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The Challenge of Interpreting 'WTO-PLUS' Provisions

Julia Ya QIN*

This paper seeks to address special interpretive issues raised by the China Accession Protocol, focusing on provisions that prescribe more stringent rules for China than generally applicable WTO disciplines. These 'WTO-plus' provisions have already been involved in several WTO disputes. In the light of these disputes, the paper analyzes the interpretive challenge presented by the Protocol and suggests that, to meet the challenge, WTO adjudicators need to embrace a more holistic and systemic interpretive approach. The paper then proposes three working principles that may help to interpret the WTO-plus provisions of the Protocol in a coherent and systematic manner.

This paper seeks to address special interpretive issues raised by the China Accession Protocol (the Protocol), focusing on its provisions that prescribe more stringent obligations for China than generally applicable WTO disciplines. These so-called 'WTO-plus' obligations¹ have already been involved in a number of WTO disputes. Yet, how to interpret such obligations in a systematic manner remains an open question.

Interpretation of the Protocol presents a new challenge to the WTO adjudicatory body because it contains a large number of substantive obligations of China that exceed the requirements of the WTO agreements. Despite its unique content, the Protocol needs to be interpreted consistently and coherently with all WTO agreements since it has been made an integral part of the Agreement Establishing the World Trade Organization (the WTO Agreement). The Protocol, unfortunately, is not a model of clarity. Its text is not drafted as tightly as the WTO agreements, and it does not take care to specify the relationship between a WTO-plus provision and the generally applicable WTO disciplines. Moreover, the Protocol fails to articulate any rationale for the special obligations of China, and the negotiating history of the Protocol has not been made public. As a result, it can be difficult to interpret the Protocol provisions by following a strictly applied textualist approach.

Furthermore, the China-specific provisions include broad undertakings that go to the heart of China's economic and legal systems. These systemic obligations penetrate

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¹ See generally, Julia Ya Qin, 'WTO-Plus' Obligations and their Implications for the WTO Legal System – an Appraisal of the China Accession Protocol', *Journal of World Trade* 37, no. 3 (2003): 483–522.

deeper into the domestic policy domain of a sovereign nation than any other WTO agreement. Consequently, how to interpret the scope of such provisions becomes a politically sensitive matter. The goal, of course, is to give full effect to each of the Protocol provisions without improperly intruding into the legitimate policy space of China. However, given the lack of clear guidance from the treaty, achieving that goal will not be an easy task. To meet the challenge, WTO adjudicators will need to embrace a more holistic and systemic interpretive approach.

In this paper, I will examine the major interpretive issues involved in the WTO-plus provisions and propose three working principles to aid the interpretative process. These three principles are as follows: (1) Identifying the baseline. For each WTO-plus provision at issue, the interpreter should identify, to the extent possible, the corresponding provision(s) in the WTO multilateral agreements as the baseline. Locating the baseline rules can provide a broader context for the WTO-plus provision and shed light on its rationale. (2) Distinguishing systemic commitments from commercial commitments. Some of the WTO-plus obligations are commercial commitments in nature, whereas others pertain to the reform of China's domestic system. The level of WTO scrutiny should vary depending on the nature of the commitments so that proper balance can be drawn between international and national jurisdictions. (3) Giving due consideration to China's intention. Although the Protocol has been made part of a multilateral agreement, its obligations are China-specific that do not have *quid pro quo* on the part of other WTO Members. In light of the *de facto* unilateral character of such obligations, special care should be taken in ascertaining China's intention in the interpretive process; when in doubt, the Protocol obligations should be interpreted narrowly.

The paper will proceed as follows. Part 1 provides an introduction to the WTO-plus obligations of China and an analysis of the legal nature of the Protocol. Part 2 discusses the special challenge in the interpretation of the WTO-plus obligations and illustrates such challenges by WTO disputes involving such obligations. Part 3 sets forth the three proposed working principles for interpreting such obligations. Part 4 concludes.

It should be clarified at the outset that this paper does not deal with the market access commitments of China set out its goods and services schedules, which are part of the Protocol but are separately incorporated into the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), respectively. Since all market access commitments inscribed in GATT and GATS schedules are country-specific, that is, they vary from Member to Member, the notion of 'WTO-plus' does not apply to such commitments. Instead, WTO-plus obligations refer to the obligations of a Member that go beyond the requirements of generally applicable WTO disciplines.²

² For a general categorization of 'WTO-plus' and 'WTO-minus' obligations and a survey of such obligations within the WTO system, see Steve Charnovitz, 'Mapping the Law of WTO Accession', in *The WTO: Governance, Dispute Settlement & Developing Countries*, ed. Merit E. Janow, Victoria Donaldson, & Alan Yanovich (Juris Publishing, 2008), Ch. 46, available at: <www.ssrn.com/abstractid=957651>.

1. INTRODUCTION

The terms of China's accession to the WTO are set out in the Protocol on the Accession of the People's Republic of China.³ Like all acceding Members, China was required to make its own market-access commitments in goods and services⁴ and to comply with WTO rules of conduct contained in the various substantive agreements annexed to the WTO Agreement (collectively, the WTO agreements). Unlike other acceding Members, however, the terms of China's accession also include a large number of special rules that are applicable to China only.⁵ These China-only rules are found in the main text of the Protocol, which consists of 17 sections of substantive provisions and nine annexes, and in the Report of the Working Party on the Accession of China ('WPR'), which has 343 paragraphs including 143 paragraphs containing substantive obligations that are incorporated into the Protocol by reference.

The China-only rules can be divided into two major categories: (1) 'WTO-plus' provisions, which impose on China obligations more stringent than those required by the WTO agreements; and (2) 'WTO-minus' provisions, which allow other Members to deviate from standard WTO disciplines when using trade remedies against Chinese exports.⁶ In addition, there is a set of provisions that obligate China not to seek special and differential treatment of developing country Members.⁷

1.1 FIVE TYPES OF WTO-PLUS OBLIGATIONS

The WTO-plus obligations of China are numerous. They range from important systemic commitments to purely commercial arrangements. Based on their purposes or rationale, these obligations can be viewed as comprising five types:⁸

1. *Obligations to practice market economy.* Although its rules are constructed with market economy assumptions, the WTO does not prescribe any particular

³ The Protocol on the Accession of the People's Republic of China, WT/L/432 (10 Nov. 2001), available at: <www.wto.org>.

⁴ China's market access commitments were extraordinarily extensive in comparison with other WTO members. For a comparative perspective on the scope and depth of China's market access commitments, see Nicholas R. Lardy, *Integrating China into the Global Economy* (Washington, DC: Brookings Institution Press, 2002), 79–80.

⁵ The only other major exception is Vietnam, which acceded to the WTO in 2007. Following China's precedent, Vietnam's accession protocol contains a set of special rules that apply solely to Vietnam. These rules are found in the 70 paragraphs of the Report of the Working Party on the Accession of Vietnam that are incorporated into the accession protocol. See WT/ACC/VNM/48 (27 Oct. 2006), para. 527. While special rule obligations do exist in other accessions, they are relatively few in number. For a comprehensive study of issues arising from special obligations imposed on acceding Members, see Charnovitz, *supra* n. 2.

⁶ For a summary of the WTO-minus provisions, see Julia Ya Qin, 'China, India, and the Law of the World Trade Organization', *Asian Journal of Comparative Law* 3, no. 1 (2008): 215, 222–227.

⁷ For detailed discussion, see Marcia Don Harpaz, 'China and the WTO – New Kid in the Developing Bloc?', Hebrew U. of Jerusalem Law Faculty, Research Paper 2–7 (February 2007), Part II, available at: <www.ssrn.com/abstractid=961768>. See also, Julia Ya Qin, 'WTO Regulation of Subsidies to State-Owned Enterprises (SOEs): A Critical Appraisal of the China Accession Protocol', *Journal of International Economic Law* 7, no. 4 (2004): 863, 907–909.

⁸ Charnovitz divided such obligations into more groups according to the subject matter, such as industrial policy, trade policy, transparency and due process. Charnovitz, *supra* n. 2, 29–33.

economic system for its Members.⁹ While most WTO Members practice market economy, they are not legally bound to do so under WTO law. The Protocol, however, prescribes certain obligations that effectively obligate China to practice market economy. For instance, China is required to let market forces determine all domestic prices, except for a few specified categories, and is not allowed to extend price control beyond these specified categories except in exceptional circumstances.¹⁰ And within three years of its accession, China must completely liberalize its foreign trading regime to allow all domestic and foreign persons to engage in importing and exporting.¹¹ As a result of such systemic requirements, whether China adopts market economy practices is no longer merely a matter of domestic policy, but also a matter of WTO law.

2. *Obligations on domestic governance.* The Protocol prescribes a number of special obligations concerning domestic governance that exceed the requirements of the WTO agreements.¹² Such obligations relate to transparency, due process, regulatory independence, and uniform administration of law. For instance, the Protocol requires China to provide a reasonable period for public comment on 'all laws, regulations and measures' pertaining to WTO matters before their implementation¹³ and to translate all of such laws, regulations and measures into one of the three official languages of the WTO within ninety days of their implementation.¹⁴ No such general obligations exist under the WTO agreements.
3. *Obligations on foreign direct investment.* Existing WTO disciplines do not cover foreign investment except for measures directly affecting trade in goods or services specifically included in the GATS schedules.¹⁵ The Protocol, by contrast, contains significant commitments by China regarding foreign investment. For instance, China agreed not to condition government approval of foreign investment projects upon the existence of competing domestic suppliers or upon *any* performance requirement, including transfer of technology and the conduct of research and development in China.¹⁶ Most importantly, the Protocol requires China to grant national treatment to foreign investors and foreign-invested enterprises with respect to all conditions affecting their production and sales in China,¹⁷ which goes well beyond the national treatment requirements of the WTO agreements.

⁹ For example, Cuba, despite its nonmarket economy, is an original Member of the WTO. In the prior accessions of transition economies (former centrally planned economies undergoing transformation to market economies), the acceding countries were typically required to confirm the status of their economic reforms, but none was obligated to undertake substantive obligations to practice market economy. See Qin, *supra* n. 1, 504.

¹⁰ See Protocol, s. 9.

¹¹ See Protocol, s. 5.1.

¹² See Qin, *supra* n. 1, 491–499, for more detailed discussion.

¹³ Protocol, s. 2(C)(2). Exceptions are given to laws and regulations involving national security or publication of which would impede law enforcement.

¹⁴ WPR, para. 334, which was incorporated into the Protocol.

¹⁵ See Agreement on Trade-Related Investment Measures (TRIMS) and GATS schedule mode 3 (commercial presence).

¹⁶ Protocol, s. 7(3).

¹⁷ Protocol, s. 3.

4. *Obligations to eliminate export tariffs.* While reducing import tariffs is an essential part of the GATT discipline, the WTO has not imposed similar obligations on export tariffs, even though the use of export quotas or quantitative restrictions is prohibited.¹⁸ Consequently, WTO Members remain free to levy tariffs on their exports, which can achieve the same effect as quantitative restrictions. Significantly departing from this norm, the Protocol imposes on China an obligation to 'eliminate all taxes and charges applied to exports' except for 84 specific types of products. For these products, the Protocol sets maximum export duty rates, which may not be raised by China except under exceptional circumstances and after consultations with affected members.¹⁹
5. *Market access commitments that do not fit into the GATT or GATS schedule.* Market access commitments of WTO Members are set out in GATT and GATS schedules. In the case of China, however, additional market access commitments were made in the Protocol. For example, China agreed to remove the 50% foreign equity limit for joint-ventures manufacturing motor vehicle engines, and to raise gradually the limit within which foreign investments in motor vehicle manufacturing can be approved solely by the provincial governmental level.²⁰ These are market access commitments on foreign investment in a manufacturing sector, which do not fit into either the goods or services schedule. Another example is China's commitment to bind future tariffs on certain automobile products if it ever creates new tariff lines for them.²¹

Of the five types of WTO-plus obligations, those concerning market economy practice are the most broad systemic commitments of China. As a result of these commitments, China is no longer free to alter the direction and results of its market-oriented reforms.²² And failure to honour these commitments will incur the consequences of violating WTO law. The obligations on domestic governance are also systemic commitments. Unlike the obligations to practice market economy, however, the special commitments of China on transparency, due process, and administration of law are built upon explicit, existing WTO norms. While these commitments may have a significant influence on the development of rule of law in China, they do not impact China's economic system in the same manner as the market economy commitments.

Compared to the systemic commitments, the obligations on foreign investment and on export tariffs are more of commercial commitments in nature. Although they embody important industrial and trade policies, these obligations are essentially China's commitments to liberalize trade and investment unilaterally. As for the market access commitments that do not fit into the goods and services schedules, they are entirely commercial concessions of China, analogous to those contained in the schedules.

¹⁸ GATT, Art. XI.

¹⁹ Protocol, s. 11(3); Annex 6.

²⁰ WPR paras 206–207, which were incorporated into the Protocol.

²¹ WPR para. 93, which commitment was the subject matter of a WTO complaint. See *infra* Part 2.2.1.

²² For domestic legal implications of these commitments, see Julia Ya Qin, 'The Impact of WTO Accession on China's Legal System: Trade, Investment and Beyond', Wayne State U. Law School Legal Studies Research Paper Series, no 7–15, 8–10 (May 2007), <www.ssrn.com/abstractid=985321>.

1.2 LEGAL NATURE OF THE PROTOCOL OBLIGATIONS

The Protocol was concluded between China and the WTO pursuant to Article XII of the WTO Agreement, which provides that a country may accede to the WTO Agreement 'on terms to be agreed between it and the WTO'.²³ Historically, the terms of accession typically consisted of market access commitments of the acceding country, set out in the goods and services schedules annexed to its protocol of accession. Such terms of accession would not affect the rules of the WTO multilateral agreements. But since Article XII does not place any limit on the 'terms' that can be negotiated in accession, the existing Members can also demand special rule commitments from the acceding country that modify the obligations of the acceding Member under the WTO agreements.²⁴ In the case of China, such demand has resulted in the large number of WTO-plus and WTO-minus provisions.

Given that the Protocol terms modify the rules of the WTO agreements when applied to China, it becomes imperative that their interpretation be based on a clear understanding of the relationship between the Protocol and the WTO agreements. Such a relationship is complicated by the dual treaty status of the Protocol. Technically, the Protocol is a bilateral treaty between China and the WTO; but it also constitutes part of the WTO Agreement, a multilateral treaty among WTO Members. In addition, the Protocol demonstrates a distinct unilateral character when it prescribes special obligations of China that do not have quid pro quo on the part of other WTO Members. These special characteristics of the Protocol have implications not only for the interpretation, but also the enforcement and amendment of its provisions.

1.2.1 *Bilateral, Multilateral or Unilateral Obligations?*

Since the Protocol was concluded between China and the WTO, it is technically a bilateral treaty between a state and an international organization.²⁵ As an international organization, the WTO's decision to approve the Protocol was made by the Ministerial Conference by a two-thirds majority of the Members of the WTO.²⁶ This decision binds all WTO Members, including all countries that join the WTO after China's accession, and subjects their trade relations with China to the Protocol terms unless they expressly invoke the non-application clause of the WTO Agreement.²⁷

²³ WTO Agreement, Art. XII:1. This provision follows similar language contained in the accession provision of GATT Art. XXXIII.

²⁴ See Qin, *supra* n. 1, 487–489; Charnovitz, *supra* n. 2, 6–10.

²⁵ The rules governing agreements between a State and an international organization are set out in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 Mar. 1986) (VCLTIO) (not yet in force). The VCLTIO was developed by the International Law Commission and opened for signature in 1986. U.N. Doc. A/CONF.129/15.

²⁶ WTO Agreement, Art. XII:2.

²⁷ Pursuant to Art. XIII (Non-Application) of the WTO Agreement, an existing Member has the right not to consent to the application of the WTO Agreement between it and an acceding member; and the acceding member also has the right to invoke nonapplication to an existing member. El Salvador invoked Art. XIII in the accession of China. See WTO Analytical Index: Marrakesh Agreement Establishing the World Trade Organization, Art. XIII, available at: <www.wto.org>.

Section I.2 of the Protocol provides: 'This Protocol ... shall be an integral part of the WTO Agreement.'²⁸ By virtue of this integration clause, the Protocol provisions have become part of a multilateral agreement. As a formal matter, it remains unclear how a bilateral treaty between a State and the WTO could transform itself into a multilateral treaty among WTO Members.²⁹ Nonetheless, the integration is legally effective because China, the party that undertakes all the substantive obligations under the Protocol, has consented to it.

But has the integration clause taken away the bilateral status of the Protocol under international law?³⁰ Absent explicit language of the Protocol to that effect, it is difficult to conclude that the Protocol has ceased to be a treaty between China and the WTO. A better understanding, in my view, is that the integration clause has provided the Protocol provisions with an additional multilateral status. Whether the Protocol should be treated as a bilateral or multilateral instrument may depend on the purpose of the inquiry, as will be further discussed below.

Irrespective of whether it is considered a bilateral or multilateral instrument, the Protocol has a distinct unilateral character because it contains a large number of special obligations that are uniquely those of China. To the extent that they exceed the requirements of the WTO agreements, these obligations are de facto unilateral commitments undertaken by the Chinese government. But that is not to say that the Protocol is a unilateral instrument. The terms of the Protocol were agreed between China and WTO Members after years of negotiation. Clearly, China undertook these commitments in exchange for its membership in the WTO, which brings to it all the benefits of the membership subject only to the limits set by the Protocol. Hence, the Protocol obligations are 'unilateral' only in the sense, and to the extent, that they differ from the multilateral obligations of the WTO Members and do not have quid pro quo on the part of other Members.

1.2.2. *Implications for Amendment*

Normally, there is no need to amend a WTO accession protocol since such an instrument typically consists of procedural provisions for the accession and the goods and services schedules of the acceding Member, which can be amended pursuant to the relevant GATT and GATS provisions.³¹ But because the Protocol contains numerous substantive

²⁸ Protocol, s. I.2.

²⁹ Charnovitz questions the competence of the WTO Ministerial Conference to conclude a protocol with a State and thereby make the protocol part of the WTO Agreement. He suggests, correctly in my view, that the proper way to integrate the terms of accession into the WTO Agreement should be for the WTO Agreement to so state. See Charnovitz, *supra* n. 2, 42–46.

³⁰ The Protocol is registered with the United Nations in accordance with Art. 102 of the UN Charter. 2183 UNTS 138 (2004). In the UN Treaty Series, all WTO protocols of accession are registered as 'Multilateral' under the same registration number (A-31874), which follows the registration number for the WTO Agreement (I-31874). Registration of an instrument with the United Nations, however, does not confer any legal status the instrument does not already have. Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), 112.

³¹ See GATT Art. XXVIII (Modification of Schedules); GATS Art. XXI (Modification of Schedules).

provisions that modify the rights and obligations of China and other Members under the WTO Agreement, there should be a clear procedure for the amendment of Protocol provisions. Unfortunately, the Protocol is completely silent in this respect. While the need for amending the Protocol may seem remote at the moment, one cannot rule out such a possibility for the future. Indeed, if China continues to lose cases in disputes involving Protocol obligations, it may seek to renegotiate some of the Protocol terms, such as revising the list of products subject to export tariffs.³²

The requirements for amendment would differ depending on whether the Protocol is treated as a bilateral treaty or a multilateral agreement. If the Protocol is deemed part of the WTO Agreement, then its amendment should be made pursuant to Article X (Amendments) of the WTO Agreement. According to Article X, amendments to the provisions of the WTO Agreement that would alter the rights and obligations of the Members shall take effect upon acceptance by two thirds of the Members and only for each of the Members that has accepted them.³³ Because the 'acceptance' by the Members means that the Members must comply with their respective domestic legal procedures for approval of a treaty amendment, which for some Members require ratification by legislature, amending the Protocol would likely be extremely difficult if not impossible.³⁴

By contrast, if the Protocol is treated as a bilateral treaty between China and the WTO, its amendment will take effect upon mutual consent of China and the WTO. The WTO consent would be obtained through its internal decision-making procedures.³⁵ Under Article IX (Decision-Making) of the WTO Agreement, a majority of the votes cast is sufficient to make such a decision,³⁶ and the decision so made would be binding on all Members of the WTO. Alternatively, it might also be appropriate to apply the procedures of Article XII (Accession), *mutatis mutandis*, to the revision of the Protocol, which would require a two-thirds majority for approval. Either way, when the Protocol is treated as a bilateral treaty, its amendment will not require formal acceptance (ratification) by the individual Members.

In my view, for the purpose of amendment, it is more appropriate to treat the Protocol as a bilateral agreement than a multilateral agreement. Formally, as long as the Protocol remains a treaty between China and the WTO, its amendment should be made by agreement between the two parties.³⁷ The question is whether, by the integration

³² See *infra* Part 2.2.4 (*China – Exportation of Raw Materials*).

³³ WTO Agreement, Art. X:3.

³⁴ To date, the only formal amendment to an annex of the WTO Agreement that has been adopted by the General Council is the 2005 amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Amendment of TRIPS Agreement, WT/L/641 (8 Dec. 2005). The amendment has not taken effect since it has not received acceptance by two thirds of the Members. As of May 2009, only 21 Members (counting the EC as one) have accepted the amendment.

³⁵ See VCLTIO, *supra* n. 25, Art. 39(2) (stating that the consent of an international organization to the agreement to amend a treaty 'shall be governed by the rules of that organization').

³⁶ Article IX. It should be noted that in practice the WTO resorts to consensus in most of its decision-making processes. For discussion, see Claus-Dieter Ehlermann & Lothar Ehring, 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?', *Journal International Economic Law* 8, no. 1 (2005): 51–75.

³⁷ See VCLTIO, *supra* n. 25, Art. 39(1) (*General Rule Regarding the Amendment of Treaties*) (stating that '[a] treaty may be amended by agreement between the parties').

clause, the parties have implicitly agreed that amendment of the Protocol should instead be handled by the procedures under Article X of the WTO Agreement. This is a question of interpreting the scope of the integration clause, for which the answer will remain uncertain until the parties clarify their intentions. In practice, however, choosing to amend the Protocol through the procedures of Article X would be tantamount to closing the door to virtually any amendment. (Imagine the difficulty of requiring two thirds of the WTO Members to go through their respective domestic procedures for treaty ratification just to approve a change in the list of Chinese products subject to export tariffs.) It seems rather drastic that China should be given no realistic chance to renegotiate any term of the Protocol, be it a systemic commitment or a commitment of pure commercial nature. In addition, from a procedural perspective, it would not make sense to impose more stringent requirements for approving an amendment than those for approving the original terms of the Protocol under Article XII.³⁸ It is for these reasons that I believe the amendment of the Protocol should be made bilaterally.

1.2.3. *Implications for Enforcement*

The Protocol does not contain any provision on the settlement of disputes arising from its provisions. Nonetheless, thanks to the integration clause, the Protocol has become enforceable against China by individual Members of the WTO. Since the WTO Agreement is a 'covered agreement' under the Dispute Settlement Understanding (DSU),³⁹ the integration of the Protocol into the WTO Agreement makes the DSU applicable to the disputes arising from the Protocol. The legal basis for the enforceability of the Protocol through the DSU lies ultimately in China's consent, implicitly expressed in the integration clause. (This understanding has since been confirmed by China's acceptance of the jurisdiction of the WTO panels over disputes arising from its Protocol obligations.) Without such consent, it is doubtful that Members of the WTO, who are not parties to the Protocol in their individual capacity, would be able to sue China directly for breach of its Protocol obligations.⁴⁰

In theory, the Protocol, being a bilateral treaty, should be enforceable against China by the WTO directly. However, as a practical matter, the WTO would have little effective means to seek such enforcement since it does not have access to its internal dispute settlement mechanism⁴¹ and the Protocol does not provide any separate means for dispute resolution.

³⁸ Furthermore, theoretically, applying Art. X to the amendment of the Protocol could also lead to a strange result: an amendment could take effect without China's acceptance, so long as it is accepted by two thirds of the Members.

³⁹ DSU Art. 1 and Appendix 1.

⁴⁰ It should be made clear that the integration clause is only necessary to confer WTO jurisdiction over disputes arising from the Protocol provisions. For disputes against China arising from the WTO multilateral agreements, the DSU automatically applies by virtue of China's accession. If the Protocol had not been made part of a 'covered agreement', individual Members would have to rely on non-violation complaints under GATT and GATS to enforce China's commitments in the Protocol. The scope of such complaints, however, is limited. See GATT Art. XXIII:1(b), GATS Art. XXIII:3, DSU Art. 26.

⁴¹ The DSU applies to disputes between WTO Members only. DSU Art. 1.

1.2.4. *Implications for Interpretation*

Whether the Protocol is considered as a bilateral treaty or part of a multilateral agreement, its interpretation is governed by the interpretive principles set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the VCLT).⁴² Although the VCLT applies to treaties between States⁴³ and not to treaties between a State and an international organization,⁴⁴ the interpretive principles of the VCLT have attained the status of customary international law,⁴⁵ and as such, they apply to agreements between all subjects of international law, including international organizations.⁴⁶

In accordance with Article 31(1) of the VCLT, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. What constitutes the 'context' of the terms of the Protocol or its 'object and purpose', however, may depend on whether the Protocol is treated as a bilateral or multilateral agreement. Under Article 31, the 'context' of a treaty and items that 'shall be taken into account together with the context' comprise essentially agreements reached by the 'parties' to the treaty.⁴⁷ Since the 'parties' to the Protocol are China and the WTO, interpreting the Protocol as a bilateral treaty might exclude all WTO agreements – none of which was concluded between China and the WTO – from being considered as the 'context' of the Protocol.⁴⁸ That would be patently contrary to the intent of the parties. The Protocol would have no meaning unless it is interpreted in the context of the WTO Agreement. Hence, for the purpose of interpretation, it seems only appropriate to treat the Protocol as 'an integral part' of the WTO Agreement.

⁴² Done at Vienna on 23 May 1969; entered into force on 27 Jan. 1980. 1155 UNTS 331.

⁴³ VCLT, Art. 1.

⁴⁴ The VCLTIO, *supra* n. 25, contains identical provisions on treaty interpretation as the VCLT. Other than provisions pertaining to the legal capacity of international organization, the substantive rules of the VCLTIO are essentially the same as the VCLT.

⁴⁵ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, 17.

⁴⁶ According to Art. 3(2) the VCLT, the fact that the Convention does not apply to agreements concluded between States and other subjects of international law does not affect the application to them of the rules set out in the Convention to which they would otherwise be subject under international law.

⁴⁷ Article 31(2) and (3) of the VCLT states:

'2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties'.

⁴⁸ It might be argued that the 'parties' to the Protocol should be construed as *de facto* encompassing all Members of the WTO in their individual capacity; but such a construction does not seem consistent with the literal interpretation of the provisions in Art. 31 of the VCLT.

To interpret the Protocol as part of the WTO Agreement raises the issue of how the Protocol relates to the various agreements that are annexed to the WTO Agreement. In general, it can be assumed that the Protocol, which covers subject matters across various WTO agreements, prevails over these agreements to the extent that its terms differ from theirs. This assumption is premised on Article XII of the WTO Agreement, which explicitly allows accession to be conditioned 'on terms to be agreed' between the acceding country and the WTO, and mandates that such conditioned accession 'shall apply' to the WTO Agreement and the multilateral trade agreements annexed thereto. Thus, when the terms of the accession protocol differ from the WTO agreements, such terms can modify the provisions of the WTO agreements as applied between the acceding Member and other Members.⁴⁹ Defining the general hierarchy between the Protocol and the WTO agreements, however, does not solve all the interpretive issues arising from the relationship between a particular Protocol provision and the WTO agreements. As will be demonstrated below, the lack of a clearly defined relationship between specific Protocol provisions and generally applicable WTO provisions gives rise to many issues in the interpretation of the Protocol.

To interpret the Protocol as part of the multilateral treaty does not necessarily mean the bilateral status of the Protocol would have no bearing on the matter of its interpretation. For one thing, so long as the Protocol remains formally an agreement between China and the WTO, legally there is nothing to prevent the two parties from entering into a new agreement regarding the interpretation or application of the Protocol.⁵⁰ Such an agreement would constitute 'subsequent agreement' within the meaning of Article 31(3)(a) of the VCLT, which a treaty interpreter would be obliged to take into account in the interpretation of the Protocol. Indeed, if China and the WTO could ever conclude an agreement clarifying the relationship between the Protocol and the WTO agreements, such agreement would be the most 'authoritative interpretation' of the Protocol.

In comparison, 'authoritative interpretations' of the WTO Agreement can only be made by the 'legislature' of the WTO. Under Article IX:2 of the WTO Agreement, the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the WTO Agreement, and the decision to adopt such interpretations shall be taken by a three-fourths majority of the Members. In contrast with the judicial interpretations adopted by the Dispute Settlement Body (DSB), which bind the parties to a particular dispute only, an authoritative interpretation adopted under Article IX:2 may bind all Members.⁵¹ Thus, if the Protocol is treated as part of the WTO Agreement for the purpose of Article IX:2, a three quarters of the Members can adopt an interpretation

⁴⁹ This understanding is also consistent with para. 2 of Art. 30 (*Application of successive treaties relating to the same subject matter*) of the VCLT, and the same provision of the VCLTIO, which states: 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.' Insofar as the relationship between China and other Members is concerned, the Protocol and the WTO Agreement (together with its annexes) can be deemed as 'successive treaties relating to the same subject matter'. And Art. XII of the WTO Agreement can be understood as specifying that its application is subject to the terms of accession.

⁵⁰ For further interpretive implications of the bilateral status of the Protocol, see text at *infra* n. 193.

⁵¹ See generally, Claus-Dieter Ehlermann & Lothar Ehring, 'The Authoritative Interpretation under Art. IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements', *Journal of International Economic Law* 8, no. 4 (2005): 803–824.

of the Protocol irrespective of China's opinion. Such an interpretation would be binding on China as a matter of WTO law.⁵² Given the de facto unilateral character of the Protocol obligations, however, it is questionable whether an authoritative interpretation of the Protocol should be made without China's consent.⁵³ Such consent may have been given implicitly through the integration clause, but that remains to be clarified.

Whether an interpretation of the Protocol is performed by the WTO 'legislature' or the WTO adjudicatory body, the de facto unilateral character of the Protocol obligations should not be ignored in the interpretive process. To the extent that such obligations exceed the requirements of the generally applicable WTO disciplines, it may be appropriate for the treaty interpreter to make certain adjustments in applying the interpretive principles of the VCLT, as will be discussed in Part 3.

2. THE INTERPRETIVE CHALLENGE

2.1. WHAT IS THE SPECIAL CHALLENGE?

2.1.1. *Imperfect Formulation of the Protocol*

In the interpretation of WTO agreements, the WTO adjudicatory body has adopted a textualist approach that appears to apply the VCLT rules rather mechanically. In their decisions, the panels and the Appellate Body typically examine each element of Article 31 in sequence – first the words, then the context, and the object and purpose. Among these elements, words are given a clear priority, the meaning of which is determined by first looking up their dictionary definitions.⁵⁴ The judicial policy of the Appellate Body, to quote one of its former members, appeared as 'belonging to the strict constructionist school that interprets texts literally and narrowly'.⁵⁵ Although the Appellate Body, responding to criticism, has more recently stated that interpretation pursuant to the VCLT rules 'is ultimately a holistic exercise that should not be mechanically subdivided into rigid components',⁵⁶ it remains to be seen to what extent their interpretive approach has changed.

The 'strict constructionist school', in any event, will not work well in the interpretation of the Protocol. First of all, the text of many Protocol provisions was not drafted as

⁵² Because interpretations adopted under Art. IX:2 are binding on all Members, they may have similar effect as amendment. Note that Art. IX:2 states that its provision 'shall not be used in a manner that would undermine the amendment provisions in Article X'.

⁵³ Without China's consent, an authoritative interpretation of the Protocol adopted under Art. IX:2 would not qualify as 'subsequent agreement' within the meaning of Art. 31(3) of the VCLT.

⁵⁴ 'The *Shorter Oxford Dictionary* is perhaps the most quoted title in the Appellate Body reports, in any case, more than any covered agreement'. George Abi-Saab, 'The Appellate Body and Treaty Interpretation', in *The WTO at Ten, The Contribution of the Dispute Settlement System*, ed. Giorgio Sacerdoti, Alan Yanovich, & Jan Bohanes (Cambridge: Cambridge University Press, 2006), 453, 461. It appears that the Appellate Body has moved away from the obsessive reliance on dictionary definitions. See, e.g., Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269, 286/AB/R, adopted 27 Sep. 2005, ('EC – Chicken Cuts'), para. 175 (stating that while dictionaries are 'useful starting point' for the analysis of ordinary meaning of a treaty term, they are not necessarily dispositive).

⁵⁵ Abi-Saab, *id.*

⁵⁶ Appellate Body Report, *EC – Chicken Cuts*, para. 176.

tightly and carefully as that of the WTO multilateral agreements. This is especially true with the commitments set out in the Working Party Report that were incorporated into the Protocol by reference. One salient example of such loose drafting is paragraph 18 of the Working Party Report, which contains a national treatment clause of a sweeping scope:

The representative of China further confirmed that China would provide *the same treatment* to Chinese enterprises, including foreign-funded enterprises, and foreign enterprises and individuals in China. (emphasis added)

The text of this commitment is fairly unambiguous.⁵⁷ But it is hard to believe such unqualified national treatment was intended by the Chinese government or expected by other Members.⁵⁸

Next, it can be difficult to define the 'context' of the Protocol terms. The Protocol addresses subject matters across the various WTO agreements, and as such, its terms need to be read consistently and harmoniously with all other applicable provisions of the WTO agreements.⁵⁹ Yet, the Protocol does not always specify how its terms relate to the WTO provisions addressing the same subject matter. With respect to the WTO-plus obligations, the lack of a clearly defined relationship with WTO agreements raises at least one major interpretive issue: whether the general exceptions available under the WTO agreements, such as GATT Article XX, should apply to the relevant obligations in the Protocol. In the Appellate Body's practice, 'resort to context in interpretation, though frequent, can be rather guarded, particularly when it implies going from one covered agreement to another'.⁶⁰ Given this practice, how to fill the large gaps between the Protocol and other covered agreements can be a major challenge for the WTO adjudicators.

Furthermore, it may not be easy to identify the object and purpose of a Protocol provision. Although 'object and purpose' is much less referred to in the Appellate Body reports, 'much of the reasoning in [its] interpretation is informed by the object and purpose, either consciously or subconsciously, where they can be identified'.⁶¹ Unfortunately, the Protocol contains no preambular language setting out its objectives, nor any provision explaining the rationale of the special obligations imposed on China. While the overall purpose of the Protocol is evidently to integrate China into the WTO system, that general objective does not shed more light on a specific provision of the Protocol

⁵⁷ The format of this provision is highly unusual for a national treatment clause. First, this commitment does not place any limit on the scope of the 'same treatment'. Second, it uses the term 'same treatment', rather than the commonly used phrase 'treatment no less favourable than', as in GATT Art. III:4 and GATS Art. XVII. The 'same treatment' requirement raises the question of whether China can grant foreign persons more favourable treatment than that to its domestic persons, such as providing special incentives to foreign investors.

⁵⁸ In fact, para. 17 of the Working Party Report noted that 'any commitment to provide non-discriminatory treatment to Chinese enterprises, including foreign-funded enterprises, and foreign enterprises and individuals in China, would be subject to other provisions of the Draft Protocol and, in particular, would not prejudice China's rights under the GATS, China's Schedule of Specific Commitments or commitments undertaken in relation to trade related investment measures'. Curiously, though, this statement is not binding since para. 17 was not incorporated into the Protocol.

⁵⁹ See Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 Jan. 2000, para. 81.

⁶⁰ Abi-Saab, *supra* n. 54, 462.

⁶¹ Abi-Saab, *id.* Apparently, the discussion of object and purpose 'does not sit well with strict constructionism' since it leads to teleological interpretation. *Id.*

than the general objective of liberalizing trade does on any specific provision of the WTO agreements.

Finally, it is unclear whether there is a negotiating record to aid the interpretation of the Protocol. The WTO adjudicatory body has not infrequently resorted to the negotiating history of GATT and of the Uruguay Round as a supplementary means of interpretation under Article 32 of the VCLT. Unlike negotiations of the GATT 1947 and the Uruguay Round agreements, the records for which have been made generally available, the accession negotiations were conducted between China on the one hand, and the incumbent WTO members, collectively and individually, on the other. It is unclear whether official records were kept for all those talks, and if so, whether they would be made available to the public.⁶² The lack of the preparatory work would deprive the WTO adjudicatory body of a major supplementary means of interpretation.

In short, the imperfect formulation of the Protocol can make it difficult for the WTO adjudicatory body to follow its usual steps in applying the VCLT rules. Instead, it may need to embrace a more flexible and holistic approach in the interpretation of the Protocol.

2.1.2. *The Challenge of Systemic Issues*

An underlying assumption of the China-only obligations is that the Chinese system is not fully compatible with the foundations of the WTO system and that such incompatibility needs to be addressed by certain China-specific rules. In other words, the special provisions are considered necessary to ensure that WTO disciplines will not be rendered ineffective in China. Surely not all China-specific obligations can be explained by this rationale. In fact, some major WTO-plus obligations of China, such as those regarding foreign investment and export tariffs, have nothing to do with safeguarding the existing WTO disciplines.⁶³ Nonetheless, many provisions of the Protocol do reflect concerns on the part of WTO Members over the issue of systemic compatibility. Prominent among them are the WTO-plus provisions concerning market economy practices and domestic governance, some of which have already been involved in WTO disputes.⁶⁴

Interpreting these Protocol provisions can be most challenging because they address issues of domestic policies at a systemic level that is unprecedented in the history of the world trading system. Traditionally, the GATT system focused on border measures, and its regulation of domestic measures was very much limited to the requirement of nondiscrimination. Although the WTO has greatly expanded the trade disciplines into areas that are traditionally domestic regulatory domains (such as services, health and safety standards, and intellectual property rights), none of the WTO agreements imposes broad systemic obligations as the Protocol does. Yet, interpreting the expanded disciplines has already

⁶² For domestic political reasons, China might not agree to disclose such records.

⁶³ For detailed discussion, see Qin, *supra* n. 1.

⁶⁴ See Part 2.2 *infra*.

proven a major challenge. Some high-profiled cases involving domestic regulations that are nondiscriminatory on their face, such as *US–Gambling*⁶⁵ and *EC–Hormones*,⁶⁶ have resulted in noncompliance by the losing parties. Such unsatisfactory outcomes undermine the effectiveness of the WTO system and also raise questions about the wisdom of the WTO decisions.⁶⁷ The fundamental challenge for the WTO adjudicatory body is how to define proper boundaries between WTO and national jurisdictions over domestic policies which, while affecting trade interests, implicate important societal values of the Member countries. The Appellate Body has yet to demonstrate a systematic approach for handling such politically sensitive cases.

Moreover, there is a tendency on the part of the Appellate Body to shun systemic or policy discussions. As noted above, the Appellate Body is more inclined to limit its legal reasoning to textual and contextual analyses, than placing such analyses in the light of the 'object and purpose' of the treaty provision explicitly, which would entail a serious inquiry into the underlying policy considerations.⁶⁸ Some critics have described such tendency as 'textual fetishism and policy phobia'.⁶⁹ While there may be sound reasons for the Appellate Body to choose such an interpretive approach (that is, to ensure the legitimacy of its decisions and to avoid criticism of judicial activism), its reluctance to discuss the systemic or policy dimension of the treaty provisions does not bode well for the interpretation of the Protocol provisions that are meant to address systemic issues.

It should be noted that, to avoid dealing with systemic issues, the WTO adjudicatory body may employ certain 'issue-avoidance' techniques, such as judicial economy and non liquet.⁷⁰ Although invoking non liquet (which occurs when a judiciary body decides not to rule on a case because the law is not clear) is generally disfavoured, in light of the special circumstances of the Protocol, a strong argument can be made that when

⁶⁵ See Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 Apr. 2005. At issue was the US ban on Internet gambling, which was found by the WTO adjudicatory body to be inconsistent with the GATS. Instead of changing its domestic regulation, the United States has withdrawn its relevant concessions from the GATS schedule, and accepted the sanction by the complainant (Antigua and Barbuda) in the form of suspension of TRIPS obligations at the level of USD 21 million per year.

⁶⁶ See Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R; WT/DS48/AB/R, adopted 13 Feb. 1998. At issue was the EC ban on hormone-treated meat, which was found by the Appellate Body to be inconsistent with the SPS Agreement. The ban has enjoyed a wide support in the EU public. Because the EC has not withdrawn the ban, the complainants (the United States and Canada) have been imposing sanctions on EC products since 1999. The EC, however, challenged such sanctions by bringing its own complaints in 2004. See Appellate Body Report, *Canada/United States – Continued Suspension of Obligations in the EC–Hormones Dispute*, WT/DS320/AB/R, WT/DS321/AB/R, adopted 14 Nov. 2008. The case has developed into an intractable dispute.

⁶⁷ See, e.g., Joost Pauwelyn, 'Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS', *World Trade Review* 4, no. 2 (2005): 131–170; Petros C. Mavroidis, 'Highway XIV Revisited: The Road of Non-discrimination to Market Access in GATS', *World Trade Review* 6, no. 1 (2007): 1–23; Federico Ortino, 'Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique', *Journal of International Economic Law* 9, no. 1 (2006): 117–148; Alan O. Sykes, 'Domestic Regulation, Sovereignty and Scientific Evidence Requirements', in *Trade and Human Health and Safety*, ed. George A. Bermann & Petros C. Mavroidis (Cambridge: Cambridge University Press, 2006), 257; Caroline E. Foster, 'Public Opinion and the Interpretation of the World Trade Organization's Agreement on Sanitary and Phytosanitary Measures', *Journal of International Economic Law* 11, no. 2 (2008): 427–458.

⁶⁸ *Supra* n. 61.

⁶⁹ Douglas A. Irwin & Joseph Weiler, 'Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)', *World Trade Review* 7, no. 1 (2008): 71, 89–95.

⁷⁰ For discussion of the various 'issue-avoidance' techniques that may be used by the WTO adjudicator, see William Davey, 'Has the WTO Dispute Settlement System Exceeded Its Authority?', *Journal of International Economic Law* 4 (2001): 79, 96–110.

encountering a genuine indeterminacy in the Protocol provisions, the WTO adjudicatory body would be justified to declare *non liquet*.⁷¹ In principle, large gaps in treaties should be filled by WTO Members, not by panels or the Appellate Body. But when 'legislative' interpretation is not forthcoming,⁷² in the interest of resolving disputes, the WTO adjudicatory body may be compelled to fill such gaps, no matter how undesirable it might be from an institutional perspective.

2.2. DISPUTES INVOLVING WTO-PLUS PROVISIONS

Claims regarding WTO-plus obligations of China have already been made in several WTO disputes. This section discusses four cases involving such claims. At the time of writing, one of these cases has been decided, one settled, and two are ongoing. The WTO-plus provisions involved in these cases range from purely commercial commitments on future tariff bindings and export duties to systemic commitments on trading rights and regulatory independence.

2.2.1. *China–Auto Parts*⁷³

This is the first case brought against China that has gone through the WTO dispute settlement proceedings.⁷⁴ It involves three complaints brought by the EU, the United States, and Canada, respectively. At issue were Chinese regulations imposing a surcharge on imported automobile parts that are used in assembling vehicles for sale in China. This surcharge effectively raised China's tariff rates for auto parts from 10% to 25%, which is the tariff rate for complete vehicles. China's rationale for the surcharge was that if the auto parts imported possess the 'essential character' of a complete vehicle, then they should be charged as complete vehicles. The purpose of the surcharge, according to China, was to prevent circumvention of the higher tariff on complete vehicles. Under the Chinese regulations, the imports deemed to possess the 'essential character' of a complete vehicle included: (a) completely knocked down kits (CKD) or semi-knocked down kits (SKD); (b) certain key parts, such as a body or an engine assembly; and (c) parts when the total price of which accounts for at least 60% of the total price of a complete vehicle. Whether imported parts meet the criteria was to be determined after they were assembled into vehicles.

⁷¹ See Lorand Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism', *International & Comparative Law Quarterly* 53 (2004): 861, 873–877 (discussing the possibility and appropriateness of declaring *non liquet* under WTO law).

⁷² Such 'legislative' interpretation should be made by agreement between China and the WTO, or possibly by the Ministerial Conference or the General Council pursuant to Art. IX:2 of the WTO Agreement. See *supra* discussion surrounding nn. 50–53.

⁷³ *China – Measures Affecting Imports of Automobile Parts*, WT/DS339, 340, 342.

⁷⁴ The first WTO complaint against China was *China – Value Added Tax on Integrated Circuits* (WT/DS/309), which was brought by the United States in March 2004. The case was settled through consultations. See WT/DS309/8 (6 Oct. 2005).

The complaints claimed that the Chinese regulations violated GATT Articles II and III, TRIMS, the SCM Agreement, and the China Accession Protocol. The Protocol provision involved was paragraph 93 of the Working Party Report, which sets out a special commitment of China on tariffs for CDK and SDK. Paragraph 93 states:

Certain members of the Working Party expressed particular concerns about tariff treatment in the auto sector. In response to questions about the tariff treatment for kits for motor vehicles, the representative of China confirmed that China had no tariff lines for completely knocked-down kits for motor vehicles or semi-knocked down kits for motor vehicles. *If China created such tariff lines, the tariff rates would be no more than 10 per cent.* The working Party took note of this commitment. (emphasis added)

This commitment is a WTO-plus obligation in the sense that Members are not required to make tariff bindings beyond the contents of their goods schedules. The United States and Canada⁷⁵ submitted that China had violated this commitment by effectively charging a 25% tariff on CDK and SDK. China countered that no violation had occurred because it still had not created separate tariff lines for such kits.

The Panel found in favor of the complainants on practically all their claims, with its main findings based on violations by the Chinese measures of GATT Article III.⁷⁶ On appeal by China, the Appellate Body affirmed the Panel's main findings, but reversed its finding on paragraph 93 on the grounds of legal errors.⁷⁷ As a result, the substantive issue arising from the paragraph was left undecided.

Although the Panel's finding on paragraph 93 was reversed, its interpretation of the Protocol is nonetheless noteworthy, given that it is the first such attempt by the WTO adjudicatory body. Two observations can be made of the Panel's decision:

(a) Clarification of the legal status of the Protocol

The Panel first sought to clarify the legal status of China's obligation under paragraph 93. It noted:

All parties agree that China's commitments under its Working Party Report are enforceable in WTO dispute settlement proceedings. The Accession Protocol is an integral part of the WTO Agreement pursuant to Part I, Article 1.2 of the Accession Protocol. In turn, paragraph 342 of China's Working Party Report incorporates China's commitments under its Working Party report, including paragraph 93, into the Accession Protocol. Therefore, China's commitment in paragraph 93 of the Working Party Report is also an integral part of the WTO Agreement. (footnotes omitted)

Accordingly, the Panel will interpret China's commitment under paragraph 93 of the Working Party Report in accordance with the interpretive rules of the *Vienna Convention* to determine whether China has acted inconsistently with commitments under paragraph 93 of the Working Party Report.⁷⁸

⁷⁵ The EU did not make a claim regarding para. 93 of the Working Party Report.

⁷⁶ Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339, 340, 342/R (18 Jul. 2008). The Panel exercised judicial economy on claims under TRIMS and the SCM Agreement.

⁷⁷ Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339, 340, 342/AB/R, adopted 12 Jan. 2009.

⁷⁸ Panel Report, paras 7.740–7.741. A note to para. 7.740 states additionally: 'China considers it appropriate for dispute settlement panels to take into account the context of a commitment made in a working party report, and to exercise special care in interpreting these commitments.' *Id.*, n. 1104.

The Panel's statement is significant on two accounts. First, it recorded an explicit agreement between the disputing parties that China's obligations under the Protocol are enforceable through the WTO dispute settlement proceedings. If there had been any doubts previously as to the enforceability of such obligations, the Panel's statement dispelled them. Second, the Panel declared that it would interpret paragraph 93 as part of the WTO Agreement, and that position was accepted by the parties.⁷⁹ Arguably, the Panel's statement reflects a 'subsequent agreement' regarding the interpretation or application of the Protocol provisions within the meaning of Article 31(3)(a) of the VCLT.

(b) The Panel's interpretive approach

It is interesting to observe how the Panel's approach in the interpretation of paragraph 93 differs from its approach in the interpretation of the GATT provisions. In interpreting the GATT provisions applicable in this case, the Panel faithfully followed all the steps in the usual pattern of applying the VCLT by the WTO adjudicatory body. For each GATT provision analyzed, the Panel examined, in sequence, the ordinary meaning of the words, their context, object and purpose, subsequent practice, and supplementary means of interpretation.⁸⁰ By contrast, in its analysis of paragraph 93, the Panel did not mention the 'ordinary meaning' of its terms, or identify their context;⁸¹ nor did it refer to the 'object and purpose' or other elements in the VCLT rules. Instead, it addressed the substantive issue raised under paragraph 93 directly from a policy perspective.

The single substantive issue under paragraph 93 was: whether China had created separate tariff lines for CDK/SDK kits, upon which its commitment of 10% tariff binding was conditioned. All parties agreed that China had not formally created separate tariff lines for CKD and SKD kits. The dispute therefore centred on whether such tariff lines could be created in effect. The Panel answered the question in the positive. It found that China had imported such kits under the subheadings of 'complete sets of assemblies', at the ten-digit level, under the tariff heading for 'motor vehicles'.⁸² Furthermore, it found that a tariff line for such kits could be 'deemed' created through the Chinese measures at issue.⁸³ Based on these two findings, the Panel concluded that China had fulfilled the condition underlying its commitment under paragraph 93.⁸⁴ To interpret otherwise, the Panel stated, would render China's commitment meaningless, since it would leave the fulfilment of its underlying condition entirely to China's own discretion.⁸⁵

On appeal, China claimed that the Panel had erred in this interpretation. Among other things, China claimed that it had classified CKD/SKD kits at the same ten-digit level both before and after its accession to the WTO.⁸⁶ Consequently, the condition

⁷⁹ The Appellate Body quoted the Panel's statement in full and noted that 'neither of these propositions has been disputed at any point in these proceedings, including in this appeal'. Appellate Body Report, para. 214.

⁸⁰ For example, the Panel followed this formula strictly in its analysis of whether China's treatment of CKD/SKD kits is consistent with GATT Art. II:1(b). See Panel Report, paras 7.658–7.735.

⁸¹ In defining the term 'tariff lines', the Panel simply referred to the HS Convention. See *id.*, para. 7.749.

⁸² Panel Report, para. 7.750.

⁸³ *Id.*, para. 7.755.

⁸⁴ *Id.*, paras 7.757–7.758.

⁸⁵ *Id.*, para. 7.756.

⁸⁶ Appellate Body Report, paras 41–44. The United States and Canada disputed this factual claim. *Id.*, paras 76, 97. For facts established in this regard, see *infra* n. 89.

underlying its commitment in paragraph 93 could only be the creation of explicit tariff lines for such kits, because it would not have made sense to have a commitment of continuing its existing practice. The meaning of China's commitment, however, was left undetermined. The Appellate Body reversed the Panel's findings on the grounds that it had misconstrued the Chinese regulations in question.⁸⁷ Having reversed the Panel on this legal error, the Appellate Body decided that, given the way in which China framed its appeal, it needed not rule on the meaning of paragraph 93.⁸⁸

The substantive arguments surrounding the interpretation of paragraph 93 illustrate the difficulties in ascertaining the common intention of the parties behind such ad hoc China-specific provisions. In order to determine what was intended by China's commitment, it would be necessary to understand the historical context of and the reason for this commitment. Paragraph 93 states that certain members of the Working Party expressed 'particular concerns about tariff treatment in the auto sector', and that China's commitment was in response to 'questions about the tariff treatment for kits for motor vehicles'. There is, however, no additional text in the Working Party Report or elsewhere explaining what those particular concerns were; nor is there negotiating record showing what questions were asked about China's tariff treatment for such kits at the time. Indeed, it was ultimately unclear what tariff treatment China had applied to CDK/SDK kits prior to its accession.⁸⁹ Given the situation, it is perhaps unsurprising that the Panel would depart from the standard interpretive formula and made its findings directly from a policy perspective (effectiveness of the commitment). It would have been very difficult to mechanically apply the textualist approach in interpreting China's commitment under paragraph 93.

2.2.2. *China – Publications and Audiovisual Products (the Trading Rights case)*⁹⁰

This case was brought by the United States to challenge China's restrictions on the import and distribution of certain foreign cultural products, including books, magazines, newspapers, sound recordings, audiovisual entertainment products, and movies. The case has two

⁸⁷ According to the Appellate Body, since the Panel had (correctly) characterized the charge imposed by the Chinese measure as 'internal charges' falling under GATT Art. III, it could not logically characterize such charge also as 'an ordinary customs duty' in violation of China's commitment under para. 93. Appellate Body Report, paras 230–245.

⁸⁸ *Id.*, para. 252. The effect of the Appellate Body's decision is to allow China to continue charging 25% tariffs for CDK/SDK kits.

⁸⁹ The facts established by the Panel are as follows: China maintained separate tariff lines for CDK/SDK kits under the tariff headings for motor vehicles from 1991 to 1995. Thereafter, China prohibited the imports of CDK/SDK kits officially, but continued such imports in practice. From 1996 to 2001 (the time of accession), the separate tariff lines for such kits ceased to exist in China's tariff schedule. The parties however disputed as to how China treated such kits during this period. The complainants submitted that China applied tariff rates on such kits based on the negotiations it reached with individual auto manufacturers at substantially lower levels than the rates for complete vehicles. China, on the other hand, insisted that it always applied the same tariff rates to CDK and SDK kits as those to complete vehicles. In the end, the Panel accepted that China had classified the kits as complete vehicles prior to its accession. See Panel Report, paras 7.731–7.735.

⁹⁰ 'China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products', Request for the Establishment of a Panel by the United States, WT/DS363/5 (11 Oct. 2007); Request for Consultation by the United States, WT/DS363/1 (16 Apr. 2007); Addendum, WT/DS363/1/Add.1 (16 Jul. 2007).

major components: one concerns China's obligation to liberalize trading rights under the Protocol, the other China's specific commitments on distribution services under GATS. At the time of this writing, the Panel has yet to release its decision to the public.

The trading rights claim involves China's WTO-plus obligation to liberalize trading rights within three years of accession. The United States claims that, contrary to its commitment, the Chinese government has not allowed foreign entities and non-state-owned Chinese enterprises to import cultural products, and instead has reserved the right to import such products to certain state-owned enterprises (SOEs).

2.2.2.1. *Background*

Prior to the accession, the government controlled the rights to engage in foreign trade in China. It did so by allocating trading rights to approved entities. Typically, the domestic companies receiving trading rights were state-owned. Although all foreign-invested enterprises (FIEs) were also allowed to import and export, their rights to trade were generally limited to importation for their own production needs and exportation of their own products.⁹¹

As part of the accession commitments, China agreed to completely change this trading system. Specifically, China promised that, within three years of its accession, all Chinese enterprises, regardless of their ownership, and all foreign individuals and enterprises, whether they invested in China or not, would have the right to import and export all goods except for a list of products the trading of which is reserved for specific SOEs.⁹² This commitment is 'WTO-plus' because the WTO does not require its Members to limit the extent of their state trading activities. Rather, the WTO discipline on state trading focuses on the requirement of nondiscrimination.⁹³

To implement the trading rights commitment, China amended its Foreign Trade Law in 2004.⁹⁴ The new law did away with the government approval system and replaced it with a simple registration procedure for operating foreign trade businesses in China. Under the new system, any person – legal or natural, domestic or foreign – who wishes to engage in imports and exports of goods may do so simply by completing the registration process with the Ministry of Commerce.⁹⁵ The implementation of this commitment, therefore, has fundamentally changed the way in which China conducts its foreign trade.

Despite the fact that cultural products were not among the listed products reserved for state trading,⁹⁶ China has never liberalized the trading rights in foreign cultural

⁹¹ See WPR, para. 80.

⁹² Section 5 of the Protocol. The trading rights commitment is further elaborated in paras 83 and 84 of the Working Party Report.

⁹³ GATT Art. XVII.

⁹⁴ Foreign Trade Law of the People's Republic of China, as amended, effective 1 Jul. 2004.

⁹⁵ Documents required for registration are mostly for identification purposes. The Ministry of Commerce must complete the registration within five days of receipt of the required documents. Foreign Trade Law, Arts 8 and 9.

⁹⁶ Annex 2A of the Protocol contains a list of 84 products in seven categories (grain, vegetable oil, sugar, tobacco, processed oil, chemical fertilizer, and cotton), the import of which can only be conducted by specific SOEs; and a list of 134 agricultural products and commodities (such as tea, grains, metals, coal, oil, silk and cotton), the export of which can only be conducted by specific SOEs.

products.⁹⁷ Since the 2004 amendment of the Foreign Trade Law, the Chinese government has reiterated its policy of prohibiting non-state capital from engaging in the import of cultural products.⁹⁸

This prohibition is part of a long-standing policy of the Chinese government. In contrast with the extensive liberalization of economy in the past three decades, the government has kept a relatively tight political control over Chinese society. Such control is exercised through government censorship of press, media and the Internet, which is carried out to a large extent by maintaining state ownership in the media and publishing industries. Under this policy, private capital is prohibited from owning or operating news agencies, newspapers, publishing houses, radio broadcasting or TV stations, and from engaging in the import of foreign cultural products.⁹⁹ Consistent with this policy, the government has strictly limited foreign investment in the cultural sector. The Industry Catalogue for Foreign Investment, which the government publishes periodically to guide foreign direct investment, has consistently listed news organizations, newspapers, publishing houses, radio and TV stations, and importation of various cultural products under the category of 'Prohibited' sectors for foreign investment.¹⁰⁰

The dominance of state ownership in China's cultural sectors is undoubtedly a legacy of the centrally-planned economy, but it continues to serve an important function in preserving the political control of the Communist Party. Although the state-owned media have become increasingly commercialized,¹⁰¹ they remain the ideological tools of the Party and are entrusted with the missions of propagating government policies and educating and informing the public within the parameters set by the Party. In addition, ownership control is critical to China's censorship regime. Unlike censorship typically practiced in other countries, the Chinese authorities rely heavily on self-censorship¹⁰² and constantly adjust censorship criteria.¹⁰³ By limiting the 'sensitive' industries to a

⁹⁷ By contrast, exports of Chinese cultural products are not subject to state trading.

⁹⁸ See Catalogue for Guidance of Foreign Investment Industries, Order [2004] no. 24, State Development and Reform Commission, the Ministry of Commerce (30 Nov. 2004) (The Industry Catalogue); The Several Opinions of the Ministry of Culture, State Administration of radio, Film and Television, General Administration of Press and Publication, national Development and Reform Commission and the Ministry of Commerce on Introducing Foreign Investment into the Cultural Sector, Order [2005] no. 19 of the Ministry of Culture (6 Jul. 2005).

⁹⁹ See State Council, Decision Concerning the Entry of Non-State Capital into Cultural Industries (20 Apr. 2005). Despite the restriction, however, an increasing number of private companies have entered the publishing business unofficially and are operating in a grey area.

¹⁰⁰ The Industry Catalogue was first promulgated in 1995 and has been revised four times in 1997, 2002, 2004 and 2007, respectively. While the import of foreign cultural products has been prohibited, there has been some limited liberalization following the WTO accession, notably in the distribution of printed matters and audiovisual products. See China's Services Schedule 2D, 4A–4E.

¹⁰¹ Except for a few media outlets directly controlled by the Party, Chinese media enterprises must finance themselves mostly through subscriptions and advertisement. See Sigrun Abels, 'State vs. Market: Media in Transition', *International Institute for Asian Studies News Letter*, no. 37 (2005).

¹⁰² The publishers are subject to the editorial responsibility system. See State Council, Regulation on the Administration of Publishing Industry (Order 343, 25 Dec. 2001), Art. 25; State Council, Regulation on the Administration of Audiovisual Products (Order 341, 25 Dec. 2001), Art. 16. In addition, with respect to audiovisual products, the importers must submit all planned imports to the Ministry of Culture for advance content review. *Id.*, art. 11. See also, Carin Zissis & Preeti Bhattacharji, *Media Censorship in China*, 18 Mar. 2008, Council on Foreign Relations, <www.cfr.org/publication/11515/>.

¹⁰³ The criteria are tightened and loosened from time to time to balance the need for control and the need to allow freer flow of information in the society. See Zissis & Bhattacharji, *id.*; Abels, *supra* n. 101.

small number of SOEs whose management personnel are appointed and controlled by the government, the Chinese authorities are able to implement censorship policies in a highly flexible and non-transparent manner, which arguably has made censorship more effective and cost-efficient. While the ownership restriction is clearly anti-competitive – a small number of SOEs are guaranteed monopoly profits in the cultural industry – it is motivated by political rather than economic considerations.

The same political consideration helps explain the policy of maintaining state import monopolies in foreign cultural products. The political nature of the policy can be further observed by the absence of normal trade barriers for cultural products. China imposes no tariff or quota on the import of foreign books, magazines, other printed matters, or audiovisual products.¹⁰⁴ And there is no evidence of monopolistic price ‘markup’ in the domestic sales of such products.¹⁰⁵ Although in theory the authorized SOEs may restrict the quantity of imports at will, under the current Chinese system they have incentives to import more rather than less so as to make greater profits.

In light of the political nature of the policy, it seems curious that China failed to include cultural products in the Protocol list of products reserved for state trading. One plausible explanation is that the Chinese government had considered cultural products of sufficiently a political character that it would not be necessary to include them in the reserve list, just as it would not be necessary to include weaponry and military equipment in the list. Apparently, the issue of trading in cultural products was never discussed in the accession negotiations.¹⁰⁶

2.2.2.2. *Major interpretive issues*

The central issue here is whether China has the right to maintain exclusive state trading in the import of cultural products, even though such products are not expressly reserved for state trading under the Protocol. Section 5.1 of the Protocol, which sets out the principal commitment on trading rights, provides the following:

Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. (emphasis added)

China submitted that its restrictions on trading rights are within its ‘right to regulate trade in a manner consistent with the WTO Agreement’, because they are necessary

¹⁰⁴ See China's Goods Sch. CLII, Annex 8 of the Protocol.

¹⁰⁵ Such price markup by state import monopolies is prohibited by GATT Art. II:4.

¹⁰⁶ There is no mention of this matter in the Protocol or the Working Party Report. In the WTO dispute proceedings, the United States did not indicate that there was any understanding on the issue during the accession negotiation.

to protect public morals, consistent with GATT Article XX(a).¹⁰⁷ The first interpretive question, therefore, is whether the policy exceptions contained in GATT Article XX are available as affirmative defense for the Protocol obligations.

The United States argued that 'China's right to regulate trade' under the first clause of section 5.1 applies only to measures regulating goods that are traded, such as import licensing, TBT and SPS requirements, and not to measures regulating whole categories of traders engaged in the importation of goods.¹⁰⁸ Textually, the US argument makes sense. Since the WTO agreements do not regulate the extent of state trading activities – it is in this sense that the trading rights commitment is 'WTO-plus' – one cannot determine logically whether China's maintaining of state trading in the cultural sector is consistent with the WTO Agreement by merely examining the texts of WTO provisions. To answer the question of whether GATT exceptions are available to the Protocol provisions, one needs to define the relationship between the GATT and the Protocol at a systemic level – the very interpretive challenge facing the WTO adjudicatory body discussed above.

Recognizing the issue is of 'broad systemic import', the United States suggested that it is not necessary for the Panel to deal with the issue in order to resolve this dispute.¹⁰⁹ According to the United States, China's measures fall considerably short of the standards of Article XX, and therefore the Panel can simply apply Article XX in this case on an *arguendo* basis and conclude in its favour. To support this approach, the United States cited the Appellate Body decision in *US–Shrimp Bonding*, in which the Appellate Body took this approach to avoid deciding the issue of whether GATT Article XX is available to justify a measure found to be inconsistent with the Anti-Dumping Agreement.¹¹⁰ Indeed, applying GATT Article XX on an *arguendo* basis may prove an effective issue-avoidance technique in this case. But the technique is only useful and will only be used when the treaty interpreter believes the Article XX defense should fail. Hence, there is a limit on how far the technique can help the WTO adjudicators to avoid addressing the systemic issue altogether.

Once the Panel decides to apply GATT Article XX, on an *arguendo* basis or otherwise, it will find itself in a familiar territory since there already exists a substantial body of Article XX jurisprudence. The challenge then becomes how to balance the political interest of China with the trade interests of other Members in the application of Article XX. The balance can be drawn at each step of the Article XX analysis.

¹⁰⁷ See *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WT/DS363), Second Submission of the United States of America, 29 Aug. 2008, para. 39, available at: <www.ustr.gov>. China has not made its submissions public.

¹⁰⁸ *Id.*, para. 40. The United States also pointed out that para. 84(b) of the Working Party Report contains the following qualification for the trading rights commitment: '[f]oreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS'.

¹⁰⁹ *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WT/DS363), *Answers of the United States of America to the First Set of Questions by the Panel to the Parties* (11 Aug. 2008), para. 60, available at: <www.ustr.gov>.

¹¹⁰ *Id.*, para. 61 (citing *United States – Measures Relating to Shrimp from Thailand* (DS343), *United States – Customs Bond Directive for Merchandise Subject to Antidumping/Countervailing Duties* (DS345), WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 Aug. 2008, paras 304–319).

The only defense China invoked is GATT Article XX(a), which exempts measures 'necessary to protect public morals'. Although Article XX(a) has never been interpreted in previous GATT disputes, a similar provision in GATS Article XIV(a) has been interpreted by the Panel and the Appellate Body in *US–Gambling*.¹¹¹ To meet the standards of Article XX(a), China has to show that its measures are designed to protect 'public morals' and are 'necessary' to protect public morals. Furthermore, it has to demonstrate that the measures do not constitute 'arbitrary or unjustifiable discrimination' or 'disguised restriction on international trade' within the meaning of the chapeau of Article XX.

While there are interpretive questions as to whether China's measures are designed to protect public morals,¹¹² the key issue in this case lies in the interpretation of the 'necessary' standard. Under Article XX jurisprudence, interpreting 'necessity' involves a process of 'weighing and balancing' several factors: the relative importance of the interests to be furthered, the contribution of the measure to the realization of its objective, and the restrictive impact of the measure on trade. The question of necessity hinges ultimately on whether there is a WTO-consistent alternative that is reasonably available to achieve the policy objective of the measure.¹¹³ According to the United States, China has numerous alternatives to achieve its censorship objectives that do not restrict the right to import. It suggested that China could allow foreign entities to conduct the content reviews themselves after developing the relevant expertise or to hire domestic Chinese entities with the appropriate expertise to do so.¹¹⁴ In deciding whether these suggested alternatives are 'reasonably available', the Panel needs to evaluate whether they could achieve the same level of control desired by the Chinese government.¹¹⁵

If China's measures are found to be necessary to protect public morals, they will be further examined under the chapeau of Article XX, which requires that such measures be 'not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. The main issue under the chapeau is to define arbitrary or unjustifiable discrimination. Since all the entities authorized to import cultural products

¹¹¹ The exception of GATS XIV(a) is broader in scope than GATT XX(a) as it exempts measures 'necessary to protect public morals or to maintain public order'. China did not invoke GATS XIV since s. 5.1 defines the right to trade as 'the right to import and export goods'.

¹¹² The term 'public morals' was defined as denoting 'standards of right and wrong of conduct maintained by or on behalf of a community or nation'. Panel Report, *US–Gambling*, para. 6.465. Some have suggested that accepting the censorship policy of the Chinese government as meeting the WTO standard of public morals would be more damaging to the reputation of WTO panels than the accusations that they kill turtles and dolphins or legitimize gambling. See Henry Gao, 'The Mighty Pen, the Almighty Dollar, and the Holly Hammer and Sickle: An Examination of the Conflict between Trade Liberalization and Domestic Cultural Policy with Special Regard to the Recent Dispute between the United States and China on Restrictions of Certain Cultural Products', *Asian Journal of WTO and International Health Law and Policy* 2, no. 2 (2007):313–344.

¹¹³ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161, 169/AB/R, adopted 10 Jan. 2001, paras 162–166; Appellate Body Report, *US–Gambling*, paras 305–308.

¹¹⁴ *Answers to Panel questions*, *supra* n. 109, para. 62.

¹¹⁵ An alternative is not considered 'reasonably available' if it is merely theoretical in nature or imposes an undue burden on the responding Member, such as prohibitive costs and substantial technical difficulties. And such an alternative must be capable of achieving the level of protection desired by the responding Member. Appellate Body Report, *US–Gambling*, para. 308.

are Chinese SOEs, the discriminatory effect of the measures may seem obvious.¹¹⁶ However, given the fact that all Chinese private enterprises (and most Chinese SOEs for that matter) are also denied the right to import cultural products, can the measures be viewed as discriminating between China and other Members 'where the same conditions prevail'? In fact, when the right to import is reserved exclusively to a small number of SOEs, the measure is in essence one of state import monopoly which, by definition, excludes competition from all other importers, domestic or foreign. Hence, how to define 'discrimination between countries where the same conditions prevail' can be the key to the chapeau interpretation.¹¹⁷

2.2.2.3. *Summary comment*

What the WTO adjudicatory body encounters in this case are measures taken by the Chinese government for the purpose of keeping political control over its citizens. In maintaining exclusive state trading and import monopoly in foreign cultural products, the Chinese authorities can rely on the personnel of selected SOEs to police the imports. In other words, the Party can trust the personnel of selected SOEs in a way it cannot with private entities to carry out its opaque and capricious censorship policies. It is for this reason that I believe that China has never intended to liberalize trading rights in foreign cultural products and that the failure to explicitly exclude these products from the trading rights commitment was a major oversight on the part of China in the accession negotiations. While a partial reform of the system is possible (e.g., to allow private entities to import certain categories of products that are not politically sensitive, such as science and technology publications), complete liberalization of trading rights in the cultural sector is unlikely to happen in the foreseeable future no matter how this case is decided. In the event China loses, it may just accept the consequences of noncompliance, which would be an outcome similar to that of *US–Gambling*.¹¹⁸ The ultimate challenge for the WTO adjudicatory body, therefore, is to determine where the boundary should be drawn between the jurisdictions of the WTO and China on regulating domestic measures of such political nature.

¹¹⁶ The United States also claimed that China's measures are inconsistent with s. 5.2 of the Protocol which provides: 'Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.' If China is found to have violated s. 5.2, the question will still arise as to whether such violation can be excused by Art. XX.

¹¹⁷ What constitutes 'the same conditions prevail' under the chapeau is not well developed in WTO jurisprudence. See Julia Ya Qin, 'Defining Non-Discrimination under the Law of the World Trade Organization', *Boston University International Law Journal* 23, no. 2 (2005): 215–297.

¹¹⁸ See *supra* n. 65. Unlike in *US–Gambling*, however, China would not be able to withdraw or amend its trading rights commitment easily. See *supra* Part I.B.2.

2.2.3. *China – Financial Information Services (the Xinhua case)*

This case was initiated by the European Communities and the United States in March 2008 and joined by Canada in June 2008.¹¹⁹ The complainants claimed that certain measures taken by the Xinhua News Agency, the State news agency of China, violated China's specific commitments on financial services under the GATS and its Protocol commitment to maintain regulatory independence in the service sectors. The dispute was settled in November 2008.¹²⁰ Despite the settlement, it remains instructive to look at some of the interpretive issues relating to the WTO-plus provision involved in the case.

2.2.3.1. *Background*

The Xinhua News Agency is the official news agency of the Chinese government.¹²¹ In addition, it was vested with regulatory powers, including the authority to regulate activities of foreign news organizations in China.¹²² Although foreign news agencies are generally prohibited from establishing business operations in China, an exception was made in 1996 to allow them to distribute economic and financial news directly to Chinese clients.¹²³ This policy, however, was abruptly reversed in September 2006 when Xinhua issued a decision requiring all foreign news organizations to use an agent designated by Xinhua to sell information in China.¹²⁴ The 2006 decision drew strong criticism from major media companies, including Reuters, Bloomberg and Dow Jones, which considered the move as a maneuver by Xinhua to grab the fast growing business of financial information supply in China.¹²⁵ Then in June 2007, Xinhua launched its own financial information service, 'Xinhua 08', that aimed to compete with foreign financial information services.¹²⁶

The complainants in this case made three major claims. First, they claimed that China made specific commitments on the provision of financial information in its GATS Schedule, and therefore the 2006 decision violated China's obligations under GATS. Second, they contended that the reversal of the previous policy was inconsistent with China's

¹¹⁹ *China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS372, WT/DS373, WT/DS378.

¹²⁰ See Memorandum of Understanding regarding Measures Affecting Foreign Suppliers of Financial Information Services (MOU) reached between China and the EC, the United States, and Canada, respectively, WT/DS372/4, WT/DS373/4, WT/DS378/4 (9 Dec. 2008).

¹²¹ Xinhua serves as the largest information centre in China. It has more than 100 bureaus worldwide, owns and publishes more than 20 newspapers and journals, and prints in six foreign languages. See Brief Introduction to the Xinhua News Agency, <www.xinhuanet.com/xhsjj/pic1.htm>.

¹²² State Council, Decision on Establishing Administrative Permission for the Administrative Examination and Approval of Items that must be Retained (Order no. 412, 29 Jun. 2004).

¹²³ See State Council's Notice Authorizing Xinhua News Agency to Implement Centralized Administration over the Release of Economic Information in the People's Republic of China by Foreign News Agencies and their Subsidiary Information Institutions (31 Dec. 1995, issued as Circular no.1 of 1996).

¹²⁴ 'Measures for Administering the Release of News and Information in China by Foreign News Agencies', *Xinhua News Agency*, 10 Sep. 2006.

¹²⁵ See 'China's Media Curbs Aim to Bolster Xinhua: Beijing Hopes to Create a Global News Competitor; Plan Draws Criticism from U.S., EU', *Wall Street Journal*, 13 Sep. 2006, A8.

¹²⁶ *Xinhua launched a comprehensive financial information services system*, available at: <http://news.xinhuanet.com/fortune/2007-06/20/content_6269035.htm>.

'standstill' obligation contained in the horizontal section of its GATS Schedule, which requires China not to make the conditions for existing foreign service suppliers more restrictive than they existed as of the date of accession. Third, the complaints alleged that China breached its Protocol commitment to maintain regulatory independence in the service sectors covered by its GSTS Schedule, because Xinhua, the regulatory authority for financial information services, also participated in the supply of such services through Xinhua 08, which competes with foreign service suppliers.

The Protocol commitment at issue is set out in paragraph 309 of the Working Party Report, which was incorporated into the Protocol. Paragraph 309 reads:

Some members of the Working Party also expressed concern about maintaining the independence of regulators from those they regulated. China confirmed that *for the services included in China's Schedule of Specific Commitments, relevant regulatory authorities would be separate from, and not accountable to, any service suppliers they regulated, except for courier and railway transportation services*. For these excepted sectors, China would comply with other relevant provisions of the WTO Agreement and the Draft Protocol. The Working Party took note of these commitments.

This commitment is a WTO-plus (or 'GATS-plus') obligation in that no such requirement exists under GATS. The closest GATS obligation may be found in Article VI *Domestic Regulation*, which requires each Member to 'ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner'.¹²⁷ Although an 'objective and impartial' administration can be better achieved through formal regulatory independence, GATS stops short of requiring formal separation of regulatory authorities from service suppliers they regulate.¹²⁸ As indicated in paragraph 309, China made this special commitment in response to the particular concerns of some Members on the issue of regulatory independence in China.

2.2.3.2. *Interpretive issues concerning paragraph 309*

Since paragraph 309 applies only to services included in China's GATS Schedule, a threshold issue in this case would be to determine whether China has made a specific commitment on financial information services. The complainants cited section 7B Banking and other financial services, subsection (k), of China's Schedule, which states: 'Provision and transfer of financial information, and financial data processing and related software by supplier of other financial services.'¹²⁹ China contended that section 7(B)(k)

¹²⁷ GATS Art. VI:1.

¹²⁸ Similarly, GATS requires each Member to provide judicial or administrative reviews of administrative decisions affecting services, but stops short of requiring such review procedures to be formally independent of the agency rendering the administrative decisions. Instead, it provides that '[w]here such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review'. And this provision 'shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system'. GATS Article VI:2. The soft requirement of GATS contrasts with the corresponding provision of GATT Article X:3, which states unequivocally that the judicial or administrative review tribunals or procedures 'shall be independent of the agencies entrusted with administrative enforcement...'

¹²⁹ Regarding this item, under both 'market access' and 'national treatment', the Schedule shows no limitation for modes 1, 2 and 3, and 'unbound except as indicated in horizontal commitments' for Mode 4. The column of 'market access' contains a note on mode 3: 'Criteria for authorization to deal in China's financial services sector are solely prudential (i.e., contain no economic needs test or quantitative limits on licenses). Branches of foreign institutions are permitted'.

was not intended to cover services provided by foreign news agencies and that it made no commitment to open up its market for news services.¹³⁰ As *US–Gambling* demonstrates, interpreting a Member's services schedule can be exceedingly complex and controversial.¹³¹

In comparison, the textual interpretation of paragraph 309 should be relatively straightforward. Given Xinhua's control of Xinhua 08, it would not be difficult to find that the Chinese regulatory authority in financial information services was not 'separate from' the service supplier it regulated.

A more difficult question in this case would involve the interpretation of the relationship between paragraph 309 and the GATS provisions. Specifically, should the GATS-plus commitment be entitled to the defense of the general exceptions under GATS Article XIV? For instance, could China avail itself of GATS Article XIV(a), which excuses measures 'necessary to protect public morals or to maintain public order'?¹³² The interpretive issues in this context would be similar to those raised in the Trading Rights case regarding the availability of GATT Article XX. Compared to the trading rights commitments, however, the regulatory independence commitment has a narrower and more precisely defined relationship with the WTO Agreement: it applies to China's GATS Schedule exclusively. This more defined relationship might suggest that paragraph 309 should be interpreted completely within the context of GATS, including all the applicable GATS exceptions. On the other hand, unlike section 5.1 of the Protocol which provides the trading rights commitment with the condition that such commitment is 'without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement', paragraph 309 does not contain any qualifying language for the regulatory independence commitment. Textually interpreted, the absence of any qualifying language in paragraph 309 may suggest that China's commitment is unconditional and hence not entitled to any defense based on GATS Article XIV.¹³³ But does such a conclusion make policy sense in light of the fact that the Article XIV exceptions are available to the less stringent obligation under GATS Article VI (administration of domestic regulation in an objective and impartial manner)?

2.2.3.3. *The settlement outcome*

China settled this dispute through consultations instead of going to the panel procedure. In the settlement agreements, China agreed to repeal the 2006 decision and to authorize a new regulator that would be 'separate from, and not accountable to' any suppliers of

¹³⁰ The Industry Catalogue has consistently listed the news industry in the 'Prohibited' category for foreign direct investment. See text at *supra* n. 100.

¹³¹ Although China's Schedule was negotiated in the accession context, rather than during the multilateral GATS negotiations, the interpretive approach would not be different given that China's Schedule has become one of the annexes to GATS. See Part II, para. 1, of the Protocol.

¹³² A footnote to paragraph (a) states: 'The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.'

¹³³ The Appellate Body has said that 'omission must have some meaning'. Appellate Body Report, *Japan – Taxes on Alcohol Beverages*, WT/DS8, 10, 11/AB/R (4 Oct. 1996), 18.

financial information services. Moreover, it agreed to allow foreign suppliers of financial information to establish local operations in China – a breakthrough in its long-standing policy of prohibiting foreign investment in news services, although the agreements carefully defined 'financial information services' as distinct from 'news agency services'.¹³⁴ Subsequently, China replaced Xinhua with the State Council News Office (SCNO) as the regulator for financial information services. Under the new rules jointly issued by SCNO and other government agencies, effective 1 June 2009, foreign institutions may provide financial information to Chinese clients directly and may also establish local operations to do so; but they may not engage in news-gathering activities or operate as news agencies in China.¹³⁵

Thus, the outcome of this case appears to be a complete victory for the complainants. Despite all the legal uncertainties involved, China has accepted full responsibility under GATS and made significant institutional changes to fulfil that responsibility. Meanwhile, it has strictly limited the concessions to the 'provision of financial information', just as provided in its Services Schedule, so as to ensure that its control over the supply of information in all other areas will remain intact.

2.2.4. *China–Exportation of Raw Materials*

The latest WTO disputes filed against China involve its WTO-plus commitments on export taxes. In June 2009, the United States and the EC requested WTO consultations with China regarding China's constraints on the export of various raw materials, including bauxite, coke, fluor spar, magnesium, manganese, silicon metal, yellow phosphorus and zinc.¹³⁶ Their requests allege that China has imposed tariff and nontariff restrictions on the export of these materials in violation of a number of GATT and Protocol provisions.¹³⁷

2.2.4.1. *Background*

China's principal commitment regarding export taxes is set out in section 11.3 of the Protocol, which provides:

¹³⁴ See MOU, *supra* n. 120, para. 5 (stating that '[F]inancial information services are distinct from "news agency services" as defined in UN Provisional Central Product Classification (1991) group 962.') It is interesting to contemplate whether the MOU would constitute 'subsequent agreement' regarding the interpretation of the Protocol under Art. 31(3)(a) of the VCLT, although the MOU declares that it is without prejudice to the rights and obligations of the parties under the WTO Agreement.

¹³⁵ See State Council Information Office, Ministry of Commerce and the State Administration of Industry & Commerce, *The Rules on the Administration of Provision of Financial Information Services by Foreign Institutions in China* (30 Apr. 2009), Art. 19.

¹³⁶ *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/1 (25 Jun. 2009) (US); WT/DS395/1 (25 Jun. 2009) (EC).

¹³⁷ The alleged violations are that of GATT Arts VIII, X and XI, paras 5.1, 5.2, 8.2 and 11.3 of the Protocol, and paras 83, 84, 162 and 165 of the Working Party Report. *Id.*

China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.

Annex 6 of the Protocol, Products Subject to Export Duty, contains a list of 84 products, most of which are minerals or other raw materials. The export duty rates on these products range from 20% to 40%, with the exception of tin ores and concentrates which are subject to a rate of 50%. The Note to Annex 6 states:

China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.

In short, China made three commitments regarding export taxes. First, it will eliminate customs duties on all exports other than the 84 products listed in Annex 6. Second, the statutory rates for the 84 products will be bound at the level set out in Annex 6. Third, the applied rates for the 84 products will not increase except under exceptional circumstances and only after prior consultations with affected Members.

These commitments are 'WTO-plus' because the WTO imposes no discipline on the elimination or reduction of export tariffs.¹³⁸ While quantitative restrictions on exports are prohibited under GATT Article XI, a Member can effectively circumvent such prohibition by charging taxes on the exports.¹³⁹ Considering the general lack of WTO disciplines on export taxes, China's commitments are nothing short of remarkable. It is unclear what motivated China to accept such obligations. It seems obvious, however, that these commitments were not taken for systemic reasons and instead are purely commercial in nature.

Unfortunately, China has not lived up to its promises. Since joining the WTO, China has levied export taxes on many products outside the list of Annex 6. According to the WTO Trade Policy Review report, in 2007 China imposed statutory export taxes on 88 tariff lines and interim export duties to an additional 110 lines that had not been subject to statutory export taxes.¹⁴⁰ The products subject to such duties included mineral products, chemical products, iron and steel products, and grain and other agricultural products. And many such duties were levied in addition to export quotas and licenses.

¹³⁸ Although the GATT contracting parties recognized that export tariffs could constitute serious obstacles to trade and contemplated negotiations to reduce export tariffs, see GATT Art. XXVIII *bis*, no such negotiation was conducted. The existing GATT rules on export tariffs are limited to the MFN requirement of Art. I and to the requirements on customs fees and formalities under Art. VIII.

¹³⁹ The lack of effective GATT disciplines on exports can be partially explained by the historical context in which the major industrial countries 'could reasonably assume that no impediment would ever be placed to their free access to other people's resources'. Statement of the Representative of Canada on 22 Feb. 1977, GATT Doc. MTN/FR/W/6 (10 Mar. 1977), 1. Credit is due to Lorand Bartels for pointing to this source. For a general discussion on the lack of effective GATT disciplines on exports and its historical context, see Melaku Geboye Desta, 'The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements', *Journal of World Trade* 37, no. 3 (2003): 523–551.

¹⁴⁰ 'WTO Trade Policy Review on China', Report by the Secretariat, WT/TPR/S199/Rev.1 (12 Aug. 2008), para. 112.

Moreover, China has raised both statutory and applied taxes on some of the products listed in Annex 6. For example, in May 2008, the export duties on natural phosphates (not on the list of Annex 6) and yellow phosphorus (on the list of Annex 6 but subject to a rate cap of 20%) increased from 10% to 20% to 110% to 120%.¹⁴¹ Apparently, China never conducted prior consultations with affected Members as required by the Protocol.

The United States, the EC and Japan have been most vocal about China's failure to honour its commitments. In recent years, they repeatedly raised the issue during the annual transitional reviews of China's WTO compliance.¹⁴² They claim that China's export restrictions have caused sharp rises in world prices on the one hand and declines in domestic prices on the other, giving China's downstream producers a significant competitive advantage over foreign producers. China, on the other hand, has defended its export restrictions on the grounds of environmental protection and conservation of natural resources. According to China, export restrictions are imposed on products that are highly energy consuming and polluting, or consuming large amounts of raw materials. China asserts that, like other WTO members, it has the right to invoke GATT Article XX to implement necessary export restrictions on exhaustible natural resources and that its export taxes were levied on a temporary basis in a manner consistent with WTO rules.¹⁴³

2.2.4.2. *Major interpretive issues*

Once again, the major interpretive issue in this case lies in the availability of GATT exceptions, including those under Articles XI and XX, to the Protocol obligations. As noted, China has defended its export taxes under GATT Article XX(g), which excuses measures 'relating to the conservation of exhaustible natural resources' if such measures are made effective in conjunction with restrictions on domestic production or consumption. Furthermore, China has claimed that its export taxes are levied on a temporary basis in a manner consistent with WTO rules. Apparently, China was referring to the provision of GATT Article XI:2(a), which provides that the obligation to eliminate quantitative restrictions under Article XI:1 does not extend to '[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party'.

But what is the textual basis of applying the exceptions of GATT Articles XI and XX to China's commitments in section 11.3 and Annex 6 of the Protocol? Under section 11.3

¹⁴¹ In 2008, China also levied 100% export taxes on 32 products in April, and 150% export taxes on fertilizers in September. See *infra* n. 142, 'Questions from Japan to China', G/C/W/606; 'Questions from the United States to China', G/C/W/603.

¹⁴² See WTO Transitional Review Mechanism Pursuant to para. 18 of the Protocol on the Accession of the People's Republic of China, 'Questions from the United States to China', G/C/W/589 (16 Nov. 2007) and G/C/W/603 (24 Oct. 2008); 'Questions from the European Communities to China', G/C/W/605 (4 Nov. 2008); 'Questions from Japan to China', G/C/W/568 (2 Nov. 2007) and G/C/W/606 (10 Nov. 2008).

¹⁴³ See WTO Trade Policy Review Body, Minutes of Meeting 21 and 23 May 2008, 'Trade Policy Review on China', WT/TPR/M/199/Add.1 (28 Aug. 2008), China's answer to Japan Question 11, 216; China's answer to EC Questions 63–64, 331.

of the Protocol, China's obligation to eliminate export taxes is subject to the exception of charges 'applied in conformity with GATT Article VIII'. GATT Article VIII concerns the imposition of fees and charges other than import or export duties.¹⁴⁴ This specific mention of GATT Article VIII in section 11.3 can be construed to mean that the parties intended to exclude all other GATT provisions from being applicable (*expressio unius est exclusio alterius*).

Despite the lack of a textual basis to link the GATT exceptions to China's commitments on export taxes, it would not make sense to deny China the right to invoke these exceptions from a systemic point of view. After all, export tariffs are merely one form of export restrictions. If export quotas and licenses can be justified under GATT Articles XI:2(a) and XX, what would be the policy reason for disallowing the same justifications for export tariffs? If anything, export tariffs should be preferable to export quotas due to their inherent transparency, just as import tariffs are preferred to import quotas under the WTO system. However, without a textual basis, the panels and the Appellate Body would be hard pressed to find the availability of the GATT exceptions to China's commitments on export taxes, unless the potential complainants in this dispute could agree otherwise.

It should be noted that the systemic issue raised in this context would not be fully resolved within the dispute settlement process. Suppose China is found to have violated its commitments on export taxes, can it then seek to withdraw such commitments or modify them by expanding the list of products or raising the rates set out in Annex 6? Unlike in the case of import tariffs, in which the WTO Member may seek to modify or withdraw its scheduled concessions on a regular basis in accordance with GATT Article XXVIII (Modification of Schedules), there is no similar mechanism under GATT with respect to export tariffs. As a result, China would have to seek to revise its commitments through a formal amendment to the Protocol. As previously discussed, the legal mechanism for making such amendment remains unclear.¹⁴⁵

3. A PROPOSAL FOR THREE WORKING PRINCIPLES

The interpretive issues presented by the Protocol are of broad systemic import that requires a systemic response. In the absence of 'legislative' guidance, it is now up to the WTO adjudicatory body to take up the challenge. To meet that challenge, panels and the Appellate Body will need to embrace a more holistic and flexible approach than the one prevailing. While it might be prudent to address each specific issue on the narrowest ground possible and on a case-by-case basis, it will take a broad systemic view of the field to produce a body of Protocol jurisprudence that can provide the level of 'security and predictability' desired by the WTO system.¹⁴⁶

¹⁴⁴ GATT Art.VIII:1.

¹⁴⁵ See Part 1.2.2.

¹⁴⁶ DSU Art. 3.2.

Interpretation of the Protocol provisions, of course, must follow the interpretive principles codified in Articles 31 and 32 of the VCLT. The VCLT articles are however treaty provisions themselves; and as such, their application is more of an art than a scientific process.¹⁴⁷ In practicing that art, a treaty interpreter needs more tools and skills to achieve a desired result. While the VCLT provides 'an essential infrastructure' for interpretation, applying its rules in particular circumstances 'requires skills and techniques which go well beyond their brief prescriptions'.¹⁴⁸

In light of this understanding, this part of the paper proposes three working principles for interpreting the WTO-plus provisions of the Protocol: (i) identifying the baseline of a particular WTO-plus obligation; (ii) distinguishing systemic commitments from commercial commitments; and (iii) giving due consideration to China's intention. These principles are formulated based on the observation that there are common interpretive issues presented by the WTO-plus provisions and that such issues can (and should) be dealt with in a systematic manner. It is hoped that these working principles will serve as useful tools in applying the VCLT in the particular circumstances of the Protocol so as to achieve a 'correct' result of interpretation.

3.1. IDENTIFYING THE BASELINE

A WTO-plus obligation is by definition a more stringent obligation than what is prescribed by the WTO multilateral agreements. What is prescribed by the WTO multilateral agreements, therefore, provides a baseline for the WTO-plus obligation.¹⁴⁹ Depending on the particular WTO-plus obligation, its baseline may be one or more provisions contained in a single WTO agreement or multiple provisions across several WTO agreements. The relationship between a WTO-plus provision and its baseline provision(s) may be fairly close and clear, or somewhat vague and distant. For example, the baseline for the special transparency obligations of China can be easily found in the various WTO provisions regarding transparency, such as GATT Article X, GATS Article III, and TRIPS Article 63. By contrast, the baseline for China's obligations on foreign investment is more distant and less clear, because these obligations are much broader in scope than the limited investment rules contained in TRIMS or the specific commitments under mode 3 of GATS schedules. In addition, some WTO-plus obligations may not have any corresponding provision in the WTO agreements, a prime example of which is the obligation to let

¹⁴⁷ See Richard Gardiner, *Treaty Interpretation* (New York/Oxford: Oxford University Press, 2008), 5, 7 (expressing the view that interpretation is 'an art', and that the Vienna rules 'are not a set of simple precepts that can be applied to produce a scientifically verifiable result. More guidance is needed to set the ground for a "correct result", or at least one which has been correctly ascertained').

¹⁴⁸ *Id.*, 6. Furthermore, Gardiner observed that the Vienna rules 'are not an exclusive compilation of guidance on treaty interpretation, other skills and principles that are used to achieve a reasoned interpretation remaining admissible to the extent not in conflict with the Vienna rules'. *Id.*

¹⁴⁹ The concept of 'baseline' for defining WTO-plus and minus rules was introduced by Charnovitz, *supra* n. 2, 15–16 (defining a baseline as 'the body of obligations that would otherwise automatically devolve upon any applicant when it joins the WTO').

market prices determine all prices in China. In that case, the baseline can be defined as the absence of any discipline in the WTO.

What is the use of identifying the baseline for the WTO-plus obligations? First of all, locating the baseline can help the treaty interpreter to ascertain the rationale or purpose of a particular WTO-plus obligation. Apparently, some WTO-plus rules were enacted because the generally applicable WTO rules were perceived as inadequate or insufficient in dealing with the systemic conditions in China, and special and more stringent rules were deemed necessary to ensure the effectiveness of WTO disciplines. The various obligations of China concerning market economy practices and domestic governance appear to fall into this category. Other special obligations, such as those concerning foreign direct investment and export tariffs, do not appear, however, to have a bearing on the existing WTO disciplines; rather, they are China's commitments to unilaterally expand the liberalization of trade and investment. By locating the baseline rules, the treaty interpreter can more readily ascertain the *raison d'être* of a particular WTO-plus obligation, which in turn may help him to determine the proper boundary of such obligation.

Moreover, identifying the baseline can help to define the context of the Protocol provisions. The Appellate Body has long regarded as its duty to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously'.¹⁵⁰ Legally, the baseline rules are part of such 'applicable provisions' to China since they are not replaced, but rather are strengthened, by the WTO-plus provisions. Indeed, the baseline rules should be viewed as the relevant and useful context of the WTO-plus provisions. The object and purpose of the baseline rules can shed light on that of the WTO-plus provisions. Drawing from existing jurisprudence on the baseline rules, the treaty interpreter would be able to construe the Protocol provisions consistently and coherently with the provisions of the WTO multilateral agreements.

More specifically, identifying the baseline can help to determine which exceptions of the WTO agreements should be made available to the Protocol provisions. As a matter of principle, no WTO obligation is absolute – there is no *jus cogens* codified by WTO law – and even the most fundamental obligations of the WTO are subject to various policy exceptions.¹⁵¹ Accordingly, the silence of the Protocol about exceptions does not mean that no exception should apply to its rules. Rather, it is a matter of determining which exceptions of the WTO agreements should apply. In general, if an exception is available to the baseline rule, then it should also be made available to the more stringent WTO-plus rule, unless applying such exception will render the WTO-plus provision meaningless.¹⁵² In other words, if we recognize the baseline provisions as part of the

¹⁵⁰ Appellate Body Report, *Korea – Dairy Safeguard*, *supra* n. 59, para. 81 (quoting its own report in *Argentina – Safeguard Measures on Imports of Footwear*) (emphasis original).

¹⁵¹ For example, the general MFN obligation under GATT Art. I:1 is subject to the exceptions contained in Arts XX, XXI, XXIV and XXV, and the Enabling Clause.

¹⁵² The case for making the exceptions of the WTO agreements generally available to the Protocol can also be made from a reserve perspective: although the Protocol is generally silent about whether China must implement its Protocol obligations on an MFN basis, few would doubt the applicability of the MFN principle to all such obligations.

context for a WTO-plus obligation, then we should also recognize all the exceptions available to that baseline as part of the broader context for such obligation.

Take as an example China's obligation on export tariffs. Since the only major WTO discipline on export is the requirement of GATT Article XI:1 to eliminate quantitative export restrictions,¹⁵³ Article XI:1 provides a baseline for the special obligation of China. The purpose of the Article XI:1 provision can inform the rationale and purpose of China's obligation (liberalization of exports). And the exceptions available to the Article XI:1 obligation – including the exception set out in Article XI:2(a) (restrictions temporarily applied to prevent critical shortages of products essential to the exporting Member) and the general exceptions in Article XX – should also be made available to the Protocol obligation on export tariffs.

Applying the baseline principle in the Trading Rights case is a little more complicated. As previously discussed, the WTO system does not restrict the extent and scope of state trading activities, and it is in this sense the trading rights commitment is WTO-plus. Nonetheless, the system has long recognized that state trading enterprises might be operated 'to create serious obstacles to trade'¹⁵⁴ and has imposed certain disciplines on state trading activities. Specifically, GATT Article XVII (State Trading Enterprises) requires a state trading enterprise to act in a non-discriminatory manner, which is understood to require such enterprise to act 'solely in accordance with commercial considerations'.¹⁵⁵ The purpose of these requirements is to ensure that Members do not use state trading enterprises to escape or circumvent their GATT obligations.¹⁵⁶ In addition, GATT Article II:4 prohibits state-authorized import monopolies from marking up the prices of imports such so as to evade the tariff bindings set out in the Member's goods schedule.¹⁵⁷ Due to the inherent lack of transparency in state trading operations, however, these GATT disciplines may not be easily enforced.¹⁵⁸ It is these GATT disciplines, along with the concerns over their effectiveness that informs the basic rationale of China's trading rights obligation: general liberalization of trading rights is needed because the extensive state trading and import monopolies practiced in China could create massive nontariff barriers that cannot be adequately addressed by the existing GATT disciplines.

The GATT provisions on state trading and import monopolies, therefore, provide the baseline for the trading rights obligation of China.¹⁵⁹ It follows then that the exceptions available to these GATT provisions should also be made available to China's trading

¹⁵³ In addition, GATT Art. I:1 (MFN) applies to export tariffs and all rules and formalities affecting exports.

¹⁵⁴ GATT Art. XVII:3.

¹⁵⁵ GATT Arts XVII:1(a) and (b).

¹⁵⁶ See Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, paras 6.39, 6.89 and n. 133; Appellate Body Report, WT/DS276/AB/R, adopted 27 Sep. 2004, para. 85 (stating GATT Article XVII:1(a) is an 'anti-circumvention' provision).

¹⁵⁷ GATT Art. II:4 also requires disclosure of information regarding the import mark-up by import monopolies on products that are not the subject of a tariff binding.

¹⁵⁸ For assessment of WTO disciplines on state trading activities, see generally, Thomas Cottier & Petros C. Mavroidis (eds), *State Trading in the Twenty-First Century* (Ann Arbor: University of Michigan Press, 1998).

¹⁵⁹ Trading rights is not a sector of services classified by GATS schedules. Unlike GATT, GATS does not contain provisions on state trading. Instead, it focuses on the effect of monopolistic powers of service suppliers, regardless of whether they are owned or authorized by the State. See GATS Art. VIII, *Monopolies and Exclusive Service Suppliers*.

rights obligation, unless doing so will defeat the very purpose of the obligation or otherwise render such obligation meaningless. In fact, one of the exceptions contained in Article XX(d) does appear to be problematic for the trading rights obligation, which excuses domestic regulations 'not inconsistent with' GATT provisions, including in particular those relating to 'the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII'. Since Articles II:4 and XVII do not limit the scope of state import monopolies, Chinese laws or regulations relating to the scope of its import monopolies would not be inconsistent with GATT; but they might be inconsistent with the trading rights obligation which explicitly restricts the scope of such monopolies. Consequently, applying the exception on state monopolies may render the trading rights obligation meaningless. Other than this particular clause in paragraph (d),¹⁶⁰ the policy exceptions of Article XX do not appear to contradict the apparent purpose of the trading rights obligation – that is, to reduce state trading and import monopolies in China to a certain level so that they can be more effectively regulated by the existing GATT disciplines. These exceptions of Article XX, therefore, should be made available to the trading rights obligations. After all, the interests of public policy have been given priority over the interest of free trade under the WTO regime. And any potential abuse of the exceptions with respect to the trading rights obligation can be dealt with by the legal standards built in the provisions of Article XX.

As for the applicability of Article XX in this particular case, perhaps an analogy to GATT Article XXI Security Exceptions can better illustrate the logic of the argument. Similar to its policy of maintaining state import monopolies in cultural products, China reserves the right to trade in weaponry and military equipment exclusively to selected SOEs.¹⁶¹ Also like cultural products, weaponry and military equipment are not among the listed products reserved for state trading under the Protocol. Yet, no WTO Member is likely to challenge China's practice as a violation of the trading rights obligation. The apparent legal justification would be Article XXI, which exempts any action that a Member considers necessary for the protection of its essential security interests relating to trade in arms, ammunition and other goods and materials for the purpose of supplying a military establishment.¹⁶² If Article XXI can be used to justify state trading in goods that are not explicitly reserved for state trading under the Protocol, why should not Article XX be allowed to do the same?

¹⁶⁰ Domestic laws and regulations not inconsistent with other provisions of the GATT should remain available as defense under Art. XX(d) for violations of the trading rights obligation. For instance, China could argue that maintaining state import monopolies in cultural products is 'necessary to secure compliance' with the Constitution, which sets broad political standards for speech and press.

¹⁶¹ See the Industry Catalogue, *supra* text at n. 100.

¹⁶² GATT Art. XXI(b)(ii).

3.2. DISTINGUISHING SYSTEMIC COMMITMENTS FROM COMMERCIAL COMMITMENTS

Because the Protocol contains broad systemic commitments of China that are unique within the WTO, how to interpret such commitments becomes a special challenge. The interpretive objective should be to give full effect to these commitments without unduly intruding into the domestic regulatory space of China. To this end, we need to first distinguish China's systemic commitments from its commercial commitments and then determine the appropriate levels of scrutiny, or standards of review,¹⁶³ to be applied to each category.

The need for appropriate standards of review under international trade law arises with the expansion of the world trade regime. Traditionally, the GATT system focused on regulation of border measures (tariffs, quotas, and customs procedures) and its regulation of internal measures was limited to the requirements of nondiscrimination between imported and domestic products.¹⁶⁴ The nondiscrimination requirements ensure that GATT disciplines on border measures will not be evaded by domestic measures (disguised protectionism) but it does not interfere with the subject matter of the domestic regulation. With the advent of the WTO, the world trading system has greatly expanded its jurisdiction into traditionally domestic regulatory domains. It now regulates intellectual property rights (TRIPS), health and safety standards of products (SPS and TBT), investment policies and domestic subsidies (GATS, TRIMS, and SCM). Under these new agreements, domestic laws and policies must conform to certain substantive standards; deviation from such standards could constitute a violation even if they were not discriminatory or protectionist.¹⁶⁵

This expansion of WTO disciplines has led to growing concerns that the WTO may intrude into the legitimate policy space of its Members. In order to address such concerns, it is necessary to establish appropriate standards of review under the relevant WTO agreements.¹⁶⁶ The Appellate Body has stated that Article 11 of the DSU, which requires a panel to make an 'objective assessment' of the facts and the applicability of the relevant WTO agreement, provides the appropriate standard of review for all WTO agreements other than the Antidumping Agreement,¹⁶⁷ and that such 'objective assessment' standard is neither one of *de novo* review, nor of 'total deference'.¹⁶⁸ This DSU standard, however,

¹⁶³ The concept of appropriate levels of scrutiny is often used interchangeably with the concept of standards of review, which in the WTO context refers to the degree of deference the WTO adjudicatory body should give to the national authority's factual and legal determinations. For a comprehensive treatment of the subject, see Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford: Oxford University Press, 2003). See also, Stefan Zleptnig, 'The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority', European Integration online Papers (EIoP) 6, no. 17 (2002), <<http://eiop.or.at/eiop/texte/2002-017a.htm>>.

¹⁶⁴ The only exception is the transparency requirement of GATT Art. X.

¹⁶⁵ Some considered this a paradigm shift in international trade law. See Henrik Horn & J.H.H. Weiler, 'European Communities – Trade Description of Sardines, Textualism and its Discontent', in *The ALI Reporters' Studies on WTO Case Law*, ed. Henrik Horn & Petros Mavroidis (Cambridge: Cambridge University Press, 2002), 552.

¹⁶⁶ The standard of review effectively allocates powers between the WTO and its Members. As the Appellate Body observed, the appropriate standard of review must reflect the balance established in the relevant agreement 'between the jurisdictional competence conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves'. Appellate Body Report, *EC – Hormones*, *supra* n. 66, para. 115.

¹⁶⁷ Appellate Body Report, 'Argentina – Safeguard Measures on Imports of Footwear', WT/DS121/AB/R, adopted 12 Jan. 2000, para. 118.

¹⁶⁸ Appellate Body Report, *EC – Hormones*, *supra* n. 66, para. 117.

is too general to serve as a useful guide in specific cases.¹⁶⁹ It has been suggested that the WTO should learn from domestic laws of many jurisdictions and establish different standards of review of measures depending on the norm such measures allegedly violate.¹⁷⁰ Thus, a measure allegedly compromising the basic norms of the WTO, such as nondiscrimination, may receive very strict scrutiny that will require the Member employing the measure to provide compelling reasons for justification. A lower level of scrutiny, requiring simply that the measure not be unreasonable, may be applied in other circumstances, such as measures accused of not complying with international standards but not involving discrimination, thus giving greater deference to the national authority in making and applying such regulations.¹⁷¹ Encouragingly, recent WTO decisions appear to be moving in this direction.¹⁷²

Because different standards of review are to be established depending on the norms a measure allegedly violates, a ranking of the WTO norms becomes necessary, which in turn will depend on our understanding of the purpose of the WTO. As conventionally understood, the objective of the world trading system is to liberalize trade. The basic norms stemming from this objective are trade liberalization, nondiscrimination, and transparency. But with the expansion of WTO disciplines, the objective of the trading system seems to have extended into promoting good domestic governance, such as the protection of property rights (IP), and of the environment and public health.¹⁷³ The norms associated with the domestic governance model can be much more expansive than the conventional model of trade liberalization. For now, however, it seems safe to say that trade liberalization remains the primary objective of the WTO; accordingly, the norm of nondiscrimination (or anti-protectionism) stays at the core of the WTO disciplines on domestic regulations.

The question about the purpose of the WTO bears directly on the interpretation of the WTO-plus obligations of China. Because the Protocol does not explain its object and purpose, the interpretation of its provisions will need to be informed more generally by the object and purpose of the WTO Agreement. With respect to China's commercial commitments, such as its commitments on foreign investment and export tariffs, it

¹⁶⁹ See Claus-Dieter Ehlermann and Nicolas Lockhart, 'Standard of Review in WTO Law', *Journal International Economic Law* 7 (2004): 491 (recognizing the need for developing appropriate standards of review for different subject matters under WTO law); Matthias Oesch, 'Standards of Review in WTO Dispute Resolution', *Journal of International Economic Law* 6 (2003): 635 (concluding that panels and the Appellate Body had generally paid little deference to Members' interpretation of the WTO agreements).

¹⁷⁰ See Horn & Weiler, *supra* n. 165.

¹⁷¹ *Id.*

¹⁷² For example, the Appellate Body has articulated a clearer standard of review under Art. 5.1 of SPS, which requires Members' SPS measures to be based on a risk assessment. See 'Canada/United States – Continued Suspension of Obligations in the EC – Hormones Dispute', WT/DS320/AB/R, WT/DS321/AB/R, adopted 14 Nov. 2008, para. 590 (stating that the review power of a panel under Art. 5.1 is not to determine whether the risk assessment undertaken by a WTO Member is correct but rather to determine whether that risk assessment is supported by 'coherent reasoning and respectable scientific evidence' and 'is, in this sense, objectively justifiable').

¹⁷³ See Jeffrey Dunoff, 'Lotus Eaters: Reflection on the Varietals Dispute, the SPS Agreement and WTO Dispute Resolution', in *Trade and Human Health and Safety*, ed. George A. Bermann & Petros C. Mavroidis (Cambridge: Cambridge University Press, 2006), 153, 173 (questioning whether the WTO is being transformed into a re-maker of internal regulatory systems of its Members).

seems fairly clear that their purposes are purely to achieve trade liberalization (broadly construed). As such, these commitments embody the core value of the WTO system and their object and purpose can be fully explained by the main objective of the WTO. Therefore, although these commitments exceed the requirements of GATT and GATS, it would not be inappropriate to set the standard of review for these provisions at a level comparable to that applicable to the GATT and GATS provisions on market access (e.g., GATT Article XI, GATS Article XVI, and TRIMS).

In comparison, determining appropriate review standards for China's systemic commitments is a more complex matter. These commitments address broad systemic issues in China, including the pricing system, foreign trade rights, SOE autonomy, and the rule of law. While these issues all have a significant impact on trade, they also affect domestic institutions and societies generally. As a result, it is not so clear as to what these commitments are intended to achieve. Take for example the commitment to let market forces determine all domestic prices. Is the purpose of this commitment to ensure that China adopts a market-based economic system so that its domestic prices will not distort trade (the conventional trade model), or is it because such a system is considered a desired norm in itself (the domestic governance model), or somewhat a blend of both? Different understandings about the purpose of this commitment can lead to different interpretations of the commitment.

Consequently, the review standard to be applied in the context of the systemic commitments may depend on the treaty interpreter's vision of the purpose of such commitments. A narrower vision (the conventional trade model) would see these commitments as necessary to ensure that WTO multilateral disciplines, in particular the market access and other commercial commitments of China, will not be eroded or rendered ineffective by China's economic and regulatory system. Under this vision, the treaty interpreter would focus on the aim and trade effect of the Chinese measure at issue, and apply a lower level of scrutiny unless the measure also involves discrimination or is clearly protectionist. In contrast, a broader vision (the domestic governance model) would view the purpose of the systemic commitments as not only to ensure the effectiveness of WTO multilateral disciplines, but also to help China transform into a truly market-based economy governed by rule of law. Adopting this broader vision, a treaty interpreter would be more inclined to apply a heightened standard in scrutinizing a Chinese measure accused of violating a systemic commitment. This latter approach would be attractive to many people, both inside and outside China, who wish to see the WTO play an active role in furthering China's domestic reform. But it may also backfire if China resists compliance out of political concerns.¹⁷⁴

The *Trading Rights* case provides a good example for this analysis. The question of standards of review arises under both the Protocol provisions (section 5) and GATT Article XX(a), which China invokes as an affirmative defense. Once the Panel accepts

¹⁷⁴ See Arie Reich, 'The Threat of Politicization of the World Trade Organization', Bar-Ilan University Faculty of Law Working Paper No. 7-05, May 2005, available at: <<http://ssrn.com/abstract=723621>> (identifying emerging signs of politicization of the WTO and its contributing factors, including a broadened mandate of the WTO).

the availability of Article XX exceptions to the Protocol provisions, the focal point becomes the standard of review under Article XX(a). Although the Appellate Body has not articulated any particular standard of review for the Article XX provisions, each time a determination is made under the article, a particular standard of review is effectively used. In a given case, the interpretation of the 'necessity' test (which involves a 'weighing and balancing' process and an evaluation of what constitutes a 'reasonable available' alternative¹⁷⁵) and of the chapeau standards (which also involves a balancing exercise¹⁷⁶) all reflects the review standard actually applied by the WTO adjudicatory body.

Thus, in deciding whether the Chinese measures meet the requirements of Article XX, the treaty interpreter may well interpret these requirements through the lens of his vision on the purpose of China's trading rights commitment.¹⁷⁷ Adopting the narrower vision (the conventional trade model), the interpreter would focus on the question of whether China's measures are protectionist in design and the restrictive impact of such measures on trade. As previously discussed, the Chinese measures are motivated by political rather than economic reasons.¹⁷⁸ While the measures deny trading rights to all foreign entities, they also deny the same to the vast majority of Chinese entities. Hence, these measures are not discriminatory in the sense of being protectionist against foreign competition. In terms of trade impact, because the measures do not seem to restrict the quantity of cultural imports, their restrictive impact on trade appears to be rather limited. Given the political nature and limited trade impact of the measures, the treaty interpreter would apply a lower level of scrutiny, which would lead him to give greater deference to China's policy choice in implementing its censorship regime.

In contrast, if the treaty interpreter adopts the broader vision (the domestic governance model), seeing the purpose of the trading rights commitments as to facilitate the market-based systemic reform in China, he would scrutinize the measures more strictly even if he also agrees that the measures are not protectionist in design. In fact, when the United States submitted that the Chinese measures deny trading rights not only to 'all foreign enterprises and individuals', but also to 'all Chinese enterprises' (other than the

¹⁷⁵ See *supra* text at nn. 111–115.

¹⁷⁶ See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 Nov. 1998, para. 159 (stating that the task of interpreting and applying the chapeau is 'essentially the delicate one of locating and marking out a line of equilibrium' between the right of a Member to invoke an exception under Art. XX and the rights of other Members under varying substantive provisions of GATT.)

¹⁷⁷ Cf. Alan Sykes observed that in WTO practice the least trade restrictive means or the necessity test under Art. XX is merely 'a crude form of cost-benefit analysis', rather than a method to detect protectionism. Alan O. Sykes, 'The Least Restrictive Means', *University Chicago Law Review* 70 (2003): 403. Commentators have expressed different understandings of the WTO 'necessity' jurisprudence. See, e.g., Jan Neumann & Elisabeth Turk, 'Necessity Revisited: Proportionality in World Trade Organization Law after Korea–Beef, EC – Asbestos and EC – Sardines', *Journal of World Trade* 37 (2003): 199–233; Donald H. Regan, 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing', *World Trade Review* 6, no. 3 (2007): 347–369; Chad P. Brown & Joel P. Trachtman, 'Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act', *World Trade Review* 8, no. 1 (2009): 85–135; Benn McGrady, 'Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures', *Journal of International Economic Law* 12, no. 1 (2009): 153–173.

¹⁷⁸ See Part 2.2.2(a).

selected SOEs),¹⁷⁹ it effectively advocated this broader understanding of the purpose of China's systemic commitments.

Ultimately, the normative question confronting the WTO adjudicatory body in this case is whether to allow China to maintain, in its policing of foreign cultural products, the degree of control and flexibility afforded by the exclusive state trading. Should they answer the question in the negative, China would be required under WTO law to make certain fundamental changes in the operation of its censorship regime. Rarely before has the WTO/GATT system been involved in making a decision that intrudes so deeply into a Member's political system. It would be a remarkable achievement of the WTO if its dispute settlement mechanism could induce the Chinese government to reform its censorship regime. More likely, however, China would resist compliance. In that event, a more practical solution or compromise might be to differentiate the types of cultural imports according to their political sensitivity. For instance, China may well agree to liberalize trading rights in science and technology publications, which count for more than one third of all imported books in China. This solution would be in line with the outcome of the Xinhua case, in which China differentiated financial information from general news and accepted liberalization in the distribution of the former but not the latter.¹⁸⁰

3.3. GIVING DUE CONSIDERATION TO CHINA'S INTENTION

In one sense, WTO-plus obligations are analogous to the market-access concessions in GATT and GATS schedules, as they are all commitments made by one Member, but form an integral part of the multilateral WTO agreements. It has been well accepted under WTO law that, although each schedule represents concessions that bind one Member only, it also represents 'a common agreement among all Members'.¹⁸¹ Thus, like the task of interpreting any other treaty text, the task of interpreting a GATT or GATS schedule is to ascertain 'the common intentions' of Members.¹⁸² These common intentions cannot be ascertained on the basis of 'subjective and unilaterally determined' expectation of one Member, because the concessions are 'reciprocal and result from a mutually-advantageous negotiation' between Members.¹⁸³

Some commentators have suggested, however, that GATT and GATS schedules are instruments of de facto unilateral nature,¹⁸⁴ or are 'multilateral acts of a special character',¹⁸⁵ and as such, their interpretation process should be somewhat different from that of interpreting the provisions of GATT or GATS. When engaged in identifying the 'common intention' behind a Member's concession, the treaty interpreter 'cannot avoid

¹⁷⁹ 'U.S. Request for Consultations', WT/DS363/1, *supra* n. 90.

¹⁸⁰ See *supra* text at nn. 134–135.

¹⁸¹ Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62, 67, 68/AB/R, adopted 22 Jun. 1998, para. 109.

¹⁸² *Id.*, para. 84; Appellate Body Report, *US – Gambling*, para. 160.

¹⁸³ Appellate Body Report, *EC – Computer Equipment*, para. 84.

¹⁸⁴ Ortino, *supra* n. 67, 123–124.

¹⁸⁵ Isabelle Van Damme, 'The Interpretation of Schedules of Commitments', *Journal World Trade* 41, no. 1 (2007): 1, 19.

taking into account the unilateral origin of such concession as well as the existence of concessions of all other Members'.¹⁸⁶ While the schedules should be interpreted as part of the treaty language of the WTO agreements, the hybrid feature of their negotiation, drafting and conclusion 'may influence the weight given to certain means of interpretation in the VCLT'.¹⁸⁷ Indeed, it has been observed that WTO adjudicators have shown more flexibility in the interpretation of the schedules than the provisions of the WTO agreements.¹⁸⁸

Compared to the scheduled concessions, the *de facto* unilateral character of the Protocol obligations is, in a sense, more pronounced. This can be observed from several aspects. First of all, unlike scheduled concessions of one Member, which are negotiated in exchange for concessions of other Members on a roughly reciprocal basis, the Protocol obligations of China do not have *quid pro quo* from other Members. The accession negotiations are not 'a process of reciprocal demands and concessions, of 'give and take', the way tariff negotiations are'.¹⁸⁹ While China did accept all the special obligations of the Protocol in exchange for the overall benefit of WTO membership, these special obligations are not 'reciprocal' in the same sense as the scheduled concessions.

Moreover, in the reality of WTO accession negotiations, the applicant country does not stand on an equal footing with the existing Members. The way in which accession is conducted provides the existing Members, especially major trading powers, with great leverage to pressure the applicant into making as many concessions as possible, including special commitments not required of existing Members.¹⁹⁰ In the case of China, many of the special terms of the Protocol resulted from bilateral negotiations between China and the United States, in which the United States enjoyed more bargaining power than China and was able to squeeze out special concessions through high-handed negotiating tactics.¹⁹¹ The lack of experience and legal expertise on the part of China also inevitably constrained its ability to assert its interests in the drafting of the Protocol. Thus, while the Protocol may be regarded as reflecting the overall balance between the rights and obligations of China and other Members, such a balance was not established in the same manner as that in the GATT or GATS schedules.

Furthermore, the Protocol provisions are 'rules' that may not be periodically renegotiated or withdrawn as the scheduled concessions could.¹⁹² As previously discussed, it

¹⁸⁶ Ortino, *supra* n. 67, 124.

¹⁸⁷ Van Damme, *supra* n. 185, 52.

¹⁸⁸ *Id.*, 48 (observing that the Appellate Body seemed to accept, in part, deference to 'WTO Member-specific' means of interpretation for schedules, which it would otherwise reject as interpretive means for the interpretation of other WTO covered agreements).

¹⁸⁹ Appellate Body Report, *EC – Computer Equipment*, para. 109.

¹⁹⁰ See Charnovitz, *supra* n. 2, 55–56 (quoting critical views of the accession process from Roman Grynberg & Roy Michey Joy, 'The Accession of Vanuatu to the WTO', *Journal of World Trade* 34, no. 6 (2000): 159; Maxim Medvedkov, 'WTO Accession: The Russian Perspective', in UNCTAD, *WTO Accessions and Development Policies*, UNCTAD, CITC/TNCD/11 (2001): 47).

¹⁹¹ See 'To Brink and Back: In Historic Pact, US Opens Way for China to Finally Join WTO', *Wall Street Journal*, 16 Nov. 1999, A1; 'Roller-Coaster Ride' to an Off-Again, On-Again Trade Pact', *The Washington Post*, 16 Nov. 1999, A26; 'The Fist Lady of Trade: Woman in the News Charlene Barshefsky: The US trade representative was praised after China's accession to the WTO', *Financial Times* (London), 27 Nov. 1999, 11.

¹⁹² GATT Art. XXVIII; GATS Art. XXI.

is not even clear how the Protocol provisions may be amended legally. As a result, the Protocol obligations impose a heavier burden on China than that imposed by the schedules on the concession-making Member.

The question, then, is whether the special character of the Protocol obligations, and the circumstances surrounding their negotiation, drafting and conclusion, should influence their interpretation (a normative question), and if so, how (a technical question). I believe the answer must be affirmative to the normative question because only by taking into account the reality of the Protocol can the treaty interpreter work consciously towards reaching an equitable result that is critical to the legitimacy and effectiveness of the WTO system.

Regarding the technical question, the short answer will be that the treaty interpreter should give due consideration to China's intention. What this entails are two things. First, in the process of ascertaining the 'common intentions' behind a Protocol provision, the treaty interpreter needs to identify China's intention separately through examination of all relevant evidence as part of the contextual analysis of the provision. Conceptually, the 'common intentions' behind a Protocol provision should be understood as the mutual intention between China on the one hand and all other WTO Members, collectively, on the other.¹⁹³ While it is not necessary to investigate the intent of each individual Member so as to establish the collective intention of the WTO Members, it will always be necessary to identify the intent of China in order to determine the mutual intention behind a Protocol provision. After all, the 'common intentions' regarding a Protocol obligation cannot go beyond what China intended.¹⁹⁴ Of course, China's intention cannot be determined on the basis of its post hoc assertions. Instead, it has to be determined objectively – through careful examination of all relevant evidence within the parameters of the VCLT rules.

Second, when there is doubt about the scope of a Protocol obligation, such obligation should be interpreted narrowly. In this regard, inspiration can be drawn from the interpretive principle of binding unilateral declarations of the State, adopted by the International Law Commission (ILC) of the United Nations in 2006, which states:¹⁹⁵

A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.

¹⁹³ This understanding reflects the bilateral nature of the Protocol.

¹⁹⁴ Interestingly, the reverse may not be true in light of the unilateral character of the Protocol obligations. It is at least theoretically possible that objective evidence will show that China actually intended to undertake a broader obligation than expected by other WTO Members under a particular Protocol provision.

¹⁹⁵ Guiding Principle 7, *Guiding Principles applicable to unilateral declarations of State capable of creating legal obligations, with commentaries thereto*, adopted by the International Law Commission of the United Nations in its 58th session in 2006, ILC Report, A/61/10 (2006).

The ILC Commentary explains that this principle is formulated on the basis of a number of judgments of the International Court of Justice concerning unilateral acts of the States.¹⁹⁶ In the view of the Court, the VCLT provisions may only apply ‘analogously to the extent compatible’ with the *sui generis* character of a unilateral declaration. By analogy of Article 31(1) of the VCLT, ‘priority consideration must be given to the text of the unilateral declaration, which best reflects its author’s intentions’. In addition, by analogy of Article 31(2), ‘to assess the intentions of the author of a unilateral act, account must be taken of all the circumstances in which the act occurred’.¹⁹⁷ Thus, the interpretation of unilateral obligations follows a two-part principle. First, when the scope of a unilateral obligation is in doubt, that obligation must be interpreted in a restrictive manner. This is essentially the principle of restrictive interpretation, or *in dubio mitius*.¹⁹⁸ Second, the intention of the State obligor should be determined by examining primarily the text of the declaration, together with the ‘context’ and ‘all the circumstances’ in which it was made. This part is an analogy of the principle in Article 31 VCLT, but with an added emphasis on the ‘circumstances’ surrounding the unilateral act.

The Protocol, of course, is not a unilateral instrument, but a negotiated agreement between China and the WTO, with virtually all of its special provisions originating from demands of other WTO Members. However, to the extent that the Protocol obligations of China differ from and exceed the obligations of all other Members under the WTO Agreement, such obligations have acquired a distinct unilateral character. It is in this sense that the interpretive principle of unilateral obligations can have a reference value.

Technically, in interpreting the Protocol, the reference value of the interpretive principle for unilateral obligations can be realized by the weight given to certain means of interpretation under the VCLT. For example, with respect to the added emphasis on the ‘circumstances’ surrounding the formulation of the text, it is possible for the interpreter to take into account such circumstances under either Article 31 or 32 of the VCLT. In the context of Article 31, the Appellate Body has already opened such possibility when it stated:

The ordinary meaning of a treaty term must be ascertained according to *the particular circumstances* of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties ‘as expressed in the words used by them against the light of *the surrounding circumstances*’.¹⁹⁹ (emphasis added)

This view reflects a contextualist approach in the application of Article 31. Moreover, under Article 32, ‘the circumstances’ of the conclusion of a treaty is one of the two

¹⁹⁶ *Id.*, Commentary (2) and (3) (citing *Nuclear Tests (Australia v. France; New Zealand v. France)*, ICJ Report 1974; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility*; *Frontier Dispute (Burkina Faso v. Republic of Mali)*, ICJ Report 1986; *Fisheries Jurisdiction (Spain v. Canada)*, Merits, Judgment of 4 Dec. 1998, ICJ Report 1998; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment of 11 Jun. 1998, ICJ Reports 1998).

¹⁹⁷ *Id.*, Commentary (3) (citing *Fisheries Jurisdiction (Spain v. Canada)*, 453, para. 46; *Frontier Dispute (Burkina Faso v. Republic of Mali)*, 574, para. 40).

¹⁹⁸ For detailed discussion of the principle, see Gardiner, *supra* n. 147, 60–61, and 349.

¹⁹⁹ Appellate Body Report, *EC – Chicken Cuts*, para. 175 (quoting Lord McNair, *The Law of Treaties* (Oxford: Oxford Clarendon Press, 1961) 365).

supplementary means of interpretation specifically identified. Such circumstances have been construed broadly so that they may include the historical background against which a treaty was negotiated,²⁰⁰ prior consistent practice of one party,²⁰¹ events, unilateral acts, and statements of individual negotiating parties,²⁰² subsequent practice of one party,²⁰³ and domestic legislative acts and court decisions.²⁰⁴ Given the lack of 'the preparatory work' of the Protocol (which is the other supplementary means specifically identified by Article 32), this broad construction of 'the circumstances' will prove very helpful in its interpretation. In sum, when applying the VCLT rules, WTO adjudicators will have ample room to take into account the circumstances in which the Protocol provisions were negotiated, drafted and concluded.

As for the principle of *in dubio mitius*, the Appellate Body has already embraced it as a 'supplementary means of interpretation' widely recognized in international law.²⁰⁵ Pursuant to this principle, 'if the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation'.²⁰⁶ The notion underlying the principle is deference to the sovereignty of states. As the Appellate Body explained, '[w]e cannot lightly assume that sovereign states intended to impose on themselves the more onerous, rather than the less burdensome, obligation'.²⁰⁷ Although some jurists have questioned the value of *in dubio mitius* in treaty interpretation,²⁰⁸ this principle has been given a particular importance in the interpretation of unilateral declarations. Given the de facto unilateral character of the Protocol obligations, the WTO adjudicator should not hesitate to resort to this principle when the scope of a Protocol obligation is in doubt.

In addition, I would suggest that the WTO adjudicators utilize supplementary means of interpretation more readily in the interpretation of the Protocol provisions. In contrast to Article 31, which sets out general interpretive principles that are obligatory, Article 32 merely provides the treaty interpreter with the option of recourse to supplementary means of interpretation. And it does not contain an exhaustive list of supplementary means.²⁰⁹ The

²⁰⁰ Appellate Body Report, *EC – Computer Equipment*, para. 86.

²⁰¹ *Id.*, paras 92–93 and 95 (stating that consistent prior classification practice of one party is often significant, whereas inconsistent practice is not relevant).

²⁰² Appellate Body Report, *EC – Chicken Cuts*, para. 289.

²⁰³ *Id.*, para. 305 (stating that it is possible that documents published, events occurring and practice followed subsequent to the conclusion of the treaty may give an indication of what were or were not the common intentions of the parties at the time of the conclusion).

²⁰⁴ *Id.*, paras 308–309.

²⁰⁵ Appellate Body Report, *EC – Hormones*, n. 154.

²⁰⁶ *Id.* (quoting from Robert Jennings & Arthur Watts, *Oppenheim's International Law*, 9th edn (London: Longmans, 1992), I, 1278).

²⁰⁷ Appellate Body Report, *EC – Hormones*, para. 165 (criticizing the Panel for interpreting Art. 3.1 of the SPS as containing binding norms rather than expressing a goal to be realized in the future).

²⁰⁸ See Gardiner, *supra* n. 147, 60–61 (discussing Hersch Lauterpacht's view in 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) XXVI BYBIL 48); John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006), 262 (suggesting that the concept of *in dubio mitius* represents 'extreme positivism' and is 'absurd and destructive of purposes of institutions like the GATT and WTO').

²⁰⁹ Article 32 provides: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

purpose of the recourse to supplementary means is either to 'confirm' the meaning resulting from the application of Article 31, or to 'determine' the meaning if the application of Article 31 leaves ambiguity or leads to a manifestly unreasonable result. In practice, panels and the Appellate Body have resorted to Article 32 from time to time, especially when they considered the recourse as 'necessary', that is, when the meaning remains unclear or leads to an absurd result after the application of Article 31.²¹⁰ Given the imperfectly formulated text of the Protocol, it may be necessary for the WTO adjudicator to employ supplementary means even when the meaning of a Protocol provision appears to be clear as a result of applying Article 31.²¹¹ A liberal approach towards recourse to supplementary means would allow the interpreter to take into account the special character of the Protocol obligations and to ensure that China's intention be properly identified.

4. CONCLUSION

The interpretive challenge presented by the Protocol provisions is substantial. At the technical level, the text of the Protocol is drafted in such a way that creates large gaps in the WTO treaties that have to be filled by the treaty interpreter. At the policy level, there is probably not another multilateral treaty under which the obligations of one member differ from those of all others in such a significant manner. And that member happens to be one of the largest trading nations in the world. Consequently, whether the Protocol obligations are interpreted properly can have major implications for the legitimacy and effectiveness of the WTO system.

The challenge of interpreting the Protocol provisions, on the other hand, also provides a great opportunity for the WTO adjudicatory body to emancipate itself from the constraints of a rigid textualist approach and to truly embrace a holistic and systemic approach in its stead. The VCLT principles are sufficiently general to allow the treaty interpreter to develop additional tools and skills in the interpretation of a particular treaty so as to achieve a desired result. More recent decisions of WTO panels and the Appellate Body have already shown increasing flexibility in the application of the VCLT principles. What is needed most in the interpretation of the Protocol is perhaps the willingness of the WTO adjudicators to adopt a broad systemic view of its unique provisions and to articulate the underlying policy considerations for their decisions. A more systemic and policy-oriented judicial policy will better serve the objective of providing security and predictability to the WTO system.

²¹⁰ See, e.g., Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 Oct. 1999, para. 138 (because the language is not clear on its face, it is 'appropriate' and 'indeed necessary' to turn to supplementary means pursuant to Art. 32); Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 Mar. 2005, para. 623 (agreeing with the Panel that the meaning of the text is clear and therefore recourse to negotiating history is 'not necessary', but did take into account of the negotiating history); Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 Dec. 2002, paras 89–90 (since the interpretation does not lead to 'irrational or absurd results', it is not 'strictly necessary' to have recourse to supplementary means identified in Art. 32, but considered negotiating history any way).

²¹¹ When the interpreter uses supplementary means to 'confirm' a clear meaning, the process also carries with it the possibility that the meaning cannot be so confirmed, which may lead to adjustment to the assumption that the meaning was clear. See Gardiner, *supra* n. 147, 307–310.