

Pacta Sunt Servanda — Practices of China as a WTO Member

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Abstract: Before and after China's accession to the WTO, China sorted out its laws and regulations to align its economic and trade laws and regulations with WTO rules. After becoming a formal WTO Member, trade policy compliance has become a routine of its government work, and it has specially developed a compliance system. Meanwhile, China has become actively involved in WTO dispute settlement, settling disputes with other Members per WTO rules, faithfully executing rulings and adjusting measures including amending laws. China has been fulfilling WTO obligations based on the means of “implementation type”, “prevention type” and “rectification type”, thus truly implementing *Pacta Sunt Servanda*.

Keywords: WTO, Laws and regulations sort-out, Trade policy compliance, Dispute ruling execution, *Pacta Sunt Servanda*

Pacta Sunt Servanda is a basic principle of international law explicitly specified under the *Vienna Convention on the Law of Treaties*.¹ Despite its multiple modes,² its due meanings include aligning existing domestic laws with the Convention, preventing contradictions between future domestic laws and the Convention, as well as revising domestic laws so they conform to international rulings. In other words, *Servanda* is not implemented if domestic laws are not adjusted when signing or entering into international treaties, if international treaties are not actively referred to when formulating domestic laws, and if domestic laws are not revised after being considered to violate international treaties. The three means of *Servanda* can be termed “implementation type”, “prevention type” and “rectification type” respectively.

Around 2000, China sorted out and revised laws and regulations to ensure

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¹ Preamble and Article 26, See the UN website for the *Vienna Convention on the Law of Treaties*, <https://www.un.org/chinese/law/ilc/treaty.htm> (Last Visited on February 21, 2021).

² For example, interpretation in good will, adjusting domestic laws and not damaging treaty tenets. See Oliver Dorr (Eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2012, pp. 445-446.

prompt fulfillment of WTO obligations. Subsequent formulation of laws and regulations has been subject to “compliance” reviews to prevent violations of WTO obligations. Moreover, WTO rulings have been faithfully executed, while provisions of relevant laws and regulations have been revised. Regarding the three means, it can be concluded that China has abided by WTO rules. I have participated in relevant work and my personal experience proves this conclusion.³

I. IMPLEMENTATION TYPE: SORTING OUT LAWS AND REGULATIONS

“Laws and regulations” include laws, administrative regulations, department regulations, normative documents, and local regulations. Sorting out laws and regulations is an ordinary legislative activity.⁴

For instance, in 2008, the National People’s Congress issued the *Notice on Conducting Legal Sort-out*, requiring that “legal regulations which are apparently unfit for economic and social development”, “regulations which are inconsistent or incoherent under the previous laws and the subsequent laws so that execution is difficult”, and “laws with low operability which are unlikely to be enforced” should be sorted out.⁵ In 2009, the National People’s Congress again issued the *Opinions on Properly Conducting Local Regulations Sort-out*, deploying local regulations sort-out on a national scale.⁶ Furthermore, in 2000, the State Council issued the *Notice on Conducting Sort-out of Existing Administrative Regulations*, which provides for the following principles: Administrative regulations of which the main content does not match new or revised laws, as well as new or adjusted policies and guidelines of the Party and the State should be abolished. Those that new laws or administrative regulations have replaced should be abolished. Those with expired application periods or disappeared adjustment objects and that are invalid should be announced. Those that laws and administrative regulations have explicitly abolished should be uniformly

3 From 1996 to 2014, I worked with the Treaty and Law Department of the Ministry of Foreign Economic Relations and Trade (Ministry of Commerce) and participated in the negotiations for China’s accession to the WTO, laws and regulations sort-out and dispute settlement.

4 There is no relevant regulation under the *Law on Legislation*.

5 See the Chinese Government website, http://www.gov.cn/zhengce/content/2016-06/14/content_5081660.htm (Last Visited on February 21, 2021).

6 See news of Jiangxi People’s Congress, <https://jxrd.jxnews.com.cn/system/2010/04/15/011350694.shtml> (Last Visited on February 21, 2021).

announced.⁷ In 2010, the *Notice on Relevant Issues of Properly Conducting Regulations Sort-out* was issued, mainly researching and sorting out regulations centering on the following three types of problems for abolishment, announcement of invalidation or amendment: regulations have become apparently unfit for economic and social development; regulations are inconsistent with higher-level laws; there is a notable lack of coordination between regulations.⁸ The inevitable results of laws and regulations sort-out are “abolishment” and “amendment”, some of which have been specified in the documents. These is the case in reality. For example, two years after the National People’s Congress Legal Sort-out Notice was issued, some laws have been abolished and amended, and the State Council has been urged to develop supporting regulations.⁹ Following the State Council’s sort-out of administrative regulations, a batch of regulations have been abolished.¹⁰

However, laws and regulations sort-out for fulfilling WTO obligations is a rare legislative activity with unprecedented levels of well-developed professionalism and large-scale operations.

7 See the Chinese Government website, http://www.gov.cn/zhengce/zhengceku/2010-11/12/content_2024.htm (Last Visited on February 21, 2021).

8 See the Chinese Government website, http://www.gov.cn/zhengce/content/2016-06/14/content_5082175.htm (Last Visited on February 21, 2021).

9 “Based on the sort-out, some laws have become apparently unfit for economic and social development, some legal regulations are inconsistent or incoherent, and some laws cannot be effectively implemented due to the lack of supporting regulations. Regarding these problems, the Standing Committee has sorted out by classification upon careful research and repeated argumentation. First, the decision on abolishing some laws has been made, abolishing 8 laws including the Organic Regulations on Police Stations and the Organic Regulations on City Sub-district Offices. Second, the decision on amending some laws has been made, making package amendment to 141 provisions of 59 laws while supplementarily listing other laws which are highlighted for amendment during the sort-out into the legislative plan and annual plan for timely amendment. Third, the State Council and relevant departments have been urged to efficiently formulate law-supporting regulations, and it has been specified that in the future, while establishing legislative projects and drafting laws, supporting regulations should be planned for simultaneous implementation with laws.” See Wu Bangguo, Laws Sort-out Undertaking Obtaining Major Stage Achievements, China National People’s Congress website, <http://www.npc.gov.cn/npc/c10134/201003/29e125b22d794cab8b8621e1e1b9458c.shtml> (Last Visited on February 18, 2021).

10 “I. The 71 administrative regulations of which the main contents do not match new laws or revised laws, as well as new or adjusted policies and guidelines of the Party and the State should be abolished, and those having been replaced by new laws or administrative regulations should be abolished (See Annex I for the Table of Contents). II. The 80 administrative regulations with expired application periods or disappeared adjustment objects and actually invalidated should be announced invalid (See Annex II for the Table of Contents). III. The 70 administrative regulations having been explicitly abolished by laws and administrative regulations promulgated from 1994 to the end of 2000 should be uniformly announced (See Annex III for the Table of Contents).” See the Chinese Government website, http://www.gov.cn/gongbao/content/2001/content_61147.htm (Last Visited on February 23, 2021).

A. Process

On December 11, 2001, China officially became a WTO Member. WTO agreements are international treaties that should be fulfilled.¹¹ China's obligations are mainly represented under *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations of the World Trade Organization* (Legal Texts) and the *Compilation of the Legal Instruments on China's Accession to the World Trade Organization* (the Protocol on the Accession of the People's Republic of China (the Protocol) and its annexes as well as the *Report of the Working Party on the Accession of China* (the Report)), a total of 1,378 pages.¹² Specifically, Article II:2 of the *Marrakech Agreement Establishing the World Trade Organization* specifies that WTO Agreement "are binding on all Members" and Article XVI:4 thereof specifically requires that "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations". In addition, it is also regulated in Article 2A(3) of the *Protocol on the Accession of the People's Republic of China* as follows: "China's local regulations, rules and other measures of local governments at the sub-national level shall conform to the obligations undertaken in the WTO Agreement and this Protocol."

China experienced arduous negotiations to accede to the WTO, and it took 15 years from "joining GATT" to "joining the WTO".¹³ An important reason was that the WTO was a rule system based on the market economy and restricted

11 See The Decision of the Standing Committee of the National People's Congress on China's Accession to the WTO, the Chinese Government website, http://www.gov.cn/gongbao/content/2002/content_74600.htm (Last Visited on February 21, 2021).

12 The Legal Texts has 531 pages, see *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations of the World Trade Organization* (In both Chinese and English), Translated by the International Economic and Trade Relations Department of the Ministry of Commerce, Law Press, Edition 1, October 2000; The Protocol and the Report totally have 847 pages, See *Compilation of the Legal Instruments on China's Accession to the World Trade Organization* (in both Chinese and English), Translated by the International Economic and Trade Relations Department of the Ministry of Commerce, Law Press, Edition 1, January 2002; See also the Ministry of Commerce website, <http://sms.mofcom.gov.cn/aarticle/ztzx/200209/20020900039082.html> (Last Visited on February 21, 2021).

13 In 1947, China was a founding contracting party to the *General Agreement on Tariffs and Trade* (GATT), the predecessor of the WTO, quitting later out of political reasons. In 1986, China applied to recover its position as a contracting party ("rejoining the GATT"). In 1995, the WTO was founded, and "rejoining the GATT" turned into "rejoining the WTO". See Shi Guangsheng (Ed.), *Textbook on Information of China's Accession to the WTO: the Negotiation History of China's Accession to the WTO*, People's Publishing House, Edition 1, November 2011. See also the Chinese Government website, http://www.gov.cn/test/2009-10/10/content_1435051.htm (Last Visited on February 22, 2021).

government control of trade,¹⁴ while China's economic system was turning from a planned economy to a market economy and had extensive government control of trade.¹⁵ Therefore, many commitments arose during the negotiation process, while there was a massive workload of post-negotiation "establishing, amending, and abolishing" of laws and regulations.

The mode of "sector legislation" has generally been adopted for economic and trade laws and regulations. Namely, the central government has proposed a draft for the State Council to approve and the National People's Congress to deliberate. Then, administrative regulations and department regulations are promulgated and implemented, while local governments simultaneously formulate regulations. Therefore, laws and regulations sort-out conducted to fulfill WTO obligations was mainly the responsibility of the State Council, and the specific department was the Legislative Affairs Office of the State Council.¹⁶ This office prepared the *Working Arrangement on the Formulation and Amendment of Relevant Laws and Administrative Regulations for Adapting to the Process of China's Accession to the WTO* in March 2000,¹⁷ and printed and issued the *Notice on Relevant Matters of Department Regulations Sort-out for Adapting to the Process of China's Accession to the WTO* in April.¹⁸ In September 2001, the General Office of the CPC Central Committee and the General Office of the State Council specially issued the *Opinions on Sorting*

14 In the Marrakech Declaration of 15 April 1994, WTO Members committed on adopting "open, market-oriented policies". See *supra* n. 12, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations of the World Trade Organization*, p. iii.

15 *Supra* n. 8, Shi Guangsheng (2011), pp. 47-99.

16 In 2001, The Notice of the General Office of the State Council on Printing and Issuing Several Opinions on Properly Conducting the State Council's Legislative Undertaking in 2001 and the State Council's Legislative Working Arrangement in 2001 (Guo Ban Fa [2001] No. 11) provides that the emphasis of the State Council's legislative undertaking in 2001 includes "laws and administrative regulations items to be amended and formulated for adapting to the process of China's accession to the WTO" and lists the "laws and administrative regulations (38 items) to be amended and formulated for adapting to the process of China's accession to the WTO". See the Chinese Government website, http://www.gov.cn/zhengce/content/2012-04/25/content_6955.htm (Last Visited on February 23, 2021); In 2018, the State Council conducted an institutional reform and the Legislative Affairs Office of the State Council was no longer retained with its functions merged into the Ministry of Justice. See the Chinese Government website, http://www.gov.cn/xinwen/2018-03/17/content_5275116.htm (Last Visited on February 21, 2021).

17 Ensuring Conformity of Domestic Legislation with WTO Rules, China's Regulations Sort-out Uninterrupted for 10 Years, <http://news.sina.com.cn/o/2011-09-26/084523217212.shtml> (Last Visited on February 23, 2021).

18 *Ibid.*

*out Local Regulations, Local Governmental Regulations and Other Policies and Measures for Adapting to the Process of China's Accession to the WTO.*¹⁹

The task of laws and regulations sort-out is to make “establishing, amending and abolishing” suggestions that refer to WTO obligations. This is a huge project that requires sorting out all currently effective laws and regulations. In theory, it should be very clear which laws and regulations are currently effective. However, the factors of rapid economic and trade development, many government documents, policies divided based on each department, and changing organizations²⁰ have caused laws and regulations to have an unclear status quo. This is also a specialized job requiring expertise related to relevant laws and regulations as well as WTO obligations. One can imagine that “reference” is difficult due to the quantity of laws and regulations as well as WTO obligations. I was fortunate to become involved in this job and hence can provide organizations observing laws and regulations sort-out with perspectives based on personal experiences.

At the end of 1999, the Laws and Regulations Sort-out Group was established under the Ministry of Foreign Economic Relations and Trade (currently Ministry of Commerce), with the Minister acting as the group leader. The office was included as part of the Treaty and Law Department, with the Department Chief serving as the Director. August 2002 marked the end of the sort-out. During this period (two years and eight months), my position was Deputy Director General responsible for the Office's specific affairs. More than ten colleagues ultimately joined this Office.²¹

The Laws and Regulations Sort-out Group of the Ministry of Foreign Economic Relations and Trade was established at the end of 1999, even earlier than the State Council's uniform deployment, mainly for two reasons. First, the Sino-US agreement was reached. On November 15, 1999, the Sino-US bilateral

19 See the Hangzhou Government website, http://www.hangzhou.gov.cn/art/2019/7/13/art_1664365_5548.html (Last Visited on February 21, 2021).

20 Government institutional reform and change is a common phenomenon. See Shen Kun & Mu Jiang, Historical Change of and Reflections on the 60-year Chinese Government Institutional Reform, *Journal of Hebei Youth Administrative Cadres College*, No. 3, 2012.

21 To Cope with the Accession to the WTO, China Sorts Out and Amend Foreign Economic and Trade Laws and Regulations — Interviewing Zhang Yuqing the Chief of the Treaty and Law Department of the Ministry of Foreign Economic Relations and Trade of the People's Republic of China, *China Law*, October 2001; See also Interviewing Zhang Yuqing, In Yang Guohua, etc. (Eds.), *Ten Years after the Accession to the WTO, Rule of Law in China*, People's Publishing House, pp. 5-27.

agreement on China's accession to the WTO was reached, China's commitments were basically shaped, and China's "accession to the WTO" could be expected soon.²² As a result, fulfilling WTO obligations became an urgent need. Second, the Ministry of Foreign Economic Relations and Trade had special responsibilities. WTO obligations mainly involved economic and trade affairs and as the responsible department, the Ministry of Foreign Economic Relations and Trade needed to adjust many policies. Moreover, the State Council was about to conduct large-scale laws and regulations sort-out, while this Ministry should be a role model and provide guidance because it was the department tasked with leading the negotiations for China's accession to the WTO and hence the most familiar with WTO obligations. One reason for my luck with getting involved was that I had participated in the negotiations, particularly in the process of forming the Sino-US agreement and the Protocol, and understood the WTO obligations. My colleagues also had a legal background and were familiar with economic and trade business.

Along with the work progress, the "dual identity" of this Office was increasingly obvious. First, it sorted out laws and regulations within the department. Together with the Foreign Trade Department and the Foreign Investment Department, the Office thoroughly sorted out documents related to the Ministry of Foreign Economic Relations and Trade. Two specific steps were taken: The first was "checking the background" and sorting out 1,413 documents. The second was making suggestions for abolishment, amendment, retention, and new formulation, amending 210 documents, abolishing 559 ones, and retaining 450 ones.²³ Second, it guided national laws and regulations sort-out. Under the unified leadership of the State Council, the Ministry of Finance, the National Development and Reform Commission, the Ministry of Agriculture as well as other central ministries, commissions, and local governments involved in economic and trade responsibilities all conducted laws and regulations sort-out,

22 Press Communique of the Chinese and US Governments on Signing the Bilateral Agreement Regarding China's Accession to the WTO, http://www.china.com.cn/guoqing/2012-02/13/content_24621557.htm (Last Visited on February 22, 2021).

23 Table of Contents of the First Batch of Abolished Department Regulations of the Ministry of Foreign Economic Relations and Trade, http://www.law-lib.com/law/law_view.asp?id=17080 (Last Visited on February 23, 2021); Table of Contents of the Second Batch of Abolished Department Regulations of the Ministry of Foreign Economic Relations and Trade, http://www.law-lib.com/law/law_view.asp?id=16810 (Last Visited on February 23, 2021).

following professional guidance regarding WTO obligations provided by the Ministry of Foreign Economic Relations and Trade. Besides providing daily advisory opinions on individual cases, this Office also participated in developing the “uniform standards” of WTO obligations, i.e. main content of WTO obligations, for the reference of relevant departments. For example, in order to comply with local regulations sort-out, this Office participated in formulating guidance opinions including legal system unification, non-discrimination, along with publicity and transparency principles as well as 20 specific standards (See Appendix I). It should be specially noted that the Legal Affairs Office of the State Council participated in formulating the Protocol, while relevant central ministries and commissions participated in the negotiations, with a professional understanding of WTO obligations. Moreover, WTO training classes targeting all levels of national leadership provided professional reserves for local laws and regulations sort-out.²⁴ In other words, numerous professionals collectively

24 Central ministries and commissions, local governments at all levels and even various trade associations were holding training classes on WTO rules. The most authoritative ones included: “‘International Situation and WTO’ Special Research Class for Main Leaders and Cadres at the Provincial and Ministerial Level”, “... main leaders from various regions, various departments and relevant military units were gathered for systematic study and special research and discussion on the current international situation and the accession to the WTO ... upon 5 days of study ...” See “International Situation and WTO” Special Research Class for Main Leaders and Cadres at the Provincial and Ministerial Level (February 2002), <http://news.sina.com.cn/c/2002-02-21/1941481210.html> (Last Visited on August 23, 2021); The Organization Department of the CPC Central Committee, the Ministry of Foreign Economic Relations and Trade and China National School of Administration jointly held “WTO Rules and Foreign Investment Attraction Policies and Regulations Special Research Class for Cadres at the Provincial and Ministerial Level”, “Participated by 90 leaders from central and state organ ministries and commissions, various provinces, autonomous regions, municipalities directly under the central government, sub-provincial cities and special economic zones ... lasting for 6 days. In the Research Class, WTO rules and Chinese policies and regulations on foreign investment attraction were studied, general information of China’s negotiations for the accession to the WTO was learnt about, and coping work after the accession to the WTO as well as foreign investment attraction arrangements in the new situation were researched and discussed.” See Wu Yi Required Trainees of the Special Research Class for Cadres at the Provincial and Ministerial Level to Earnestly Study and Master WTO Rules When Having an Informal Discussion with Them, *People’s Daily Overseas Edition*, Edition 2, November 26, 2001; Series of training held by the Ministry of Foreign Economic Relations and Trade. As a lecturer, I participated in the over 10 trainings held by the Ministry of Foreign Economic Relations and Trade. Trainees were mainly cadres at the department and division level of various ministries and commissions as well as leaders of local commercial competent departments. Moreover, the *Simple List of China’s Commitments on the Accession to the WTO* printed and issued by the State Council also provided convenience for leaders and cadres at all levels to study WTO obligations. See the *Letter of the General Office of the State Council on Printing and Issuing the Simple List of China’s Commitments on the Accession to the WTO* (Guo Ban Han [2001] No. 69), the Chinese Government website, http://www.gov.cn/zhengce/content/2012-03/07/content_4582.htm (Last Visited on February 22, 2021).

conducted laws and regulations sort-out, while the Ministry of Foreign Economic Relations and Trade acted as the “general counselor” as the one responsible for negotiating the “accession to the WTO”.

B. Achievements

National laws and regulations sort-out was successfully completed while attaining major achievements. Nearly 30 departments of the State Council sorted out a total of over 2,300 laws, regulations, and department regulations; 14 laws were formulated and amended with assistance from the National People’s Congress and its Standing Committee; the State Council formulated and amended 38 administrative regulations and abolished 12 ones; relevant departments of the State Council formulated, amended, and abolished over 1,000 department regulations; various regions sorted out a total of over 190,000 local regulations, local governmental regulations, as well as other polices and measures, amending or abolishing them accordingly as required.²⁵ Specifically, the most frequent were amendments to the Foreign Trade Law and three foreign investment laws.

According to Articles 8 and 9 of the *Foreign Trade Law of The People’s Republic of China* from 1994, only companies can conduct import and export business after receiving licenses from the competent foreign trade department (i.e. the Ministry of Foreign Economic Relations and Trade).²⁶ The “licensing system” was the actual practice back then, but during the draft’s discussions,

25 See Vice Minister of the Ministry of Commerce Yu Guangzhou, Report of Relevant Circumstances since China’s Accession to the WTO — December 25, 2003 at the Sixth Session of the Standing Committee of the Tenth National People’s Congress, http://www.npc.gov.cn/wxzl/wxzl/2004-02/12/content_327956.htm (Last Visited on February 22, 2021).

26 “Article 8: For the purposes of this Law, “foreign trade dealers” refers to legal persons and other organizations that engage in foreign trade dealings in compliance with this Law. Article 9: Foreign trade dealers engaged in import and export of goods and technologies shall be qualified as follows and be licensed by the authority responsible for foreign trade under the State Council: (I) With their own names and organizations; (II) With explicit foreign trade business scopes; (III) With places, capital and professionals required for the operated foreign trade business; (IV) Import and export business commissioned upon others meets the prescribed performance or with necessary import and export supply of goods; (V) Other conditions prescribed by laws and administrative regulations. The implementation measure stipulated in the foregoing paragraph is stipulated by the State Council. Foreign-invested enterprises importing non-production goods for their own use, importing equipment, raw materials and other materials required for production and exporting their manufactured products pursuant to relevant laws and administrative regulations on foreign-invested enterprises do not need to handle licensing formalities prescribed in Paragraph 1.” <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/1/1-1-01.html> (Last Visited on February 19, 2021).

someone suggested to change it into the “registration system” to reflect the perspective of foreign trade system reforms.²⁷ Foreign trade dealing right became an issue during negotiations for the “accession to the WTO”, and China committed to liberalize its dealing right. Pursuant to Article 5.1 of the Protocol, “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 ... Such right to trade shall be the right to import and export goods ... China shall complete all necessary legislative procedures to implement these provisions during the transition period.” Paragraph 84(a) of the Report prescribes: “China will cancel the approval system on the right to trade within three years after accession ... China will allow all enterprises and foreign enterprises and individuals in China ... to import all goods throughout the customs territory of China.” In short, China committed to the condition that all enterprises and individuals could conduct import and export business within three years. In 2004, upon commission by the State Council, the Minister of the Ministry of Foreign Economic Relations and Trade made an amendment statement

27 “The Financial and Economic Affairs Commission of National People’s Congress and some regions had put forward that this provision on obtaining foreign trade dealing right upon the competent department’s licensing confirmed the current practice but should be changed to the registration system out of the long-term consideration for the foreign trade system reform, while suggesting making legal regulations on the qualifications of foreign trade dealers so as to enhance legal transparency. On the other hand, some Commissioners and regions advocate the regulation on obtaining foreign trade dealing right upon the competent department’s licensing under Paragraph 1, Article 9 of the Draft. Referring to the opinions of the Legal Affairs Department of the State Council and the Ministry of Foreign Economic Relations and Trade, the Law Committee held that regulations on qualifications of foreign trade dealers should be added to this article but considering the reality in China, suggested maintaining the regulations on the licensing system in the State Council Draft. This Paragraph was amended as follows: “Foreign trade dealers engaged in import and export of goods and technologies shall be qualified as follows and be licensed by the authority responsible for foreign trade under the State Council: (I) With their own names and organizations; (II) With explicit foreign trade business scopes; (III) With places and capital required for the operated foreign trade business; (IV) With professionals required for the operated foreign trade business; (V) With import and export business performance or import and export supply of goods; (VI) Other conditions prescribed by laws and administrative regulations.” “The implementation measure stipulated in the foregoing paragraph is stipulated by the State Council.” (Paragraphs 1 and 2 of Article 9 of the Amended Draft). See Vice Chairman of the Law Committee of the National People’s Congress Xiang Chunyi, Report of the Law Committee of the National People’s Congress on the Deliberation Result of the *Foreign Trade Law of the People’s Republic of China (Draft)* — May 5, 1994 at the Seventh Session of the Standing Committee of the Eighth National People’s Congress, The National People’s Congress website, http://www.npc.gov.cn/wxzl/gongbao/2001-01/02/content_5003158.htm (Last Visited on February 19, 2021).

to the National People's Congress, explicitly referring to the commitment content and proposing the amendment draft, and the draft was adopted by the National People's Congress.²⁸

Previously in 2000, the National People's Congress amended the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures Amendment*, the *Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures Amendment*, and the *Law of the People's Republic of China on Foreign-Capital Enterprises Amendment* (the three foreign investment laws) because their requirements for enterprises balancing foreign exchange receipts and payments, as well as purchasing raw materials in China and mainly using their products for exports did not comply with the WTO regulation

28 "1. Regarding the scope of foreign trade dealers. Pursuant to Article 8 of the currently effective Foreign Trade Law, natural persons in China cannot engage in foreign trade dealings. However, based on China's commitments on acceding to the WTO, the scope of foreign trade dealing right should be further extended. Meanwhile, considering that natural persons engaging in foreign trade dealings had existed in plenty during trade in technologies, international trade in services, and border trade activities, the Foreign Trade Law as a basic law in the foreign trade sector should allow natural persons to engage in foreign trade dealings. Therefore, this Article was amended as follows: For the purpose of this Law, "foreign trade dealers" refers to natural persons, legal persons and other organizations that engage in foreign trade dealings in accordance with this Law. 2. Regarding the foreign trade dealing right of the trade in goods and trade in technologies. Pursuant to Paragraph 1, Article 9 of the current Foreign Trade Law, foreign trade dealers engaged in import and export of goods and technologies must be qualified accordingly and licensed by the authority responsible for foreign trade under the State Council. This regulation does not comply with the commitment made in Article 5.1 of the *Protocol on the Accession of the People's Republic of China* and Paragraph 84(a) of the *Report of the Working Party on the Accession of China*, i.e. to cancel approval on the foreign trade dealing right within three years after the accession to the WTO and liberalize the foreign trade dealing right of the trade in goods and trade in technologies. Hence, this Paragraph was amended as: Foreign trade dealers can engage in the import and export of goods and technologies after registering according to law." See Minister of the Ministry of Commerce Lv Fuyuan, Statement about the *Foreign Trade Law of the People's Republic of China (Amendment Draft)* — December 22, 2003 at the Sixth Session of the Standing Committee of the Tenth National People's Congress, The National People's Congress website, http://www.npc.gov.cn/wxzl/gongbao/2004-07/23/content_5332222.htm (Last Visited on February 19, 2021). The *Foreign Trade Law* (2004): Article 8: For the purpose of this Law, "foreign trade dealers" refers to legal persons, other organizations or individuals that have fulfilled the industrial and commercial registration or other practicing procedures in accordance with laws and engage in foreign trade dealings in compliance with this Law and other relevant laws and administrative regulations. Article 9: Foreign trade dealers engaged in import and export of goods or technologies shall register with the authority responsible for foreign trade under the State Council or its authorized bodies unless laws, administrative regulations and the authority responsible for foreign trade under the State Council do not so require. The specific measures for registration shall be laid down by the authority responsible for foreign trade under the State Council. Where foreign trade dealers fail to register as required, the Customs authority shall not process the procedures of declaration, examination and release for the imported and exported goods. See the Chinese Government website: http://www.gov.cn/flfg/2005-06/27/content_9851.htm (Last Visited on February 19, 2021).

under the *Agreement on Trade-Related Investment Measures* and China's commitments (See Appendix II).²⁹

II. PREVENTION TYPE: TRADE POLICIES COMPLIANCE

After large-scale laws and regulations sort-out, central as well as local economic and trade policies had basically been aligned with WTO obligations. One can imagine that non-breach of WTO rules would be a requirement during the future formulation of new policies. Based on my personal experience, since China's accession to the WTO, government departments' regular working procedure has been to refer to WTO rules when formulating policies, or to compare drafted policies with WTO rules. This was particularly typical with the Ministry of Foreign Economic Relations and Trade where I worked. All economic and trade policies must be examined for compliance with WTO rules, with the Treaty and Law Department and the WTO Department as the gatekeepers. Moreover, the Ministry of Foreign Economic Relations and Trade was also responsible for reviewing other ministries' and commissions' policy documents when countersigning the same, and often made comments regarding WTO rules.

Furthermore, in 2014, the State Council released the *Notice on Further Strengthening Trade Policies Compliance*, requiring that trade policies which central ministries and commissions as well as local governments formulated

29 See http://pkulaw.cn/fulltext_form.aspx?Db=protocol&Gid=39662108409bd42d6d9fa7b162a7d9bfbdfb (Last Visited on August 20, 2021). For reasons of making these special regulations back then, the legislation draft statement made by the then Minister of the Ministry of Foreign Economic Relations and Trade can also be referred to. For example, "II. Conditions for establishing enterprises with foreign capital. In the process of formulating the *Law of the People's Republic of China on Foreign-Capital Enterprises (Draft)*, requirements on enterprises with foreign capital should be somewhat different considering that they represented an important way for China to utilize foreign capital but varied greatly from Chinese-foreign equity joint ventures and contractual joint ventures in that all capital of such enterprises was invested by foreign investors without a Chinese party participating in the operation and management. In other words, enterprises with foreign capital were required to adopt advanced technologies and equipment and export all or most their products. Hence Article 3 of the Draft stipulated that: "Enterprises with foreign capital shall be established in such a manner as to help the development of China's national economy; they shall use advanced technology and equipment or market all or most of their products outside China." See Minister of the Ministry of Foreign Economic Relations and Trade Zheng Tuobin, Statement about the *Law of the People's Republic of China on Foreign-Capital Enterprises (Draft)* — April 2, 1986 at the Fourth Session of the Sixth National People's Congress, The National People's Congress website, http://www.npc.gov.cn/wxzl/gongbao/2000-12/26/content_5001778.htm (Last Visited on February 19, 2021).

must comply with WTO rules. For example, it explained that “Trade policies refer to regulations, normative documents and other policy measures formulated by various departments of the State Council as well as local governments at all levels and their departments concerning or influencing trade in goods, trade in services and trade-related intellectual property, excluding concrete administrative behaviors implemented towards specific objects of administration.” It also stated that “Compliance means that the said trade policies should comply with the *Agreement Establishing the World Trade Organization* and its annexes and subsequent agreements, the *Protocol on the Accession of the People’s Republic of China* and the *Report of the Working Party on the Accession of China*.”³⁰

There must be reasons for issuing a document to require “compliance” over ten years after the accession to the WTO. The Ministry of Commerce (previously the Ministry of Foreign Economic Relations and Trade) accounted for these reasons,³¹ which can be divided into obligations and situations. Regarding obligations, the Ministry of Commerce quoted Article XVI:4 of the above-mentioned *Agreement Establishing the World Trade Organization* and Article 2A(3) of the Protocol, stressing that each WTO Member was obliged to follow the rules. Regarding situations, the Ministry of Commerce mentioned two circumstances. The first one was trade policies review. China is subject to regular trade policy reviews conducted according to WTO rules and China’s commitments, and “transitional reviews” for the first ten years were concluded with five routine reviews already completed.³² For example, the WTO’s fifth review of China’s trade policies ended on July 3, 2014. At that point, Members had raised a total of over 1,700 written questions about China’s policies involving all aspects of its economic and trade system such as transparency, governmental intervention in microeconomic activities, special treatment of state-owned enterprises, unified customs law enforcement, standards as well as inspection and quarantine measures, intellectual property protection, and the China

30 See the Chinese Government website, http://www.gov.cn/zhengce/content/2014-06/17/content_8887.htm (Last Visited on February 22, 2021).

31 See The Ministry of Commerce Holding a Special Press Conference on “Trade Policies Compliance”, the Ministry of Commerce website, <http://www.scio.gov.cn/xwfbh/gbwxfbh/xwfbh/swb/Document/1375861/1375861.htm> (Last Visited on February 22, 2021).

32 Pursuant to Article 18 of the Protocol, the implementation by China of the WTO obligations should be annually reviewed for the first ten years, while routine reviews are carried out as per the WTO’s *Trade Policies Review Mechanism* (once every 4 years at first, then changed to once every 2 years owing to the increase in the trade volume).

(Shanghai) Pilot Free Trade Zone. In other words, WTO Members paid close attention to China's economic and trade policies. The second one was reflection from foreign governments and enterprises. For instance, "The United States government, the US Chamber of Commerce and the European Union Chamber of Commerce expressed to the Ministry in all sorts of ways their concerns about strategic emerging industry policies, market access to the service industry, trade-related investment measures and other concrete trade policy issues."³³

Since China's accession to the WTO, "compliance" review has become a regular part of government work, which seems to contradict the increase of concerns of WTO Members and foreign enterprises. The Ministry of Commerce also provided an explanation, which can be divided into three aspects, i.e. enhanced status, personnel change, and existing problems. Regarding enhanced status, in comparison with that before its accession to the WTO, China's domestic and international economy has significantly changed. China has become the world's largest power of trade in goods and second-largest economy, and is the largest trade partner for over 120 countries. The Chinese economy has become closely integrated with the global economy. Hence, China's trade policies are no longer solely related to itself. Each of China's trade policies may become an important factor influencing the operation of the world's economic and trade system. Its trade partners highly value and pay close attention to the influence of its trade policies on them. Regarding personnel change, when China had recently acceded to the WTO, major training sessions focused on WTO rules were hosted throughout the country among all levels of cadres, which helped them to acquire a detailed understanding of WTO rules. However, after more than 10 years, many trained cadres were working in different roles. For instance, grassroots-level government officials were not thoroughly informed about the need for WTO compliance and may lack awareness of it. Insufficient "compliance" awareness has created "existing problems", i.e. policies not complying with WTO rules. The main problem is currently related to transparency. For example, public opinion is not sought when drafting regulations and formulating normative documents. Some policies are not announced before they are implemented, while the government does not inform the WTO

33 See The Principal of the WTO Department of the Ministry of Commerce *Interpreting Measures for Implementing Trade Policies Compliance (Interim)*, the Ministry of Commerce website, <http://www.mofcom.gov.cn/article/ae/ai/201412/20141200852707.shtml> (Last Visited on February 22, 2021).

about others. These are the main problems on the one side. In addition, some policies involve national treatment issues. For example, in fields that will be opened up to trade, some local investment policies still contain provisions on local content or forced technology transfer, which have attracted significant attention from relevant Members. Moreover, some regions have introduced policies on providing fiscal subsidies linked to export performance, which the WTO has forbidden and does not comply with WTO rules. In short, daily compliance work is insufficient due to enhanced status, personnel change, and existing problems. Therefore, the Chinese government must dedicate itself to “compliance”.

As the Ministry of Commerce is leading and in charge, concrete content of “compliance” work is bidirectional. It involves forwarding WTO Members’ concerns to involved ministries, commissions, and local governments while making compliance review comments on relevant documents. Therefore, the Ministry of Commerce has specially formulated the *Measures for Implementing Trade Policies Compliance (Interim)*, which contains work procedures and reference standards (“policy measures which may influence trade”).³⁴ In the meantime, the Ministry of Commerce has organized “National Trade Policies Compliance Training Classes”³⁵ to train talent from various departments and

34 “Policy measures which may influence trade. I. Policy measures directly influencing import. 1. Customs procedures, valuation and place of origin rules; 2. Tariffs; 3. Indirect taxes influencing import; 4. Import bans and licenses; 5. National trade; 6. Trade reliefs; 7. Standards and other technology requirements; 8. Import-related financing policies. II. Policy measures directly influencing export. 9. Export tax; 10. Export tax rebate; 11. Processing trade tax concession; 12. Export bans, restrictions and licenses; 13. National trade; 14. Export-related financing, insurance and guarantee policies; 15. Promotion and marketing support measures. III. Other policy measures influencing trade. 16. Tax preference policies; 17. Subsidies and other governmental support; 18. Trade-related industrial policies; 19. Price control; 20. Competition policy and consumer protection policies; 21. Trade-related intellectual property policies; 22. Trade-related investment policies; 23. Policies regarding market access to the service sector; 24. Policies regarding national treatment in the service sector; 25. Other policies influencing trade.” See the Ministry of Commerce website, <http://www.mofcom.gov.cn/article/fgsjk/201412/20141202649740.shtml> (Last Visited on February 20, 2021). This Annex bears the same contents as the annex to the State Council’s Notice.

35 In order to implement the *Notice of the General Office of the State Council on Further Strengthening Trade Policies Compliance*, the WTO Department of the Ministry of Commerce has consecutively held 13 National Trade Policies Compliance Training Classes since 2015, effectively improving trainees’ WTO rules application levels and compliance levels. See the Ministry of Commerce website, <http://www.mofcom.gov.cn/article/zwgk/bnjg/202012/20201203025180.shtml> (Last Visited on February 22, 2021). I was lucky to lecture in the First Training Class. See The WTO Department Holding National Trade Policies Compliance Training Classes, the Ministry of Commerce website, <http://sms.mofcom.gov.cn/article/cbw/201502/20150200888211.shtml> (Last Visited on February 22, 2021).

local governments. Establishing a “compliance” mechanism showcases China’s commitment to fulfill its WTO obligations. If continually implemented, it will certainly play an active role in ensuring trade policies’ consistency with WTO rules.³⁶

III. RECTIFICATION TYPE: EXECUTION OF DISPUTES RULINGS

“Trade policies compliance” is a proactive measure to fulfill WTO obligations but does not necessarily ensure that all laws and regulations are completely consistent with WTO rules. Moreover, when other WTO Members raise doubts, disputes may arise concerning the understanding of WTO obligations. The WTO Dispute Settlement Mechanism has been established for this purpose, i.e. to clarify rules as well as maintain Members’ rights and obligations.³⁷ Since its foundation in 1995, the WTO has accepted and heard 600 cases and has also settled numerous disputes.³⁸

After its accession to the WTO, China actively participated in settling WTO disputes and filed a total of 21 cases and responded to 31 cases.³⁹ Settling disputes with other Members while referring to this Mechanism in itself manifests its performance of WTO obligations: WTO rules explicitly require reference to this Mechanism rather than adopting unilateral measures for dispute settlement.⁴⁰ More importantly, China still faithfully executed rulings where the WTO had considered that relevant laws and regulations were inconsistent with WTO rules, i.e. “a lawsuit was lost”. For example, in the *China — Auto Parts* (DS339/340/342, 2006), *China — Publications and Audiovisual Products* (DS363, 2007), *China — Raw Materials* (DS394/395/398, 2009), *China — Electronic Payment Services* (DS413, 2010), *China — GOES*

36 “The Ministry of Commerce is hearing a substantially increased number of documents soliciting compliance opinions submitted by various departments, which number has reached 133 so far. Calculating based on such an increasing speed, roughly 300 documents will be handled annually, and department compliance workload will at least be doubled.” See The Principal of the WTO Department of the Ministry of Commerce Interpreting the *Measures for Implementing Trade Policies Compliance (Interim)*, the Ministry of Commerce website, <http://www.mofcom.gov.cn/article/ae/ai/201412/20141200852707.shtml> (Last Visited on February 22, 2021).

37 Article 3.2 of the WTO’s *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

38 For information of WTO cases, see the WTO website, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (Last Visited on February 22, 2021).

39 31 cases calculated by measures, and 45 cases by the prosecutor.

40 Article 23.1 of the WTO’s *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

(DS414, 2010), *China — X-Ray Equipment* (DS425, 2011), *China — Broiler Products* (DS427, 2011), *China — Rare Earths* (DS431/432/433, 2012) cases, China amended or canceled related administrative regulations, department regulations, or specific measures.⁴¹ Moreover, in 2013, the Ministry of Commerce specially formulated the *Temporary Rules on Executing WTO Rulings Regarding Trade Remedy Disputes*, which specified: “Where the WTO Dispute Settlement Body’s rulings require China to align anti-dumping, anti-subsidy or safeguard measures with the WTO Agreement, the Ministry of Commerce can suggest or decide on amending, cancelling such measures according to law or decide to adopt other appropriate measures.”⁴²

After completing the special work for the Laws and Regulations Sort-out Office of the Ministry of Foreign Economic Relations and Trade, I was the Head of the newly established WTO Law Division of the Treaty and Law Department, specializing in WTO disputes settlement. Afterwards, I was the Deputy Chief of the Department in charge of disputes settlement and dealt with important cases from 2002 to 2014 and gained personal experience with executing rulings. My most memorable impression was that nobody from the central ministries, commissions, and local governments who had participated in handling cases had ever suggested to refuse to execute the rulings. For instance, the *China — Auto Parts* case involved tax collection from imported automobiles, the *China — Publications and Audiovisual Products* case involved “cultural products”, while the *China — Raw Materials* case and *China — Rare Earths* case involved “strategic materials”, but neither the “importance” nor the “sensitivity” of relevant products affected the execution of rulings.⁴³

41 See Hu Jianguo, Reviewing Executions of WTO Rulings in the Past 20 Years, In Yang Guohua etc. (Eds). *The WTO's Future: The Festschrift of John H. Jackson*, Shanghai People's Publishing House, Edition 1, October 2016, pp. 535-543.

42 See the Ministry of Commerce website, <http://www.mofcom.gov.cn/article/b/c/201307/20130700219044.shtml> (Last Visited on February 22, 2021).

43 In order to execute the *China — Auto Parts* case, the Ministry of Industry and Information Technology and the National Development and Reform Commission jointly issued the No. 10 Order on August 15, 2009, deciding to stop implementing relevant provisions of the *Automobile Industry Development Policies* involving the import of automobile components and parts on September 1, 2009. The General Administration of Customs, the National Development and Reform Commission, the Ministry of Finance and the Ministry of Commerce jointly issued the No 185 Order on August 28, 2009, deciding to abolish the *Measures for the Administration of Import of Automobile Components and Parts Featuring Complete Vehicles* on September 1, 2009. The General Administration of Customs issued the No. 58 Order of 2009 on August 31, 2009, deciding to abolish the *Rules on Verifying Imported Automobile Components and Parts Featuring Complete Vehicles* on September 1, 2009. In order to execute the *China — Publications and Audiovisual Products* case, the State Council promulgated the amended *Regulations on*

Of all the cases, the *China — Intellectual Property Rights* (DS362, 2007) case that involved the *Copyright Law* was the only case leading to a law amendment and hence became a paradigm for executing rulings.

According to Article 4.1 of the *Copyright Law* of 1990, “Works which are prohibited for publication or dissemination according to law are not protected hereunder.” In the *China — Intellectual Property Rights* case, the WTO Panel held that Article 9.1 of the WTO’s *Agreement on Trade-Related Aspects of Intellectual Property Rights* required “Members to comply with Articles 1 through 21 of the *Berne Convention* (1971) and the Appendix thereto”, and hence those articles under the *Berne Convention* were also WTO Members’ obligations. Article 5(1) of the *Berne Convention* explicitly stipulated that authors shall enjoy “rights specially granted by this Convention”, i.e. the right of translation, right of reproduction, right of performance, right of broadcast, right of public recitation, right of adaptation, and the right of continuance as specified in Articles 6, 8, 9, 11, 12 and 14 of the Convention. When referring to these rights, Article 4.1 of the *Copyright Law* asserting that certain works “are not protected hereunder” does not conform with WTO rules.⁴⁴

The WTO Panel made this ruling in early 2009. The Ministry of Commerce, together with the copyright department, the General Administration of Press and Publication, studied the execution plan and submitted it to the State Council via the Legal Affairs Office of the State Council, and the State Council submitted it to the National People’s Congress. On February 26, 2010, the Standing Committee of the National People’s Congress decided to amend the *Copyright Law* as follows: “Article should be amended as follows: Copyright

the *Administration of Publications* and the *Regulations on the Administration of Audio-Video Products* on March 19, 2011, and after that, competent authorities amended a series of administrative measures. In order to execute the *China — Raw Materials* case, the Customs Tariff Commission of the State Council issued the *Notice on the Tariff Implementation Plan for 2013* (Shui Wei Hui [2012] No. 22) and promulgated the *Tariff Implementation Plan for 2013* on December 10, 2012, and the involved 7 export products did not appear on the *Tariff Schedule for Export Goods*. The Ministry of Commerce and the General Administration of Customs issued the *Catalogue of Goods Subject to Export License Administration in 2013* (2012 No. 97) on December 31, 2012, no longer implementing export quota management on the involved four products, i.e. coke, carborundum, alumina and fluoride. In order to execute the *China — Rare Earths* case, the Ministry of Commerce and the General Administration of Customs issued the *Catalogue of Goods Subject to Export License Administration in 2015* (2014 No. 94) on December 31, 2014, no longer implementing export quota management on the involved three products, i.e. rare earth, tungsten and tungsten products, and molybdenum. The Customs Tariff Commission of the State Council promulgated the *Notice on Adjusting Export Tariffs of Certain Products* (Shui Wei Hui [2015] No. 3) on April 14, 2015, cancelling export tariffs of rare earth, tungsten, and molybdenum. See *supra* n. 41, Huo Jianguo (2016).

44 WTO Panel Report, see the WTO document: WT/DS362/R.

owners, in exercising their copyright, shall not violate the Constitution or laws or infringe upon the public interests. The publication and dissemination of works shall be subject to the administration and supervision of the State.” This amendment involved two key types of content. First, it deleted the passage “works which are prohibited for publication or dissemination according to law are not protected hereunder”. Second, it stressed the State’s right to supervise and administer publication and dissemination. In fact, the legislation in 1990 was out of consideration for the administration and supervision of the publication and dissemination of certain works.⁴⁵ However, the WTO Panel’s ruling divided the copyright from the administration and supervision right: Article 17 of the *Berne Convention* allowed restricting certain works’ issuance, performance, and exhibition, but did not restrict authors’ rights just like Article 4.1 of the *Copyright Law*. Amended content apparently considered both the copyright and the administration and supervision right.⁴⁶

45 “Regarding whether the Copyright Law must be simultaneously formulated with the Publication Law: 1. We advocate for the formulation of the Publication Law as soon as possible, and the Press and Publication Administration is working on the formulation. 2. Before the Publication Law is formulated, there are governing laws on which works are prohibited for publication and dissemination. Pursuant to the Decision of the Standing Committee of the National People’s Congress on Handling Illegal Books and Magazines (this law is still effective today) adopted in 1955, books and magazines objecting to people’s democratic dictatorship, damaging domestic ethnic unity, propagating theft, obscenity, murder, arson and other criminal behaviors or otherwise breaching the Constitution and other laws are illegal and should, based on the offense severity, be suspended for issuance, sale, renting or be confiscated. Meanwhile, according to relevant regulations under the Criminal Law and the Regulations on Administrative Penalties for Public Security, illegal behaviors of counterrevolutionary propaganda and producing, selling and spreading obscene goods can be imposed criminal punishment or public security punishment according to law.” See Vice Chairman of the Law Committee of the National People’s Congress Song Rufen, Report on the Opinions of Amending the *Copyright Law of the People’s Republic of China (Draft Amendment)* — August 30, 1990, at the Fifteenth Session of Standing Committee of the Seventh National People’s Congress, The National People’s Congress website, http://www.npc.gov.cn/wxzl/gongbao/1990-08/30/content_1479218.htm (Last Visited on February 21, 2021).

46 “When the Copyright Law was being formulated in 1990, there was no specific legal regulation on the administration and supervision of the publication and dissemination of works in China. After the Copyright Law was adopted, from 1994 to 1997, the State Council successively promulgated and implemented the *Regulations on the Administration of Audio-visual Products*, the *Regulations on the Administration of Films*, the *Regulations on the Administration of Publication* and the *Regulations on the Administration of Radio and Television*. After 2001, the *Regulations on the Protection of Computer Software* and the *Regulations on the Protection of the Right to Information Network Dissemination* were promulgated and implemented. So far there has been explicit regulation on works prohibited for publication and dissemination. The publication and dissemination of works can be effectively supervised and administered even without Article 4.1 of the current Copyright Law. Hence, Article 4.1 of the current Copyright Law is deleted in the Draft.” See Liu Binjie, Statement of the *Copyright Law of the People’s Republic of China Amendment (Draft)* — February 24, 2010 at the Thirteenth Session of the Standing Committee of the Eleventh National People’s Congress”. The National People’s Congress website, http://www.npc.gov.cn/wxzl/gongbao/2010-05/10/content_1580444.htm (Last Visited on February 21, 2021).

IV. CONCLUSION

Before and after China became a WTO Member, it sorted out laws and regulations nationwide. Subsequently, WTO “compliance” became a routine task, with special requirements to ensure “compliance”. Meanwhile, it faithfully executed WTO rulings and amended measures inconsistent with WTO rules. This “laws and regulations sort-out” has continued while attaining outstanding achievements. “Trade policies compliance” has been gradually implemented while involving the establishment of regulations and systems. “Disputes rulings” have been resolutely executed based on the use of appropriate measures.

The three ways of fulfilling WTO obligations, i.e. “implementation type”, “prevention type” and “rectification type”, ensure that *Pacta Sunt Servanda* is a realistic action instead of a mere slogan. As such, we can ensure that China has abided by WTO rules. Moreover, its good practices of abiding by treaties in its economic and trade sector will definitely generate significant demonstration and “spillover” effects. It will also become a reference for other sectors, particularly for ensuring that domestic laws and regulations are consistent with international treaties as well as guaranteeing that legal means are used to settle international disputes.

Appendix I. The Opinions on Sorting out Local Regulations, Local Governmental Regulations and Other Policies and Measures for Adapting to the Process of China's Accession to the WTO (2001)

I. Principles to be followed during the sort-out: (I) The principle of legal system unification. Maintaining the unification and dignity of the socialist legal system is a fundamental principle established under the Chinese Constitution. Pursuant to the Constitution and the Law on Legislation, no law, administrative regulation, local regulation, autonomous regulation and specific regulation should contradict against the Constitution. The Law on Legislation has made further regulation on the principle of legal system unification, explicitly defining the legislative powers of the central and local governments as well as the mutual relationships among the Constitution, laws, administrative regulations, local regulations, department regulations and local governmental regulations. As required by the WTO Agreement, the Central Government is obliged to ensure nationwide uniform implementation of

the WTO Agreement, and local regulations, rules and other policies and measures formulated in accordance with relevant legal regulations should not violate the WTO Agreement and China's commitments. Where the legislative power is vested with the National People's Congress and its Standing Committee and regarding matters belonging to central legislation, including basic systems on fiscal matters, taxation, customs, finance and foreign trade, local governments should not formulate local regulations or local governmental regulations. Along with the development in situations, in the event of any amendment to laws and administrative regulations for adapting to the process of the accession to the WTO, corresponding amendments should be made to local regulations, local governmental regulations and other policies and measures. The CPC Central Committee requires local governments to strictly abide by the principle of legal system unification and prevent violations of the WTO Agreement and China's commitments from happening. (II) Non-discrimination principle. Conducting market economic activities non-discriminatorily is both a fundamental principle under the WTO Agreement and an objective requirement of breaking local lockdowns and industrial monopolization so as to establish a national unified market. The CPC Central Committee requires local governments to strictly abide by the non-discrimination principle (including the most-favored-nation-treatment principle and the national treatment principle), treat equally without discrimination imported goods and foreigners' intellectual property rights as well as domestic goods and nationals' intellectual property rights, treat equally without discrimination goods or services from other domestic regions as well as local goods or services, render corresponding treatment to foreign services and service providers as per China's commitments, and treat equally various WTO Members' goods, services, investments or intellectual property rights. During the sort-out, regulations inconsistent with this principle and hindering the creation of a national unified market should be amended or abolished in strict accordance with the non-discrimination principle. (III) Publicity and transparency principle. Publicity and transparency is an important principle under the WTO Agreement. It requires that all trade-related laws, regulations, rules and other policies and measures should be publicized and that there should be a time interval between the promulgation and the implementation. Chinese laws currently effective have explicitly provided for consultation and promulgation in the process of formulating local regulations and local governmental regulations, and such provisions should be strictly executed. The CPC Central Committee requires that democracy should be advocated and the opinions of various sides including the objects of standardization should be extensively solicited in the process of formulating and amending

local regulations, local governmental regulations and other policies and measures, and that there should be a time interval between the promulgation and the implementation rather than implementation right after promulgation. All local regulations, local governmental regulations and other policies and measures should be uniformly published on the gazettes of standing committees of local people's congress and the local government bulletins. Hence, local regulations, local governmental regulations and other policies and measures sorted out and amended as per the Opinions, as well as policies and measures not previously publicized but requiring execution should be promulgated as required.

II. Sort-out scope and standards. The WTO requires that Members' laws, regulations, rules and other policies and measures regarding trade in goods, trade in services, trade-related intellectual property protection, and trade-related investment measures should conform to the WTO Agreement, and that within Members' customs territory, central and local governments' powers in terms of formulating these policies and measures should be determined by Members as per domestic laws. Pursuant to China's Constitution, Law on Legislation and other relevant laws, local governments should not regulate on matters which are to be regulated exclusively by the CPC Central Committee, e.g. foreign exchange (including foreign exchange system and RMB exchange rate system), import and export (including import and export licenses and quota system), tariffs, customs valuation, trade relief measures (including anti-dumping, anti-subsidy and safeguard measures), etc., and regulations having been made should be abolished without exception. Local governments should not regulate on matters about which no restrictive regulation should be made according to the WTO Agreement, e.g. levying domestic taxes and fees on imported products which are higher than on the like domestic products, and requiring foreign-invested enterprises to first purchase domestic raw materials. Regarding matters where local governments can make regulations combining local reality in light of Chinese laws, the WTO Agreement and China's commitments should also be conformed to (specific contents of local regulations, local governmental regulations and other policies and measures to be amended or abolished are annexed below).

Annex: Specific contents of local regulations, local governmental regulations and other policies and measures to be amended or abolished. I. Regulations levying direct or indirect domestic taxes and fees on imported products which are higher than on the like domestic products, or levying different taxes and fees on the like products from different Members. II. Regulations rendering lower treatment to imported products regarding domestic sales, transportation, purchase or use than to

the like domestic products, or rendering different treatments to the like products from different Members. III. Regulations rendering lower treatment to foreign-invested enterprises regarding domestically purchasing raw materials and parts or selling self-produced products domestically and abroad than to domestic enterprises. IV. Regulations rendering lower treatment to foreign-invested enterprises regarding the use of local transportation, energy, infrastructure and other public facilities as well as the access to production factors than to domestic enterprises. V. Regulations levying import and export fees on imported and exported products beyond the corresponding service costs, or levying different standards of import and export fees on imported products from different Members. VI. Regulations setting quantity restrictions, subsidies and other non-tariff measures or implementing relevant non-tariff measure procedures on imported and exported products. VII. Regulations applying different purchase conditions or purchase procedures to products from different Members during local governmental purchase activities. VIII. Regulations on measures different from national health quarantine and animal and plant quarantine measures. IX. Regulations applying higher standards to imported products than to local products, or applying different standards to imported products from different Members, or local standards constituting unreasonable restrictions on trade. X. Regulations providing producers with subsidies on the condition of export performance or using domestically produced goods. XI. Regulations providing subsidies to agricultural product export. XII. The following regulations on product import and export: (I) requiring enterprises to purchase or use domestic products in specific types, quantities and value or use domestic products as per a certain percentage of quantity or value during local production; (II) requiring enterprises to purchase or use imported products in the quantity or value connected to that of local products exported by enterprises; (III) restricting enterprises' import of products directly or indirectly for production needs by connecting enterprises' foreign exchange expenditure to their foreign exchange income from overseas. XIII. Regulations on foreign investment approval asserting such conditions as whether or not there are domestic producers of the like products or export performance, local content, technical transfer, etc. XIV. The following regulations on relevant service industries: (I) rendering lower treatment to services or service providers from a certain Member than to those from other Members; (II) making requirements on the qualification and ability of service providers beyond the extent necessary to ensure the service quality, or making requirements lacking public, explicit and objective standards; (III) license procedures themselves constituting restrictions on trade in services. XV. The following regulations on relevant service industries

where China made specific commitments during the negotiations for the accession to the WTO: (I) restricting the quantity of service providers by means of quantity quota, monopolization and franchising; (II) restricting the total business volume of service or the total value of service assets by means of quantity quota or as per economic demand conditions; (III) restricting the total number of service outlets or the total volume of service output by means of quantity quota or as per economic demand conditions; (IV) restricting the total number of personnel hired in specific service industries or by specific service providers by means of quantity quota or as per economic demand conditions; (V) requiring service providers to provide service in specific organizational forms; (VI) stipulating foreign equity ratio or total foreign investment so as to restrict the entry of foreign capital. XVI. Regulations rendering lower treatment to services and service providers from other Members than to the like domestic services and service providers breaching China's commitments in relevant service industries where China made specific commitments during the negotiations for the accession to the WTO. XVII. Regulations affecting intellectual property protection substantial standards such as the acquisition, scope, maintaining, use and loss of intellectual property rights. XVIII. Regulations on administrative procedures and charging standards regarding acquiring intellectual property rights beyond laws and administrative regulations, or on different procedures and charging standards toward domestic and foreign parties or parties from different Members in the absence of specific regulations under laws and administrative regulations. XIX. Regulations on administrative relief procedures and charging standards regarding the application for intellectual property protection beyond laws and administrative regulations, or on different procedures and charging standards toward domestic and foreign parties or parties from different Members for purposes of relief application. XX. Other contents of local regulations, local governmental regulations and other policies and measures inconsistent with the WTO and China's external commitments.

Appendix II. Statement about the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures Amendment (Draft)*, the *Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures Amendment (Draft)* and the *Law of the People's Republic of China on Foreign-Capital Enterprises Amendment (Draft)*

I. Regarding the balance of foreign exchange receipts and payments. Article 20 of the Law on Chinese-Foreign Contractual Joint Ventures was deleted in the Draft,

i.e. “Contractual enterprises shall manage to balance their own foreign exchange receipts and payments. Where contractual enterprises cannot manage to balance their own foreign exchange receipts and payments, they can apply with relevant authorities for assistance pursuant to national regulations.” Article 18.3 of the Law on Foreign-Capital Enterprises was deleted in the Draft, i.e. “Enterprises with foreign capital shall manage to balance their own foreign exchange receipts and payments. If, with the approval of the competent authorities, the enterprises market their products in China and consequently experience an imbalance in foreign exchange, the said authorities shall help them correct the imbalance.” Main considerations for such amendments are as follows: Requiring foreign-invested enterprises to manage to balance their own foreign exchange receipts and payments was a regulation made adapting to the then situation. For a considerable while after the reform and opening-up had been implemented, China’s foreign exchange reserve was low due to the insufficiently developed foreign trade and hence the constant shortage of foreign exchange. In order to ensure a balance of national foreign exchange receipts and payments, the two laws then regulating as above was totally necessary. In the 1990s, along with the continual deepening of China’s foreign trade and foreign exchange system reform and continual development of foreign trade, China enjoyed an increasing foreign exchange reserve. In 1994, the RMB was conditionally convertible under the current account. In July 1996, China included foreign exchange purchase and sale of foreign-invested enterprises into the banking exchange system and cancelled transfer and conversion restrictions under current accounts. In December 1996, China announced accepting Article 8 of the Agreement of the International Monetary Fund, making the RMB convertible under current accounts. Nowadays, foreign-invested enterprises can pay for foreign exchange required by the purchase of raw materials and parts or the payment of salary, dividends and bonuses through bank foreign exchange purchasing or from their foreign exchange accounts. Therefore, conditions have become ripe to delete regulations under the said two laws on requiring Chinese-foreign contractual joint ventures and enterprises with foreign capital to “manage to balance their own foreign exchange receipts and payments”. Moreover, the original regulations did not comply with WTO rules. Article 2 of the *Agreement on Trade-Related Investment Measures* and Annex 2 Item 2 of the *Illustrative List* annexed thereto explicitly stipulate that no Member shall restrict enterprise importing by requiring foreign exchange balance. During the negotiations for the accession to the WTO, Chinese government had committed to cancel all measures inconsistent with the *Agreement on Trade-Related Investment Measures* after accession, including requiring enterprises

to balance the foreign exchange used for importing purpose and their foreign exchange receipts and to meet specific exporting goals so as to balance foreign exchange receipts and payments. As such, deleting the said regulations under the two laws was also meeting the requirement of the accession to the WTO.

II. Regarding firstly purchasing in China. In the Draft, Article 9.2 of the Law on Chinese-Foreign Equity Joint Ventures, “Raw materials, fuels and parts and components required by joint ventures should be firstly purchased in China, or be purchased directly from the world market with foreign exchange prepared by the joint ventures”, was amended as follows: “Within the scope of the operations approved, joint ventures may purchase, either in China or from the world market, raw materials, fuels and other materials they need.” In the Draft, “when these materials are available from both sources on similar terms, first priority should be given to purchases in China” was deleted from Article 15 of the Law on Foreign-Capital Enterprises, i.e. “Within the scope of the operations approved, enterprises with foreign capital may purchase, either in China or from the world market, raw materials, fuels and other materials they need. When these materials are available from both sources on similar terms, first priority should be given to purchases in China.” And this Article was amended as follows: “Within the scope of the operations approved, enterprises with foreign capital may purchase, either in China or from the world market, raw materials, fuels and other materials they need.” Such amendments were out of the following main considerations: The two laws requiring Chinese-foreign equity joint ventures and enterprises with foreign capital to firstly purchase in the Chinese market were made based on the then situation. Such requirement was out of the need to balance foreign exchange receipts and payments of foreign-invested enterprises and helped to promote development of relevant domestic industries. Under socialist market economy conditions, how an enterprise purchases should be autonomously decided by the enterprise based on market conditions and the government had better not intervene. Just like other types of domestic enterprises, foreign-invested enterprises shall have the autonomous right to purchases. The two laws requiring Chinese-foreign equity joint ventures and enterprises with foreign capital to firstly purchase in the Chinese market did not comply with WTO rules either. According to Article 2 of the WTO’s *Agreement on Trade-Related Investment Measures* and Item 1 of the *Illustrative List* annexed thereto, no Member shall restrict in any form the purchase or use by an enterprise of products of domestic origin or from any domestic source. Chinese government had committed to cancel “requirements on local contents” during the negotiations for the accession to the WTO. Therefore, it was necessary to amend regulations requiring

Chinese-foreign equity joint ventures and enterprises with foreign capital to firstly purchase in the Chinese market under the two laws.

III. Regarding the exporting obligation. In the Draft, Article 3.1 of the Law on Foreign-Capital Enterprises, i.e. “Enterprises with foreign capital shall be established in such a manner as to help the development of China’s national economy; they shall use advanced technology and equipment or market all or most of their products outside China” was amended as follows: “Enterprises with foreign capital shall be established in such a manner as to help the development of China’s national economy. China encourages establishing enterprises with foreign capital which export products or boast advanced technologies.” Such amendments were out of the following main considerations: The above regulations were made under the Law on Foreign-Capital Enterprises back then for the purpose of urging enterprises with foreign capital to maintain a balance between foreign exchange receipts and payments and of meeting the needs of export-oriented economic development. It now appears that it is advisable to encourage enterprises with foreign capital to export as many products as possible, but it doesn’t comply with the market economy principle requiring them to export all or most of their products. Under socialist market economy conditions, whether an enterprise sells its products at home or abroad should be autonomously decided by the enterprise based on domestic and international market conditions and the government had better not intervene. Just like other types of domestic enterprises, foreign-invested enterprises shall have the autonomous right to product sale. The regulation on enterprises with foreign capital having to export all or most products under the Law on Foreign-Capital Enterprises belongs to the “export performance requirement” forbidden by WTO rules. Article 2 of the WTO’s *Agreement on Trade-Related Investment Measures* and Item 2 of the *Illustrative List* annexed thereto explicitly stipulate that no Member shall restrict an enterprise’s product export quantity, value or share. During the negotiations for the accession to the WTO, Chinese government had committed to cancel the “export performance requirement”. Therefore, it was necessary to amend the regulation on enterprises’ exporting obligation under the Law on Foreign-Capital Enterprises to China encouraging export.”