreigners. Thus, it is prone to be put on the backlog by the bureaucrats due to the lack of relevance to domestic constituencies.

For these reasons, it's no wonder that the translation obligation has a poor implementation record. Until 2015, China has only translated on a regular basis the trade-related laws and administrative regulations, but not the numerous departmental or local rules.⁹⁴ Moreover, China has been “years behind” in publishing the translations, which are typically only made available after implementation rather than before.⁹⁵ After repeated complaints from the US,

⁸⁹ MOFTEC, “Duiwai Maoyi Jingji Hezuobu WTO Zixun Wang” 9 yue 13 ri Kaitong (“MOFTEC WTO Enquiry Website” established on September 13), September 16, 2002, available at <http://sms.mofcom.gov.cn/aarticle/zcfb/200209/20020900040388.html>.

⁹⁰ WTO/FTA Enquiry Website, Guanyu Women (About Us), available at <http://chinawto.mofcom.gov.cn/gywm.shtml>.

⁹¹ USTR, *supra* note 61, at p. 167.

⁹² *Id.*, at p. 91.

⁹³ *Id.*

⁹⁴ USTR, *supra* note 61, at p. 164.

⁹⁵ *Id.*

the State Council issued the Notice on Improving the Translation Work of Trade-related Departmental Rules on March 16, 2015.⁹⁶ The Notice requires all ministries and agencies to publish, in principle, official English translations of the relevant departmental rules through their websites or other means before implementation. In exceptional cases, the English translation shall be published no later than 90 days after the implementation. While this Notice partly solved the problem for departmental rules, no similar requirements have been made for laws, administrative regulations and local rules. In response to pressures from the US, China agreed in 2016 to find ways to comply with its obligation.⁹⁷

In several WTO disputes, translation has become an issue. The first is the *China – Publications and Audiovisual Products* case, which was brought by the US in 2007. While the US did not make a formal claim for the violation of the translation obligation in the case, translation did become a hot issue in the case. The problem arose because the US and China each provided different translations of certain key terms of the Chinese measures.⁹⁸ At the request of the panel, they were able to agree on the translation of some but not all the terms in question.⁹⁹ In October 2008, the panel proposed to engage the UN Office at Geneva (UNOG) as a neutral independent translator.¹⁰⁰ However, in November 2008, the parties were informed that, due to the current workload and resource constraints, the UNOG might not be able to complete the translation in time.¹⁰¹ The US proposed to use a private translation company instead but China did not like the alternative.¹⁰² In December 2008, the issue was finally resolved when the United Nations Office at Nairobi (UNON) agreed to provide a timely translation, which was submitted in February 2009.¹⁰³

While there are three different translations of many key terms, the Panel used the translation by the US in most cases. In a footnote in the Panel Report, the Panel explained the rationale for its approach:

“Because the United States is the complaining party and bears the burden of providing evidence of the content of the Chinese measures being challenged, as a general rule, when referring to one of China’s laws, regulations or documents the Panel will utilize the US translation, unless the specific provision is one which the parties agreed to utilize China’s

⁹⁶ State Council General Office, Guowuyuan Bangongting Guanyu Zuohao yu Maoyi Xiangguan Bumen Guizhang Yingwen Fanyi Gongzuo de Tongzhi (Notice on Improving the Translation Work of Trade-related Departmental Rules), Guobanhan [2015] No. 22, March 16, 2015.

⁹⁷ USTR, *supra* note 61, at p. 165.

⁹⁸ Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261, at para. 2.4.

⁹⁹ *Id.*, at paras. 2.5-2.6.

¹⁰⁰ *Id.*, at para. 2.7.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*, at para. 2.8.

translation or if based on the advice of the independent translator the Panel finds that the US translation is inappropriate. However, we have reviewed both translations and may refer to China's versions to confirm our understanding of the measures. Our citation to the US translation should not be construed as necessarily implying that it is an authoritative translation of China's measures or that we believe the United States is in a better position to provide an English translation of China's internal measures."¹⁰⁴

Altogether, the Panel identified 10 key terms where the Parties disagreed on the translations.¹⁰⁵ Among the 10, the Panel used the US translation for 5 terms, which includes 3 terms that China claimed to be “unique terms that can find no English word matching its exact meaning” and thus did not provide translation.¹⁰⁶ The Chinese translation was only adopted for one term.¹⁰⁷ As for the remaining 4 terms, the Panel did not choose a specific translation as it found that the translation differences would not affect its ruling.¹⁰⁸

Probably learning from its unpleasant experience in the *China – Publications and Audiovisual Products* case, the US has included among its claims China’s alleged failure to implement the translation commitment in several subsequent disputes. For example, on December 22, 2010, the United States requested consultations with China concerning certain measures providing grants, funds, or awards to enterprises manufacturing wind power equipment. In the Request for Consultation, the US alleged that China has violated its translation commitment by failing to provide the translation of the Notice of the Ministry of Finance on Issuing the Provisional Measure on Administration of Special Fund for Industrialization of Wind Power Equipment, including the Annex on Provisional Measures on Administration of Special Fund for Industrialization of Wind Power Equipment.¹⁰⁹ Similarly, in the 2012 case of *China — Certain Measures Affecting the Automobile and Automobile-Parts Industries*¹¹⁰ and the case of *China — Tax Measures Concerning Certain Domestically Produced Aircraft*¹¹¹ in 2015, the US also alleged failure to provide translation of 73 and 4 measures respectively. As these cases have not lead to panel reports, it is still unclear how a panel will rule on these issues.

For a continuous obligation like translation, the best way to implement is establishing an institutional mechanism. However, China has yet to establish such a mechanism and all

¹⁰⁴ *Id.*, at footnote 84 to para. 7.34.

¹⁰⁵ *Id.*, Annex A-1 Translation Differences in the Report – Summary Table.

¹⁰⁶ *Id.*, at paras. 7.928-7.931.

¹⁰⁷ *Id.*, at paras. 7.368-7.369.

¹⁰⁸ *Id.*, at paras. 7.928-7.931, 7.1365-7.1375, and 7.1382-7.1387.

¹⁰⁹ *China — Measures concerning wind power equipment*, Request for Consultations by the United State, WT/DS419/1, G/L/950, G/SCM/D86/1, 6 January 2011.

¹¹⁰ *China — Certain Measures Affecting the Automobile and Automobile-Parts Industries*, Request for Consultations by the United State, WT/DS450/1, G/L/1002, G/SCM/D93/1, 20 September 2012.

¹¹¹ *China — Tax Measures Concerning Certain Domestically Produced Aircraft*, Request for Consultations by the United States, WT/DS501/1, G/L/1141, 10 December 2015.

translations are done on an *ad hoc* basis. In the 2016 USTR Report to Congress on China's WTO Compliance, the US suggested China follow the example of the EU. However, this is not a feasible solution as China is not a multi-racial and multi-language country. Indeed, due to its special nature, the EU is an anomaly among WTO Members and is more like an international organization in many aspects.

Instead, the author suggests that China could draw inspirations from the *China – Publications and Audiovisual Products* case by outsourcing the translation work. The MOFCOM has been outsourcing its work since Feb 2015, when the Department of WTO Affairs issued a call for tender for the translation of the documents used in China's WTO notification and review process.¹¹² In March 2015, two contractors won the bid, with the top choice being Zhonglun, a leading Chinese law firm.¹¹³ While the scope of this tender covers only the documents used in China's WTO notification and review processes,¹¹⁴ there is no reason why the same approach could not be adopted for the translation obligation as well.

5. Transitional Review Mechanism

As the transitional review mechanism does not involve any substantive obligation, one may assume that it is rather easy to implement. However, as it turned out, this has become one of the most contentious areas of implementation, primarily due to the lack of detailed procedural rules in the Accession Protocol.

The first problem concerned the timing of the review. Section 18.1 only states that the WTO subsidiary bodies "shall, within one year after accession... review... the implementation by China". The US interpreted this to mean that the review is a continuous process with "WTO Members... rais[ing] their concerns regarding China's implementation throughout the course of the year within the relevant WTO bodies and Committees".¹¹⁵ China, however, argued that the review is a one-off annual exercise with "only one annual review".¹¹⁶ Thus, when the US tried to start the review process soon after China's accession by putting China's implementation of its

¹¹² Guoxin Tendering Group, Zhongguo Zhengfu Shimao Zuzhi Tongbao Shenyi Fanyi Gongzuo [Baokuo Biyi he Jiaochuan Kouyi] Zhaobiao Gonggao (Call for Tenders for the Translation Work [including Written Translation and Oral Interpretation] of WTO Notification and Review by the Chinese Government), February 13, 2015, available at http://www.mof.gov.cn/xinxi/zhongyangbiaoxun/zhaobiaogonggao/201502/t20150213_1192744.html.

¹¹³ Guoxin Tendering Group, Zhongguo Zhengfu Shimao Zuzhi Tongbao Shenyi Fanyi Gongzuo Zhongbiao Gonggao (Notice on Contract Award on the Translation Work of WTO Notification and Review by the Chinese Government), March 16, 2015, available at http://www.ccg.gov.cn/cggg/zygg/zbgg/201503/t20150316_5096384.htm.

¹¹⁴ MOFCOM Department of WTO Affairs, Shangwubu Shimaosi Fabu Zhongguo Zhengfu Shimao Zuzhi Tongbao Shenyi Fanyi Xiangmu Zhaobiao Gonggao (Publication of the Call for Tenders for the Translation Work of WTO Notification and Review by the Chinese Government), December 29, 2015, available at <http://sms.mofcom.gov.cn/article/u/aa/201512/20151201222432.shtml>.

¹¹⁵ Council for Trade in Services, Report of the Meeting held on 19 March 2002: Note by the Secretariat, S/C/M/59, May 14 2002, at para. 55.

¹¹⁶ *Id.*, at para. 70.

services commitments on the agenda of the regular meeting of Council for Trade in Services on March 27, 2002, China refused to discuss them on the ground that they are too complicated and should be raised in the formal review process instead.¹¹⁷ After some haggling between China and the other WTO Members, they finally agreed that the first TRM review would be held at the last regular meetings of the respective subsidiary bodies in 2002.¹¹⁸

After the timing issue was resolved, another battle was fought over the timetable for the submission of the information required in the review. The Accession Protocol only specifies the timetable for the review by the General Council by noting, in Annex 1B, that China “shall submit any information and the documentation relating to the review no later than 30 days prior to the date of the review.” As to the reviews by the subsidiary bodies, there is no such explicit requirement and China is only required to “provide relevant information, including information specified in Annex 1A, to each subsidiary body in advance of the review.” The US again took an expansive interpretation by proposing the following: first, China should submit the relevant information set out in Annex 1A 90 days before the respective meetings; second, other Members shall submit their specific questions for China 60 days before the meeting; and three, China should submit its responses to Members' questions 30 days before the meeting.¹¹⁹ This proposal was again rejected by China, which insisted that no specific time-frame or procedure may be imposed as they go beyond the stipulated obligation under Section 18.¹²⁰ In the end, China only submitted the relevant information, on average, three days before the scheduled meeting.¹²¹ Such late submission made it very hard for the other Members to react to China's submissions.¹²²

Another contentious issue was whether China shall provide written replies to Members' questions during the review. Section 18 is again silent on the issue, as it doesn't even explicitly state that other Members may raise questions. The US took the view that there may be an exchange of written questions and answers before the review meeting.¹²³ Based on the understanding, some Members submitted written questions from as early as August 2002.¹²⁴ China, however, insisted that it was under no obligation to provide written replies under the

¹¹⁷ Terence P. Stewart, *China's Compliance with World Trade Organization Obligations: A Review of China's 1st Two Years of Membership*, A Report Prepared for the U.S.-China Security and Economic Review Commission, March 19, 2004, at p. 72, available at <https://www.uscc.gov/Research/chinas-compliance-world-trade-organization-obligations-review-chinas-1st-two-years>.

¹¹⁸ *Id.*, at p. 74.

¹¹⁹ Committee on Market Access, *Minutes of the Meeting Held in the Centre William Rappard on 12 June 2002*, G/MA/M/32, 11 September 2002, at para. 12.1.

¹²⁰ *Id.*, at para. 12.2.

¹²¹ Stewart, *supra* note 117, at p. 79.

¹²² *Id.*, at pp. 78-79.

¹²³ Committee on Market Access, *supra* note 119, at para. 12.1. See also Committee on Market Access, *Minutes of the Meeting Held on 23 September 2002*, G/MA/M/33, 19 November 2002, at para. 8.31.

¹²⁴ Stewart, *supra* note 117, at p. 74.

TRM.¹²⁵ When the US complained that the lack of written response made it difficult to conduct the review,¹²⁶ China proposed to “convene an informal meeting outside of the transitional review mechanism process” so that the “Chinese experts could provide more information to the questions raised by any interested Members”.¹²⁷ However, the US rejected the proposal as they preferred “to have a formal record of the discussions including China's responses.”¹²⁸ As the other Members were also not receptive, China withdrew the proposal.¹²⁹

A related issue is whether Members may submit follow-up questions to China after the review meeting. This issue was first raised by Chinese Taipei during the first review¹³⁰ and was echoed by the US¹³¹ and Japan.¹³² China refused to accept written questions post-meeting on the ground that the review takes place only once a year at the designated meeting.¹³³

As mentioned earlier, Section 18.1 requires the subsidiary bodies to report the results of the review to the relevant Councils, which shall in turn report to the General Council. However, it does not specify the nature or content of such reports. Under Section 18.2, the General Council shall conduct the review in light of the reviews conducted by the subsidiary bodies, and “may make recommendations to China”. Reading the two parts together, one might argue that, to help the General Council to make such recommendations, the reports by the subsidiary bodies shall include more substantive analysis on whether China has implemented its commitments. This was indeed the view taken by Japan.¹³⁴ However, this view was rejected by the committee Chairman on practical grounds, as the adoption of such a report would require a consensus, which would be impossible to obtain given the differences between China and other Members.¹³⁵ For the same reason, even the final report by the General Council did not include any specific recommendations.¹³⁶

In summary, it seems that China has largely won the battle on the TRM by insisting on a strict textualist and minimalist interpretation of its obligations under the Accession Protocol. While Members like the US, EU, and Japan were unhappy, they had no choice but quietly

¹²⁵ Committee on Market Access, *supra* note 123, at para. 8.21.

¹²⁶ *Id.*, at para. 8.31.

¹²⁷ *Id.*, at para. 8.52.

¹²⁸ *Id.*, at para. 8.54.

¹²⁹ *Id.*, at para. 8.56.

¹³⁰ *Id.*, at para. 8.45.

¹³¹ *Id.*, at para. 8.60.

¹³² *Id.*, at para. 8.58.

¹³³ *Id.*, at para. 8.47.

¹³⁴ Stewart, *supra* note 117, at pp. 83-84.

¹³⁵ Committee on Market Access, *supra* note 123, at para. 8.65.

¹³⁶ Stewart, *supra* note 117, at pp. 84-85.

accepted this and simply used the TRM to request more information from China on the various issues they were concerned with, mostly concerning transparency and procedural issues in various Chinese trade measures.¹³⁷ In 2006, however, China became even more impatient with the TRM, when it also had to field the Trade Policy Review Mechanism for the first time. The TPRM was held in April 2006. When the TRM was conducted later that year, China raised several issues. First, some Members used the TRM to request answers for questions raised during the TPRM.¹³⁸ China regarded this as inappropriate as the two are separate processes and thus refused to answer these questions. However, when the US pressed further by asking if this were the official position of China,¹³⁹ China backed off and agreed to provide oral replies.¹⁴⁰ Second, some questions were raised repeatedly in several committees. For example, the same question concerning the Chinese Compulsory Certification (CCC) regulation was raised in the Market Access Committee, the TBT Committee and the CTG.¹⁴¹ China was concerned that this would turn the TRM from a once-per-year event into a multiple-times-per-year exercise.¹⁴² This led to a spirited retort from the EU, which noted that they not only had to raise the same questions in different committees, but also had been putting the same questions for five years because they are not getting answers.¹⁴³ In response, China accused the EU of applying double standard by asking China to reduce its exports on products such as textile while complaining that China should not restrict its exports on certain raw materials.¹⁴⁴ However, eventually, China also softened its stance by agreeing to address issues even if they are raised in several committees.¹⁴⁵

While this episode did not really change China's practice in the TRM, it did provide some interesting insights into China's perception of the TRM. Instead of viewing it as a useful exercise to help China to implement its WTO obligations, as suggested by the US and EU, China regarded it more as a source of burden and humiliation. As noted by China's first WTO Ambassador, from the beginning, the TRM has been viewed as an additional burden and discriminatory measure by China.¹⁴⁶ However, until 2006, China largely kept such view to itself and did not publicly denounce it. However, when China went through the TPRM in 2006, it

¹³⁷ For a summary of the issues raised, see US Government Accountability Office, U.S.-China Trade: Summary of 2003 World Trade Organization Transitional Review Mechanism for China, GAO-05-209R, Jan 25, 2005, available at <http://www.gao.gov/products/GAO-05-209R>.

¹³⁸ Committee on Market Access, Minutes of the Meeting Held on 4 October 2006, G/MA/M/42, 14 November 2006, at para. 7.2.

¹³⁹ *Id.*, at para. 7.11.

¹⁴⁰ *Id.*, at para. 7.13.

¹⁴¹ *Id.*, at para. 7.2.

¹⁴² *Id.*

¹⁴³ *Id.*, at para. 7.7.

¹⁴⁴ *Id.*, at para. 7.9.

¹⁴⁵ *Id.*

¹⁴⁶ Sun Zhenyu, Rineiwa Kongzong Suiyue (Busy Days in Geneva), Renmin Chubanshe (People's Publishing House), Beijing, 2011, at pp. 17-18.

received over one thousand questions, while the US received less than one thousand questions in their last TPR.¹⁴⁷ Moreover, China noted that it took the US nine months to provide answers, while Members pressed China for answers after less than six months.¹⁴⁸ That is why China snapped and openly called the TRM discriminatory.¹⁴⁹

In a way, China's confrontational behaviour in the TRM can be explained by the fact that the TRM, unlike the TPRM, may be used by WTO Members to collect information to be used in WTO dispute settlement proceedings. To avoid self-incrimination, it is understandable that China took an ultra-cautious approach by refusing to provide written answers. Had the TRM been designed more like the TPRM, it might, paradoxically, have been more effective in getting China to improve its implementation of WTO commitments.

IV. Conclusion

From our discussions above, we can make the following general observations on China's implementation of the transparency obligation:

First, the implementation at the Central Government level is better than the local government level;

Second, among the Central Government ministries, MOFCOM has a better implementation record than the other ministries. Furthermore, those agencies with a primary or significant coverage of international trade-related issues such as General Administration of Customs and AQSIQ tend to have better transparency.

Third, the implementation records of the local governments are uneven as well, with better records by the coastal provinces compared to the inland provinces. On some issues, some coastal cities such as Shenzhen have actually provided a model for the central government;

Fourth, transparency has been greatly improved for formal laws and regulations, while many problems remain for informal rules;

Fifth, the implementation of the transparency obligation mostly took place on an *ad hoc* basis, and currently there still is no institutional mechanism to address the transparency issue as a whole.

1. Reasons

In a way, China's less-than-satisfactory implementation record of the transparency obligation is not really surprising, as it reflects deeper problems in the Chinese system. In particular, the reasons can be grouped into the following three categories.

A. Political reasons

The first is the de-centralized law making system, which is necessary because China is a vast country with differing conditions across many different regions. Moreover, as the reform

¹⁴⁷ Committee on Market Access, *supra* note 138, at para. 7.3.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*, at para. 7.9.

process is an unprecedented exercise with no pre-defined blueprint, the central government often encourages local governments to experiment with various initiatives. These criss-crossing network of legislative framework makes it difficult for the central government to comply with the transparency obligation, as even the central government itself might not always be aware of what's going on at the local level.

At the central government level, turf wars among the different ministries and agencies also made it hard to achieve full transparency. While MOFCOM claims that its requests for information from other agencies is justified by the need to comply with WTO obligations, the other agencies might regard such requests more as attempts by MOFCOM to grab power from them and thus are unwilling to give in. This is especially the case for the agencies which are higher than MOFCOM in the bureaucratic hierarchy, such as the NDRC and Ministry of Finance (MOF). For example, the first WTO case that China had to defend before the Panel and the AB - the *China - Auto Parts* case - concerns policies made by the NDRC and MOF.¹⁵⁰ While other WTO Members have been raising questions about the policies since the first TRM,¹⁵¹ MOFCOM was unable to provide solutions as it did not have the power to overrule the decisions of the two agencies. This also illustrates the limitations of the transparency obligations.

B. Practical reasons

In addition to the political reasons, China also has practical difficulties in complying with the transparency obligations.

First, many government officials lack familiarity with WTO obligations and might not be aware of the need to comply with such obligations. This is especially the case at the local government level. When it first acceded to the WTO, China launched extensive campaigns to educate the officials with WTO rules. As time went by, however, many officials have either moved on or simply forgotten the WTO rules as they are rarely used in everyday work.¹⁵² Even at the central government level, the officials in the non-trade related agencies are often not aware of the trade implications of their proposed regulations. The combination of these two factors makes it a major challenge to comply with the transparency obligation.

On the other hand, while the officials in the trade-related ministries such as MOFCOM have higher levels of sensitivities of WTO obligations, they are often too busy to focus on the transparency obligations. For them, the more important work is often to ensure the consistency with the substantive obligations of the WTO. Thus, the implementation of procedural obligations such as transparency is often pushed to bottom of the to-do list. Moreover, as obligations such as

¹⁵⁰ See Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, Add.1 and Add.2 / WT/DS340/R, Add.1 and Add.2 / WT/DS342/R, Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119.

¹⁵¹ See e.g., Committee on Market Access, *supra* note 123, at para. 8.22.

¹⁵² MOFCOM News Office, Shangwubu Zhaokai “Maoyi Zhengce Hegui Gongzuo” Zhuanti Xinwen Fabuhui (MOFCOM Held Press Conference Dedicated to “Trade Policy Compliance Work”), July 18, 2014, available at <http://www.mofcom.gov.cn/article/zhengcejd/bl/201407/20140700667570.shtml>.

translations and TRM only benefit foreigners, they are often side-lined by the officials who have to give priorities to serving their domestic constituencies.

C. Cultural reason

Lastly, in the Chinese culture, there is a long-standing aversion to transparency of the law. For example, in 513 BC, the publication of the Penal Code by the Kingdom of Jin met with heavy criticisms from Confucius, who argued that the publication will disrupt the established social order and make it more difficult to govern the people as they can now rely on the law instead.¹⁵³ Even today, this idea remains popular among Chinese officials. A lot of seemingly harmless information are still regarded as classified and state secret laws are widely used to persecute people who demand more transparency. Thus, it is unsurprising that transparency is regarded as an inconvenient obligation that is only reluctantly implemented.

2. Conclusion

This paper presents an interesting case study on how to enhance the transparency of a domestic legal regime through international agreements. As we can see from the foregoing discussions, external pressure can help to improve the transparency of the trade law to a certain extent, mainly through the imposition of certain guidelines and establishment of relevant institutions. The successful experiences in the trade law system can also provide a model for other areas of law. However, in the long term, it is difficult to achieve full transparency without systemic reform in the domestic legal system as a whole. As noted by William Alford,

*“A system of state determination of which ideas may or may not be disseminated is fundamentally incompatible with one of strong intellectual property rights in which individuals have the authority to determine how expressions of their ideas may be used and ready access to private legal remedies to vindicate such rights.”*¹⁵⁴

To paraphrase Alford, a system of state determination of which information may or may not be published is fundamentally incompatible with one of strong transparency rights in which individuals have the authority to determine how their right to information may be exercised and ready access to private legal remedies to vindicate such rights.

¹⁵³ Zuozhuan, Zhaogong Ershijiu Nian (the 29th Year Under the Reign of Duke Zhao), available at <http://ctext.org/chun-qiu-zuo-zhuan/zhao-gong-er-shi-jiu-nian/ens>.

¹⁵⁴ William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, Stanford University Press, 1995, at p. 119.