Nonmarket Economies’ Accessions to the WTO:
An Empire is Rising?

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Introduction

Since the 1980s formerly non-market economies have been making historic changes as they have attempted to transform themselves into Western-style market economies based on private enterprise. A major part of this transformation has involved efforts to join the mainstream of the global economy through expanded economic relations with other nations. In addition to building up business connections at the entrepreneurial level, participation in the dominant international trading system, namely the General Agreement on Tariffs and Trade (GATT) and now the World Trade Organization (WTO), has been a priority.¹

The GATT/WTO trade rules are based on assumptions of a market economy. The regime promotes less governmental interventions in international trade activities, and aims to facilitate trade by restricting national governments from adopting measures that impede the free flow of commodities. A nonmarket economy, on the contrary, features a state monopoly of foreign trade and a planned approach to all economic activities. From this perspective, nonmarket economies’ practices have presented a significant conflict with the GATT/WTO principles.

Although there was a debate on whether the international institution for trade and economic matters should be limited to governments which generally pursue a “market-oriented” economic system, the historical development shows us that the GATT/WTO has chosen to include economies with non-market features. The issue at stake then has been on how to bring these countries into the system; and this is also the subject of this paper. The participation of nonmarket economies in the GATT/WTO was embedded in a historical and political context. How the regime integrated, or intended to integrate these countries, mirrored the development of international historical and political processes.

This paper provides a historical and theoretical analysis of the presence of nonmarket economies in the international trading system. It starts from the 1930s when the post-war design for international trade policy was drafted, and surveys the nonmarket economies’ interaction with the GATT/WTO. The evolvement of the mechanisms deployed by the GATT/WTO is carefully studied. This paper finds that the approach to nonmarket economies under the WTO era is significantly different from the one under the GATT. While special mechanisms were provided in the GATT accession protocols to bridge different market structures, WTO accessions required nonmarket economies to convert their very own market structures.

This paper provides a theoretical explanation for this evolution by placing the issue of nonmarket economy accession in a broader picture of the system friction problem, which was not new to the GATT/WTO regime. The paper argues that frictions over different domestic economic structures and policy preferences have been one of the major sources of trade disputes. The marketisation obligations

¹ This paper is based on my PhD thesis. State-trading Countries in the World Trade Organisation: A Case Study of China’s Trading Right Reforms, London School of Economics, Department of Law, 2007.
imposed on the acceding nonmarket economies were not unique in the sense that the convergence of economic ideologies, the WTO Agreements’ penetration into the domestic sphere and the legalisation of trade rules all contributed to the rise of a single set of values in the international economic order. With almost all the significant economic players being a member of the WTO, the set of standards favoured by the WTO acquired strong influence over acceding countries. Facing an Empire based on market economy principles, nonmarket economies were left with no alternatives but marketisation.

1. **Nonmarket economies and the post-war international trade arrangements**

The post-war design for international trade policy was triggered by the concern to avoid a repetition of the disastrous errors of the 1920s and 1930s, as the beggar-thy-neighbour monetary and trade policies during the inter-war years were blamed for the crash of the international economy. During the 1944 Bretton Woods Conference, an International Trade Organisation (ITO) was proposed for the regulation of trade, including areas such as tariff reduction, business cartels, commodity agreements, economic development and foreign direct investment.

As part of the long-term goal to re-establish “expansionist, universal and multilateral trade”, the ITO based on the United States Suggested Charter was designed to be an organisation capable to accommodate countries with various market structures. Taking into consideration the need of internal stability of participating countries, the US Suggested Charter recognised “the right of a country to plan its economic and political system”, even though this might have meant nationalising its industries and controlling its economy for purposes of social security and welfare. As an observer at that time pointed out, the development of a workable system of international trade in the post-war world would have to be one that was “acceptable by both free and planned economies.”

To encourage Soviet Union participation in the multilateral trade system, the US Suggested Charter included some provisions directly relevant to the Soviet monopoly of foreign trade. A separate Article 28 in the Suggested Charter concerned expansion of trade by any member “establishing or maintaining a complete or substantially complete monopoly of its import trade.” This

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2. There is an extensive literature on the post-war efforts to establish the ITO. For the discussion in late 40s, see Robert E. Hudec added substantially to our understanding of the legal design of ITO in More recent perspectives can be found in

3. For the detailed analysis on Suggested Charter provisions concerning state-trading countries, see ; and

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7. Suggested Charter, Article 28.
provision took centralised foreign trade for granted and offered an institutional framework within which the policies of the foreign trade monopoly would be consonant with the principles of the Suggested Charter. The other main requirement for a nonmarket economy country was to conduct foreign trade in accordance with commercial, that is, non-political considerations. In contrast to Article 28 applicable to members with “a complete state monopoly of import trade”, this provision was not designed solely for state-trading countries. In the US Suggested Charter, a “state-trading enterprise” was to be understood as “any enterprise over whose operations a member government exercises, directly or indirectly, a substantial measure of control”. Such an enterprise should adhere to the nondiscriminatory principles of the ITO and should base its decisions on commercial considerations, such as “price, quality, marketability, transportation, and other terms of purchase or sale, and also differential customs treatment”.

Although listed as a member in the Preparatory Committee, the Soviet Union never actively participated in the negotiation of a new international trade order. In spite of that the text of the Havana Charter was still supposed to be “sufficiently flexible” to enable the eventual participation of the Soviet Union in the ITO. Similar to the U.S. Suggested Charter, the Havana Charter made no effort to limit the privilege of a country to “socialise” its industry or trade, but only required state-trading enterprises to do business in accordance with commercial principles.

Given the rapid deteriorating political environment of post-war cooperation among the wartime allies, these provisions aiming to accommodate nonmarket economies were gradually weakened in the subsequent drafts. The negotiation on “import duties” or other arrangements that were to substitute tariffs did not take place. As a result, the GATT, which was designed as a short-term mechanism to secure the tariff concessions, only incorporated articles on “state enterprise”. The ITO provisions designed for nonmarket economies never came into force. The later Article XVII of GATT 1947 hence was the only article referring to the state trading issue when the GATT substituted the ITO as the main forum for international trade.

Article XVII of the GATT on state-trading regulates the trading behaviour and policies of firms enjoying monopoly power over international trade on certain commodities. Its main purpose is to restrict the government’s influence on private calculations in trade decisions. The Article requires that such firms should behave “solely in accordance with commercial considerations.” It also provides that state-trading enterprises should follow nondiscriminatory rules of the General Agreement. The

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8 Suggested Charter Article 26:1.
9 Ibid.
10 Hereinafter cited as Analytical Index.
11 To “socialise” a country’s economy is a term used at then to describe implementing socialism regarding a country’s economic structure. See
12 The thorough study of state trading issues can be found in
13 GATT Article XVII
main obligation of the member state is to notify the GATT about the state-trading enterprises. These provisions, which reflect only one aspect of the proposed Havana Charter, are hardly enough to resolve the practical problems and policy concerns relevant to countries whose economy is organised mainly along other than market criteria.

2. **Participation of nonmarket economies in the GATT**

After the establishment of GATT, countries operating centrally-planned economic policies were not actively involved in the regime. Cuba and Czechoslovakia had both been GATT founding members. Future political affiliation to the socialist bloc could not have been foreseen when they signed the GATT Agreement. After their transformation to centrally-planned economies, these two countries still remained GATT members, but were no more than sleeping partners and as such did not participate in GATT’s tariff-reduction rounds and did not demand the fulfilment of other GATT members’ contractual commitments. Correspondingly the Contracting Parties did not feel any need on their part to demand special obligations from them. It was not until the mid-1950s when the trade between Eastern European countries and Western European countries and the US started to increase that the issue of how to regulate the trade relationships between these two groups was raised in the GATT. Czechoslovakia first brought up this issue in the context of antidumping practice, and an interpretative note was added to Article VI of GATT. But for the overall compatibility of nonmarket countries in the GATT system, it was actually Poland’s entry to the GATT in 1967 which was regarded as the first accession of a planned economy, and a special mechanism was developed to integrate it into the regime based on free market principles.

Nonmarket economy countries’ attitude towards the post-war multilateral trading system developed in several stages. In the beginning, they rejected both the multilateral trading order and institutions. After a period of isolation, nonmarket countries started to accept multilateralism in trade, but they sought organisations other than the General Agreement as the base of a new international economic order. When a new trade organisation did not materialise, they turned to the GATT.

Even though nonmarket economies started seeking membership of the GATT, they did not give up their planned economy. When Poland and Romania acceded to the GATT, they still maintained a monopoly of those institutions which were responsible for drafting and executing the foreign trade plan. Although Hungary was undergoing economic reforms at the time of its accession, its economy was not a “market economy” as those in the West. Academic debates on regulating East-West trade during late 1970s and 1980s still tried to determine how to accommodate centrally-planned economies as such in the international trade system.

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The GATT, contrary to the ITO’s attempt to be a universal organisation, was drafted under circumstances where only market economies participated. Its provisions could only apply with difficulty to Eastern European countries that controlled their trade by means of plan targets. A few elements were repeated in the accession of Poland, Romania and Hungary. These elements together present a picture of how state-trading countries were incorporated in the GATT. In terms of legal instruments, the GATT used the accession protocols to address the issues raised by the participation of state-trading countries. The mechanisms used to bridge the gap of economic systems were import quotas and special safeguards. This arrangement reserved the market-principles of the GATT while at the same time accepted the planned-economy nature of the acceding countries.

Country-specific accession protocols were the legal instrument chosen by the GATT to address the issues raised by the participation of nonmarket economies. In theory, two options were available on which the membership of nonmarket countries in the GATT could be based. First, some general provisions or separate codes could be introduced. Second, a country-by-country approach could be used to work out arrangements for particular acceding countries. The preference for a country-by-country approach was understandable in the context of the long-term objectives that the GATT contracting parties expected to achieve by allowing the state-trading countries to enter the regime. By integrating the planned economies in a regime based on market principles, the West hoped to induce the planned economies to adopt market reforms. Inclusion in the GATT of general provisions referring to centralised state-trading systems would tend to discourage these systems from decentralisation and liberalisation. It would also have meant an explicit modification of the GATT philosophy, compromising liberalism to the advantage of economic centralism. The country-by-country accession protocol, in contrast to general rules, was to be based on silent recognition of the special status of the planned economy system in the GATT and of the provisory character of these arrangements. The accession protocols, though also constituting binding obligations, imply an exceptional tolerance of planned economies within the organisation. The GATT rules, based on market principles, were the norm of the organisation. Planned economy features were exceptions which were specially granted to state-trading countries in the accession protocols.

For substantive obligations, the accession protocols of the three state-trading countries did not alter much of the GATT rules. For the reciprocity principle, the protocols provided a simple conversion between tariff concessions and import quotas in the cases of Poland and Romania. For Hungary, as it insisted on its newly-implemented tariff system which was comparable to the ones in the existing GATT countries, the GATT did not require special arrangements. Special safeguards were the only mechanism used to buffer the different economic systems of the market economies and the new state-trading members. The safeguard clauses allowed GATT members to take remedy against the increase of exports from state-trading countries. Except for that, there were no other requirements in the accession protocols addressing the planned market nature of the new acceding countries.  

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When these countries entered the GATT, their planned market nature was taken for granted. They joined the GATT without any proposals, or any accession commitments to pursue market reforms. It is true that by accepting these countries the existing GATT members expected to influence their trade policy toward market-oriented directions. However, these expectations remained only expectations. There were no legal obligations imposed on the state-trading countries to deploy economic liberalisation.

3. Theories explaining the GATT approach to state-trading countries

**Interface principle**

The “interface principle” of the GATT has mainly been promoted by John Jackson. He has invoked this concept in various works in connection to the accommodation of nonmarket economies in the GATT and even the system frictions among market economy GATT members. This concept is based on two assumptions of the GATT regime. First, the GATT is designed to be “universal”. He traces the history of the ITO and concludes that since the GATT had to fill the gap left by the failure of the ITO, the GATT had also inherited the underlying mission to accommodate all types of economies. As the GATT should be a universal forum for all kinds of economies, he stresses that it is not the purpose or role of the GATT to apply pressures on sovereign nations to accept market-oriented economic principles, because the internal structure of a country’s market should be left to that country’s own judgment. The second assumption is that different economic systems will always exist in the world. Even in the same category of “market economy”, there are still different levels of government intervention in the market.

As global economic interdependence has increased, the management of relations among various economies has also become more difficult. Jackson sees this problem analogous to the difficulties involved in trying to get two computers of different designs to work together, and the solution is an “interface” mechanism to mediate between the two computers. In international trade relations, the GATT rules serve as such an “interface” among countries with different economic systems. The international regime only provides rules and a negotiation platform to reduce the incompatibility among its members’ market structures. The GATT itself, although based on market principles, is neutral regarding the choice of domestic economic designs. Concerning the debates on how to integrate nonmarket countries into the GATT, the aim should be to structure a set of interface rules by which the applicant planned economy can trade with the existing GATT market economies to the most

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feasible extent.\textsuperscript{21}

The integration of Poland, Romania and Hungary in the GATT system perfectly fits with the interface principle. Their domestic economic structures were taken for granted. The efforts during the negotiation were to reach satisfactory conversion of trade benefits. Poland and Romania had difficulties to offer reciprocity for advantages associated with membership, because of the state-trading nature of their foreign trade systems. The solution to this issue, however, was not to introduce tariff systems as in the market economy members. Instead, the negotiators looked for a formula to convert the import quotas into trade benefits equivalent to tariff concessions. The GATT in these cases served as an interface between two sets of countries. The choice of economic systems was kept to the contracting parties and the GATT only provided rules aiming to facilitate trade and a forum where the members could conduct negotiations once disputes broke out.

\textit{Embedded liberalism}

Embedded liberalism, although not purposely addressing the nonmarket economy issue, is another theory helpful to understand the GATT approach to nonmarket economies. Most closely identified with the works of John Ruggie, the embedded liberalism model understands the GATT as incorporating a series of complex compromises designed to achieve a balance between trade liberalisation and various domestic social policies.\textsuperscript{22}

This theory focuses less on the economic justifications, such as comparative advantages or gains from free trade, for the GATT than on its domestic political grounds. Looking at it historically, Ruggie suggests that the principles of multilateralism, tariff reductions and reciprocity were affirmed during the Bretton Woods negotiations.\textsuperscript{23} However, these diplomats were not committed to completely free trade.\textsuperscript{24} On the contrary, they understood the need for state intervention to cushion the dislocations that trade liberalisation might produce.\textsuperscript{25} Accordingly, as the task of the post-war international economic institutional reconstruction was to manoeuvre between the two concepts of economic liberalisation and domestic stability, the GATT was designed to reduce tariffs and other trade barriers while at the same time offered a range of exceptions, safeguards, and exemptions to

\textsuperscript{21}See A more recent article by Andrew Lang analyses the theoretical foundations of embedded liberalism and shed a light on how international economic legal studies can benefit from the theory, see

\textsuperscript{22}As a former US State Department trade policy analyst, William Diebold stated: “Neither the ITO nor GATT said a word about free trade. …no one involved in working out the problems of international trade at the time who thought that free trade was a realistic goal or even a reasonable aspiration for a liberal economic system that had to be operated by sovereign states,” in his article “Reflections on the International Trade Organization ”, 336.

\textsuperscript{23}See
protect domestic social policies. For example, although quantitative restrictions were generally prohibited, they were expressively permitted as a means of safeguards. Through a series of such compromises, the GATT was structured in a manner that sought gains from trade but simultaneously “promised to minimise socially disruptive domestic adjustment costs as well as any national economic and political vulnerabilities” resulting from the international division of labour.

The underlying compromise was that, in exchange for liberal trade policies, GATT nations would provide a variety of domestic safety nets. John Ruggie has labelled this bargain the “embedded liberalism” compromise. To John Ruggie, the essence of embedded liberalism is to devise a form of multilateralism that is compatible with the requirements of domestic stability. This is also reflected in the GATT approach toward nonmarket economies, as the accession arrangements preserved room for the new members to manoeuvre their domestic economic policies. The design to integrate nonmarket economies in the GATT era was about ensuring reciprocity in trade benefits and offering emergency escape mechanisms. These countries’ domestic economic structures were untouched. Seen from the view of the embedded liberalism model, planned-economy countries were afforded wide latitude over their domestic market structures, free of interference by other GATT contracting parties.

4. The WTO: a more legalised organisation aiming for a deeper integration

While the original GATT was signed by 23 contracting parties, the formal conclusion of the Uruguay Round trade negotiations in April 1994 involved 117 countries establishing a complex organisation in response to “a different world of ever deepening integration and globalisation”. The Marrakesh Agreement Establishing the World Trade Organisation, the negotiation result of the Uruguay Round, changed the nature of the regime dramatically. Not surprisingly, the WTO took a very different approach regarding nonmarket economies’ accession.

The WTO was not only the first international trade organisation with legal personality, the coverage of the organisation also expanded to several new areas which were not deemed to be “trade” issues in the GATT era. However, it is wrong to suggest that all the changes happened over night. The history of the GATT/WTO system has already displayed a record of flexibility and gradualism. In parallel to the development of international trade, the shift in the focus of trade liberalisation was gradually moving from tariff to non-tariff measures, from border issues to domestic policy issues.

Due to the successful rounds of trade negotiations under the GATT, average tariff rates in major industrialised countries were sufficiently low by the 1970s and the volume of international trade grew
dramatically. However, the “golden age” of growth in international trade and the GATT came to a halt in the 1970s. Facing new economic difficulties at that period, national governments looked for new economic solutions, and the resulting rise of “new protectionism” at that period was the first sign of the insufficiency of the GATT in resolving new trade issues.

In trying to tackle the new protectionism, the Tokyo Round negotiations, held from 1973 to 1979, for the first time in the GATT history made nontariff barriers the priority objective of the negotiations. Negotiation focus was on the border trade measures and trade-impeding barriers arising from domestic policies such as subsidies, government procurement and standard regulations. Despite the unsatisfactory outcome regarding protectionist measures, the Tokyo Round initiated a transformation of the nature of rules and the principle norms of the system itself. The focus on nontariff barriers became a substantial challenge to the GATT. The negotiation on reducing nontariff measures was more complex, thus requiring a different institutional framework, and the implementation of any nontariff measure agreements was also more difficult to achieve.

In addition, the increase in the number of contracting parties in the GATT also posed a need for institutional changes. Whereas the GATT had been built essentially by a transatlantic alliance with only a few “outsiders” involved, by the end of the round the number of contracting parties had grown to 89. The much larger number of participants encouraged a shift towards legalisation of the rules. In the eyes of newly-joined developing countries, the traditional broad statements drafted by members of a small club implied too much secrecy. A more transparent, rule-based structure would serve small countries’ interest better. An attempt to reform the dispute settlement mechanism in the GATT was proposed, but no agreement was reached during the Tokyo Round.

Launched in September 1986, the negotiators in the Uruguay Round gathered for the purpose of solving the “leftovers” of the previous rounds. In addition to reinforcing the agreements addressing new-protectionism issues, the negotiation outcome of the Uruguay Round further established a new trade organisation. The World Trade Organisation turned the GATT from a trade agreement into a membership organisation. It is a legal framework that brought together all the various pacts and codes and other arrangements that were negotiated under the GATT. Members of the WTO must abide by the rules of all these agreements as well as the rules of the GATT as a “single undertaking”. The strengthened dispute settlement mechanism and the enlarged scope made the WTO a dramatically different entity from the GATT.

There is no lack of academic analysis on the WTO agreements and its role in international

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31 See Marrakesh Agreement Establishing the World Trade Organization, Article II.2.
economic relations. For the purpose of this paper, I focus on two distinct characteristics of the WTO, the first is the WTO as the platform for deeper integration of trade policies, and the second is the legalisation characteristic of the organisation. These two characteristics, as I will describe in a later section, had a major impact on how the WTO changed the GATT approach to integrate state-trading countries.

A deeper integration

Since the Tokyo Round, the general direction of the GATT had been on expanding the liberalisation of trade by reducing border barriers, which reflected the “shallow integration” of the post-war international economy. The Uruguay Round kept developing the traditional issues such as trade remedies, safeguards and dispute settlement mechanism, while expanding the scope of the WTO into new issues. The new issues of services, intellectual property and investment in the Uruguay Round were anything but traditional. In contrast to the GATT, the WTO agreements involved subjects centred on what had been considered domestic policies in the past. The further development in the leftover issues together with the new issues marked a deeper integration in the WTO era.

Trade remedy measures, including anti-dumping, subsidies and countervailing duties, and safeguards, are good examples of what the WTO demands concerning domestic governmental regulations. In these agreements, almost every step of administrative procedure to establish the case of imposing special tariffs is subject to detailed WTO rules. The factors that should be taken into consideration by administrative authorities at every step of decision-making process are also provided in the agreement text. After the decision is made, the agreements also require WTO members to provide prompt review mechanisms.

The new agreements on trade in services, intellectual property and investment not only extend the range of GATT/WTO from goods and primary products into new subjects of international trade, but bring the WTO’s influence into domestic policy making. While trade rule matters still focus on import/export aspects, the new issues involve interventions into the member country’s regulations of its domestic market environment. For example, the General Agreement on Trade in Services (GATS) provides a comprehensive set of rules for preserving and expanding market access for internationally traded services under the institutional framework of the WTO. The establishment of a business by investment in a member’s territory, one of the modes of service supply defined by the GATS, concerns the domestic regulations on how foreign investors are allowed to set up an entity in a specific industry. This was not an international trade topic in the GATT era.

37 See
38 Antidumping Agreement, Article 13.
39 General Agreement on Trade in Services, Article I.2(c).
Consequently, the nature of governance under the WTO is dramatically different from the GATT in the sense that the power to regulate certain domestic policies has transferred from the member countries to the WTO Agreements. For example, market access, in the eyes of the WTO, no longer only includes zero tariff and zero import quota, but also extends to more implicit impediments to foreign goods, such as technical standards and health requirements. Both the Singapore 1996 and Geneva 1998 Ministerial Declarations call for “meaningful market access commitments”.41 “Effective access” requests a reduction not only of border barriers but also of “structural impediments”, which create obstacles for foreigners to have “fair” competition with domestic producers. With regard to new members’ accession, this signals that the accession negotiations under the WTO request countries to make remarkable commitments in relation to their capability to undergo all the reforms necessary to meet WTO obligations. The candidates must not only familiarise themselves with the new rules with respect to services and intellectual property but are also under an obligation to bring their regulatory, judicial and administrative framework in compliance with the WTO Agreements.

**A more legalised organisation**

The dispute settlement mechanism has been said to be the centrepiece of the WTO.42 The “rule orientation” nature of the new dispute settlement replaced the old GATT system’s negotiation or diplomacy-oriented approach in dealing with conflicts between members.43 This tendency towards a more legal approach is reflected in the detailed dispute resolution procedure, the almost automatic binding effect of the rulings and the enforcement means authorised by the new Dispute Settlement Understanding (DSU). The Appellate Body created by the DSU serves as a trade “supercourt”44, and the legal effects of its ruling, some say, will greatly erode traditional concepts of state sovereignty.45

The dispute resolution system under the WTO marks a dramatic departure from past international trade practices. In the GATT era, winning plaintiffs were required to obtain approval from the GATT CONTRACTING PARTIES before dispute settlement panel decisions were final and effective, and losing defendants had the right to veto panel decisions at this stage.46 In addition, there was no court of appeals and no mechanism for authorising retaliation without having obtained the affirmative votes of all GATT contracting parties. On the contrary, the WTO dispute settlement

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43 The discussion on the rule-oriented approach, see More on the dispute settlement mechanism of the WTO, see, for example,

44 *Cf.* (arguing against a proposal to create a trade “supercourt” within the GATT).

45 See for example *cf.* arguing that the WTO in fact strengthens national sovereignty.

46 GATT Article XXIII.
decisions are automatically effective unless all the members vote unanimously against the decisions.\textsuperscript{47} The Appellate Body is the appeal level of the dispute settlement procedure. Moreover, it has the final authority to interpret WTO law, like a supreme court in the domestic sense. The creation of the WTO dispute resolution system opens a new stage of trade legalism.\textsuperscript{48}

The intended effect of these modifications in dispute resolution is to enhance the compliance so as to increase the benefits of membership.\textsuperscript{49} However, the other side of a more precise and more enforceable trade regime means WTO members are allowed less room in their policy options on issues “related to trade”. Under legalisation combined with the expansion of “trade-related issues”, the old GATT style of accepting nonmarket economies without requiring market reforms is not sustainable anymore. Integration of these countries under the WTO is not possible without taking these new features of the organisation into account.

5. Nonmarket economies’ accession in the WTO

Nonmarket economies’ entry to the WTO took place under a very different international political environment from the GATT time. During the Cold War, formal trade relations between market economies and the Soviet bloc were mostly dictated by political strategic rather than economic considerations. The end of the Cold War is an important factor in nonmarket economies’ reintegration into global trade. Along with the end of the Cold War and the collapse of communist regimes in Eastern Europe and then the Soviet Union, the bipolarity in international politics and economics also diminished. There were no longer two opposed economic systems: capitalist or communist, market or planned.

Reforming countries were seeking entry into the GATT/WTO system exactly at the time of the Uruguay Round negotiations when the existing GATT countries were attempting to move beyond the traditional emphasis on trade in goods to a deeper economic integration involving trade in services, intellectual properties, and a strengthening of the dispute settlement mechanism. At issue was whether those reforming countries could successfully participate in such an expanded international trade regime like the WTO.

The final results of the Uruguay Round produced a new trade organisation with coverage of new issues and more detailed rules for traditional issues. However, the integration of nonmarket economies was not changed. The WTO did not establish a committee for this issue. There is no new agreement attempting to provide a unified approach to accommodate reforming countries. Despite the scholarly discussion on how to integrate state-trading countries into the international trade organisation in the late 1980s and early 1990s, no action was taken. Even with the forthcoming

\textsuperscript{47} DSU Article 17.14.

\textsuperscript{48} Cf. , arguing the legalisation of the WTO actually increased the difficulty for national government to commit to the trade liberalisation.
accessions of large nonmarket economies such as China and Russia, the GATT/WTO regime remained unmoved to develop any new mechanism to solve the conflicts that might occur due to these countries’ accessions.

A ready explanation for this is the on-going convergence of economic ideologies. By “convergence of economic ideologies” I refer to the post-Cold War development that saw the end of the rivalry between two economic policy ideologies - planned economy and market economy. The pursuit of a market economic structure in the domestic sphere had become the only option after the disappointing failure of communism. Indeed, the level of state intervention varies among market economies, such as the United States, Western Europe and Japan. Nevertheless, they are still based on the common ground that governmental intervention is exceptional, and the main agents of economic activities are private entities. Similarly, reforming countries may adopt different approaches of market reform and have different designs of governmental involvement in their new economic structures. Their common aim is to establish a new market order based on private enterprises’ activities, rather than state planning.

Because the acceding countries are pursuing the same goal of a market economy, the WTO response to their applications to join the organisation is different from that in the GATT time. The consideration of the WTO members now is not on how to integrate countries with planned economy features, but more on how to provide a transition mechanism before these members become Western style market economies. As an expert said, the fundamental question is no longer “why can they not be more like us?” but now that nonmarket countries have decided to be like market economy countries, “what is the most efficient, therefore least painful, way of doing so?”50 Since the WTO rules, representing the norms of the international trade regime, are deemed by acceding reforming countries as a guidance of economic reforms, the accession negotiations are designed to provide a “roadmap” for these countries to adopt a “WTO-compatible” system, rather than to provide an “interface” of the two systems.

**From interface to marketisation**

Although the GATT had a number of nonmarket economies participating in it, these economies are relatively small. The GATT had been able to easily compromise and accommodate them without undue strain. Now the situation is changing, with several East European countries and, most importantly, China as its member, the WTO has developed a new strategy to integrate these new members. Concerning the legal instrument, the WTO still uses accession protocols as the main platform addressing the issue of nonmarket countries’ participation. Different from the GATT era, however, the content of accession obligations under the WTO abandons the traditional “interface” principle. Instead, the WTO accession requirements to nonmarket countries have shifted to
marketisation.

More recent WTO accession negotiations involving nonmarket economies no longer emphasise the translation between import quotas and tariff concessions. The emphasis is now on transiting the market structure in the countries seeking accession. Former centrally planned economies are required to privatise enterprises and establish competitive market structures. Demands made on countries such as China, Bulgaria, Latvia, Estonia, Lithuania and other former Soviet Union countries are focusing on the trading rights of enterprises and liberalisation programmes.\footnote{On the topic of state-trading countries' WTO accessions, see}

In fact, for all acceding countries, not only those with state-trading features, the WTO accessions are very different from accessions during the GATT era.\footnote{For a thoroughly analysis of the accession process under the WTO, see} As the domains of the WTO were enlarged and more rule-oriented approaches were adopted, WTO members began to request commitments about compliance with WTO rules, about introducing new measures and regulations and the implementation of WTO obligations. Candidates were asked to make commitments to WTO rules.\footnote{For example, see WTO document, WT/ACC/BGR/7, Accession Protocol of Bulgaria (11 October 1996), see also WTO document, WT/ACC/EST/28, Report of the Working Party on the Accession of Estonia to the World Trade Organization (9 April 1999), para. 41, hereinafter referred as Estonia Working Party Report; WTO document, WT/ACC/LVA/32, Report of the Working Party on the Accession of Latvia to the World Trade Organization (30 September 1998), para. 40, hereinafter referred as Latvia Working Party Report; and WTO document, WT/ACC/LTU/52, Report of the Working Party on the Accession of Lithuania to the World Trade Organization (7 November 2000), para. 42, hereinafter referred as Lithuania Working Party Report. All documents available at http://www.wto.org.}

In addition to these commitments applying to all WTO members, there are marketisation obligations targeting nonmarket countries. Typically, acceding countries are asked to guarantee the rights of individuals and enterprises to import and export goods. These obligations are detailed in the working party report, which is later incorporated into the protocol of accession. For example, the report of the working party on Latvia’s accession recorded the confirmation by the representative of Latvia “that the former state monopoly in foreign trade had been abolished and that no restrictions existed on the right of individuals and enterprises to import and export goods into Latvia’s customs territory.”\footnote{Latvia Working Party Report, para. 39.} Similar statements can also be seen in the working party reports of Bulgaria, Estonia and Lithuania.\footnote{See Bulgaria Working Party Report, para. 25; Estonia Working Party Report, para. 40; and Lithuania Working Party Report, para. 41.} These countries further confirmed that “individuals and firms were not restricted in their ability to import or export based on their registered scope of business,” and the criteria for registration of companies were generally applicable and published in their State Gazette.\footnote{Bulgaria Working Party Report, para. 25. Also see Estonia Working Party Report, para. 40 and Latvia Working Party Report, para. 41.}
Besides the above requirements on issues directly included in WTO agreements, nonmarket applicants are further requested to provide annual reports to WTO members on the progress of their privatisation programmes.\(^{57}\) Concerns about their overall economic policies are also raised. For example, in the working party report Latvia explained its price control policies, provided the list of goods under state price controls, and committed to apply price control in a “WTO-consistent fashion”, and to take account of the interests of exporting WTO members.\(^{58}\) These accession obligations cannot find their grounds in the text of WTO agreements. Although the preambles of the Marrakesh Agreement and the GATT 1994 mention the principle of trade liberalisation, there is no wording on “market economy” nor “privatisation”. The term “WTO-consistent fashion” is also unclear and vague. If there is no legally written obligations in the agreements on what role “price” should play in a member’s domestic economy, questions arise about how is a practice to be examined in terms of “WTO-consistent fashion”?\(^{58}\)

The accession protocols, however, cannot be read independently from the historical background. As noted, these reforming countries’ accessions took place in the late 1990s, when the convergence of economic ideologies was occurring. Politically there are no alternative economic structures other than those based on market principles. These countries were all undergoing economic reforms. Price, not state plans, as the deciding force of how an economy should be run, is the more appealing notion for these reforming countries. They did not quarrel about the marketisation obligations in the accession protocols. The length of the transition period, i.e. how fast they should complete the market transition, was a more important negotiation topic.

**The new approach**

So the WTO approach to nonmarket countries has evolved towards the use of accession protocols with marketisation requirements. One of the reasons of the change is that the poor results of import quotas or import commitments obliged the WTO to develop new methods in accommodating reforming countries. Reciprocity, reflected in ensuring market access, has been the most important task for existing GATT/WTO members when admitting new-comers. The long negotiations are all serving this purpose. If the import commitments did not ensure trade benefits for existing members, surely new methods needed to be developed for the launching of new accession negotiations. These accession commitments on market structure echoed the call for “meaningful market access

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commitments” in the first WTO Ministerial Meeting in Singapore, as they were designed to ensure that reforming countries had a pro-market economic structure in areas where foreign products and services should be able to compete fairly with domestic rivals.

Overall, contrary to the GATT approach of providing an interface to buffer the gap between the market and planned economy contracting parties, the WTO has taken a “like-us” approach. The WTO regime in this context represents a club only open to members operating on the basis of market principles. If a country wants to join the club, it has to transform itself to alike those in the club. The organisation thus abandons the identity of being a neutral forum in this regard. Economies operating on a nonmarket basis are subject to pro-market reforms which are part of their entrance tickets to the WTO.

This different approach has to do with the changes occurring in the international political environment and the GATT/WTO regime itself. When the first three nonmarket economy countries entered the GATT, the focus was still on eliminating quantitative restrictions and reducing tariffs. As these two border measures were deemed main obstacles for free trade, it was natural that the contracting parties wanted to exchange tariff concessions for import quotas as a means of guaranteeing market access.

Yet since the Tokyo Round the discourse in the international trading system has been shifting to nontariff measures. More and more domestic policies or even domestic market structures were identified as barriers offsetting the benefits brought by tariff concessions. The Uruguay Round not only established the WTO, but also expanded the scope of the international trading regime to areas which were formerly not covered and which stipulated more detailed rules for areas like anti-dumping, safeguards and agricultural trade. The recent accessions of nonmarket countries were negotiated in this environment. It is clear that the regime’s approach of focusing on a more liberalised domestic economic/market structure influenced the way nonmarket economies were accommodated in the WTO.

The experience of reforming countries’ WTO accessions shows a departure from the interface approach. Even though the market structure and ownership of enterprises are not covered by any WTO provisions, the acceding countries were required to provide periodical information for review. The international trade organisation promotes not only free trade, but also the concept of a market economy system. The organisation does not only facilitate trade among members, but also tries to ensure that acceding countries take necessary pro-market reforms of their economic structure.

6. **Theorising the WTO approach to nonmarket economies: Part of a broader trend of system convergence**

If we look carefully at the sixty years of the history of the GATT/WTO regime, trade conflicts

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59 Singapore Ministerial Declaration.
caused by the differences of domestic market structures are not completely new. Various degrees of
government intervention in capitalist countries triggered an earlier “crisis” period.\textsuperscript{60} The integration of
the ex-planned or reforming planned economies into the world economy can be seen as a continuation
of these already-existing conflicts.

\textbf{System friction and the pressure for system convergence}

Disputes over different political and economic models and their effects on international trade
have grown since the mid-1970s. Where trade barriers are due to fundamentally different regulatory
approaches, they can be thought of as forms of ‘system friction’.\textsuperscript{61} The rise of Japan in the global
economy, a country which pursued a very different political and economic paradigm compared to the
U.S., provides the best example for seeing the trade tensions caused by divergent domestic systems.
During the 1980s, there was a significant increase in international conflicts centred on high-tech
product trade. Japan’s trade and current account surpluses against the US in these products were the
source of a series of US-Japanese trade disputes handled by bilateral sectoral negotiations, which led
to the US – Japanese bilateral Structural Impediments Initiative (SII).\textsuperscript{62}

For the US, the “Japan problem” was defined as “systematic barriers to entry in the Japanese
market that prevented a ‘level playing field’ in trade and international competition”.\textsuperscript{63} The SII was an
unprecedented effort by an industrialised country to influence structural adjustment of another’s
economy and society. One way of reducing system friction, i.e. to replace “free trade” with “fair
trade”, and hence to achieve a “level playing field” for all participants in the international economic
activities was to harmonise, which meant, to establish one brand of capitalism.\textsuperscript{64} In other words, the
political agenda behind convergence was not based on any particular expectations of advances for
democracy or rights but on a demand to minimise the gains in trade earned by firms operating from
nations with domestic structures significantly different from the Anglo-American economic
liberalism. From the US “fair trade” point of view, the absence or slowness of convergence among
states at comparable levels of development suggested illegitimate gains on the part of the
nonconverging partners.\textsuperscript{65}

The experience of the 1980s introduced some new concepts into the Uruguay Round. The
Marrakesh Declaration, signed by governments at the conclusion of the Uruguay Round, notes the

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widespread desire for a “fair and more open multilateral trading system”.\textsuperscript{66} Trade negotiations were extended beyond the borders to include domestic policies. The idea of “effective access” now included domestic regulatory policies that were not necessarily designed to protect against imports but had such effect, and other structural impediments that limited competition or transparency.\textsuperscript{67}

\textit{System convergence towards marketisation: a departure from embedded liberalism?}

The integration of nonmarket economies into the world economy provides economic gains, but the introduction of hybrid forms of political and economic organisations adds new conflicts over the already-existing problems concerning domestic differences. Following a route similar to the earlier system friction cases, more recent conflicts have also been resolved with efforts to “harmonise” candidate nonmarket countries. In other words, to make these countries “more like” industrialised members in the WTO.

If we see the integration of nonmarket economies in the broader picture of system convergence in the WTO regime, the marketisation requirements will be a quite straightforward option. The expansion of the WTO domain into domestic regulatory issues requires the establishment of a similar regulation structure. The “WTO-compatible” regulation structure in fact refers to a structure mimicking a Western one. For nonmarket countries, to effectively implement their WTO obligations cannot be done without the establishment of a domestic system similar to the one of industrialised countries. From the perspective of the system convergence mission, the old GATT approach that simply designed an interface mechanism to bridge the gap was not sufficient. The WTO obligations require a deeper reform in domestic economic structures of reforming members.

These developments suggest a departure from embedded liberalism as a description of how the WTO accommodates nonmarket economies. According to embedded liberalism, the stability of the international economic order is established on the balance of trade expansion and domestic stability. The trade obligations are embedded in domestic politics. While committed to liberalise foreign trade, national governments are allowed certain space to manoeuvre its other social policies. Applying this concept to the cases of nonmarket economies’ entry to the GATT, the nonmarket applicants were allowed to keep their domestic systems as long as their trade obligations under the GATT were fulfilled.

On the contrary, nonmarket economies are required to marketise their economies within different time frames in the WTO era. Competition policy, pricing policy, privatisation and periodical reports on the reform progress have been important common features in several transition countries’ accession protocols. This trend of harmonisation of domestic economic policies contradicts embedded liberalism. Requirements on nonmarket countries to marketise and the implication of adopting a

\textsuperscript{66} Marrakesh Declaration, April 1994, para. 2.

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Western-style administrative regulatory system, limit their choices of economic reform. The national governments’ room for manoeuvre is restricted by their WTO obligations. Nevertheless, it is wrong to suggest that nonmarket countries were entirely “forced” to carry out the marketisation reforms. It should be noted that the pursuing of a market economy is a goal shared also by nonmarket countries themselves. Because of the convergence of economic ideologies, WTO accession obligations might not be perceived as a mere disadvantage to state-trading countries. Many suggest that national governments use the WTO accession to endorse the market reforms they intended to carry out anyway.68

Of course, whether the WTO-compatible standards are “imposed” on nonmarket economy countries when there are no other feasible alternatives remains an open question. I will turn to this issue in the last part of discussion. What I want to stress here is that the WTO approach to nonmarket economies also follows the old “system convergence” route in dealing with system conflicts. In economic policy, a set of dominating universal values is forming, leaving less and less alternatives for domestic systems.

7. Conclusion: An Empire is rising?

In recent years, the development of the WTO regime has often been associated with the term “globalisation”. Although its exact content and even existence have been hotly contested, globalisation has triggered the emergence of a set of claims about the transformation of international law. Theories about the relationship between international and domestic law, the new type of global governance and the concept of sovereignty are all attempts to conceptualise the new international legal order. Theories describing how globalisation is governed emphasise contract, hierarchy, transnational governmental networks, lex mercatoria or legal pluralism.69 The general claim is that the world is witnessing a move to cosmopolitan law and the concept of national sovereignty is to be redefined.70 From this perspective, the debates are about how to conceptualise the jurisdiction of the new world order.

Empire by Hardt and Negri offers a new way of interpreting the changes occurring in the international system.71 The theoretical argument of Empire is helpful in our understanding of the system convergence in international economic law. The concept of Empire is a new global form of sovereignty, composed of a series of national and supranational organisms united under a “single logic of rule”.72 Hardt and Negri claim that what is replacing the system of states is not a pluralistic, cooperative world political system under a new impartial global rule of law, but rather a project of

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imperial world domination by Empire. No longer opposed by an extrasystemic “outside”, this new form of sovereignty constitutes a regime that effectively encompasses the “spatial totality” of the entire globe.\textsuperscript{73} On its operation, Empire neither establishes a territorial centre nor relies on fixed boundaries, but “manages hybrid identities, flexible hierarchies, and plural exchanges through modulating networks of command”.\textsuperscript{74} From this perspective, the framework of international economic rules and rule-making organisations are simply the discourses and mechanisms by which the Empire aims to rule.\textsuperscript{75} The declining sovereignty of nation-states and their increasing inability to regulate economic and cultural exchanges is actually one of the primary symptoms of the coming of Empire.\textsuperscript{76}

In Empire, Hardt and Negri admit that the United States occupies a privileged position, although they also stress that no nation-state can today form the centre of Empire.\textsuperscript{77} It is true that Europe and East Asia are not passive in the shaping of the global economic order. Nevertheless, economic globalisation is being channelled by rules of the international economic regime, in the making of which the United States has exercised by far the dominant voice. As those claiming that an American empire is being created, economic globalisation looks like powerless expansion of market but in fact it works to enhance the ability of the United States to fortify its empire-like power.\textsuperscript{78}

The Empire model is based on the belief in the political inequality of countries, and this inequality is not restricted to difference in military and economic power, but includes differences in competence of self-governance.\textsuperscript{79} The imposition of a set of global standards, which involves the exercise of power, is how Empire rules. To answer the question how Empire “imposes” its single logic of rules while participation in international economic organisations is in fact the “free choice” of countries, David Grewal’s concept of “network power” can be used. He explains how the dynamic operations of economic globalisation reflect a kind of domination.\textsuperscript{80} The “network” is defined as “a group of people united in a particular way that makes them capable of mutual recognition and exchange”.\textsuperscript{81} The network is united through a “standard”, which is a particular shared norm or practice that its members use to gain access to one another. When viewing it in the WTO context, the standard referred to by Grewal is actually the overall regulatory framework of the WTO Agreements. Grewal argues that network power derives from two aspects. First, when greater numbers of people use the coordinating standards, the standards are more valuable. Second, when more people are coordinated

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into one network, it progressively eliminates the alternatives over which free choice among standards can effectively be exercised.\textsuperscript{82}

Grewal further applies this concept to the WTO agreements. He claims that the WTO exerts network power as the coordinator of the multilateral trading system.\textsuperscript{83} WTO is not only a free trade organisation, but promotes a specific kind of trade regime. The drive to join the WTO comes from the desire to enjoy freer trade with other countries. With the backing of all the world’s powerful economies, the WTO now governs virtually all of international trade. Any party wanting access to the world’s major economies can get it through membership in the WTO, provided it complies with the WTO standards. Yet the formation of WTO regulations is historically tailored for the need of trade among industrialised countries. When nonmarket countries join the WTO, they can only choose between the adopted standards or being left outside the mainstream trade organisation. The network power of the WTO therefore produces a set of dominant minimum standards in trade policies. While its members voluntarily join the organisation, they also lose the possibility of other standards under which they might have fared better.

The WTO approach to nonmarket economies adds to the claim that a dominant standard, Empire, is developing in the international trade regime. In contrast to the GATT interface approach, marketisation requirements under the WTO have become the only option for nonmarket countries to be reintegrated into global trade. It is rightly held that the formerly planned economies are carrying out market reforms out of their own willingness, and the bid to join the WTO is part of their own projects. Nevertheless, the Cold War rivalry has left most of these countries isolated from the trade network dominated by the United States and Western Europe. With the end of the Cold War and collapse of the Soviet Union, these countries were trying to reconnect to the network represented by the GATT/WTO. The recognition by the international society is one strong motivation of market reforms. The adoption of international norms is one step on the way leading to be recognised. And the network power of the WTO wiped out other alternatives for global economic cooperation. The Empire based on market economy principles is the dominating international trade paradigm.