

## **“OPENING UP” THE WTO: WHAT DOES IT MEAN FOR CHINA?**

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*Da jia hau.* The purpose of my visit to China is to introduce, and talk about, my book which was recently translated in Chinese. Its title is: *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law.*

In my talk today, I want to elaborate on this book and ask the question of what it means for China.

My goal is, firstly, to put the relation between trade and other international law – if you wish, the interaction or balance between economics and politics – in a historical perspective.

I will, secondly, talk about why it is so important today for the WTO to open its doors to outside international law – be it general principles of public international law, IMF rules, free trade agreements or treaties on health, the environment, core labor standards or cultural diversity. My claim is that such “opening up” policy – within strictly defined limits -- is needed for the very survival of the WTO, and to give effect to the sovereign diversity between WTO members.

Thirdly, I will demonstrate how the WTO already opened-up in its first 10 years of operation, and this in sharp contrast to the old GATT days. Even if one were, therefore, *against* a more open WTO, it is crucial to realize that today the WTO already opened its doors to outside international law, and to deal proactively with this new situation.

Fourthly, and finally, I will elaborate on how the WTO's opening-up could affect China in WTO dispute settlement. I will do so through a number of concrete examples.

Most importantly, I will cast the debate in the context of China and try to convince you that -- although some of you may think that China has most to gain by keeping the WTO *separate* from other international law -- it may actually be in China's best interest for the WTO to "open up".

China's self-proclaimed goal of a "harmonious world" and a "harmonious society"<sup>1</sup> seem ideally suited to support a healthy balance between free markets and social concerns, or between what I call here economics and politics. The same could be said about China's Confucian social context. Moreover, China's quest for sovereign diversity and its stated goal of amicably settling trade disputes and concluding free trade agreements (China is currently negotiating more than 20 FTAs), all require a flexible WTO that is open to other international compromises and agreements.

For what it is worth -- and to some this may come as a surprise -- my current home country, the United States, has traditionally been skeptical about WTO panels looking at other international law. As the sole super-power today, it is often said that the United States prefers discreet "coalitions of the willing" for each subject matter. Moreover, as the US State Department's former legal adviser himself recently admitted, since the 1990s, the United States has been far from enthusiastic "about the value of multilateral conventions and undertaking new international legal obligations".<sup>2</sup>

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<sup>1</sup> *Trade Policy Review, Report by the People's Republic of China*, WT/TPR/G/161, 17 March 2006, p. 19

<sup>2</sup> William H. Taft, IV, *A View from the top: American Perspectives on International Law After the Cold War*, YALE JOURNAL OF INTERNATIONAL LAW (2006), 503, at 504.

Nonetheless, and this is important, in October 2005, even the United States formally accepted that WTO law is “itself public international law” and must be interpreted with reference to other international rules, including non-WTO treaties concluded between the disputing parties.<sup>3</sup>

Some commentators speculate that “China, like all rising powers, will most likely seek to change the status quo, and this, as a practical matter, means breaking international law and asserting new international norms”.<sup>4</sup> Others have been more optimistic and noted that “China’s participation in international organizations since it joined the UN in 1971 has been marked by an overall pattern of more or less continuous improvement in its compliance with international norms and rules”.<sup>5</sup>

The jury is out. Although my talk today does not address the broader issue of China’s attitude toward international law generally, my presentation must be read with those speculations in the background.

## **I. A Historical Perspective on the Interaction between Trade and International Law**

\* It is easy to forget how recent modern international law really is.

In Europe, the idea of sovereign and equal states concluding legally binding treaties is less than 400 years old. It was consecrated in the Treaty of Westfalia, signed in 1648 and making an end to both the Thirty Years’ War between Catholics and Protestants and the secular dominion of the Holy Roman Empire.

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<sup>3</sup> *Negotiations on Improvements and Clarifications of the DSU, Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement*, Communication from the United States, TN/DS/W/82, 24 October 2005.

<sup>4</sup> Eric Posner and John Yoo, *International Law and the Rise of China*, CHICAGO JOURNAL OF INTERNATIONAL LAW (2006), 1, at 10.

<sup>5</sup> Ann Kent, *Influences on National Participation in International Institutions: Liberal v. Non-liberal States* in THE FLUID STATES: INTERNATIONAL LAW AND NATIONAL LEGAL SYSTEMS (EDS. HILARY CHARLESWORTH ET AL, 2005), at 18.

In China, and the East more generally, modern international law is even more recent. It was introduced -- or should we say force-fed? -- less than 200 years ago. For China, the Treaty of Nanjing, signed in 1842 and the first of a series of so-called “unequal treaties”, ended both the Opium Wars with England and the Sino-centric, tributary system of the Celestial Empire with China as the so-called “Middle Kingdom”.

\* It is equally easy to forget how trade forms the bedrock of that modern international law.

One of the first principles introduced by the very founder of international law, my compatriot Hugo Grotius, was that of “freedom of the seas”. This principle was at least partially inspired to facilitate Dutch domination of world trade through Holland’s unrivaled naval power.

Similarly, the first push by Britain to conclude a treaty with China was driven by trade. When, in 1792, King George III sent Lord Macartney to China, it was to seek “the end of the restrictive Canton trading system, the opening of new ports for international commerce and the fixing of fair and equitable tariffs”.<sup>6</sup> The Emperor’s response is, by now, legendary:

“We have never valued ingenious articles, nor do we have the slightest need of your country’s manufactures”.

As you can see, trade deficits with China are nothing new: Britain already had one in the 19<sup>th</sup> Century. Fortunately, the remedy has changed: In the 19<sup>th</sup> Century, Britain exported opium (and started a war); today, China buys US treasury bonds.

That trade is the linchpin of international law was, more recently, confirmed by China’s accession to the WTO (which, of course, is a dramatic departure from the Empirical

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<sup>6</sup> JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* (1999) at p. 122.

statement that I just quoted). More so than the 1971 transfer of China's permanent seat on the UN Security Council to the People's Republic of China (PRC), WTO membership has rekindled Chinese interest and commitment to international law. Conversely, it has led to statements that China has "a special responsibility to protect and grow the multilateral trading system".<sup>7</sup>

\* At the same time, the link, or balance, between trade law and other branches of international law has varied over time. In some ways it has proven to be cyclical.

In the very first treaty concluded by the United States – the 1778 Treaty of Amity and Commerce with France – peace, commerce, navigation, territorial delimitation and liberties and immunities for aliens, were all dealt with in one single legal instrument. This holistic approach changed dramatically at the end of the First and, especially, the Second World War.

Rather than integrated in one regime or treaty, international law was gradually fragmented along functional lines: in 1919, the International Labor Organization (ILO) was created to address labor questions; in 1945, the UN was set up to deal with peace and security, the World Bank to address development, the IMF to tackle monetary questions and the GATT to deal with trade. In subsequent decades, as new problems arose, separate treaties and international organizations were established – once again on functional lines -- to address human rights, the environment, intellectual property, culture, and so forth.

\* Although this expansion of international law has mostly been welcomed as beneficial, it did, over time, create problems of coordination and coherence.

In domestic legal systems functional specialization does exist in different ministries and bureaucracies. However, within states, there is a central legislator, executive and

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<sup>7</sup> *Remarks by U.S. Trade Representative Susan Schwab, AmCham China – US China Business Council Event, August 29, 2006, p. 1.*

judiciary that bring everything together in a legal system where hierarchies are established based on the *source* of the legal norm. In the case of China, for example, the Constitution prevails over Basic Laws of the National People's Congress (NPC) which, in turn, prevail over laws of the (NPC) Standing Committee which, in their turn, trump administrative regulations by the State Council.

In international law, in contrast, there is no centralized legislator or world government, and each state decides for itself what treaty or organization it wants to join. Moreover, in international law, with the exception of *jus cogens*, there is no inherent legal hierarchy: all sources of international law (custom, treaties and general principles) have the same value. More specifically, and exception made of the prominence of UN Charter obligations, no pre-determined hierarchy exists between different treaties enacted by, for example, the WTO as opposed to the UN, IMF, UNESCO or the ILO.

Combine this expansion of international law with the general lack of hierarchy between international norms and the sad fact that different teams of negotiators for one single country not always coordinate, and the challenge of fragmentation and conflict between international norms is unavoidable.

\* There is no doubt that today also China faces this challenge. In a clear break with its past skepticism toward international law -- previously seen by China as either the source of quasi-colonial occupation or a tool of Western imperialist powers -- since the 1979 "opening up" policy, China has signed a host of new treaties and became member of an increasing number of international organizations. In 2005, China was reported to be a party to 273 multilateral treaties, out of which 239 (that is, 92 %) became applicable to China only after 1979.<sup>8</sup> In 2006, China was said to be a member of 46

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<sup>8</sup> Hanqin Hue, *China's Open Policy and International Law*, CHINESE JOURNAL OF INTERNATIONAL LAW (2005), p. 133 at 136.

intergovernmental organizations.<sup>9</sup> In other words, overlaps and possible conflicts between treaties and international organizations has become an issue also for China.

## **II. The Current Tension between WTO and Other International Law and Why the WTO Must “Open Up”**

\* Let me now focus on what is perhaps the most acute and most interesting source of coordination and conflict problems, namely: the question of how WTO law (centered on free markets and economics) relates to other branches of international law (especially those expressing politics or written to deal with market failure or externalities).

There is an obvious reason for why the WTO is at the center of the fragmentation debate. Much like a vacuum cleaner sucks up its surrounding environment, the new, compulsory and fully automatic WTO dispute settlement system can suck up just about any dispute that is even tangentially related to trade. Any WTO member has the full and automatic right to sue any other WTO member about any alleged trade restriction. No such right exists in most other international organizations. This has led complainants to bring disputes that were not centrally based in the WTO treaty to WTO dispute settlement. Conversely, it has led defendants to rely on all kinds of non-WTO rules of international law (ranging from IMF recommendations and environmental treaties to drug conventions and regional trade agreements) in defense of their trade restrictions. This tendency is simply unavoidable and over time is destined to increase.

\* Yet, besides the uniquely automatic and binding WTO dispute process, there is another, more fundamental reason for why the WTO is at the heart of the fragmentation debate. This reason is a substantive one, centered on the WTO’s focus on deregulation and free, economic markets as the optimal way to organize society.

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<sup>9</sup> Ann Kent, *China’s Changing Attitude to International Law and its Implications*, Paper Presented to the Annual Conference of the Australian and New Zealand Society of International Law, Wellington, 29 June 2006, p. 4.

Thus looking at civilization through an exclusively economic prism is relatively new. The WTO's almost religious belief in free trade as a solution to most of the world's problems (ranging from war to poverty) is equally new. It used to be otherwise.

In ancient Greece, for example, during the days of the Greek city-states, trade and commerce were looked at with contempt. Aristotle tells us that in Thebes any person who had at any time during the previous 10 years engaged in trade was simply not eligible for any political office. Citizens were forbidden to take part in industry and trade, both of which were activities regarded with disdain and to be left to aliens.

With the end of the cold war (and the victory of capitalism over Soviet communism), the subsequent establishment of the WTO and the so-called "Washington Consensus", the pendulum swung completely: Rather than looked at with contempt, trade and the free market place became the new religion, a worldview where economics was to silence the excesses of politics.

This prevalence of economics over politics can be seen already in, for example, the 1947 Havana Charter (later reduced to the GATT), which recognizes that parties

"should not attempt to take action which would involve passing judgment in any way on essentially political matters".<sup>10</sup>

Equally, the World Bank's Articles of Agreement provide that, in bank operations such as loans, "only economic considerations shall be relevant to their decisions".<sup>11</sup>

As all pendulums go, however, there is the tendency to go from one extreme to the other and, if so, counter-balancing forces are triggered almost automatically. Where ancient Greece clearly underestimated the worth of trade, economics and free markets, in today's wave of globalization the opposite is true: The religious belief in economics and pure

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<sup>10</sup> Article 86:3, Havana Charter.

<sup>11</sup> Article IV, Section 10, World Bank Articles of Agreement.

market forces has gone to extremes and, in response, all over the world counter-balancing forces were triggered.

To put it differently, politics is back, both in its attractive manifestations, such as greater demands for participation and accountability in the global economy and with the ugly face of politics, such as protectionism, nationalism and fundamentalism.

This counter-balancing pressure of politics is felt also on the WTO. It started with the 1999 protests in Seattle, the disenchantment of developing countries and manifests itself today through the collapse of the Doha Round negotiations and the resurgence of protectionism.

This return of politics has also put pressure on the WTO to factor in non-economic concerns in the settlement of trade disputes, including outside treaties. This political counter-weight to globalization's exclusive focus on economics and markets is, in my view, the second reason for why the WTO is at the forefront of the debate on fragmentation of international law. Together with the automatic WTO dispute settlement system, it explains why the interaction between WTO law and other norms of international law, in particular those concerned with market failures and market externalities such as poverty, health, the environment, labor and cultural diversity, has become such a pressing topic.

\* In my view, and this is the central message of my speech, it is crucial for the WTO to open its doors to those non-market concerns – if you will, those manifestations of politics -- for the simple reason that not doing so would undermine the legitimacy and long-term survival of the multilateral trading system. To put it differently, if we do not let in those benign manifestations of politics, the grave danger is that the ugly face of politics resurfaces, more specifically: rampant protectionism, fundamental nationalism and, God forbid, war.

Let us not forget that the world's first experimentation with an exclusively economic or market view of civilization -- that is, the first wave of globalization during the second half of the 19<sup>th</sup> Century -- ended in disaster and two world wars. To avoid such violent swing of the pendulum from economics back to the ugly face of politics we must take on board the legitimate demands of politics.

Such injection of politics into the WTO should not be limited to giving policy space to WTO members to enact *domestic* rules and regulations to address questions of redistribution, poverty and non-economic, social concerns. As global competition often makes it difficult for states to enact such flanking policies on their own, the WTO must equally open its doors to *international* treaties concluded with non-economic concerns in mind. Such international treaties are what enable countries to step out of the regulatory race to the bottom and to collectively deal with the social side of globalization. Thus, for the WTO to recognize such international treaties -- only, of course, as between the signatories of those treaties -- is as important as it is to give broader domestic policy space to WTO members.

Moving away from a situation of self-contained regimes in international affairs is not only needed for the long term survival of distinct international organizations such as the WTO. A more holistic approach is also needed to avoid double work, overlap and conflicts and, most importantly of all, to effectively deal with today's global problems. As UN Secretary-General Kofi Annan declared recently:

“Today's threats to our security are all interconnected. We can no longer afford to see problems such as terrorism, or civil war, or extreme poverty, in isolation. Our strategies must be comprehensive. Our institutions must overcome their narrow preoccupations and learn to work across the whole range of issues, in a concerted fashion”.<sup>12</sup>

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<sup>12</sup> Kofi Annan, *Foreword to the UN High-level Panel on Threats, Challenges and Change, entitled: A More Secure World: Our Shared Responsibility* (2004) available at <http://www.un.org/secureworld/>.

### III. How the WTO Has “Opened Up” in Its First 10 Years

As applied to the rather limited and technical field of how WTO panels can take account of non-WTO treaties, let me explain how this “opening up” could be done, and is already happening in practice. I will then end my talk with a few examples on how such reference to outside international law could affect China.

In contrast to the old GATT’s ostrich-like approach of sealing off trade questions from all other international debates, the new WTO struck a far more conciliatory tone. Its very preamble now stresses the incorporation of developing countries into the world trade system as well as the goal of sustainable development. More importantly perhaps -- although on paper seemingly less dramatic -- Article 3.2 of the new WTO dispute settlement understanding explicitly directs panels and the Appellate Body to clarify WTO agreements “in accordance with customary rules of interpretation of public international law”.

In its very first report, on *US – Gasoline*, the Appellate Body jumped on that direction to dramatically declare the end of GATT’s isolation from other rules of international law. No doubt influenced by a prominent public international lawyer in its midst, Florentino Feliciano of the Philippines (who also happened to be the Presiding Member in the *Gasoline* case), the Appellate Body states that Article 3.2 of the DSU

“reflects a measure of recognition that the GATT is not to be read in clinical isolation from public international law”.

The extent or level of this “measure of recognition” of public international law, was subsequently further elaborated in a number of seminal cases.

As a result, today, WTO panels routinely refer to general principles on proportionality, burden of proof, standing, due process, good faith, representation before panels, the

retroactive application of treaties or error in treaty formation. None of these principles are set out in the WTO treaty itself. All derive from public international law.

More controversially, the Appellate Body has also dealt with international health and IP standards, environmental treaties, the precautionary principle, drug and labor conventions and regional trade agreements. All of these were equally created outside the WTO.

The legal foundation for these references to outside international law was well summarized in the conclusions of a recent report on “Fragmentation of International Law” by the UN International Law Commission (a report in which your compatriot Ms. Hanqin Xue, Chinese Ambassador to the Netherlands, played a prominent role)<sup>13</sup>:

“Even as it is clear that the competence of WTO bodies is limited to consideration of claims under the [WTO] covered agreements (and not, for example, under environmental or human rights treaties), when elucidating the content of the relevant rights and obligations, WTO bodies must situate those rights and obligations within the overall context of general international law (including the relevant environmental and human rights treaties)”. (para. 170)

“A limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties”. (para. 45)

“This means that although a tribunal may only have jurisdiction in regard to a particular instrument [such as the WTO treaty], it must always *interpret and apply* that instrument in its relationship to its normative environment - that is to say “other” international law”. (para. 423)

To be fair, I quote this ILC report so extensively because what they say is exactly what I had proposed and advocated in my book.

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<sup>13</sup> *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006.

Crucially, also WTO political bodies have, in the first 10 years of WTO operation, actively engaged with other international organizations and non-WTO treaties. The WTO has concluded agreements with all kinds of international institutions ranging from the IMF to the World Bank and the Codex Alimentarius Commission. WTO members took cognizance of other international treaties in a variety of ways, ranging from renewing their commitment to “internationally recognized core labour standards” in the 1996 Singapore declaration and the enactment of waivers to accommodate the Lome Convention on bananas and the UN-sponsored Kimberley scheme on conflict diamonds, to stressing, in the Doha Declaration on the TRIPS Agreement and public health that TRIPS “be part of the wider national and international action to address” HIV/AIDS.

In sum, the WTO has already opened its doors to outside international law. Whether one likes it or not, this new situation is a reality. This new reality must be taken account of, by all sides, and cannot be swept under the carpet. In essence, whenever China, or any other WTO member, agrees to a new international norm or treaty, it must realize that this agreement can boomerang in the WTO. Negotiators must realize that even deals made outside the four walls of the WTO may have an impact on WTO affairs, including WTO dispute settlement.

#### **IV. Examples of How Outside International Law Could Affect China in WTO Dispute Settlement**

The first reaction of many in the developing world is one *against* opening WTO doors to outside international law. For many, such opening up policy is seen as thinly disguised protectionism by rich countries. As I pointed out earlier, however, opening WTO doors is not about protectionism. It counts as much for the rich world (stressing environment and labor) as for the poor world (stressing redistribution and preferential treatment for development). Indeed, was one of the very first cases considered under WTO rules against China (though never officially filed) not one raised by the EC against Chinese

export restrictions on coke which China, at least partially, explained on environmental grounds?

What is more, as I explained earlier, an open door policy at the WTO is needed to *prevent* protectionism and nationalism, or what I called the ugly face of politics. It is about rebalancing the hegemony of economics with the benign input of politics, a move which I see as absolutely necessary to maintain popular support for the world trade system in both rich and poor countries.

To underscore this point, let me give you a few examples of how other international law could be, and could *not* be, played out by or against China in WTO dispute settlement. These examples will, at the same time, confirm the important limits on the WTO open door policy that I advocate here.

\* First, outside international law cannot be used “offensively”: It is out of the question that, for example, the United States or the European Communities (EC), could sue China before a WTO panel for breach of human rights or labor standards. Crucially, this is so even for those human rights or labor standards that China agreed to. And remember, China has agreed to more ILO core labor treaties than the United States (4 out of 8 versus 2 out of 8). The reason why the WTO cannot entertain claims of human rights or labor violations is simple: the jurisdiction of WTO panels is limited to claims of WTO violation. It does not include jurisdiction over claims of human rights or labor violations. This is the first limit on my WTO open-door policy: the limit of WTO jurisdiction.

To put it differently, for the WTO to open its doors to other international law is not the same as saying that somehow all international law must now be made and enforced at the WTO. Let the specialization and division of labor between international organizations continue. Let the ILO set labor standards, the WHO set health standards, the UN agree on human rights and the WTO discipline trade policy. Such division of labor is efficient,

creates healthy competition and operates as a checks and balances, by far to be preferred to one single world government.

Yet, when it comes to applying any of these rules, created in different fora, it is crucial to interpret and apply those rules in the context of, and in a way that takes account of, all other rules. In that sense, international law is a universe of islands, but islands that are all interconnected.

\* Second, although no claims of human rights or labor violation could be brought to the WTO, a WTO “open door” policy, as I described it, would mean that claims of WTO violation are to be evaluated against possible defenses under other treaties. Put differently, although outside treaties cannot be used “offensively”, they can be used “defensively”. Crucially, however, such other treaties could only be held against a complaining party if that party has agreed to that outside treaty. This is the second limit of my WTO open-door policy: the limit of state consent.

Let’s take the example of the UN Kimberley Scheme against conflict diamonds. This scheme calls for certain trade restrictions on conflict or blood diamonds as between participants. Now, if, for example, South Africa were to enact such restrictions, and China challenges those trade restrictions before a WTO panel then the WTO panel should consider possible defenses under the Kimberley Scheme. Yet, it should only do so because both South Africa and China are parties to this scheme. If China were *not* a party to the outside treaty – as is the case with certain human rights, labor or environmental treaties – then the outside treaty could not be held against China.

Conversely, if the United States were to sue China over alleged currency manipulation then China should have the right to invoke possible defenses under the IMF articles of agreement, in particular, China’s right to maintain a pegged currency. Why so? Because both China and the United States have agreed to this IMF rule and the United States cannot pretend before a WTO panel that the IMF does not exist.

To put it differently, an open door policy for the WTO is subject to state sovereignty: only outside rules binding on the disputing parties should be referred to. This applies for the Kimberley scheme on conflict diamonds and IMF rules, as much as for the Cartagena Protocol on Biosafety, the new WHO Convention on Tobacco Control or the recent UNESCO Treaty on Cultural Diversity.

What is more, such open door policy is not only subject to, but gives expression to, state will: It acknowledges the sovereign diversity between WTO members and lets them refine, alter or add to their relationship with other countries in other fora in ways that are subsequently respected also before a WTO panel. As China highly values the principle of state sovereignty, it should, therefore, welcome a WTO open door policy.

The same should apply as regards decisions of international organizations. If, tomorrow, Myanmar were to challenge the US trade embargo against it, then surely the United States should be allowed to refer to the 2001 ILO recommendation calling upon all ILO members to take action against Myanmar for its grave breach of the prohibition on forced labor. As Myanmar is an ILO member and agreed to ILO enforcement proceedings, Myanmar should live with this ILO recommendation, also before a WTO panel. Again, the WTO would not thereby condemn Myanmar for ILO breach. This is outside the WTO's jurisdiction. It would only give effect to a ILO permission for ILO members to impose trade sanctions on Myanmar.

Conversely, if China were to win a WTO dispute against the United States, the United States refuses to implement and China obtains the right from the WTO to suspend certain of its IP obligations as against the United States as a form of cross-retaliation, what happens if the United States subsequently challenges China before WIPO?

As in the Myanmar example, under an open door policy, WIPO should then open its eyes to the WTO grant of authority for China to suspend US patents or copyrights, and *permit* China to invoke this WTO permission in defense of any violation of its WIPO obligations.

\* Third, reference to outside international law by WTO panels must respect third party rights. A WTO open door policy would permit WTO members to bilaterally settle any trade dispute. Doing so, WTO members might even alter or deviate from preexisting WTO rules. As noted earlier, such possibility fits well with China's stated preference for bilateral settlement. The 2005 MOFCOM Investigation Rules of Foreign Trade Barriers (China's equivalent to US Section 301) explicitly states that MOFCOM is to terminate investigations when China is provided with "proper trade compensation". Settlement rather than retaliation and protracted litigation may also conform better to China's Confucian social context.<sup>14</sup>

At the same time, China should rightly worry about settlements between other countries (say, the US and Europe) that violate China's WTO rights, in particular China's MFN rights. That is why settlements or, for that matter, any other outside treaty, can only be referred to by a WTO panel if it respects third party rights. The rule that a treaty cannot affect third parties is enshrined in the Vienna Convention on the Law of Treaties (Article 34). This is the third limit of my WTO open-door policy: the limit of third party rights.

\* Finally, and very importantly, a WTO open door policy would also take account of steps agreed on in bilateral or regional trade agreements. Such agreements must, of course, comply with GATT Article XXIV and GATS Article V. However, once two or more WTO members agree to something in an FTA, they should not be allowed to retract from such agreement before a WTO panel.

Let me explain by giving you two examples that involve China.

Article 9 of the 2004 trade in goods section of the FTA between ASEAN and China (ACFTA) permits the imposition of safeguards against ACFTA imports during a

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<sup>14</sup> Paolo Farah, *L'Accession de la Chine à l'OMC: Les Règles Internationales et les Barrières Culturelles Internes*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=924757](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924757) at 4 and note 27.

transition period. It seems to do so without requiring “unforeseen developments”, a requirement explicit in Article XIX of GATT. What if China imposes a safeguard on goods from ACFTA parties but not from other WTO members and, for example, Thailand challenges this Chinese safeguard before a WTO panel as a trade restriction in violation of MFN and the GATT Article XIX requirement of “unforeseen developments”?

Pursuant to a WTO open door policy, China should have the right to invoke Article 9 of ACFTA to justify its safeguard as one that Thailand explicitly agreed to in ACFTA. Thailand cannot now renege on its ACFTA concessions and revert to China’s pre-ACFTA obligations under the WTO. Article 44 of the recent FTA between China and Chile provides for a similar safeguard mechanism.

Let me give you another example, one that is more likely to arise in practice (as it almost did in recent WTO cases such as *Argentina – Poultry* and *Mexico – Soft Drinks*).

Like many FTAs, Article 2.6 of the Agreement on ACFTA dispute settlement includes a clause on forum shopping. It provides that if a dispute can be brought under two treaties, one of which is ACFTA and the other, for example, the WTO, once dispute settlement proceedings have been initiated under either ACFTA or the WTO

“the forum selected by the complaining party shall be used to the exclusion of any other such dispute”.

This provision, included also in Article 81 of the FTA between Chile and China, is there to avoid duplication of proceedings, waste of resources and the potential for conflicting rulings on the same dispute.

Now, what if Singapore or Chile disregards this provision and, over the same trade measure, sues China first before an FTA panel and subsequently before a WTO panel?

The answer under a WTO open door policy is clear: In that event China would have the right to invoke the forum exclusion clause in the FTA in its defense and, on that basis, a WTO panel would have to decline jurisdiction. As Singapore and Chile explicitly agreed with China not to bring the same case first under the FTA and then before the WTO, why should a WTO panel disregard this defense?

## **V. Conclusion**

Let me stress what I want you to take away from this talk.

Given the historical interaction between trade and other international law, economics and politics, it is crucial for the WTO to open up to the benign elements of politics.

Besides giving WTO members sufficient policy space domestically so as to deal with questions of poverty, redistribution, environmental degradation and other non-economic concerns, the WTO must also open up to international efforts and treaties that address these non-trade concerns. As countries find it increasingly difficult to address these concerns on their own, because of regulatory competition driven by globalization, solutions to these social problems are likely to be offered also through international law.

If so, for the WTO's own long term survival and to neutralize the ugly face of politics (namely protectionism, nationalism and violence), it is crucial that the WTO take account of that other international law.

I have shown you how this could be done specifically in WTO dispute settlement. In the process, I hope that I have convinced you that a WTO "open door" policy is also in China's best interest.

*Shieh shieh.* And I very much look forward to your comments and reactions.