10 Commitments China made when it joined the WTO and has not respected

When China acceded to the WTO in 2001 it made a series of commitments to change its national rules on a wide variety of issues. These commitments were part of the agreement that allowed China to become a member of the WTO.

China has still not yet complied with quite a number of its Protocol commitments. In this note we highlight 10 of those commitments which are fundamental to the functioning of a market economy and have not been respected.

All the provisions of the Protocol were drafted with the the object of facilitating China's accession to the WTO in anticipation of it becoming a market economy.

Commitment No 1: Prices in every sector must be determined by market forces

Section 9 of China's WTO Protocol of Accession provides that China *shall allow prices for traded goods and services in every sector to be determined by market forces, and multi-tier pricing practices for such goods and services shall be eliminated.*

Exceptions to this requirement are quite limited and are set out in Annex 4 of the Protocol. The products covered in Annex 4 are certain agricultural products, certain pharmaceuticals, natural gas and processed oils.

Other than these very limited exceptions, China committed to allowing prices to be set by the market immediately in 2001. Even for the exceptions, China committed to "make best efforts to reduce and eliminate" them.

As China has not allowed a true competitive market to develop for many products, and indeed government intervention and influence continues in 2015 to pervade key sectors of the Chinese economy, many key prices are not being determined by market forces.

Commitment No 2: All subsidies to be notified to the WTO and prohibited subsidies to be eliminated

- Under Section 15 of its WTO Accession Protocol, China agreed to notify to the WTO any subsidy within the meaning of Article 1 of the SCM Agreement, granted or maintained in its territory, organised by specific product, including those subsidies defined in Article 3 of the SCM Agreement. The information provided was to be as specific as possible, following the requirements of the questionnaire on subsidies.

- China also committed itself to eliminate all subsidy programmes falling within the scope of Article 3 of the SCM Agreement upon accession.[1]

These obligations have not been respected. Subsidies are not publicised despite China's commitment to report its subsidies to the WTO (as required of all WTO Members). There is grossly inadequate notification of subsidies provided by central and sub-central governments.[2]

Furthermore, China continues to provide prohibited export subsidies and subsidies favouring the use of local products to its domestic industries.[3]

China also committed to make available to WTO Members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange before such measures are implemented or enforced. In emergency situations, laws, regulations and other measures are to be made available at the latest when they are implemented or enforced.

Accurate and reliable information was to be provided to individuals and enterprises *(*in relation to the legislation to be published*).* [4]

All of China trade-related laws, regulations and other measures were to be translated in one or more of the WTO languages (English, French and Spanish).

However, China has not honoured these obligations either. There is no transparency in the elaboration, promulgation and implementation of laws and regulations by legislative, judiciary and administrative bodies.[5] No body has been set up to undertake these obligatory translations.[6]

Commitment No 3: State Owned Enterprises (SOEs) to operate free of State influence

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[1] Protocol of Accession, Section 10 as well as Sections 1 and 3 of Part 1. The subsidies covered by Article 3 of the SCM Agreement include: (a) subsidies contingent upon export performance and (b) subsidies contingent upon the use of domestic over imported goods.

[2] *2014 Report to Congress on China's WTO compliance*, p. 11, 58.

[3] *Ibid.,* p.11. These subsidies include the export promotion programme which is currently subject to a WTO case brought by the US (WT/DS489/1, *China-Measures related to Demonstration Bases and Common Services Platforms Programmes),* and the income tax credit for the purchase of domestically produced equipment. Currency devaluation may be considered an export subsidy.

[4] Protocol of Accession, Part I, Section 2, paragraph C. See also Annex 5A to the Protocol for details of the programmes to be notified.

[5] *The European Business in China Position Paper 2015/2016,* p. 102.

[6] *2014 Report to Congress on China's WTO compliance,* p.13.

The Government of China agreed not to influence, directly or indirectly, commercial decisions of SOEs and State-invested enterprises. In particular, under Section 6 of its Accession Protocol, and Article XVII GATT 1994, China agreed that these enterprises would make purchase and sales involving imports or exports based solely on commercial considerations such as price, quality, marketability and availability.[7]

However, decisions of State-owned enterprises are not taken on a commercial basis. The 12th Five-year Plan illustrates the GOC control over many industries and SOEs in terms of consolidation, location, access to raw materials, overseas investments, management of capacity and production as well as the market shares for key products.[8]

Moreover, SOEs do not need to be profitable because of government intervention to keep them afloat.[9] SOEs have been directed to build up huge overcapacities without regard to profitability. This has direct consequences on world markets as those overcapacities result in a flood of dumped exports to other countries.

Commitment No 4: Non-discrimination in Procurement

Except as otherwise provided for in the Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of:

- the procurement of inputs and goods and services necessary for production and the conditions under which their goods are produced, marketed or sold, in the domestic market and for export;
- the prices and availability of goods and services supplied by national and sub-national authorities and public or state enterprises, in areas including transportation, energy, basic telecommunications, other utilities and factors of production.[10]

China also agreed to join the Government Procurement Agreement (GPA) following accession. China has not joined the GPA, nor has China made a credible offer of activities that would be covered by the GPA commitments.[11]

There is continuing discrimination against imports and foreign companies (FIEs) established in China. FIEs are discriminated in public procurement in various manners. SOEs and public

[7] *2014 Report to Congress on China's WTO compliance*, p.78, 95.

[8] *Ibid.,* p. 96, 112. See also findings of the EU Commission in anti subsidy actions against Organic Coated Steel.

[9] EZEL S., ATKINTSON R; *False promises: the yawning gap between China's WTO commitments and practices*, Information Technology & Innovation Foundation (ITF), September 2015, p.11. See also Annex 5A to the Accession Protocol.

[10] Protocol of Accession, Part I, Article 3.

[11] *False promises: the yawning gap between China's WTO commitments and practices*, p.12.

institutions bar FIEs from bidding on public contracts in certain sectors such as the railway market. Regulations exclude FIEs due to 'licensing requirements' in the constructions, engineering and design sectors. FIEs are discriminated against on the basis of the country of origin of the supplier. There is no publicity for tenders.[12]

A further example of theses measures can be seen in the Steel sector. There is discrimination against foreign equipment and technology imports in the steel sector through the Steel and Iron Industry Development Policy. It encourages the use of local content by stressing the fact that financial support for steel projects using newly developed domestic equipment is provided by the Government of China and should be favoured. The Policy also calls for the use of domestically manufactured steel-manufacturing products and domestic technologies.[13]

Commitment No 5: Non-discrimination in general

China agreed to repeal or revise all laws, regulations and other measures inconsistent with the GATT Most Favoured Nation ('MFN') and National Treatment rules. China also confirmed that it would comply with the MFN rule with regard to all WTO members.

China has adopted plans to boost innovation in high-technology sectors called the strategic emerging industries. These plans discriminate against foreign firms and their products. They also encourage excessive involvement of the GOC in the market and technology transfer.

In addition, VAT discriminates between domestic goods and imported goods.[14]

Commitment No 6: Technical Barriers to Trade (TBT)

China shall, upon accession, bring into conformity with the TBT Agreement all technical regulations, standards and conformity assessment procedures.[15]

China has not complied with the TBT Agreement leading to obstacles for foreign companies to access the local market. Certain mandatory industry standards and regulations requiring conformity assessment procedures have not been notified to the WTO while other technical regulations do not fulfill the legitimate objectives defined in the TBT Agreement. China appears to use in-country testing for a range of products which does not conform with international practice that tend to accept foreign tests result and certifications. China continues the development of unique national standards as a means to protect domestic companies from competing foreign

[12] *The European Business in China Position Paper 2015/2016,* pp. 107-108.
[13] *2014 Report to Congress on China's WTO compliance*, p.95.
[14] *2014 Report to Congress on China's WTO compliance,* pp. 46-47.
[15] Protocol of Accession, Part I, Article 13(2).

technology and standards.[16]

Commitment No 7: Intellectual Property

By accepting the TRIPS agreement, China agreed to comply with generally accepted international norms to protect and enforce IPRs held by foreign companies and individuals.[17]

IPRs are not properly registered and protected.[18] Issues in relation to trade secrets, copyright protection, software piracy, counterfeiting, uncertain and complex enforcement environment due to lack of transparency in the process, procedural obstacles to civil enforcement, local protectionism and, corruption.

Commitment No 8: Market access

China committed to the removal of trade barriers and the opening of the domestic market to foreign companies and their exports in every sector as from the first day of accession.[19]

Market Access Barriers remain. Many barriers to foreign direct investment through the prohibition or restriction to invest in certain sectors, burdensome pre-approval processes for investment (that include registering producers before importation), local content and joint-venture requirements. National treatment not being extended to Foreign Invested Enterprises ('FIEs'). A ban prohibiting the control by foreign investors of steel companies is in force since 2005.[20] Similarly, the mining sector is closed to foreign investment.[21]

Commitment No 9: Non-tariff measures

- China shall eliminate and cease to enforce trade and foreign exchange balancing requirements, local content and export or performance requirements made effective through laws, regulations or other measures.
- China shall ensure that the distribution of import licences, quotas, TRQs, or any other means of approval for importation, the right of importation or investment by national and sub-national authorities, is not conditioned on: whether competing domestic suppliers of such products exist; or performance requirements of any kind, such as local content, offsets, the transfer of technology, export performance or the conduct of R&D in China.[22]

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16 *The European Business in China Position Paper 2015/2016,* pp. 124-125; *2014 Report to Congress on China's WTO compliance*, p.55, 64.

17 *2014 Report to Congress on China's WTO compliance,* p. 96, p. 112.

18 *Ibid.*, p. 111.

19 USTR, *2014 Report to Congress on China's WTO compliance*, December 2014, p.27.

20 European Union Chamber of Commerce in China, *The European Business in China Position Paper 2015/2016,* p. 133.

21 *Ibid.,* p. 224.

22 Protocol of Accession, Part I, Article 7.3.

Foreign Invested Enterprises must transfer technology as a precondition for market access. This happens when participating in tenders through the Chinese partner requiring the FIE to transfer technology information before agreeing to form a joint-venture.[23]

Commitment No 10: Judicial review

China shall establish and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.[24]

The judicial system in China is not impartial and objective. In this regard, China has not acted in compliance with WTO commitments or China's own Regulation.[25]

Commitments in relation to specific market sectors:

a) Automotive sector:

Requirements concerning local content, technology transfer and exports will be eliminated upon accession. The right to invest will not be conditioned upon the conduct of R&D.

China industrial plans require new automobile and new plants to make substantial investments in R&D facilities in China.[26]

b) Banking sector

China committed to give national treatment to foreign banks within five years following accession. Specific commitments were also made as regards electronic payment services.

This commitment has not been implemented with regard to China-foreign joint banks and bank branches. Foreign credit card and business that issue or accept credit and debit cards face

[23] *The European Business in China Position Paper 2015/2016,* p. 118. In particular, the following sectors are affected by this practice: seed, construction and, the rail industry.

[24] Protocol of Accession, Part I, Article 2.(D).(1).

[25] Covington & Burling LLP, *Measures and practices restraining foreign investment in China*, prepared for the European Commission Directorate-General for Trade, August 2014, p.62.

[26] *False promises: the yawning gap between China's WTO commitments and practices*, pp.13-14.

restrictions.[27] A WTO case in relation to electronic payment services discrimination was brought and won by the United States.

c) Telecommunications

China has committed to open the telecommunication market to foreign producers.

The restrictions on basic telecomunications services, including the informal bans on new entry, the requirement to set up a joint-venture with a SOE and, very high capital requirements have prevented foreign suppliers from accessing the telecommunication market services.[28]

d) The film industry

China agreed to liberalise foreign film distribution and to allow a certain number of films to be imported.

After accession, foreign producers were allowed to import less than the number of films committed. This has lead to a WTO dispute won by the United States.[29]

e) Agriculture

China shall upon accession administer TRQs on bulk agricultural commodities should in a transparent manner. China also agreed to be bound by the WTO Agreement on Agriculture which sets out commitments in relation to market access, domestic support and export subsidies. China committed to a cap for trade and production-distorting subsidies that is lower than the cap permitted for developing countries.

The administration of these TRQs is impaired by lack of transparency.[30] China has increased domestic subsidies and other support measures for the local agricultural sector.[31] Sanitary and phytosanitary ('SPS') measures, not based on science as required continue to obstruct agricultural trade. Arbitrary inspection on imports constitute further obstacle. All proposed SPS measures have not been first notified to the WTO members as required by WTO law.

f) Retail industry

China maintains restraints on the retail of processed oil in breach of its WTO commitments.[32]

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27 *Ibid.,* p. 14.
28 *Ibidem.*
29 *Ibidem.*
30 *2014 Report to Congress on China's WTO compliance*, p.17.
31 *Ibid.*, pp.87-88, 91, 97.
32 *Ibid.*, p.18.

g) Legal services

In adopting measures to implement its legal services commitments, China has triggered WTO compliance issues since they impose an economic needs test and restrict the type of legal services that can be provided. The opening of offices is also characterised by lengthy delays.[33]

h) The fertilizer industry

Chinas agreed to implement a TRQ system that provides significant market access for three industrial products, including fertilizers.

That TRQ system does not work smoothly due to transparency and administrative guidance concerns. Moreover, discriminatory tax and imports measures have been introduced. US exports of fertilizers to China have declined sharply.[34]

i) Import and Export Regulations:

China accepted to implement a Trade Defence framework in line with WTO rules. China agreed to substantially reduce or eliminate the vast majority of export restrictions.

Transparency and procedural fairness requirements concerning anti-dumping investigations have not yet been implemented. Trade defence cases are also often initiated as a retaliatory tool. Numerous export restraints have been maintained that have led to two WTO cases, i.e. raw materials and rare earth, defeats against the United States and Europe.[35]

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[33] *Ibid.,* p. 19.
[34] *Ibid.,* pp. 36-37.
[35] *Ibid.,* pp.15-16.