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ARAKI Ichiro
RIETI



Research Institute of Economy, Trade & Industry, IAA

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China and the Agreement on Technical Barriers to Trade

Ichiro ARAKI*

Abstract

China became a Member of the World Trade Organization (WTO) in December 2001, after more than 15 years of difficult negotiations. This paper reviews the negotiating history of China's accession with special emphasis on the Agreement on Technical Barriers to Trade, which deals with standards and technical regulations as well as conformity assessment procedures. Because of the unique domestic system in China, the negotiations regarding the TBT Agreement posed special difficulties both for China and the existing Members of the WTO. A close examination of the negotiation process reveals that China's negotiating position was a sophisticated one, with full understanding of the cutting edge of the developing jurisprudence in the WTO.

Key words: China, World Trade Organization, Agreement on Technical Barriers to Trade

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* Senior Fellow and Director of Research, Research Institute of Economy, Trade and Industry (E-mail: araki-ichiro@rieti.go.jp)

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Introduction

The Agreement on Technical Barriers to Trade (TBT Agreement) sets out rules to be observed by WTO Members in their administration of technical regulations and standards, as well as conformity assessment procedures.

Under the TBT Agreement, technical regulation is defined as a “document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory”. The Agreement further notes that technical regulations “may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method”.¹

The TBT Agreement defines standard as a “document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory”. As in the case of technical regulations, the Agreement further notes that standards “may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method”.²

Conformity assessment procedures are defined as “any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled”. The Agreement further notes that “conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations”.³

Trade negotiators have long been aware that national and local rules governing technical regulations, standards and conformity assessment procedures can be used, intentionally or unintentionally, as trade barriers against foreign products. This is the reason why the old Agreement on Technical Barriers to Trade (Standards Code) was negotiated in the Tokyo Round.

¹ TBT Agreement, Annex 1, para. 1.

² *Id.*, Annex 1, para. 2.

³ *Id.*, Annex 1, para. 3.

At the conclusion of the Tokyo Round, the Director-General of the General Agreement on Tariffs and Trade (GATT) observed as follows, explaining the rationale behind the newly negotiated Standards Code:

Technical regulations are essential in modern society. They are adopted to protect human and animal life and health; to ensure that products offered to the consumer meet the necessary levels of quality, purity, technical efficiency and adequacy to perform the function for which they are intended; to protect the environment; and for reasons connected with safety; national security; and the prevention of deceptive practices.

However, international trade can be complicated and inhibited by disparities between regulations, adopted at local, State, national or regional levels; by insufficient information on the often complex and detailed requirements; by the introduction of regulations without allowing time for producers, especially foreign ones, to adjust their production; by frequent changes to regulations which create uncertainty; by the drawing up of regulations in terms of design rather than performance in order to suit the production methods of domestic suppliers, thus causing difficulties to suppliers using different techniques; by exacting testing requirements; by the denial of access to certification systems; and finally by the manipulation of regulations, testing or certification to discriminate against imports. The problem has been to strike a balance between the essential needs referred to in the preceding paragraph and the demand of exporters that their goods should not unreasonably or unfairly be excluded from the market.⁴

This explanation is still valid today. These considerations were also the driving force behind the new Agreement on Technical Barriers to Trade, negotiated in the Uruguay Round.

The new TBT Agreement builds upon the old Standards Code, making it a more effective tool for preventing technical regulations, standards and conformity assessment procedures from being used as a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

The most significant feature of the new TBT Agreement is that the new dispute settlement mechanism under the Dispute Settlement Understanding with enhanced

⁴ GATT Secretariat, *The Tokyo Round of Multilateral Trade Negotiations*, Report by the Director-General of GATT (1979), p. 62.

automaticity and stronger enforcement is applicable to it.⁵ One might question then why there has been so few disputes involving technical barriers to trade adjudicated under the DSU. This presents a stark contrast with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement, which was newly negotiated in the Uruguay Round as a companion to the TBT Agreement, has been invoked in a number of controversial disputes, including the famous *Hormones* case.⁶

This is not to say that there has been no complaint where the TBT Agreement was formally invoked. Starting with the *Gasoline* case⁷, the very first case to reach the Appellate stage, a number of complaining parties alleged violations of the TBT Agreement as part of their claims. However, to date, there has been no case where a dispute settlement panel found violation of the TBT Agreement. In many cases, parties reached a mutually agreed solution before the panel was established or even when it was established, before it made a definitive ruling on TBT issues. In other cases, panels declined to rule on TBT issues for the sake of judicial economy.⁸

Most recently, Canada alleged violation of the TBT Agreement in its complaint against the European Communities on asbestos. Again, the panel avoided a ruling on the TBT Agreement arguing that a general ban on asbestos was not a “technical regulation” within the meaning of the TBT Agreement.⁹ Although this part of the panel’s finding was reversed by the Appellate Body, which found that the measure, viewed as an integrated whole, constituted a “technical regulation” under the TBT Agreement, the Appellate Body declined from examining Canada’s specific claims regarding the

⁵ TBT Agreement, Article 14.

⁶ Panel and Appellate Body reports on *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA, WT/DS48/R/CAN, WT/DS26/AB/R, WT/DS48/AB/R, adopted on 13 February 1998.

⁷ Panel and Appellate Body reports on *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, WT/DS2/AB/R, adopted on 20 May 1996.

⁸ See, for instance, the panel report in the *Gasoline* case, at para. 6.43 (“In view of its findings under the General Agreement, the Panel concluded that it was not necessary to decide on issues raised under the TBT Agreement”).

⁹ Panel report on *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, adopted (as modified) on 5 April 2001, para. 8.72.

violation of the TBT Agreement due to the lack of adequate factual basis.¹⁰

However, the fact that there have been no violation findings on the TBT Agreement does not diminish its utility. As Thorn and Carlson argue, “the most important provisions of the TBT Agreement are those relating to procedural requirements, and the Agreement’s principal (not insignificant) contribution to the international trading system has been to promote transparency and information exchange”.¹¹

¹⁰ Appellate Body report on *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted on 5 April 2001, para. 83.

¹¹ Thorn, Craig and Marinn Carlson, “The Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade”, *Law and Policy in International Business*, Vol. 31, No. 3, p. 842.

TBT Issues in China

In view of China's long history of state control over economic activities, it is not surprising that many foreign traders doing business in China have complained about the lack of transparency in, and the discriminatory nature of, China's technical regulations, standards and conformity assessment systems.

For instance, the United States Trade Representative pointed out a number of TBT issues as trade barriers of China in the 2000 NTE Report:

It is often difficult to ascertain what inspection requirements apply to a particular import, as China's framework of import standards is not fully developed. Moreover, the United States and other countries have complained that safety and inspection procedures applied to foreign products are more rigorous than those applied to domestic products. Foreign suppliers have also had difficulty in learning exactly how and who conducts inspections.

Inspection Standards

Chinese law provides that all goods subject to inspection by law or according to the terms of a contract must be inspected prior to importation.

China maintains statutory inspection requirements known as "conformity assessment procedures" on about 800 imported goods, and an even greater number of exported products. Chinese buyers or their purchase agents must register for inspection of imported goods at the port of entry. The scope of inspection includes quality, technical specifications, quantity, weight, packaging, and safety requirements.

Quality Licenses

For manufactured goods, China requires that a quality license be issued before the goods can be imported into China. Obtaining quality licenses is a time-consuming process. While requirements vary according to the product, U.S. exporters have complained that they are burdensome and contrary to principles of national treatment.

Safety Licenses

China also imposes safety licensing requirements on certain products under the terms of the "Import and Export Commodity Inspection Law" of 1989. National health and quarantine regulations in addition require that all imported (but not domestic) food items be marked with a laser sticker as evidence of the product's safety. Importers are charged between 5 and 7 cents per sticker. Major problems with China's safety licensing system include the

lack of transparency, lack of national treatment, difficulty in determining relevant standards. Examples include:

Electronic Products. On January 1, 1999 China imposed mandatory safety inspections for imports of electronic products, including personal computers, monitors, printers, switches, television sets, and stereo equipment. As of January 1, 2000, these same products require an import commodity safety license.

Cosmetic Regulations. In mid 1999, the Ministry of Health imposed strict testing standards on imports of cosmetic products containing sunscreens, skin lighteners or hair restorers. Industry sources say the testing requirements create an effective import barrier, as they require individual testing requirements for each individual product containing one of the regulated substances, making them expensive to carry out.¹²

Many trading partners of China also shared these concerns. For instance, a report published by Japan's trade ministry has made the following observation:

In China, different authorities or institutions are in charge of product inspections depending on whether the product is domestic or imported. The standards by which products are inspected often lack transparency. When pressed to create a uniform system, China claims that this dual certification regime is non-discriminatory because common standards are used. Applying common standards alone, however, is not enough. There must also be common procedures for certification and a single authority inspecting both imports and domestic goods. Otherwise, it will be difficult to allay suspicion that imported products are more rigorously inspected and thus discriminated against. We hope that China will undertake active efforts in this regard, especially given the peculiarity of the dual certification system by international standards. Certification standards and procedures, including the detailed implementations, should be published, and should take international standards into account in accordance with the TBT Agreement.

The Sino-Japanese bilateral negotiations [of September 1997] resulted in a commitment from China to improve specific features of its standards and certification regime upon accession. The industries involved, however, report that there have been no significant improvements, even in the simplification of procedures requiring redundant markings (Great Wall Mark, CCIB Mark) for consumer electronics. Japan urges China to adhere faithfully to its commitments in the Sino-Japanese Agreement. These issues will need to be

¹² Office of the United States Trade Representative, *2000 National Trade Estimate Report on Foreign Trade Barriers* (available from the USTR Web site at http://www.ustr.gov/html/2000_contents/html).

taken up during the negotiations on the protocol issues.¹³

Indeed, these issues were considered by the Working Party on the Accession of China. In particular, the discussions on TBT issues were given a high priority after the work on the accession protocol and the Working Party report was reactivated in March 2000.

The starting point of their discussion was the text of the draft protocol, which had remained unchanged since May 1997. The draft protocol provided as follows:

15. Standards and Technical Regulations

1. The list of *[import]* products subject to statutory inspection in China, together with the applicable technical regulations and standards, the objective which they fulfil and their necessity to fulfil those objectives, are specified in Annex 7 of this Protocol.
2. China's standards, technical regulations and conformity assessment procedures shall be based *[, to the maximum extent possible,]* on relevant international standards, where they exist, except where use of different standards, technical regulations and conformity assessment procedures are justified to the TBT Committee pursuant to Article 2.4 of the TBT Agreement as necessary to fulfil: the legitimate objective of national security; prevention of deceptive practices; or protection of human health or safety, animal or plant life or health, or the environment. Any such standards, technical regulations and conformity assessment procedures shall be administered so as not to create unnecessary barriers to trade. Government inspection agencies shall not apply to imported products compulsory standards which relate solely to fulfilling unspecified criteria of quality, quantity or weight, nor apply statutory inspection to products by reason of the volume of such imports.
3. China shall publish in the official journal complete commodity inspection criteria, whether formal or informal.
4. *Government-mandated inspection agencies shall not inspect imported products for compliance with the terms of commercial contracts.*
5. China may inspect imported products and/or require conformity assessment only upon justification that third-party testing or

¹³ Industrial Structure Council, *Report on the WTO Consistency of Trade Policies by Major Trading Partners* (2000), pp. 296-7 (available from the Web site of the Ministry of Economy, Trade and Industry at <http://www.meti.go.jp/english/report/index.html>). See also Working Party report , WT/MIN(01)/3, para. 196.

certification is not able to fulfil the legitimate objectives listed in the TBT Agreement. *[Pending the conclusion of a Mutual Recognition Agreement with the WTO Member concerned, China shall comply with Article 6 of the TBT Agreement.]*

6. China shall not maintain requirements which have the effect of acting as barriers to the operation of foreign and joint-venture commodity inspection agencies.
7. In implementing the TBT Agreement, China shall submit its Statement on Implementation and Administration of the Agreement (Article 15.2 of the TBT Agreement) in line with the relevant Decisions adopted by the Committee on Technical Barriers to Trade of the Tokyo Round Agreement on Technical Barriers to Trade (TBT/16/Rev.7).
8. Further to China's application of the provisions of the GATT 1994 and the TBT Agreement 1994, China shall *[, by [x date],]* eliminate the two-tiered system used for imports and domestic products, and otherwise consolidate the standards, technical regulations and conformity assessment procedures (e.g. testing, inspection, certification, quality system registration, laboratory accreditation) to ensure that the same measures applied to domestic production are applied to imports and in the same way.¹⁴

While these provisions served as certain indicators of various difficulties encountered by non-Chinese economic operators, many delegates felt that the language used in this part of the draft protocol was imprecise and lacked coherence. I will briefly describe the ensuing Working Party process regarding TBT issues, highlighting the changes that were made to the 1997 draft protocol.

(a) Statutory Inspection

Paragraph 1 of the draft protocol related to the practice of the State Administration for Entry-Exit Inspection and Quarantine of China (CIQ-SA), where many imported and exported products are subjected to inspection at the port of entry or exit, as described in the USTR report above. While this was an important issue, many delegates felt that placing this at the top of the section on TBT in the protocol was not appropriate. Particularly, if the Working Party were to endorse the content of Annex 7, it was feared that it might send a wrong signal to the Chinese side by creating the appearance that Annex 7 had a special legal status. "Statutory

¹⁴ *Inside U.S. Trade*, 14 March 1997. The text is also available to the subscribers of World Trade Online ("Around the World, China"), <http://insidetrade.com>.

inspection” is a terminology unique to China, and the listing does not have any legal significance apart from providing information for transparency purposes. Furthermore, the listing did not represent the entire universe of technical regulations in China.

For these reasons, the Working Party decided to move the content of this paragraph to a section on TBT in the Working Party report. Accordingly, Annex 7 was removed from the protocol, and transcribed into separate notification lists expressly said by the Working Party report not to prejudge the legal status of the measures.¹⁵

(b) Harmonization with International Standards

Paragraph 2 of the draft protocol was essentially a restatement of the provisions of Article 2.4 of the TBT Agreement.¹⁶ However, China and the members of the Working Party were not able to reach consensus on the bracketed language. China insisted on the inclusion of the phrase “to the maximum extent possible”, and many Working Party members were opposed to the inclusion of this phrase.

This issue was part of the more general discussion regarding China’s status as a developing country. China argued that since as a developing country it was entitled to the “special and differential treatment” provisions of the TBT Agreement (Articles 12.4 and 12.8 in particular), it was unreasonable for the Working Party members to expect immediate and full harmonization with relevant international standards by China. China also pointed out that even those developed countries that were asking for deletion of this phrase themselves maintained some technical regulations that were not based on international standards. At the same time, China stressed that it intended to comply fully with the requirement of the TBT Agreement upon accession.

¹⁵ See Working Party report, para. 190 referring to WT/ACC/CHN/31 and WT/ACC/CHN/32. Following this deletion, Annex 8 (Reservations by WTO Members) in the draft protocol was renumbered as Annex 7.

¹⁶ Article 2.4 provides as follows: “Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems”.

In response to this argument, some members of the Working Party sought explicit commitment by China not to invoke Articles 12.4 and 12.8. Expectedly, China refused to accommodate this request, claiming that the issue of developing country status was a matter of principle. However, as a practical matter, China said that it had no intention of seeking exceptions from the obligations under the TBT Agreement. China also stressed that since 1980, China had taken the active adoption of international standards as a basic policy for accelerating industrial modernization and promoting economic growth. According to China, due to its efforts in the past 20 years, the rate of adoption of international standards had been raised from 23 percent to 40 percent.

In view of these exchanges, it became futile for the Working Party to pursue a mutually acceptable language on the basis of paragraph 2 of the draft protocol. Members of the Working Party worked to draft appropriate Working Party report language, which would accommodate the two sides' positions. The final Protocol says only that China will comply with the TBT Agreement but is silent upon the right to have recourse to Article 12. The Working Party report contains a commitment to increase the use of international standards by 10 percent in five years.¹⁷

(c) Transparency

Paragraph 3 of the draft protocol is essentially a transparency provision. Although the issue of transparency is dealt with elsewhere in the protocol in a more general manner, it was considered necessary to reiterate the importance of transparency in TBT issues, in view of the current lack thereof in China. With modifications to make it more consistent with the TBT Agreement, this became Section 13.1 of the final Protocol.

(d) Commercial Contracts

During the protocol negotiations in 1997, paragraph 4 was bracketed reflecting the

¹⁷ Working Party report, para. 184.

disagreement about whether China should be able to continue its practice of inspecting imported products to verify compliance with the terms of commercial contracts. China argued that government-mandated inspection agencies (CIQ-SA in particular) should be allowed to carry out such inspections when the parties to the contracts so request.

The agreed compromise in the final Protocol includes commitments by China that conformity assessment bodies will determine the conformity of imported goods with commercial terms of contracts only if authorized by the parties to such contract and that such inspections will not affect customs clearance or the granting of import licenses for such goods.

(e) Conformity Assessment

China and the members of the Working Party agreed that paragraph 5 of the draft protocol should be made more generic. The final Protocol includes a statement that China will apply conformity assessment procedures to imported goods to determine compliance with technical regulations and standards that are consistent with the provisions of the Protocol and the WTO Agreement.¹⁸

Regarding mutual recognition, the content of the bracketed sentence in paragraph 5 was deleted. It was clearly unnecessary. The Working Party report was amended to include an note of the obligation applying under Article 6.1 .

(f) Foreign Commodity Inspection Agencies

Paragraph 6 of the draft protocol dealt with the issue of foreign commodity inspection agencies. It was deleted from the Protocol but became the basis for paragraph 195 of the Working Party Report.

(g) TBT Committee

The obligations relating to China's obligation vis-à-vis the TBT Committee of the WTO, contained in paragraph 7 of the draft protocol, were made more

¹⁸ Protocol, Section 13.3.

comprehensive and included in paragraph 177 of the Working Party Report rather than in the Protocol.

(h) Two-tier system

This was the most controversial issue in the whole TBT negotiations. As discussed in the Japanese report cited above, imported products were subject to inspection and certification by CIQ-SA, while domestic products were subject to a separate standards and certification regime under the auspices of the China State Bureau of Technical Supervision (CSBTS).

Although paragraph 8 of the draft protocol referred to China's commitment to "eliminate the two-tiered system used for imports and domestic products, and otherwise consolidate the standards, technical regulations and conformity assessment procedures", it was never clear what was meant by this paragraph. Did it mean that China had to unify the two regimes operated by CIQ-SA and CSBTS into a unitary system of technical regulations, standards and conformity assessment procedures? Or was it sufficient for China to accord national treatment to imported products while maintaining the co-existence of CIQ-SA and CSBTS?

Many members of the Working Party took the former view, while China adhered to the later view, claiming that how to allocate responsibilities among different administrative agencies was a sovereign decision of China and that asking for more than national treatment would be a "WTO-plus" requirement.

The negotiations thus seemed to have reached a stalemate at one point. However, after months of negotiations, a compromise was formulated in the spring of 2001 with the following elements:

- Upon accession, China will ensure that same standards, technical regulations and conformity assessment procedures are applied to both imported and domestic products.
- Upon accession, China will ensure that all certification bodies and agencies are authorized to undertake certification of both imported and domestic products.

- All inspection bodies and agencies will be authorized to undertake inspection for both imported and domestic goods [after a certain transition period].
- The choice of body or agency will be at the discretion of the applicant.
- With respect to the treatment of imported and domestic products, all bodies and agencies will issue the same mark and charge the same fee. They will also provide the same processing periods and complaint procedures for imported and domestic products. Imported products will not be subject to more than one conformity assessment.
- [After a certain transition period,] China will assign the respective responsibilities of its authorizing bodies solely on the basis of the type of product without any consideration of the origin of such product, *and will authorize only one body to oversee all conformity assessment bodies and procedures falling within a particular assigned scope of responsibility.*

Following a further agreement that the first of the transition periods referred to above would be 12 months and the second would be 18 months, this compromise became Section 13.4 of the final Protocol (with the exception of the italicised part, which was perhaps considered unnecessary because of the merger of CIQ-SA and CSBTS into the State General Administration for Quality Supervision and Inspection and Quarantine (AQSIQ)).¹⁹

Conclusion

Thus, the whole negotiations on TBT issues reached a close.

On one view, it is not necessary to dwell too much upon what was being debated during the negotiations. It may even be harmful to record too much of a subjective negotiating history in view of the principles of treaty interpretation enshrined in Article 31 of the Vienna Convention, which is so often cited by the Appellate Body. After all, China acceded to the WTO Agreement on terms that were agreed between China and the WTO.²⁰ Those terms are set out in the Protocol and the Working Party report. If a dispute arises regarding the interpretation of those terms, we should rely on the ordinary meaning of the terms in light of the context, as well as the object and purpose of the accession protocol. What was at the back of the

¹⁹ Working Party report, para. 188.

²⁰ Marrakesh Agreement Establishing the World Trade Organization, Article XII:1.

negotiators' mind is not relevant.

However, as a personal note, I thought it was very interesting to observe case law being developed by the Appellate Body, while the same type of issue was being debated at the Working Party—on the issue of the two-tier system.

Many members of the Working Party cited the precedent of the *Section 337* case²¹ in support of their position that the very existence of the two-tier system (CIQ-SA for imports and CSBTS for domestic products) was in violation of the national treatment requirement under Article III of the GATT because it was origin-based distinction and was *per se* illegal.

The panel in the *Korea—Beef* case held a similar view. The panel report stated that “any regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the product is incompatible with Article III and this conclusion can be reached even in the absence of any imports (as hypothetical imports can be used to reach this conclusion) confirming that there is no need to demonstrate the actual and specific trade effects of a measure for it to be found in violation of Article III”.²²

The Appellate Body reversed this part of the panel's finding. According to the Appellate Body, a formal difference in treatment between imported and like domestic product was neither necessary nor sufficient to show a violation of Article III:4. Whether or not imported products are treated less “favourably” than like domestic products should be assessed instead by examining whether a measure modifies the condition of competition in the relevant market to the detriment of imported products.²³

²¹ Panel report on *United States—Section 337 of the Tariff Act of 1937*, adopted on 7 November 1989, BISD 36S/345.

²² Panel report on *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted (as modified) on 10 January 2001, para. 627.

²³ Appellate Body report on *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted on 10 January 2001, para. 137-8.

Had China maintained the two-tier system, a WTO dispute regarding the operation of the system would have made an excellent opportunity for clarifying what the Appellate Body really meant in its *Korea—Beef* report. However, the issue is now moot because CIQ-SA and CSBTS were merged into AQSIQ, and the legislation implementing China's obligation under the TBT Agreement was promulgated in December 2001.²⁴ Nevertheless, the above-mentioned episode in the negotiation tells us that China's accession process was closely following the cutting edge of the developing jurisprudence in the WTO.

²⁴ See Working Party report, para 188.