Implementing China’s WTO Transparency Obligations: An Inside View*

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In acceding to the World Trade Organization (WTO), the Chinese government made sweeping and controversial commitments in market access and trade liberalization across a range of economic sectors. These concessions have generated a burgeoning literature that examines the economic impact of China’s WTO entry. While these economic changes are ground-breaking, the most immediate and striking commitments are actually in economic governance and the application of the rule of law in China’s economy. In accepting the WTO’s transparency obligations, the Chinese government has promised a great degree of openness and predictability in how it makes and implements laws, regulations and other measures relating to trade and foreign exchange. It has promised to release all trade-related laws and regulations for public comment before taking effect, and to listen to comments from interested stakeholders. The implicit understanding is that the public’s comments will be integrated into the final legislation, regulation or rule. The WTO transparency obligations requiring publication of information and public comment enshrine the “right to information” and “right to comment” into a Chinese governance system that has passed laws and regulations from the top-down into the modern period.

Two main bodies of literature discuss China’s WTO “transparency problem”. The first focuses on China’s actual record in meeting its WTO transparency obligations. The United States Trade Representative (USTR) publishes a yearly WTO compliance evaluation report for China specifically. This Report sets the terrain for international debate on China’s compliance. In addition, a growing list of academic and non-governmental publications has surfaced since China’s accession, which also examines China’s compliance record. A second stream, mainly involving legal scholars, discusses China’s WTO transparency problem in relation to the ongoing reform of the Chinese legal system as a whole. This literature examines the conflicts between the liberal

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1 For example see: Peter Drysdale and Ligang Song (eds.), China’s Entry to the WTO: Strategic Issues and Quantitative Assessments (London: Routledge, 2000); Ross Garnaut and Ligang Song (eds.), China 2020: WTO Entry and World Recession (Canberra: Asia Pacific Press, 2002).
2 The most recent “Report on China’s WTO Compliance” was published on 14 December 2004. In addition to the USTR, the United States government also devotes the combined resources of the Departments of State, Commerce, and Agriculture to monitoring China’s WTO compliance performance.
4 For example, see: Sylvia Ostry, Alan S. Alexandroff, and Rafael Gomez (eds.), China and the Long March to Global Trade: The Accession of China to the World Trade Organization (New York: Routledge,
norms of the western civil and common law traditions which underpin the global trade regime and existing Chinese legal and administrative frameworks. Much of this literature predated China’s formal accession to the WTO, and was written without full knowledge of the final terms of China’s WTO entry. Neither of the above literatures give sufficient attention to the practical and operational challenges that China faces in meeting its transparency obligations.

Why should one care about these concrete political institutional reform and organizational change issues? This paper argues that China’s capacity to orchestrate the required political and administrative reforms is the key dependent variable conditioning its performance in meeting WTO obligations. This paper examines the inside perspective of Chinese government officials and the actual reform program in implementing China’s WTO transparency obligations to gain a more empirically grounded understanding of the prospects for WTO compliance. The goal is to accurately describe the practical implications of China’s WTO transparency obligations; and the process of institutional and organizational transformation entailed in moving toward ever greater compliance. The aim at this stage is not to provide a distanced perspective but to summarize Chinese government perspectives and experiences to date. This is understood as the first step in progressing to a more ‘objective’ perspective. It also provides a baseline for gauging future performance.

Transparency: Conceptualizing the Problem
Most evaluations, including those of the USTR, have given China a generally passing grade for its progress to date in the official publication of trade related documentation, in providing appropriate “notification” on changes in trade rules and in responding to trade inquiries. Most observers believe that China will continue to make the necessary

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7 “Report on China’s WTO Compliance”, (Office of the United States Trade Representative, 2004), p.81. One exception is She Duanzhi, who argues that China has still not published all of the documentation that it should according to a strict interpretation of its WTO obligations. See: She Duanzhi, “Transparency: Miles to Go”, in China Economic Quarterly, Q3, 2004, p.31-35.
progress in these transparency requirements. However, the general consensus ‘outside’\(^8\) is that the major weakness in China’s transparency performance is in allowing for public comment on laws, regulations, policy and other measures relating to trade and foreign exchange.

The scale of this particular transparency challenge for China was broadly recognized prior to China’s accession. For example, Ostry noted that China faced “formidable challenges” in raising the transparency of its trade regime to WTO standards.\(^9\) Under the WTO, the term “transparency” has taken on a vastly expanded yet more precise meaning, requiring “publication of laws, regulations, and the mode of administration in tradable services or, to a more limited extent, investment regimes.”\(^10\) But China’s central limitation, according to Ostry was that “while consultation does take place during legislative drafting (sometimes even with foreigners), virtually no consultation occurs while drafting implementing regulations, especially at the lower levels.”\(^11\) Others have stressed that China’s realization of the WTO transparency requirements is inhibited by a cultural tradition of non-transparency that dates back over the millennia where only the imperial ruling elite was aware of legal prescriptions, most of which were criminal, and where citizens only found out about the law when they ended up on the wrong side of it.\(^12\)

The USTR “Report on China’s WTO Compliance” (2004) highlighted what it calls “systemic opacity” and stressed that China’s ministries and agencies “still had a poor record of providing an opportunity for public comment before new or modified laws and regulations are implemented; that only a small proportion of new or revised laws and regulations were issued after a period for public comment, and even in those cases the amount of time provided for public comment was generally too short”.\(^13\) The Report further notes that, even though the State Council had issued regulations in December 2001 for the procedures for formulating administrative rules and regulations that expressly allow for public comment, it still took two years (2002-2004) before some Chinese government ministries and agencies started providing opportunity for public comment on draft laws and regulations.\(^14\)

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8 The term ‘outside’ refers to both domestic Chinese and foreign commentators, who are not Chinese officials or official spokespeople on WTO affairs.
10 Ostry notes that the new transparency features of the WTO include: an extension of coverage (to include goods, services, TRIPs and foreign exchange controls); publication of laws and regulations before implementation with “right of comment” (a consultation phase); enforcement of only those laws and regulations that are published; and creation of a single inquiry point with a time limit for response; and that countries must provide notification of all regulations and administrative arrangements to the Council for TRIPs. (S. Ostry, “China and the WTO”, 1998, pp.11, 12.)
14 The frustration of US business chronicled in the USTR Report is reflected in a July-August 2003 survey by the US-China Business Council in which its member companies ranked “transparency” as the second most important WTO implementation issue for China (not surprisingly, protection of intellectual property
How have academic and non-official researchers rated China’s performance? Drawing on a survey by *China Economic Quarterly* (2004), Tom Miller states that China has a “middling” overall performance on its transparency compliance record after three-years WTO membership; that there is “no system for foreign-company comment on draft laws and regulations”; that “on the whole the drafting process remains closed to foreign (though not domestic) companies; and the public comment period for most rules remains far too short”.\(^{15}\) She Duanzhi argues that important guidelines and policies enunciated by senior officials in internal meetings are not made public, and that “public comment on drafts laws and regulations is still very limited”.\(^ {16}\) This author adds that the “basic problem is that to improve transparency, China must dismantle a millennia-old tradition of government secrecy, and uproot a deeply held belief that citizens have no right to hold the government accountable for its actions.” While it is obvious that China must dismantle and uproot traditional systems in order to meet the new transparency obligation, what is missing in She’s analysis is any examination of whether and how new institutions, organizations and procedures are simultaneously being built – efforts in re-regulation rather than mere deregulation.

Insufficient attention has been given to the historical contextual factors that inhibit Chinese performance. One of the exceptions is Kim’s discussion of five constraints on China’s efforts to build a “more transparent, rule-based economy”: (1) leadership constraints; (2) constraints related to systematic inertia; (3) behavioural constraints; (4) social adjustment costs; and (5) cultural constraints.\(^ {17}\) But what is missing in Kim’s article is analysis of the steps being taken to overcome the systemic constraints. Such analysis would be grounded in primary research, such as key case studies with participant observers, including interviews with key Chinese actors in this particular reform process.

More attention needs to be given to historical institutional and organizational legacies, particularly the sources or origins of these inhibiting factors, and the reform measures needed to overcome these constraints. A more balanced perspective would also ask: what measures have been taken to date to implement the WTO transparency obligations; what results have been achieved; what new barriers have emerged in the course of implementation? This paper argues, in part, that while the measurement of WTO compliance is important, China’s actual capacity to comply is, in practical terms, preconditioned by more fundamental issues of institutional, organizational and operational reform. Yet it is these practical and operational considerations in China’s WTO implementation that have received scant attention heretofore.

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\(^{15}\) Tom Miller, “WTO after Three Years: Has it Worked?”, *China Economic Quarterly*, Autumn 2004, p.22. (emphasis added)

\(^{16}\) She Duanzhi, “Transparency: Miles to Go”, in *China Economic Quarterly*, Q3, 2004, p.34.

Obligations and Priorities: The Chinese View

Prior to formal WTO accession, China had no formal legal obligation to ensure opportunity for public comment on new or modified laws and regulations prior to implementation. The Chinese government’s notification and public comment practices were not standardized (*bu biaozhunhua*).\(^{18}\)

Although legal specialists are correct in noting that Chinese law only currently permits public consultation (in certain areas) and does not require consultation\(^{19}\), Chinese WTO affairs officials stress that strengthening government transparency is a key priority of the Chinese government and has been emphasized in the media, government work plans, new legislation promulgated by the National People’s Congress, and speeches outlining the priorities of senior Party leaders.\(^{20}\) MOFCOM officials describe China’s WTO membership as an “external force which is reinforcing an internal reform need for China.” Trade officials note that China’s leaders recognize that improvement in administrative and legislative transparency serves to strengthen the public’s faith in the government. Thus enhancing transparency is now seen as integral to China’s ongoing political reforms process, and not merely a technical issue related to WTO accession.

Representatives of the State Council’s Legislative Affairs Office (LAO) emphasize that the domestic governance reforms entailed in meeting China’s WTO transparency obligations are not contrary to China’s own reform orientation but rather reinforce the basic aim of the Chinese government to build a “more modern and democratic socialist society with Chinese characteristics”.\(^{21}\) These statements from LAO spokespeople are significant because this Office was responsible for reviewing and adjusting China’s entire legal framework for WTO compliance and is the legal advisory body to the Chinese Premier and the State Council. Moreover, as the final author of all regulations from the central government, the LAO was responsible for revising all economic regulations to ensure their conformity with WTO norms.

The Chinese government’s overall strategy for meeting the country’s new WTO transparency obligations, including public comment, is not to promote reforms aimed at creating a particular “legal system or mechanism” (*fading xitong huozhi jizhi*) (read: western civil or common law systems). MOFCOM officials stress, “the aim is not for China to simply adopt, for example, the American legal framework, or just accept parts of the US legal system such as the American Administrative Procedural Law”. Rather the goal is to foster a “working system” or “working mechanism” (*gongzuo xitong, gongzuo jizhi*) and “working style” and “practices” for government legislative procedure and administration that are recognized as WTO-compliant.\(^{22}\)

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\(^{18}\) Interview, MOFCOM 3, May 2005.


\(^{20}\) Discussion, MOFCOM 2, April 2005.

\(^{21}\) Discussion, LAO 1, January 2002.

\(^{22}\) Interview, MOFCOM 3, May 2005.
To this effect, the Chinese government has put concerted effort into creating a legal framework that is consistent with WTO norms at all levels of the Chinese state. Whereas foreign analysts have focused on the need to regularize and standardize public comment procedures when discussing key next steps for strengthening WTO transparency compliance in China, Chinese officials have instead focused on legislative redrafting aimed at strengthening administrative predictability and the simplification, regularization and standardization of administrative procedure. When asked to identify the key measures that China has taken to meet its WTO transparency obligations, Chinese WTO officials start by listing a series of legislative advances such as the promulgation of the Legislative Law and the Administrative Permission Law in 2002 and August 2003 respectively. They furthermore note that the State Council LAO has redrafted regulations to ensure that policy implementation follows clearly outlined administrative procedures such as the Regulation on Procedure for the Formulation of Administrative Regulations and the Regulation on Submission of Regulations and Rules for the Record. These new regulations aim to clarify and standardize the administrative behaviour of line-ministries.

When asked to address the public comment obligation specifically, a senior Chinese WTO official stated that Chinese authorities are aware that foreign businesses want to be more fully involved in all phases of drafting or re-drafting laws, regulations and other measures that they may impact their operations. That it is understandable when foreign businesspeople complain that they are only consulted at the final stages of re-drafting, and not in the initial stages. Chinese officials emphasize, however, that it important to be clear on “exactly what China is legally committed to do in its WTO accession agreements, versus what is requested or preferred by foreign stakeholders”. For example, there is room for interpretation on what is a “reasonable period” and “minimum time frames” for public comment.

MOFCOM WTO Affairs officials acknowledge that “China needs to make improvements in providing drafts of the proposed laws and regulations, and then listening to the public’s comments”. However, they also note that, with respect to public comment, there is need for interpretation of what is meant by “public comment”; and figure out the fine line between “informing the public” and “consulting the public”. Chinese trade bureaucrats furthermore believe that there is room for interpretation on the scope of inclusiveness in WTO-compliant public consultation. They ask rhetorically, “is it necessary for the entire nation to be involved in a particular set of consultations”? Arguing instead that what is required are public hearings and forums in which proper notification has been given, Chinese officials note that the United States government, in contrast, “pushes China for all encompassing public consultations”. Chinese insiders note that it would be extremely costly to arrange “totally comprehensive” public consultations in China due to the country’s enormous population, the broad range of interest groups on all issues, and

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23 Discussion, MOFCOM 1, September 2005.
24 Discussion, MOFCOM 1, September 2005. (emphasis in original statement)
25 The Chinese government committed to “minimum time frames” for allowing public comment on proposed technical regulations, standards and conformity assessment procedures as set out in the Technical Barriers to Trade Agreement in response to pressure from the WTO’s Working Party for China Accession.
26 Interview, MOFCOM 3, May 2005.
27 Interview, MOFCOM 4, May 2005.
major regional variations. Yet it would be left to the Chinese government to shoulder the financial burden for carrying out such consultations. The goal instead for China’s trade bureaucrats is to find a balance between procedural efficiency and allowing for “adequate” representation of the range of stakeholders on a particular issue.

Inside Realities

The WTO’s public comment requirement has meant that the Chinese government needs to establish what for China are historically unprecedented mechanisms and procedures for public consultation. There is debate over whether these procedures need to be, or can be, standardized but all agree that much more is required than what has existed to date.28

The basic predicament for China in meeting this WTO requirement is summed up in a statement from a senior official from one of China’s “WTO compliance agencies”29, the State Administration for Quality Supervision, Inspection and Quarantine (AQSIQ):

Getting the [Chinese] government to work in accordance with the principles, norms and standards of the WTO is a major challenge for the whole government. We need to operate according to WTO rules, and amend our laws and regulations. AQSIQ officials have needed to go abroad, to closely study the application of international standards and WTO rules, and learn from foreign experiences. WTO harmonization, or bringing China’s policies, rules and regulations in line with the WTO is a very difficult challenge for Chinese officials, and it is a long term issue… if we make changes to our regulations or rules, we need to put these proposals out for public comment. Before entering the WTO, we operated on an “if necessary” basis. After accession, we must put all changes out for public comment, just like the other foreign countries that are members of the WTO. This also means that the State Council’s Legislative Affairs Office must understand the WTO’s principles, and help build the necessary public consultation process.30

LAO officials see the main challenges in setting up new public comment/consultation mechanisms as follows:

With China’s WTO accession, the LAO, as a law-making institution, now faces very detailed law-making procedural requirements such as the use of public consultation processes, including public hearings, symposiums, etc. The question for the LAO is, “what kind of hearings; what type of acts require hearings and which do not; and what kind of acts only must be published”? We need to learn from the more experienced WTO members on these issues.31

The LAO has been very cautious in establishing new public comment mechanisms and procedures, and this is understandable if one considers the potential risks to China’s governance system and to the global trade regime more broadly, if the reform of the highly synchronized Chinese decision-making system is carried out in a rash manner.

28 Discussion, MOFCOM 5, May 2005.
30 Interview, AQSIQ 1, April 2004.
31 Interview, LAO 1, January 2002.
Systemic coherence considerations are balanced against reform objectives. The LAO sees itself as entrusted with being:

…a good advisor to the Prime Minister, safeguarding and maintaining the unity and coherence of the nation’s legal system, even as it takes a lead role in promoting the deepening of the reform of the legal system, by reviewing, clarifying and correcting laws which are not WTO-consistent, and coordinating with other Chinese government organs to review and properly amend the trade-related rules and regulations that are administered by all of these units.  

The same official goes on to say that:

WTO standards and regulations can only be implemented and enforced through China’s own domestic legal system and laws. Therefore it is our responsibility to protect the integrity and coherence of China’s legal system amid all the changes, even as we promote the WTO-related changes in the country’s legal system.

A MOFCOM insider notes that:

LAO officials are aware of the significance of their responsibilities in legislative and regulatory (re-)drafting, and the potential impact on people’s livelihood. They take their transparency commitments seriously, as seen in their handling of the consultations for the Anti-Monopoly Law, the Telecommunications Law, the Company Law, and the Securities Law. Public hearings were set up for drafting these laws and proper notification was given.

One procedural advance in terms of WTO transparency – an example of domestic Chinese institutional innovation – is the LAO’s efforts to establish an annual legislative drafting plan. The LAO’s intention is to publish the plan at the beginning of each year, which will notify interested parties of the exact time-period when public hearings are scheduled for a particular legislative item. Line-ministries that intend to (re)draft legislation in their sector during the calendar-year are asked to notify the LAO, which then compiles all of the cases into the annual legislative plan. The LAO followed this procedure, for example, in handling re-drafting of anti-dumping legislation with MOFCOM as the lead line-ministry. Such procedural innovation raises the level of transparency in China’s economic governance, by making it easier for stakeholders to stay informed on the timing of public hearings in their areas of interest, and participate in the decision-making process. It helps foster standardization and regularization of channels for public participation in the decision-making structure.

Case Studies

32 The senior official further noted that from 1979 to 2001/02, the Chinese government had passed over 400 new laws, had passed over 900 new administrative regulations, and enacted a multitude of other policy measures, many of which related to trade affairs.

33 Interview, MOFCOM 3, August 2005.

34 A MOFCOM deputy director for WTO Affairs noted that there are inherent limits to efforts to standardize the LAO’s public hearing and comment procedure in that the process needs to be adjusted for each circumstance and sectoral differences such as the number of interests groups related to a particular legislative issue.
The 2004 USTR Report states that there had been “no notable progress” in 2003 in the consultation practices of many of China’s ministries and agencies in drafting a new or revised law or regulation.\(^{35}\) Is this accurate?

Field research shows that beyond the Ministry of Commerce, in 2003, various Chinese line-ministries initiated public consultation in (re)drafting laws and regulations for their sectors of responsibility. In many of these cases, opportunities for public comment have been well publicized, and opportunities for commenting were provided even in the early stages of drafting. MOFCOM WTO Affairs officials highlight, for example, that the People’s Bank of China (PBOC) released a draft of the *Rules for Administration of Automobile Financing Institutions* for public comment on 8 October 2002.\(^{36}\) The PBOC gave public notice that the comments were due by 31 October 2002; established channels for receiving public comments on these draft Rules (email and facsimile); and identified a focal point for coordinating the feedback, specifically the PBOC’s Department of Non-Bank Financial Institution Supervision.\(^{37}\)

The release of this Draft had followed public statements made in the PBOC’s Announcement Concerning Several Issues Related to Market Access for Foreign-Invested Financial Institutions, issued on 9 December 2001. In this Announcement, the PBOC indicated that further details about automobile financing companies would be provided in implementing regulations and administrative measures that would follow. China issued automotive financing regulations in October 2003, and then issued the implementing regulations in November 2003, to open the sector to foreign financial institutions. One of the marked differences between the final regulations and the initial drafts was that the minimum capital requirements were reduced.\(^{38}\) In August 2004, the PBOC and the China Banking Regulatory Commission jointly issued the *Rules for Administration of Automobile Financing*, which became effective immediately.\(^{39}\) What the above indicates is that Chinese authorities gave foreign stakeholders opportunity to comment on the draft Rules starting in the early stages of the drafting process, and that some of the comments were reflected in the final version. These consultations included high level participation from the financing arms of the foreign automotive companies.

Another critical case study has been the Ministry of Agriculture’s (MOA) draft *Regulations for the Fertilizer Industry*. This case is particularly noteworthy because prior to China’s WTO accession, scholars had identified the MOA as one of the more conservative economic ministries, which had resisted further liberalization and

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\(^{36}\) Interview, MOFCOM 1, May 2005.

\(^{37}\) All public correspondence was directed to the PBOC Department for Non-Bank Financial Institution Supervision at a specific facsimile number or email address. See: Baker and McKenzie, “People’s Bank of China Issues Draft Automobile Financing Rules”, (online, October 2002).

\(^{38}\) The finalized minimum registered capital is RMB 300 million (approximately US$36 million) and minimum paid-in capital at RMB 500 million (US$60 million).

\(^{39}\) These Rules set forth administrative requirements and risk management rules for e-auto loans in China and allowed the licensed companies to actually begin operations.
internationalization of agricultural markets, and opposed China’s WTO entry. However, the perception of impending threat entailed in China’s WTO accession induced a cognitive shift in the thinking of many MOA officials and in the ministry’s organizational culture more broadly. In particular, since China’s formal accession to the global trade regime, MOA officials have come to acknowledge that “it is both necessary and beneficial to set up public comment channels and mechanisms now that China is a WTO member”.

In September 2003, the MOA’s Department of Policy and Law held public consultations to solicit comments on its initial draft of the “Framework of Regulations on Fertilizer Management” from other Chinese government departments and representatives from foreign governments, select domestic and foreign companies, and foreign consulting companies. The consultation session, organized by the department’s Fertilizer Management and Policy Study Group, ended with technical presentations and comments from foreign specialists on public consultation strategy for managing the acceptance of new regulations and policy by industry, farmers and government officials. The MOA has followed up these initial consultations by distributing the re-drafts of the regulations to major domestic and foreign stakeholders, including Cargill and Campotex, for further comment and revision. This has been done, in conformity with WTO obligations, to ensure that the views of influential foreign stakeholders are taken into consideration in finalizing the proposed regulations.

The real challenge for Chinese trade bureaucrats is to ensure that such consultations are not merely pro forma but actually feed into regulatory and legislative redrafting. For example, MOFCOM WTO affairs officials note that public consultations were carried out for the drafting of the Postal Service Law, however the comments were not properly integrated into the redrafting and thus were not reflected in the final piece of legislation.

Since the beginning of 2004, concerted efforts have been made to ensure that China’s Commerce Ministry, as the main agency responsible for ensuring the country’s successful WTO implementation, has complied even more fully with the WTO transparency commitments, and intensified its efforts to promote such behaviour to other line-

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42 Interview, MOA 1, April 2004.

43 These consultations took place at the “Workshop on Fertilizer Policy and Regulation in China”, held at the Asia Hotel in Beijing, September 4-5, 2003. The intra-governmental reach of these consultations can be seen in the list of participants at the consultation session which included representatives from the Office of the Leading Group for Financial and Economic Affairs, the National People’s Congress (Standing Committee on Agricultural Affairs), State Council’s LAO (Agriculture and Forestry Department), the National Development Reform Commission (Industrial Research Institute), the Ministry of Commerce, various research institutes under the China Academy of Agricultural Sciences, and from the Chinese media (Economic Daily, Agriculture Department).

44 Interview, MOA 2, May 2004.

45 Discussion, MOFCOM 6, January 2004.
ministries and State Council agencies. MOFCOM aims to gradually expand and deepen WTO-compliant behaviour ‘externally’ vis-à-vis other Chinese departments by promoting adherence to the new procedural rules set out in the Provisional Regulations on Administrative Transparency, issued in November 2003. ‘Internally’, MOFCOM issued an internal circular (wenjian) in 2005 that instructs all commerce officials to adhere strictly to the proper administrative transparency guidelines in the provisional regulations. MOFCOM officials have also received instruction from their senior management to foster more consultative approaches in their administrative work. They note that Commerce Minister Bo Xilai has placed “great emphasis on improving transparency”, and that the commerce ministry intends to publish all if its own internal (neibu) administrative rules and guidelines for public information and comment.

Looking Forward
Chinese WTO Affairs officials acknowledge that MOFCOM is perceived as being the most advanced bureaucratic organ in terms of meeting transparency requirements but they stress that other state agencies are “working hard to improve their practices to meet the WTO’s transparency requirements”. Trade officials express the belief that, “in the coming years, the overall level of understanding and appreciation for the WTO’s transparency requirements will increase in China and across the Chinese government”; and that “this is an important precondition for ensuring China’s compliance with the WTO’s transparency standards”. They further suggest that pressures from other areas in China’s current development context reinforce the trend toward greater transparency, noting that “the transparency issue is becoming particularly salient for managing China’s growing environment challenges”. As such, “transparency has become a key concept in the Chinese system of governance and the current stage of reform; and that the Chinese public is becoming more and more aware of the issue now too”.

MOFCOM officials are cautiously optimistic in assessing China’s progress on public consultation across the state as a whole, noting that:

We need to consult better with the public and industry while the laws are still being drafted. We need to learn how to better communicate with business circles and citizens; to include their views into our decision- and law-making. And then in some cases, such as the Postal Service Law, the business community provided significant input during the consultation process, but due to weak internal communications, these inputs were not properly built into the actual drafting of the law. We also need better communication from government to the business community, so that industry will better accept the new laws. We need to have public consultation and public hearings, from the beginning of drafting. We need to put the promulgations up for comment. If there are any problems, they can be brought up to MOFCOM.

Chinese WTO Affairs officials acknowledge that the commerce ministry and the Chinese government as a whole need to further develop the “communications” and “coordination skills” of its young officer corps working on trade affairs. A senior MOFCOM WTO Affairs official notes that:

46 Interview, MOFCOM 3, May 2005.
47 Interview, MOFCOM 2, May 2005.
48 Interview, MOFCOM 3, May 2005.
49 Discussion, MOFCOM 1, October 2004.
Many of our younger officers are newly arrived to government and have never worked in the private sector. We hope that through international exposure and intensive training, they will learn how to communicate better with key people. We need to develop their skills to conduct consultation with business representatives and the public.\(^{50}\)

The Chinese government appears most willing to engage in public discussion on how to bring its trade policy consultation process into conformity with international standards, and somewhat hesitant to open its nascent legislative and regulatory consultation mechanisms to public scrutiny. While this may appear to hinder transparency in Chinese legislative and regulatory decision-making the scenario may not be as gloomy if one considers the *de facto* relationship between policy making and law making in China: that the Chinese Communist Party (CCP) directs the policy process in China, and that policy innovation is the usual precursor to legal innovation. As Bledsoe and Prosterman explain,

In China... policies reflect the goals and intent of the government and serve as the foundation for laws. In contrast to most market economies, however, policies in China are often written and carry significant authoritative weight without a corresponding implementing law. CCP policies are the foundation of Chinese law. The CCP initiates political, economic, and social change in China through issue of policy directives.\(^{51}\)

Moreover, “sometimes existing laws are ignored, shunted aside, or bent when new policies conflict with the existing laws”. In such a context, it may therefore be most effective to promote standardized and regularized public commenting in the policy making process as the trigger for promoting legislative and regulatory change, and systemic transparency more broadly.

MOFCOM has led the experimentation in trade policy consultation, but MOFCOM WTO officials are making sure to expose officials from other economic ministries to training opportunities. Various approaches to public consultation in addition to public hearings are under examination including focus groups for specific policy issue-areas. Consideration is also being given to different techniques for identifying discrete groups of social actors that should be involved in a particular consultation process, and different techniques for fostering new consultation relations and mechanisms with these groupings. Currently, Chinese trade bureaucrats envision public consultation as mainly confined to discussions with business and enterprise representatives, academic experts, and researchers that are recognized by government as experts in their field. MOFCOM’s WTO Affairs Department has been examining different options for organizing China’s vast pool of experts across different sectors as consultation networks for the Chinese government, stretching from consultations on drafting legislative, regulatory and policy to internal Chinese government preparations in advance of trade negotiations.

For senior Chinese trade officials, the key priorities with regards to strengthening public consultations are to ask: “how to organize government, plus industry, plus academic

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\(^{50}\) Discussion, MOFCOM 1, October 2004.

experts into a ‘consultation community’ where the capacity of the group as a whole can be marshaled, and where their interests can be heard by government decision-makers”. MOFCOM WTO Affairs officials are particularly interested in strategies for how to hold consultation discussions, how to encourage and lead debate, and then reach consensus; how to link the various groups together, and how finally how the government brings the diverse interests together to achieve a consensus”.

**Conclusion**

Whereas China’s performance on its publication, notification and trade inquiry-related obligations are easier to measure and evaluate, performance in the area of public comment is more complicated to gauge, especially in a qualitative sense. What the above points suggest is that, although there is still much room for improvement both in the quality and amount of transparency in China’s trade regime, the Chinese government has been taking steps toward improving transparency and a more rule-based economic governance system. This is so even in the dimensions of transparency where it has made the least progress, specifically in providing adequate opportunity for public comment before a rule takes effect.

This paper has examined particular reform measures which are the practical manifestation of the WTO’s transparency obligations. We have seen that the reform program goes beyond dismantling constraints to transparency to building new mechanisms and channels for public information, public comment and public participation; and that it extends beyond MOFCOM to include most economic line-ministries, and many key administrative Bureaus and legislative Offices of the State Council. While it is clear that the quality of transparency is uneven across the various WTO indicators, this paper has also shown that the statement that there is “no system for foreign-company comment” is misleading at best.

At the same time, it is important to acknowledge the limits so far in fostering WTO-compliant transparency in China’s economic governance system. In terms of quantitative performance indicators, there are still numerous cases in which the Chinese government has not allowed opportunity for public comment before a trade-related rule has taken effect. In terms of qualitative indicators, as discussed above, major foreign multinational corporations continue to question the degree to which their feedback is actually integrated into the re-drafting, and whether their views are ultimately reflected in the final piece of legislation, regulation, policy or rule. The question for the major business interests is whether the public consultation exercises are merely *pro forma*.

In the next phase of transparency reform, it will also be important for MOFCOM, together with the LAO and the NPC to establish a new set of procedural understandings on, for example, what types of acts require public hearings, versus those where a public debate will suffice; and cases where it is only necessary to inform the public versus those in which it is essential that the opinions of the public must be solicited and an adequate response be given. Of equal importance will be turning these understandings into

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52 Interviews with China Office representatives of multinational corporations in the fertilizer industry: Beijing, February and March 2005.
standardized practice. Another key task for MOFCOM, the LAO, and the NPC will be ensuring that public comments do feed into the drafting loop. It is their challenge to clearly demonstrate to interested stakeholders, both foreign and domestic, that consultations do have an impact on Chinese decision-making. In addition to improved consultation methods, this will depend on better coordination of information flows inside the governance system as well as in the government’s public communications exercises.

While skeptics continue to stress the limits of the reforms to date, other observations highlight the practical and operational adjustments that have been undertaken, and are ongoing, to meet China’s WTO transparency obligations. The trade-related public comment procedures that are being fostered inside the Chinese governance system take the overall transparency drive to a much more demanding level. This consultation must now involve ‘foreign’ stakeholders as direct participants. This extension of the scope of participation introduces a degree of external unpredictability into the proceedings. Chinese trade officials are now devising new procedures and channels for managing this engagement. Regardless of how one sees China’s progress so far in implementing its WTO transparency commitments, the obligation to not only allow for but require public consultation and participation in drafting the rules that govern trade and related economic exchanges, the promise to notify the general public, and provide reasonable opportunity to affected parties for public comment before new or modified laws and regulations are implemented, marks a new tone in economic governance for the country.