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A Comment on China's Participation in the World Trade Organization

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I. INTRODUCTION

The World Trade Organization (WTO) is one of the most important international organizations, and China's entry in late 2001 was a key milestone for the WTO. Although the WTO resisted China's entry for many years, it eventually agreed to admit China and thus to move closer to the idea of a world organization. Admitting new member countries is one of the few processes in the WTO treaty that are technically actions taken by the WTO itself, rather than by Member governments. Article XII:1 of the Marrakesh Agreement declares that states or separate customs territories may accede to the Agreement "on terms to be agreed between it and the WTO."

Accession to the WTO was important for China. It showed by deeds and words that China was ready to commit to greater economic liberalization and to the international rule of law. As part of the Chinese accession process, governments, companies, universities, institutes, and law firms in China have vastly increased their attention to international trade law. Indeed, if every country in the WTO took its membership responsibilities as seriously as China appears to be, the WTO would be a more effective institution.

I was delighted to have the opportunity to participate in the stimulating U.S.-China WTO Roundtable held at Temple University School of Law, and to offer comments on two of the papers from Chinese the scholars.

II. PROFESSOR ZHANG NAIGEN'S PAPER

The thoughtful paper by Zhang Naigen examines treaty interpretation in the dispute settlement under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Professor Zhang makes the insightful observation that WTO panels will have to interpret the

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underlying provisions in non-WTO treaties, namely, the intellectual property rights treaties overseen by the World Intellectual Property Organization (WIPO). The interpretation of non-WTO law by WTO panels is a little-known aspect of WTO jurisprudence that deserves attention. It is well known that panels interpret the WTO pursuant to the Vienna Convention on the Law of Treaties and that panels ascribe meaning to national law using various techniques. But, as Zhang points out, the panels and Appellate body use the Vienna Convention approach to determine the meaning of provisions in the intellectual property treaties that have been incorporated by reference into the WTO.

A significance of this procedural situation is that it insinuates the WTO into a role that might otherwise be filled by the International Court of Justice (ICJ) or some special procedure in the WIPO. Thus, it is possible that the ICJ and the WTO could announce different meanings to the same provision in a particular intellectual property treaty. So far, WTO panels have not sought the advice of the WIPO in treaty interpretation in any of the disputes discussed by Professor Zhang. Panels have also not asked disputing WTO Members whether they would be willing to seek an advisory opinion from the ICJ.

The unstated assumption of the WTO panels considered in Zhang's paper was that WTO dispute settlement has jurisdiction to interpret the intellectual property treaties referenced in TRIPS. To be sure, the Understanding Rules and Procedures Governing the Settlement of Disputes (DSU) does not specifically confer that jurisdiction. Yet, it is reasonable to infer such authority, given that Article 3.2 of the DSU states the purpose of clarifying the existing provisions of WTO agreements. Because the TRIPS Agreement references extrinsic international law, the Agreement seems to confer the authority to interpret such extrinsic law.

Professor Zhang notes that the intellectual property treaty provisions given an interpretation in WTO dispute settlement had never been interpreted judicially by an international tribunal. This raises the intriguing possibility that the WTO will become the regular forum to interpret the Paris or Berne Conventions, which is surely a different result than the drafters of those treaties intended. As Zhang comments, "In this way, the WTO, as a non-United Nations organization, has taken over the jurisdiction of the ICJ to interpret the basic intellectual property conventions . . . ."

Zhang illustrates this feature of WTO jurisprudence in his commentary on two WTO cases. In the *United States-Section 110(5) Copyright* case, the litigant governments disagreed on the meaning of provisions in the Berne Convention, and the panel issued an interpretation. In the *United States–Havana Club* case, the panel interpreted several provisions in the Paris Convention on Industrial Property, and the Appellate Body reviewed these findings.

In another section of Zhang's paper, he discusses the *India–Patent Protection* case where the Appellate Body reversed the panel's attempt to use a standard of "legitimate expectations" in interpreting the TRIPS

Agreement. Zhang suggests that the Appellate Body may have undervalued the importance of good faith and may have overlooked the relevance of TRIPS Article 7, which points to "a balance of rights and obligations." Zhang also quotes Sir Ian Sinclair in noting that the principle of good faith applies to the entire process of treaty interpretation.

Unafraid to address a controversial issue, Zhang points out that the Doha Declaration on the TRIPS Agreement and Public Health may have relevance to the way that WTO panels will interpret TRIPS. In that regard, he makes an important observation that the Doha decisions can be regarded as a *legislative* interpretation under the WTO decision-making process.

III. DR. YANG GUOHUA'S PAPER

The paper by Yang Guohua points out the paradox that although the WTO permits governments to utilize import safeguards, in all six cases where such measures were challenged, the WTO found that the import barriers violated the WTO Agreement on Safeguards. Three of those cases were against the United States, and the other three involved complaints against Chile, Argentina, and Korea. Dr. Yang therefore reaches the startling hypothesis that although safeguards are permitted in theory, in practice they are not.

If this hypothesis were true, it might suggest a need to change WTO rules. After all, the possibility of an escape clause in trade agreements goes back many decades, and has always been perceived by the trade policy community as being essential. An empty Safeguards Agreement would remove a key flexibility mechanism that can reassure import competing industries that they will be protected against significant import industry. On the other hand, however, it might be argued that safeguards are no longer as necessary as they once were, either politically or economically. Yang does not argue that point however; he seems to view safeguards as important.

Another reason why an inability to impose a safeguard would be a problem is that without safeguards, mercantilist governments would rely on antidumping measures and voluntary export restraints. Indeed, one of the goals of the Uruguay Round was to eliminate the voluntary restraints and encourage governments to use safeguards that are more transparent. As an inducement, the Safeguards Agreement provides a three-year period where the user of a safeguard need not provide compensation under certain circumstances. There would have been no point in providing this inducement if governments had intended the relief in the Safeguards Agreement to be procedurally impossible. So it might be assumed that governments would be concerned if they believed that the Yang hypothesis were true.

Yang presents strong support for his hypothesis. He explains that in all six cases, governments made the same error – they did not make a sufficient showing that imports were the cause of the injury and that other factors were

not. Yang suggests that WTO jurisprudence may have made it so hard to prove causation that governments will not succeed in doing so when challenged.

It is, of course, difficult to prove a negative. Yang's hypothesis is vulnerable to a future WTO case in which a safeguard is upheld. Perhaps that will happen in the ongoing adjudications on steel. One might also question his hypothesis on the grounds that only six of the approximately twenty safeguards were challenged in the WTO (based on data in Yang's paper). Perhaps the other fourteen were more technically sound decisions that did not suffer the flaws of the six.

At the end of his paper, Yang suggests that the technical requirements for safeguards in the WTO need to be loosened. Perhaps he is right. Another possibility is that governments have gotten sloppy in their safeguard investigations and eventually will make corrections to conform to the decisions of the Appellate Body. It will be interesting to watch this play out, and Yang's paper provides the reader a valuable guide.