Domestic Effect of the WTO Agreement in China

Trends and Implications

Xin ZHANG*

The WTO Agreement requires each Member to "ensure the conformity of its laws, regulations and administrative procedures with its [WTO] obligations." It imposes an international obligation on the Members but does not specify how the Members must give it domestic effect in domestic law. Instead, each individual Member can decide how to comply with its obligations or determine its own means and ways to implement the WTO Agreement in its internal legal system. One fundamental issue of the implementation of the WTO Agreements by Members is their "domestic effect" in Members' legal systems.

This article examines the domestic effect of the WTO Agreement in one new Member—the People's Republic of China (PRC). Part I defines the concept of "domestic effect" as composed of three elements:

- direct applicability;
- direct invocability; and
- hierarchical rank in the domestic legal order.

It also outlines the practices of some major Members that would affect China's position. Part II explores the academic arguments for domestic effect of the WTO Agreement in China as well as the application in practice. Part III discusses the newest development of this issue in China—a judicial interpretation issued by China's Supreme Court.

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* LL.M. (London, 2000); Master of Laws (Xiamen, People's Republic of China, 1997); member of Chinese Bar Association and Chinese Institute of Certified Public Accountants. The author is now a Ph.D researcher at the Department of Law, SOAS, University of London. He would like to thank Professor Michael Palmer for his valuable opinions.

The author may be contacted at: zhangxin10@hotmail.com.

1 The WTO Agreement, Article xvi:4.
2 Article 26 of the Vienna Convention on the Law of Treaties provides the fundamental principle of the law of treaties—pacta sunt servanda: "Every treaty in force is binding upon the parties to it and must be performed in good faith."
Court on 27 August 2002, entitled “Measures on Several Issues Relating to the Adjudication of International Trade Administrative Litigations”, as the first Chinese law to reject the direct invocability of the WTO Agreement. Part iv presents a short conclusion on the implications of China's attitude, which could affect the multilateral trading system as well as the practices of other applicants, such as Russia, some Eastern European countries, and Viet Nam.

I. THE ELEMENTS OF “DOMESTIC EFFECT” AND THE GENERAL PRACTICE OF WTO MEMBERS

A. DEFINITION OF “DOMESTIC EFFECT”

The relationship between treaty and domestic law is usually governed by the constitutional rules of the State concerned. There is no uniform concept for “domestic effect”. The complexity of this issue is partly due to differences of terminology because terms such as “direct effect”, “direct applicability”, “direct invocability”, or “self-execution” of treaties are always used in an inconsistent way. For example, Jackson prefers the terminology “direct applicability”, which means “to what extent the treaty norms are treated directly as norms of domestic law (‘statute-like law’) without a further ‘act of transformation’”. Jacobs refers “direct effect” to the issue of whether or not a treaty provision can be invoked in domestic courts; Aust uses “self-executing” to describe an approach that “a treaty may, without legislation, become part of domestic law once it has been concluded in accordance with the constitution and has entered into force for the state”, while Oppenheim avoids using such terms but simply discusses how treaties can operate as part of domestic law by “municipal adoption”. Therefore, it is necessary to clarify the scope and define the elements of “direct effect” before discussing it in the context of the World Trade Organization.

I prefer the literal meaning of this term, that is, whether and how treaties have effect vis-à-vis domestic law in the domestic legal system. This is composed of three elements:

- direct applicability;
- direct invocability; and
- hierarchical ranking in the domestic legal order.

The first element—direct applicability—relates to whether a treaty can automatically become a part of the domestic law of the signatory upon ratification (i.e.,...