Articles

The People's Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma

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I. Introduction

"China is not yet our enemy, but neither is it our friend."[1]

On November 15, 1999, representatives of the United States and the People's Republic of China (*"China"*) executed a landmark trade deal that will almost inevitably pave the way for China's entry into the World Trade Organization (*"WTO"*).[2] After more than 13 years of bilateral negotiations, a handshake between United States Trade Representative (*"USTR"*) Charlene Barshefsky and China's Foreign Trade Minister Shi Guangsheng sealed the terms of a bilateral deal that has been

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1. Senator Tim Hutchinson, *An Open-Eye China Policy* (visited Jan. 8, 1999) <http://www.congressvote.com/senatevote/issues/issue235/item5393.asp>. While participating in an online forum sponsored by SenateVote.com, Senator Hutchinson (R-Ark) opined:

"China is not yet our enemy, but neither is it our friend. Our China-centered foreign policy and our obsession with trying to appease Beijing's demands and accede to its wishes will only serve to strengthen a regime that may in turn seek to extinguish the flames of democracy abroad as they have done so effectively at home. We must recognize a menace before it becomes a threat and act to protect our interests and promote our values in Asia." *Id.*

2. *See, e.g.*, Dexter Roberts et al., *Welcome to the Club*, BUSINESS WEEK, Nov. 29, 1999, at 34; Brendan Pearson, *China comes in from the cold*, THE AUSTRALIAN FINANCIAL REV., Nov. 16, 1999, at 1.

praised as "the Rubicon in China's opening to the outside world"[3] and a "watershed in US-China relations."[4]

Until November, however, there had been no indications that the most populous country[5] and tenth largest trading nation worldwide[6] was willing and able to obtain membership in the WTO, the sole global trading institution today. Membership[7] in the Geneva-based body that sets global trade rules has escaped China since 1994.[8] The announcement of a significant trade deal prior to the Millennial Round negotiations of the General Agreement on Tariffs and Trade ("*GATT*") was hardly expected[9] in light of the trade frictions that marred the Sino-US trade relationship in 1999. Indeed, the last year of the 1900s could hardly be called a banner year in the history of Sino-US trade relations.

Consider the smorgasbord of events that reeked havoc on Sino-US trade relations during 1999. The nations relentlessly sputtered over trade "speedbumps" ranging from the United States's seemingly unmanageable trade deficit[10] to free-floating

3. Joseph Fewsmith, *China and the WTO: The Politics Behind the Agreement*, NAT'L BUREAU OF ASIAN RESEARCH REPORT, Nov. 1999 (visited Dec. 5, 1999) <http://www.nbr.org/publications/report.html>.

4. *Id.*

5. *See* BUREAU OF EAST ASIAN & PACIFIC AFFAIRS, US DEP'T OF STATE, BACKGROUND NOTES: CHINA , Oct. 1998 (visited Jan. 30, 1999) <http://www.state.gov/www/background_notes/China_1098_bgn.html> [hereinafter BACKGROUND NOTES].

6. *See China Was World's 9th Largest Exporter, 11th Largest Importer in 1998, WTO Says*, CHINAONLINE, Feb. 17, 1999, *available in* CHINAONLINE, Legal Library <http://www.chinaonline.com>. Because CHINAONLINE articles are typically unavailable to non-subscribers, CHINAONLINE articles will hereafter be cited "on file with author."

7. As of November 13, 1999, membership in the WTO consists of 135 governments and includes most global superpowers. *See Press Pack: 3rd Ministerial Conference*, WTO, Nov. 28, 1999, at 58.

8. Correspondence with Jeffrey Gertler, Secretary of China's Working Party, WTO (Mar. 4, 1999) [hereinafter Gertler Correspondence].

9. *Cf.* Bruce Stokes, *Almost Now-or-Never Time*, NAT'L J., Dec. 12, 1998, *available in* 1998 WL 21794652 (speculating that "the next opportunity for China's WTO membership is 2003" if the United States and China could not have reached terms of accession before year-end 1999); Gertler Correspondence, *supra* note 8 (noting that there "is a renewed sense of optimism about reaching agreement by the end of 1999 (in advance of the Seattle kick-off of the next round of multilateral trade negotiations)").

10. *See e.g.*, Paul Magnusson et al., *A Backlash Against Beijing is Building*, BUS. WK., Jan. 18, 1999, at 55; *Trade Deficit Swells to Record High*, NY TIMES ON THE WEB, July 20, 1999 (visited July 20, 1999) <http://www.nytimes.com/aponline/f/AP-Economy.html> (noting that through June 1999, "the U.S. trade deficit is running at an annual rate of $225 billion, more than one-third higher than last year's $164.3 billion, which had been a record high").

fears about Chinese nuclear proliferation[11] to renewed skepticism over human rights in China.[12] Allegations of military espionage emanated from the infamous Cox Report[13] and the two nations disagreed over the United States's support of Taiwan, which is considered a renegade province by China.[14] Premiere Zhu Rongji's springtime visit failed to strengthen accession relations in lieu of what might be deemed by some as a White House mockery (i.e., turning down a Chinese accession package in which China made major concessions toward WTO entry).[15] But the *crem de la crem* of this year's Sino-US strife was undoubtedly the bombing of the Chinese embassy by American-led NATO forces during the Kosovo conflict.[16]

Of course, the awe and optimism displayed by trade enthusiasts and Sinologists tend to overshadow the fact that the United States Congress may pose a significant hurdle to Ameri-

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11. *See e.g.,* Douglas Paal, *Political, Economic and Strategic Trends in East Asia*, Harvard University Asia Center's Modern Asia Series, Spring 1999 (visited Aug. 5, 1999) <http://www.fas.harvard.edu/~asiactr/MAS_030599.htm>; Bates Gill and Michael O'Hanlon, *China's Hollow Military*, 56 THE NAT'L INTEREST (Summer 1999) (on file with author); Susan V. Lawrence and Shawn W. Crispin, *Behind the Lines*, FAR E. ECON. REV., Apr. 8, 1999 (visited July 17, 1999) <http://www.feer.com/Restricted/99apr_08/foreign.html>.

12. *See, e.g., 1999 Outlook: China*, 16 INT'L TRADE REP., No. 3, at 120 (Jan. 20, 1999); Helene Cooper, *Clinton Criticizes Chinese Record On Human Rights,* WALL ST. J., Jan. 12, 2000, at A4. Cooper quotes State Department spokesman Rubin as remarking:

"Over the past year, the government of China intensified its crackdown on political dissent, initiated a campaign to suppress the Falun Gong, and intensified controls on unregistered churches and on the political and religious expression of ethnic minority groups, especially Tibetians." *Id.*

13. *See, e.g., House Committee Says US Security Harmed by Export of Sensitive Technology to China*, 16 INT'L TRADE REP., No. 1, at 6 (Jan. 6, 1999) (recognizing that the Cox Report ultimately concluded that "national security was harmed" by technology exports to China). *See also Senate Rejects Amendment Requiring OK By Congress of US-China WTO Entry Deal*, 16 INT'L TRADE REP., No. 12, at 489 (Mar. 24, 1999).

14. *See e.g.,* William Roberts & Heidi Przybyla, *Some US-China issues are resolved*, J. COM., Apr. 12, 1999 at 4A; Erik Eckholm, *Violative Issues Await China's Premier in US*, NY TIMES, Apr. 4, 1999 (on file with author).

15. *See generally* Bruce Gilley and Shawn W. Crispin, *Limited Engagement*, FAR E. ECON. REV., Apr. 22, 1999 (visited July 17, 1999) <http://ww.feer.com/Restricted/99apr_22/foreign.html>; Daniel H. Rosen, *China in the WTO: A Great Leap Forward for US Businesses?*, CHINA ONLINE, May 1999 (on file with author) [hereinafter Rosen: A Great Leap Forward].

16. *See* Richard Fisher, Director of Asian Studies at the Heritage Foundation in Washington, described general frustrations with China (after witnessing Beijing's response to the errant NATO bombing) when he stated, "The ice is beginning to congeal. How many fund-raising scandals, cases of espionage and now embassy trashings do we need to endure to be convinced that China is not really our friend?" Lawrence and Crispin, *supra* note 11.

can business realizing the oft-discussed financial benefits which the November agreement connotes. Commentators[17] are now beginning to recognize that the Hill may compose a very real obstacle to what has been called "one of President Bill Clinton's biggest foreign policy prizes."[18] The debate, which will hit the floor of Congress in the spring of 2000,[19] is destined to be "the most important economic debate in years."[20]

One of the most looming questions is whether Congress will grant China permanent "normal trade relations"[21] status with the United States, which is a fundamental benefit that the other WTO members currently enjoy under domestic law. Though Congressional approval is not a prerequisite to China's accession to the WTO, Congress determines how much the United States will reap the financial benefits of this toughly negotiated agree-

17. *See, e.g.*, Joanne Gray, *Clinton trade deal not home yet*, THE AUSTRALIAN FINANCIAL REV., Nov. 17, 1999, at 12; James H. Nolt, *China in the WTO: The Debate*, FOREIGN POLICY IN FOCUS, Dec. 1999 (visited Jan. 5, 2000) <http://www.foreignpolicy-infocus.org/briefs/vol4/v4n38china.html>; *US Administration Prepares Congressional Move On China WTO Deal*, INSIDE CHINA TODAY, Nov. 20, 1999 (on file with author); David S. Broder, *The Inescapable Issue*, WASHINGTON POST, Dec. 19, 1999, at B7; Joseph Kahn, *Clinton Will Press Congress to Back Trade Deal With China*, NY TIMES, Jan. 10, 2000 (visited Jan. 10, 2000) <http://nytimes.com/yr/mo/day/late/11trade.html>.

18. Gray, *supra* note 17, at 12.

19. Nicholas Lardy has stated that, in his opinion, there is a very practical deadline for the normal trade relations vote and, accordingly, Congress will make its decision in February or March, 2000. However, Gary Horlick has expressed doubt with that time frame. In his opinion, Mr. Horlick thinks that the nature of the issue (i.e., an issue which can hurt Congressional Representatives in the eyes of their constitutents) will result in the debate dragging out longer than expected. *See The WTO in Seattle: Controversy Over New Rules of Global Commerce*, TRANSCRIPT OF A BROOKINGS INSTITUTE PRESS BRIEFING, Nov. 23, 1999 (visited Dec. 5, 1999) <http://www.brook.edu/comm/transcripts/19991123.htm>; Kahn, *supra* note 17 (reporting that the Clinton administration fears that Republicans will delay a vote on the agreement until after the national political conventions in June).

20. Broder, *supra* note 17 (quoting White House aides).

21. Normal trade relations status was previously known under United States trade law as "most favored nation" status, not to be confused with MFN as used in the GATT/WTO regime. The change in domestic terminology occurred when President Bill Clinton signed into law Pub. L. 105-206 on July 22, 1998. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685. For an excellent explanation of the mechanism formerly known as most favored nation status and the Jackson-Vanik Amendment, *see* Annita Lysikatou, *Engagement with China: A Smithian Perspective*, Nov. 28, 1999 (visited Dec. 5, 1999) <http://www.american.edu/projects/mandala/TED/Smith/lysikatou.htm>.

ment.[22] China's accession to the WTO would not technically be impeded by a Congressional denial of normal trade relations status, but the United States would be denied the Chinese market access concessions solidified in the November bilateral agreement if a Congressional vote in the negative were to occur.[23]

While it is difficult to predict the decisions of Congress, early indications are that rallying enough Congressional support for the deal will be extremely difficult.[24] Political partisanship will obviously underscore Congressional votes,[25] as will lobbying pressures from industry groups with deep pockets and heavy influence.[26] But what are the facts, factors and experiences associated with today's Sino-US trade relations?

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22. *See* Stephen J. Yates, *US to China: Join the WTO, but Real Work Lies Ahead*, THE HERITAGE FOUNDATION EXECUTIVE MEMORANDUM NO. 638, Dec. 9, 1999 <http://www.heritage.org/library/execmemo/em638.html>.

23. *See id.* If Congress refuses to grant permanent, unconditional normal trade relations status to China as it accedes to the WTO, China would likely invoke the so-called "non-application" exemption of Article XIII of the WTO Agreement. Invocation of Article XIII would allow China to join the WTO and extend WTO rights and benefits to all of its trading partners *except* the United States. In such a situation, none of the WTO rules would apply to trade between the United States and China. The main trade competitors of the United States (i.e., the European Union and Japan) would principally benefit from such circumstances. *See* Stephen H. Dunphy, *Yearly fight on China trade is now one-time, winner-take-all battle*, SEATTLE TIMES, Dec. 26, 1999, at 1.

24. *See* Broder, *supra* note 17. Broder notes:

> "Rep. Bob Matsui of California, the point main for the White House on this issue, told me that if most Republicans back the business-supported effort to open the Chinese market to American goods and services, it will be tough to produce enough Democratic votes to pass the measure."

Id. See also US Administration Prepares Congressional Move on China WTO Deal, *supra* note 17(noting that at this time, "the Republican-controlled Congress, much of which is not particularly China-friendly, votes on such status each year"); Tom Squitieri, *Buchanan: Trade fight is a winner*, USA TODAY, Dec. 27, 1999, at 13A (noting that Buchanan has promised to oppose the President in Congress if President Clinton seeks to grant China permanent normal trade relations status); Dunphy, *supra* note 23 (predicting that that the Congressional battle over granting permanent normal trade relations status to China "will be fierce"); Kahn, *supra* note 17 (speculating that the vote will be "a close contest"). *But cf. The WTO in Seattle: Controversy Over New Rules of Global Commerce*, *supra* note 19 (quoting Nicholas Lardy as remarking, "I think that permanent NTR status for China is going to pass the Congress. I think there will be a spirited debate, but I, quite frankly, don't think the outcome is in doubt . . . There's very strong support for it across a very broad spectrum.").

25. *See, e.g., US Administration Prepares Congressional Move on China WTO Deal*, *supra* note 17; *Welcome to the Club*, *supra* note 2, at 34-36; Gray, *supra* note 17; Kahn, *supra* note 17.

26. In 1997, AFL-CIO President John Sweeney turned the North America Free Trade Agreement ("*NAFTA*") "fast track" issue into a litmus test issue by

The purpose of this article is to examine facts, experiences, etc. that the United States Congress will mull over when debating the bilateral accord with China and which might ultimately persuade Congress not to support the November agreement. Part II of this article provides background information fundamental to any Chino-WTO discussion from a Western perspective, including: the WTO accession process; China's history with the GATT/WTO regime; an abbreviated history of modern Sino-US trade relations; and benefits to-be-gained from China's accession to the WTO.

Next, this article explores China's accession accomplishments and shortcomings. Part III begins by narrating China's tremendous accession progress, culminating with a cursory review of the terms of the November trade deal. Part III then details eight non-tariff accession issues in an attempt to portray historical facts which Congress might give credence to in deciding whether to support the much-hyped bilateral agreement. These eight accession issues are: transparency; inspection standards, certification and testing; protection of intellectual property rights ("*IPR*"); foreign investment and service industries; local-content requirements; trading rights (i.e., import/export quotas and licensing); foreign currency exchange restrictions; and export subsidies and performance requirements.

Part IV scrutinizes a particularly sensitive area of China's still-developing relationship with WTO norms: Chinese subsidization of State-owned enterprises ("*SOEs*").[27] By way of background, the roles of SOEs in China are described prior to analyzing three relevant WTO instruments: the Agreement on Subsidies and Countervailing Measures (the "*SCM Agree-*

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threatening to deny financial aid (via campaign contributions) to Democrats who supported President Bill Clinton on the fast track proposal. At least one commentator has noted that such tactics have "made a critical difference" from Congressional votes in which no such tactics were used, such as the initial Congressional vote on NAFTA in 1993. *See* Broder, *supra* note 17. *See, e.g., Welcome to the Club*, *supra* note 2; Dunphy, *supra* note 23; Kahn, *supra* note 17.

27. For purposes of this article, SOEs are defined as government entities that are owned, controlled or supported by the government and which purchase goods or services in international trade for purposes other than government use. In theory, China's SOEs are owned by the masses; in practice, these collectively-owned enterprises are controlled by, and affiliated with, governments at the county level and higher. Control by the governmental bodies involves allocations of credits, goods and personnel. *See* Shuhe Li, *The Road from Socialism to Capitalism: Determinants of the Private Sector Development in Chinese Industry*, July 9, 1999 (visited July 18, 1999) <http://faculty.washington.edu/karyiu/confer/HK99/papers/index.htm>.

ment"),[28] the Agreement on Trade-Related Investment Measures (the "*TRIMs Agreement*"),[29] and the Understanding on the Interpretation of Article XVII of the GATT 1994 (the "*Article XVII Understanding*").[30] Part IV then engages a particularly well documented subsidization practice associated with China's SOEs – the absorption of SOEs' debt and losses – under the foregoing WTO instruments to demonstrate why Congress might find this practice offensive under the WTO regime and, accordingly, economically adverse to the United States.

Part V of this article looks at various Chinese laws, regulations and guidelines that govern operations of SOEs in China which must be amended (if not repealed) in light of the November bilateral agreement. This section takes a textualist approach, much like Congress might do, in evaluating these Chinese instruments as they relate to SOE subsidization.

Finally, Part VI concludes that notwithstanding China's recent lunge toward market liberalization, the United States Congress will be skeptical to support measures relating to the historic bilateral agreement, including the obtainment of permanent normal trade relations status, based on the history of actions and snafus associated with trading with China over the last 25 years.

II. Background

A. AN ACCESSION ROAD MAP

Unlike many multilateral agreements, the Marrakesh Agreement Establishing the World Trade Organization ("*WTO Agreement*")[31] does not establish detailed membership requirements for its government members. Instead, the WTO Agreement merely provides that any nation "possessing full autonomy in the conduct of its external commercial relations" may accede

28. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, *infra* note 31, at Annex 1A [hereinafter SCM Agreement].

29. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, WTO Agreement, *infra* note 31, at Annex 1A [hereinafter TRIMs Agreement].

30. Understanding on the Interpretation of Article XVII [hereinafter Article XVII Understanding] of the General Agreement of Tariffs and Trade 1994 [hereinafter GATT 1994], WTO Agreement, *infra* note 31, at Annex 1A. The Article XVII Understanding is but one legal instrument incorporated into the GATT 1994 that was not a part of the GATT 1947. Reference to this incorporation can be found in the GATT 1994, *id.* at par. 1(c)(ii).

31. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *reprinted in* LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION vol. 1 (Oceana Publications, Inc., 1995) [hereinafter WTO Agreement].

to the WTO,[32] assuming the government is willing to accept the obligations imposed by the Multilateral Trade Agreements.[33]

The accession process commences with the submission of a formal written request for accession under Article XII of the WTO Agreement.[34] Accession decisions are rendered exclusively by the WTO members at Ministerial Conferences and require approval by a two-thirds majority vote of the members.[35] A non-GATT party attempting to accede must have concluded negotiations for its accession to the GATT prior to accepting the WTO Agreement.[36] If an accession request is received from a country that is in the process of joining the GATT, then "the Preparatory Committee shall, to the extent practicable, examine the request jointly with the Working Party established by the Contracting Parties to GATT 1947 to examine the accession of that State."[37]

The accession process is complicated by two factors. First, the WTO Agreement provides that the WTO "shall continue the practice of decision-making by consensus followed under the GATT 1947."[38] Matters are deemed to have been decided by

32. *See Id.* at art. XII(1). For a detailed and exhaustive explanation of the accession process, see generally TRADING INTO THE FUTURE: THE WORLD TRADE ORGANIZATION, WTO (2d ed., Apr. 1999) at 14.

33. *See* WTO Agreement, *supra* note 31, at art. II(2). The Multilateral Trade Agreements, or "framework agreements," are the legal instruments included in Annexes 1-3 of the WTO Agreement that bind all WTO members. Alternatively, the Plurilateral Trade Agreements included in Annex 4 of the WTO Agreement bind only those Members who have voluntarily accepted them. *Id.* at arts. II(2) and (3).

34. *See About the WTO: The Organization*, WTO (visited Apr. 14, 1999) <http://www.wto.org/about/organsn6.htm>.

35. *See* WTO Agreement, *supra* note 31, at art. XII(2).

36. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, par. 5, LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION, *supra* note 31 [hereinafter Final Act].

37. Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization, dec. 2(a), LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION, *supra* note 31, at booklet 5. This Ministerial Decision also provides that the prepared accession report "shall be taken into account by the Ministerial Conference in its consideration of any application by the State or separate customs territory concerned to accede to the WTO Agreement." *Id.* at 2(b). The Final Act, or WTO "charter," states that by signing the Act, the Members "agree . . . to adopt the Ministerial Declarations and Decisions." *See* Final Act, *supra* note 36, at par. 2(b).

38. WTO Agreement, *supra* note 31, at art. IX(1). Despite the fact that consensus voting is technically an exercised preference, the preference has become, as a practical matter, a required function in WTO decision-making in light of the few GATT/WTO decisions that have been rendered by vote. *See infra* text accompanying note 40.

consensus if no member present at the Ministerial Conference formally objects to a proposed decision.[39] All relevant issues, including accession decisions, will be decided by vote only if a decision cannot otherwise be made by consensus.[40] The predilection for decision making by consensus is extremely strong, with less than a dozen matters being decided by vote since the GATT's inception.[41]

Second, once a country applies for WTO membership and tenders a memorandum detailing its laws, regulations, and policies affecting investment and trade, the prospective member begins to negotiate bilateral market access agreements with individual WTO members.[42] As explained by the WTO Secretariat, "each accession is principally a negotiation between the WTO Members and the applicant [, the pace of which] depends in large measure on the capacity of the acceding government to negotiate actively at the bilateral and multilateral level."[43] All bilateral negotiations must be concluded before the Working Party may submit a Protocol of Accession at the Ministerial Conference for approval. Each WTO member, therefore, effectively wields a veto power over prospective members should the WTO member refuse (expressly or through indirect action) to conclude bilateral market access negotiations, which in turn prevents an accession protocol from being submitted to the General Council for an accession decision.[44]

B. CHINA AND THE GATT/WTO REGIME

The turbulent love affair between China and the GATT/WTO regime dates back to the establishment of the GATT 1947. China was a founding member in the GATT 1947,[45] the legal

39. *See* WTO Agreement, *supra* note 31, at fn. 1.

40. *See id.* at art. IX(1).

41. *See* Robert P. O'Quinn, *How to Bring China and Taiwan into the World Trade Organization*, HERITAGE FOUND. ASIAN STUD. CTR. BACKGROUNDER NO. 140, Mar. 22, 1996 (visited Feb. 16, 1999) <http://www.heritage.org/library/categories/trade/ascbg140.html>.

42. *See* Decision on Accession to the Agreement on Government Procurement, para. 1(c), LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION, *supra* note 31, at booklet 5. This Ministerial Decision notes that prospective members "interested in accession would hold consultations with the Parties on the terms for its accession." *Id. See also Accession to the WTO - State of Play*, WTO Doc. WT/GC/W/100 (Sept. 30, 1998) (visited Feb. 19, 1999) <http:www.wto.org/wto/about/GCW100.html.

43. *Accession to the WTO*, *supra* note 42.

44. *See* O'Quinn, *supra* note 41.

45. *See, e.g.*, 1 FRANK W. SWACKER ET AL., WORLD TRADE WITHOUT BARRIERS 2 (Frank W. Swacker et al. eds., 1995); *Status of Working Party Accessions:*

predecessor of the WTO, but China's tenancy in the GATT was short-lived as Chang Kiashek and the Taiwanese government severed ties with the trade vehicle in 1950.[46] The Chinese Communist Party abandoned the free market system shortly thereafter in favor of a closed-market economy with absolute ownership and operation by the State.[47]

More than thirty years passed before China demonstrated an interest in renewing ties with the multilateral trade regime. China's first efforts to resume its GATT seat resulted in China receiving "observer" status in November 1982.[48] On July 16, 1986, Beijing formally notified the GATT's contracting parties of China's desire to again participate in the trade agreement,[49] tendering the requisite memorandum describing China's trade system soon thereafter.[50] While a GATT Working Party was established in March 1987 to negotiate China's accession, China failed to renegotiate its GATT membership prior to the Uruguay Round and was, therefore, limited to participating in the monumental negotiations as an observer.[51] As an observer, China neither participated in the formal decision-making process (observers have no vote) nor submitted schedules of commitments in goods or services.[52]

In 1994, China commenced a massive campaign to join the GATT upon the conclusion of the Uruguay Round, an effort that culminated in China submitting a formal bid for accession to the

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China, WTO, May 1999 (visited Aug. 17, 1999) <http://www.wto.org/wto/about/china.htm>.

46. *See, e.g.*, Gertler Correspondence, *supra* note 8; RUI MU & WANG GUIGUO, CHINESE FOREIGN ECONOMIC LAW: ANALYSIS AND COMMENTARY, Pt. 13, p. 18 (Rui Mu & Wang Guiguo eds., 1994). China was unable to participate in the GATT after Chang Kiashek severed mainland China's ties because the GATT officially recognized the Chinese seat as belonging to the Taiwanese government. When the GATT followed a 1971 decision by the United Nations General Assembly to recognize mainland China as the only legitimate government of China, China's observer status was terminated and it immediately became legally competent to participate in the GATT once more.

47. *See* SWACKER ET AL., *supra* note 45, at 2-3. *See generally* KENNETH A. CUTSHAW & JIANYI ZHANG, DOING BUSINESS IN CHINA 1174-81 (Kenneth A. Cutshaw & Jianyi Zhang eds., 1997).

48. *See* O'Quinn, *supra* note 41.

49. *See Request By the People's Republic of China to Participate in the GATT*, 27 I.L.M. 1419 (1988).

50. *See* O'Quinn, *supra* note 41 (reporting that China tendered the necessary memorandum on Feb. 13, 1987).

51. *See id.* (citation omitted) *with* fn. 57, *infra*.

52. *See* Gertler Correspondence, *supra* note 8.

WTO on December 7, 1995.[53] Beijing relished the thought of being a founding member of the WTO, envisioning the move as a "political recognition of China's status as a world economic power."[54] In contrast, however, numerous economic superpowers drove home the non-political nature of the WTO solely as a commercial contract, insisting that China's accession would only be acceptable on commercially viable terms.[55] To date, China professes a desire to join the global trade institution but has failed to produce an agreement on accession that is acceptable all members of China's Working Party in the twenty-plus formal Working Party sessions convened since 1987.[56]

What does this mean for China? China is attempting to join the WTO as a newly acceding government rather than as a GATT contracting party.[57] Consensus voting means that China must gain the support of the most powerful and influential GATT contracting parties to avoid accession objections at the Ministerial Conferences or, alternatively, take the more rigorous accession path and secure the votes of at least two-thirds of the WTO members. The bilateral negotiations requirement also means that China must avoid reaching "choke points" in market access negotiations to avoid any effects that would, practically speaking, veto a Chinese accession. As of July 1998, China's Working Party opined that while negotiations on goods and

53. *See Communication from China*, WTO Doc. WT/ACC/CHN/1 (Dec. 5, 1995) (visited Feb. 23, 1999) <http://www.wto.org> (available in the documents database with the search term "WT/ACC/CHN").

54. O'Quinn, *supra* note 41.

55. *See id.*

56. *See, e.g., US Makes Progress in China WTO Talks But No Deal Before Zhu's Visit, Daley Says*, 16 INT'L TRADE REP., No. 11, at 442 (Mar. 17, 1999) (reporting that China's Foreign Trade Minister told reporters on March 12, 1999 that "China's position on the WTO has never changed . . . China wishes to enjoy the rights and undertake the obligations under the WTO").

57. When China sought to participate in GATT negotiations during the 1980s, China challenged the legality of Chang Kiashek's severance of mainland China's GATT membership, contending that the Chinese Communist Party never resigned from the GATT. After China expressed an interest in renewing its ties with the GATT, a Working Party on China's Status as a Contracting Party was formed to renegotiate the terms of China's contracting party status. In 1995, after the completion of the Uruguay Round negotiations, this Working Party was transformed into a WTO Working Party on the Accession of China. While the legality of China's "Kiashek challenge" was never resolved, China has committed to apply for WTO membership as a newly acceding government. *See, e.g.*, Gertler Correspondence, *supra* note 8; Thomas Yunlong Man, *National Legal Restructuring in Accordance with International Norms: GATT/WTO and China's Foreign Trade Reform*, 4 IND. J. GLOBAL LEG. STUD. 471, 473-75 (1997).

services are advanced (in addition to the United States, China has now substantially or successfully negotiated bilateral accession terms the European Union, Australia, Canada, and Japan),[58] numerous issues remain open and subject to further consultation.[59]

The nature of the accession process also brings to light the importance of the November trade deal with the United States. On a multilateral level, the United States is a member of the Working Party on the Accession of China[60] and thus, influences the direction of the multilateral accession demands imposed on China. On a bilateral level, China was able to prevent the United States from invoking its "bilateral veto" power. In doing so, China operated predominantly within the legal confines of the Uruguay Round Agreements Act of 1994[61] and the accompanying Executive Statement of Administrative Action.[62] These

58. *See, e.g., 1999 Outlook: China, supra* note 12, at 120; *Australia Backs China WTO Bid*, CHINAONLINE, July 14, 1999 (on file with author); *Japan, China Reach Basic WTO Agreement*, INSIDE CHINA TODAY, July 8, 1999 (on file with author); Yates, *supra* note 22 (noting that China is expected to sign bilateral deals with Canada and the European Union in the near future on substantially similar terms as the deal recently negotiated with the United States).

59. *See Accession to the WTO, supra* note 42.

60. *See* Gertler Correspondence, *supra* note 8 (noting that the Working Party, which is chaired by Mr. Pierre-Louis Girard of Switzerland, is comprised of 54 Members).

61. Pub. L. No. 103-465, 108 Stat. 4809 (codified at 19 U.S.C. §§ 3531-32) (1994), as amended by Pub. L. No. 105-304, 112 Stat. 2860 (1998). The GATT 1994 entered into force in the United States on January 1, 1995.

62. The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1133 (codified at 19 U.S.C. § 2905). This law requires the President to make certain determinations about China's SOEs, including: whether China's SOEs account for a significant share either of China's exports, or China's goods that are subject to competition from goods imported into China; and whether these enterprises adversely effect United States's foreign trade or the its economy in general. If both determinations are made in the affirmative, the WTO Agreement cannot apply between China and the United States until either China enters into agreement regarding its SOE operations, or federal legislation is enacted that supports application of the WTO Agreement to China. For a discussion regarding what would happen if China becomes a WTO member and Congress has not passed the necessary legislation, see generally *China Trade: Hearings on China's WTO Membership and Most-Favored-Nation Status Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 105th Cong (1998) (statement for the record by JayEtta Z. Hecker, Assoc. Dir., Int'l Relations and Trade Issues, Nat'l Security and Int'l Affairs Div.), *reprinted in* GAO/T-NSIAD-98-209, June 17, 1999. China also faces a large statutory obstacle in the Jackson-Vanik amendment of the Trade Act of 1974, which limits the trading privileges the United States may grant to countries that Congress determines to be suppressing their national citizens. For further discussion of this statutory constraint in the context of China's accession to the WTO, see, e.g., Alan S. Alexandroff, *Concluding China's Accession to the WTO: The US*

federal measures require the USTR to "consult with Congress before voting in favor of a Protocol of Accession."[63] As previously noted, however, persuading Congress (an especially difficult task so far)[64] that China's accession is paramount and appropriate may prove daunting.[65]

C. THE EVOLUTION OF MODERN SINO-US RELATIONS

i. Paving the Way: The Pre-WTO Framework

The Reagan Administration laid the foundation for modern day trade relations with China. The United States-China Trade Agreement of 1980 (*"Trade Agreement"*)[66] bestowed Most Favored Nation (*"MFN"*)[67] status on China,[68] which not only

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Congress and Permanent Most Favored Nation Status For China, 3 UCLA J. INT'L L. & FOR. AFF. 23 (1998); Richard W. Stevenson, *Capital Hill Is a Barrier to China Goal*, NY TIMES, Apr. 9, 1999 (visited Apr. 9, 1999) <http://www.nytimes.com/yr/mo/day/news/world/china-congress.html>; Lysikatou, *supra* note 21.

63. Alexandroff, *supra* note 62, at 31.

64. *See id.* at 34-39 (discussing proposed bills regarding United States support for China's accession, most of which are unfavorable towards China and would require Congressional approval before supporting China's accession). *See also* Chad Bowman, *Gephardt Bill Would Require Hill OK Before US Support for China Accession*, 16 INT'L TRADE REP., No. 11, at 357 (Mar. 3, 1999); Rossilla Brevetti, *Helms, Hollings to Introduce Bill Requiring Congress to Vote on China WTO Accession*, 16 INT'L TRADE REP., No. 9, at 443 (Mar. 17, 1999); Robert G. Kaiser, *House Democrats Facing A Dilemma on China Deal*, WASHINGTON POST, Nov. 21, 1999, at A10; David R. Francis, *Partisan Ping-Pong may delay China deal*, CHRISTIAN SCIENCE MONITOR, Nov. 22, 1999 (visited Dec. 28, 1999) <http:www.csmonitor.com/durable/1999/11/22/p17s1.html>; Patrick J. Buchanan, *A Time for Truth About China*, THE AMERICAN CAUSE, Apr. 5, 1999 (visited Dec. 5, 1999) <http://www.theamericancause.org/pjb-speech-china.html>.

65. For an excellent discussion of the fashioning of America's China policy, see Alexandroff, *supra* note 62. In his introduction, Alexandroff notes that "[a]s with trade policy generally, American support for China's accession to the WTO will require not only executive backing but the approval of Congress as well." *Id.* at 24.

66. Agreement on Trade Relations Between The United States of America and the People's Republic of China, July 7, 1979, 31 U.S.T. 4651; T.I.A.S. No. 9630 <http://www.ustr.gov/reports/tpa/1998/contents.html>(entered into force on February 1, 1980). *See also* 1998 TRADE POLICY AGENDA AND 1997 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 188 (noting that "[t]he framework for US trade relations with China" is based on the Trade Agreement) [hereinafter 1997 ANNUAL REPORT]. *Cf.* Lysikatou, *supra* note 21, at 3 (explaining that the Jackson-Vanik extension was awarded by Congress with respect to China on January 24, 1980).

67. *See supra* note 21.

68. *See* 1997 ANNUAL REPORT, *supra* note 66, at 188 (noting that "[t]he framework for US trade relations with China is based on" the Trade Agreement). While this treaty was negotiated and signed into law by President

helped cement favorable Sino-US trade relations but also prompted trade between the two nations to double over the next year.[69] The United States and China were also able to withstand and survive disputes in textile trade in the early 1980s which "proved to be the first dueling grounds for the two countries."[70]

The birth of the multilateral trade negotiations known as the Uruguay Round[71] also impacted our Chinese relations during the 1980s. When China indicated an interest in re-acquiring Contracting Party status in the GATT in 1986, the United States devised a multifaceted plan for China's membership into the GATT.[72] Not unlike the November bilateral agreement, the plan called for greater transparency, the establishment of a national trade regime, deconstruction of non-tariff barriers inconsistent with GATT principles, a demonstrated commitment to trade and price reforms, and (assuming membership was secured) provisions safeguarding against possible market disruptions caused by China's non-market practices.[73]

The United States became further committed to international trade when the Bush Administration took over the Presidency in 1989. Most significantly, Sino-US relations weathered the notorious Tiananmen Square incident[74] to conclude several important trade agreements in the Administration's first year alone, including a Memorandum of Understanding (*"MOU"*) to improve IPR protection in China and three agreements relating

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Carter, the Reagan administration was the most immediate recipient of the benefits it conferred. As such, it is discussed under the Reagan Administration rather than the Carter Administration.

69. *See* BUILDING AMERICAN PROSPERITY IN THE 21ST CENTURY, REPORT OF THE COMMISSION ON US- PACIFIC TRADE AND INVESTMENT POLICY 97 (Apr. 1997), *available at* <http://www.ustr.gov> [hereinafter BUILDING AMERICAN PROSPECTS].

70. *Id.* at 97.

71. *See id.* at 98.

72. *See id.* at 99.

73. *See id.* 99-100.

74. *See* CUTSHAW & ZHANG, *supra* note 47, at 1184-86. The United States enacted several measures in condemnation of China's brutal suppression of the 1989 Tiananmen Square "political rebellion." Some of these measures included: suspending high-level exchanges with China; suspending weapons exports to China; and imposing a series of economic sanctions on China, many of which directly affected foreign investment and trade. *Id.* at 1185-86. Among the foreign investment and trade-related sanctions were measures that opposed new loans to China by international financial institutions; suspended all new activities relating to the Overseas Private Investment Corporation (*"OPIC"*) and Trade and Development Program (*"TDP"*); and, halted further liberalization of Coordinating Committee for Multilateral Export Controls. *Id.* at 1186.

to launch services, technology safeguards, and liability of commercial spacecrafts.[75] Although two Section 301 actions[76] were brought against China for IPR infractions and other market access barriers during this time, the ultimate outcome – a 1992 Market Access MOU with China – was a positive step towards accomplishing many current WTO requirements.[77]

ii. The Clinton Years: Concluding the Uruguay Round and Beyond

The Clinton Administration ushered in a renewed commitment to international trade, placing even greater emphasis on generating trade with Pacific Rim countries than the preceding administrations.[78] The United States led efforts to solidify China's membership in the GATT primarily to encourage the nation to adopt attitudes, laws, and procedures consistent with international trading.[79] The immediate results were nothing but promising, with China reducing its average tariff rate by 50% on December 31, 1993.[80]

The Clinton Administration brought with it a vigor to enforce agreements signed with China since 1992.[81] Special 301 investigations into China's IPR protections were initiated in June 1994, with the USTR determining some twenty months later that China's IPR policies burdened American trade and commerce.[82] The USTR pledged that if China could not satisfactorily resolve its outstanding IPR-related problems, the United States would impose 100% tariff rates on $1.08 billion of China's imports. The Section 301 investigation and sanctions were ter-

75. *See* BUILDING AMERICAN PROSPERITY, *supra* note 69, at 103-104.

76. As noted by the Office of the USTR:

"Section 301 of the Trade Act of 1974, as amended (the Trade Act), is the principal US statute for addressing foreign unfair trade practices affecting US exports of goods or services. Section 301 may be used to enforce US rights under bilateral and multilateral trade agreements and may also be used to respond to unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict US commerce."

1997 ANNUAL REPORT, *supra* note 66, at 238.

77. *See* BUILDING AMERICAN PROSPERITY, *supra* note 69, at 104. The 1992 Market Access MOU resulted in China's commitment to remove numerous non-tariff barriers, reduce certain tariff rates, increase transparency of Chinese trade law, curb import substitution policies, and eliminate import testing and standards requirements as trade barriers. *Id.*

78. *See id.* at 106-08.

79. *See id.* at 112.

80. *See id.*

81. *See id.*

82. *See id.*

minated, however, when China promised to take aggressive action in cracking down on piracy and to provide foreign IPR holders greater market access.[83]

The conclusion of the Uruguay Round negotiations also expanded the parameters of Sino-US accession negotiations to encompass the Uruguay Round results.[84] An unfortunate consequence of these amplified accession negotiations was the rise of disagreements over China's protocol commitments, disagreements which stalled Sino-US accession negotiations in late 1994 and throughout 1995.[85] This breakdown in accession negotiations arguably prompted increased accession demands from the United States, demonstrated by the contents of a confidential trade report outlining issues China would have to resolve prior to gaining American accession support.[86] A barrage of trade difficulties came on the heels of this report, with the next few years marred with several disparaging trade allegations against China.[87]

Accession negotiations were rejuvenated in 1997 after China put forth serious proposals toward liberalizing its markets for goods and services.[88] Chinese President Jiang Zemin and Trade Minister Wu Ti presented phase out offers that would reduce tariff rates to an average of 10% and eliminate all non-tariff barriers by 2005, contingent on China's accession to the WTO.[89] Many of the 114,000 patents and 121,000 trademarks issued by China went to American businesses;[90] China agreed to comply with the Trade-Related Intellectual Property Rights

83. *See* BUILDING AMERICAN PROSPERITY, *supra* note 69, at 112.

84. *See id.* at 113.

85. *See id.* (noting that negotiations "reached an impasse in 1994 over negotiations on China's protocol commitments, the portion of accession dealing with adherence to WTO principles").

86. *See* Alexandroff, *supra* note 62, at 24 n. 2.

87. *See* BUILDING AMERICAN PROSPERITY, *supra* note 69, at 127 tbl. 4 (China was listed as a Priority Foreign Country on the 1996 Special 301 Report for Asia Pacific Countries).

88. *See* United States-China Business Council, *China and the WTO: Critical Issues and Objectives - June 1998* (visited Jan. 30, 1999) <http://www.us-china.org/press/WTO.html> (explaining that "negotiations intensified when China put serious offers on the table to liberalize its trade in goods and services"). *But cf.* Charles Owen Verrill, Jr. et al., *International Trade*, 32 INT'L LAW. 319, 320 (1998) (reporting that Sino-US accession negotiations "produced little progress" in 1997).

89. *See* Verrill, *supra* note 88.

90. *See Hearings on the Renewal of Normal Trade Relations with China Before the Senate Comm. on Finance* (July 9, 1998) (testimony of US Trade Representative Charlene Barshefsky) (on file with author) [hereinafter Barshefsky Testimony].

("*TRIPs*") Agreement upon accession;[91] and China removed most formal quotas and import licensing requirements applicable to products covered by the 1992 Market Access MOU.[92]

Intensified accession discussions carried over into 1998 and 1999 without significant progress, largely because bilateral negotiations were complicated by two factors independent of the WTO. First, the United States's growing trade deficit with China was a huge source of trade friction.[93] All told, the deficit was exceeding $1 billion per week in China's favor while American exports to China have totaled a mere $9 billion since it received MFN status in 1980.[94] The deficit factor might not have played (and continue to play) such a prominent role except that one-third of the United States's overall trade deficit —again, the largest in Western history— is with China.[95] Speculation loomed that China was dragging its feet in the accession process because China already received the most favorable trading status conferred under the WTO from the United States without having to comply with all WTO requirements.[96] In other words, and ignoring WTO benefits that China may have been losing out on, China was having its MFN cake and eating it, too, by not having to comply with WTO standards that otherwise bind WTO members.

Second, the downturn of Asian financial markets triggered the question of whether China has the ability to weather difficult economic times without unduly hindering China's accession efforts financially. Washington found China's responses to the economic turmoil unsatisfactory and claimed that China's increased protectionist measures (taken in direct response to the

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91. *See* 1997 ANNUAL REPORT, *supra* note 66, at 189.

92. *See id.* at 190.

93. *See, e.g.*, USTR Charlene Barshefsky: Toward the Pacific Community: American Trade Policy in Asia, Remarks Before the Asia Society (Jan. 21, 1999) [hereinafter Barshefsky: Toward the Pacific Community]; *US Makes Progress*, *supra* note 56.

94. *See* Barshefsky: Toward the Pacific Community, *supra* note 93.

95. *See* Stokes, *supra* note 9. China's trade surplus is expected to reach US$60 billion in 1999. *See* William J. McMahon, *House Backs Clinton, Affirms China's Trade Status*, CHINAONLINE, July 27, 1999 (on file with author).

96. *See* Stokes, *supra* note 9 (noting that "a key reason Beijing is dragging its feet on WTO membership is that its exports already receive MFN treatment from its major trading partners," and "[w]ith China already enjoying the single-most-important benefit of WTO membership, it is little wonder that Beijing thinks the status quo is just fine"); *Rethinking China*, BUS. WK., Mar. 4, 1996, 57-65.

economic downward spiral) harmed American exports.[97] Referring to export subsidies and other newly-erected trade barriers, Undersecretary of Commerce for International Trade David Aaron noted that China's attempt to bolster its economic recovery came via "hidden devaluation."[98] Moreover, the economic slowdown appeared to have curtail the appeal of the WTO to China, which may have caused China to further delay accession negotiations.[99]

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97. *See* Frank James, *US Bristles Over China Trade Limits*, CHI. TRIB., Dec. 17, 1998, *available at* 1998 WL 23516071 (referring to the economic down slide and China's new trade barriers, Commerce Secretary William Daley reportedly stated that if China continued to do "what they've done . . . over the last six months" [taking "pure protectionist actions"], then China would force the US to respond adversely); Christopher Lingle, *China doesn't belong in the WTO*, J. COM., Mar. 5, 1999, *available at* <http://www.joc.com/>, Archives Library (noting that "[g]rowing Chinese subsidies to exporters are a form of protectionism that amount to a stealth devaluation").

98. David Ibison, *US Official Blasts Beijing Export Subsidies*, S. CHINA MORNING POST, Nov. 5, 1998, *available in* 1998 WL 22051278 (quoting Undersecretary Aaron as saying that China's recently-erected trade barriers, export subsidies in particular, "amount to hidden devaluation"). Nicholas Lardy noted in April 1999 that newly-adopted economic policies included: price floors on a broad range of goods subject to competition from imports; import licensing restrictions and import-inhibitive quotas; and access restrictions to foreign exchange for importers and foreign-funded firms. *See* Nicholas Lardy, *China's WTO Membership*, BROOKINGS INST. POL'Y BRIEF NO. 47, Apr. 1999 (visited July 17, 1999) <http://www.brook.edu/comm/policybriefs/pb047/pb47.htm>.

As of August 1999, China's retail prices had spiraled downward for 22 months, and the trend applied to more than 80% of all major Chinese commodities. *China Sees Continued Falling Prices*, NEWSEDGE CORP., Aug. 6, 1999 (on file with author). Unemployment in China is at a 30-year high, and its problems with deflation are "quite substantial because of excess capacity across such a broad range of industries, declining consumer demand, and declining price levels both at the retail level and at the consumer price index level." Dan Griswold et al., *Trade and Transformation of China: The Case for Normal Trade Relations*, THE CATO INST. TRADE BRIEFING PAPER NO. 5 at 11, July 19, 1999 (visited July 17, 1999) <http://www.freetrade.org/pubs/briefs/tpb-005es.html> (statement of Nicholas Lardy). Lardy believes that devaluation is imminent – that is, the question is not whether devaluation will occur, but when. *China's WTO Entry Debated at Brookings Institute Conference*, CHINAONLINE, July 23, 1999 (on file with author). *See, e.g., Gloomy China growth fuels calls for fresh stimulus*, HONG KONG STANDARD, July 17, 1999 (visited July 18, 1999) <http://online.hkstandard.com/fulstory/19990717/bfr0417g.htm>; Manu Bhaskaran, *Rethinking Asia: Will China Derail Recovery?*, FAR EASTERN ECON. REV., Aug. 5, 1999 (visited Aug. 1, 1999) <http://www.feer.com/Restricted/99aug_05/rethinking.html>.

99. *See* Ibison, *supra* note 98. At an internal meeting, Chinese President Jiang Zemin told State officials that, in essence, China has waited 13 years to join the GATT/WTO regime and it can wait another 13 years. *See* Joseph Fewsmith, *The Impact of the Kosovo Conflict on China's Political Leaders and the Prospects for WTO Accession*, NAT'L BUREAU OF ASIAN RESEARCH BRIEFING (July

D. BENEFITS OF CHINA'S ACCESSION

Notwithstanding China's overall state of noncompliance with the GATT/WTO regime today, China's accession to the WTO clearly serves important economic and political purposes for the United States, purposes that have both domestic and international overtones. At the international level, the potential benefits of a successful Chinese accession are best described by a WTO-drafted "advertisement" summarizing the benefits of membership in the global trade organization.[100] Among others, these reasons include: the GATT/WTO regime promotes world peace through fair trade; international disputes are handled more "constructively" through the WTO rather than the current piece-meal processes; rules-based trade "makes life easier for all;" freer trade provides numerous tangible, economic benefits (such as reducing costs of living, raising income levels, stimulating economic growth, and providing more choice of goods); national governments are "shielded from lobbying;" and the WTO, whose principles "make life more efficient," encourages good government.[101]

In the case of China, accession promotes at least three further international interests. First, WTO membership will cause China's market to become more interdependent with other economies worldwide, in turning making it more difficult (i.e., costly) for China to break off economic ties by violating international trade agreements and norms.[102] This is especially important to the United States given China's history of "shady" compliance with past bilateral agreements.[103] Second, admitting China into

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1999) (visited Aug. 1, 1999) <http://www.nbr.org/publicationis/briefing/few-smith99/index.html>.

100. *See 10 benefits of the WTO trading system*, WTO 1999 (visited Apr. 14, 1999) <http://www.wto.org/wto/10ben/10ben00.htm> (on file with the author).

101. *See id.* For a more complete discussion of the "positives" offered by the WTO, see TRADING INTO THE FUTURE, *supra* note 32, at ch. 1.

102. *See generally* Jeremy Brooks Rosen, *China, Emerging Economies, and the World Trade Organization*, 46 DUKE L.J. 1519, 1549-50 (1997) (citations omitted). At one point, Rosen quotes Minister Lee Kuan Yew of Singapore as suggesting that China will become more interconnected with the other major trading nations of the world, which will ultimately make it "costly for China to risk rupture of economic ties by violating accepted rules and conventions . . . [and] [t]his can be a powerful factor to keep [China] engaged in the international community." *Id.* at 1549 (citation omitted).

103. *Cf.* Rosen, *An Economic Balance Sheet*, *infra* note 112. In citing a study conducted by scholars from the University of Georgetown Law Centre compiling a record of China's compliance with its international obligations, Rosen reports that the results "suggest that China's record, though mixed, is better than the detractors think. . . . According to this scorecard, China's

the WTO is important from a historical perspective — never in the post World War II era has a top ten trading nation (which China now is) been excluded from the GATT 1947 regime or its successor, the WTO.[104] As one academic notes, the idea of a WTO "that pretends to truly global status without China in it is almost comical."[105] And finally, China's accession to the WTO serves international "equality" purposes: as previously noted, China relishes the notion of being considered an equal of the global economic superpowers. Welcoming China into "the family of nations" should relieve international tensions that may simply result from hard feelings, i.e., problems involving China that otherwise arise for no apparent reason.[106]

On the domestic front, opening China's market means an opportunity to promote national growth and prosperity. China's market and its productive capabilities are unprecedented; the fourth largest trading partner of the United States,[107] China is one of few remaining, virtually untapped major economies of scale.[108] Opening the market, which supports more than 400,000 American jobs,[109] will provide an opportunity to reduce the extraordinarily large trade deficit of the United States. China's annual growth rate in trade, which at 16% is more than double the worldwide growth rate,[110] offers the fastest growing export market for American companies in goods and services.[111]

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compliance record is a mixed bag — like that of many emerging countries. China does not have an exemplary record, but it is wrong to say that China is a consistent cheater on international sovereign commitments." *Id.* (citing contributions from James Feinerman and Daniel Chang of the Georgetown University Law Center).

104. *See Hearings on Changing Congressional Views of the US-China Relationship Before the Subcomm. on East Asian and Pacific Affairs of the Senate Foreign Relations Comm.* (June 19, 1998) (statement of Nicholas Lardy, Senior Fellow, The Brookings Institute (visited Feb. 6, 1999) <http://www.brook.edu/views/testsimony/lardy/19980618.htm> [hereinafter Lardy Testimony].

105. *Negotiators Say China's WTO Talks Stall Over Distribution, Insurance, Telecom*, 16 INT'L TRADE REP. 148, Jan. 27, 1999 (quoting James Feinerman of the Georgetown University Law Center).

106. *See* Rosen, *supra* note 102, at 1548-50.

107. *See* 1998 ECONOMIC REPORT OF THE PRESIDENT 233.

108. *See* BUILDING AMERICAN PROSPERITY, *supra* note 69, at 107 (noting that "Asia Pacific . . . [is] virtually the only region of the world where economic growth is thriving").

109. *See* Barshefsky Testimony, *supra* note 90.

110. *See China's Accession to the WTO*, US-CHINA EDUC. FOUND., 1998 (visited Jan. 30, 1999) <http://www.uschinatrade.org/news/wto.html> (on file with author).

111. According to United States International Trade Commission, China's accession to the WTO would increase United States exports to China by at least seven percent and Chinese sales to the United States by some ten percent. *See*

The federal government estimates that a liberated Chinese market could garner an additional $500 million in annual exports to China.[112] American businesses would receive increased foreign direct investment ("*FDI*") possibilities, whereas China presently accounts for only a paltry share of United States investment abroad while constituting the second largest recipient of global FDI.[113] In addition, China's equity market, which is predicted to increase more than $200 billion by the year 2000 from the market's present $300 billion trading level, will provide further investment opportunities.[114]

Political incentives, possibly overshadowed by financial motives, are also important notwithstanding the non-political nature of the WTO. China's accession to the world trade regime, the economic equivalent of the peace-keeping United Nations,[115] may alleviate political 'headaches' holding over from past Communist regimes, if not ultimately the downfall of Communism in China.[116] Supporting China's accession may mean developing

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Peter Hartcher, *Small step a giant stride for world trade*, THE AUSTRALIAN FINANCIAL REV., Nov. 16, 1999, at 12.

112. *See* DFL International, *US Commercial Technology Transfers To The People's Republic of China*, REPORT FOR THE OFFICE OF STRATEGIC INDUSTRIES AND ECONOMIC SECURITY, BUREAU OF EXPORT ADMINISTRATION, DEP'T OF COMMERCE pt. 2, 45-46 (Jan. 1999) (citation omitted) [hereinafter BXA REPORT]. *Cf.* Daniel H. Rosen, *China and the World Trade Organization: An Economic Balance Sheet*, CHINAONLINE, May 1999 (on file with author) (reporting that "the immediate increase in US exports of goods and services to China can be estimated at $3.1 billion"). *But cf.* Robert E. Scott, *China Can Wait: WTO accession deal must include enforceable labor rights, real commercial benefits*, ECON. POL'Y INST.: ISSUE BRIEFING PAPER, May 1999 (visited July 17, 1999) <http://epinet.org/briefingpapers/china.html> ("[T]he U.S. trade deficit with China is likely to increase by almost $50 billion in the next four years if China is allowed into the WTO . . . this would translate into a net loss of 607,000 jobs in the U.S., mostly in the manufacturing sector").

113. *See* ECONOMIC REPORT OF THE PRESIDENT, *supra* note 107, at 253. *See also China heads for the WTO*, THE ECONOMIST INTELLIGENCE UNIT, Nov. 18, 1999 (visited Dec. 6, 1999) <http://www.eiu.com/vw_lite/China_heads_for_the_WTO.asp> (according to the United States government, actual FDI in China during 1998 amounted only to $3.2 billion).

114. *See* Benjamin M. Vandegrift, *Making Deals in China*, BUS. L. TODAY, Nov./Dec. 1998, at 40.

115. *See* SWACKER ET AL., *supra* note 45 at 1 (noting that the WTO is "in a position comparable, in the world economy, to that of the United Nations in the peace process").

116. On a trade level, for example, China's highly subsidized SOEs will probably be privatized. On a political level, open market economies lend support to democratic regimes. Sino-US ideological differences may (arguably) be smoothed over, perhaps not entirely but perhaps in areas of major interest. Steps have been taken that move "away from the [Chinese] constitutional ideal of 'socialist public ownership' which has difficulties in surviving the transition

stronger Sino-US relations overall, ties that can be used to pursue goals in other areas of international concern, such as environmental protection. In addition, better Sino-US relations may help safeguard national security and international tranquility, which is presently jeopardized by China's exportation of technology of mass destruction to non-peaceful nations.[117] Moreover, there is even speculation that having a closer political ally in China may lead to improved human rights in China, which has been notorious for human rights violations long before the 1989 Tiananmen Square massacre.[118]

> And although perhaps less grandiose than China's full-fledged accession to the WTO, the November Sino-US trade agreement provides several global trade benefits in and of itself. For example, the other WTO members are now liberated to negotiate and implement their own respective trade deals with China. Countries such as Australia have been waiting patiently on the United States to conclude its bilateral negotiations with China before moving forward with the process.[119] In addition, the WTO members should also now feel free to strike trade deals with Taiwan. Apparently, the WTO governments were unwilling to risk concluding a trade deal with Taiwan prior to settling up with mainland China.[120]

III. China's Accession Process: A Report Card from the West

A. CHINA'S ACCESSION ACCOMPLISHMENTS

China has taken great strides, both multilaterally and bilaterally, toward acceding to the WTO in a "commercially meaningful" way. China's published tariffs, which averaged 43% in 1994,

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from planned to market economy in a socialist setting." Conita SC Leung, *Reforming State-owned enterprises: pragmatism before ideology*, 4 CHINA L. NEWS (CCH) 1, Oct. 1997 (noting that "[t]he Communist Party's endorsement of [SOE reform] is another bold step away from the constitutional ideal of 'socialistic public ownership' which has difficulties in surviving the transition from planned to market economy in a socialist setting"). *See also* James A. Dorn, *The death of communism in China*, J. COM., Mar. 5, 1999, at E1.

117. *See* Richard N. Haass and Nicholas Lardy, *The United States and China: A New Framework*, BROOKINGS INST. POL'Y BRIEF NO. 25, Oct. 1997 (visited Feb. 6, 1999) <http://www.brook.edu/comm/policybriefs/pb025/pb25.htm>.

118. *See* BACKGROUND NOTES, *supra* note 5; CUTSHAW & ZHANG, *supra* note 47 at 1174-78.

119. *See* Hartcher, *supra* note 111, at 12 (noting that Australia has been waiting for a Sino-US trade deal to "enable the entire process to move ahead").

120. *See id.* According to the US-China Business Council, certain WTO members have (since Taiwan's WTO Working Party was formed in 1992) been of the view that the Chinese and Taiwanese WTO applications should be considered a package deal. Thus, there is "an informal understanding" among WTO members that China and Taiwan should be admitted together. *Questions and Answers: US-China WTO Agreement*, US-China Business Council, Dec. 1, 1999 (visited Jan. 14, 2000) <http://www.uschina.org/public/wto/qanda.html>.

are reportedly around 17% today.[121] The 1992 Market Access MOU took steps to "confirm" that China has eliminated numerous import substitution regulations and policies.[122] In fact, the USTR has reported that China has "generally met the requirements of the 1992 Market Access MOU."[123]

China now has "a functioning system to protect intellectual property rights."[124] China is a member of the Berne Convention, the Universal Copyright Convention, the Madrid Protocol on the Protection of Marks, the Paris Convention for the Protection of Industrial Property, the World Intellectual Property Organization, and the Geneva Phonogram Convention.[125] China has amended most of its domestic copyright, patent, trademark, and trade secret laws to account for today's IPR challenges.[126] As a result of China's "comprehensive enforcement system," the West has seen a considerable increase of IPR protection in China.[127] Since 1995, China has shut down more than 60 CD and CD- ROM production lines and seized more than 15 million pirated CDs and CD-ROMs.[128] In the Guangdong Providence, where pirated products have historically been smuggled into China with ease, enforcement officials confiscated and destroyed more than 2.8 million pirated products in June 1998 alone.[129] Plus, more than 3000 Chinese judges have also received legal training in the field of intellectual property.[130]

Sweeping changes have also led to progress with regard to the elimination of non-tariff market barriers, with more than 185 non-tariff measures having been abolished since 1995

121. *See* Lardy Testimony, *supra* note 104. Note, however, that this figure may not include unreported Chinese tariffs. Moreover, the cited figure undoubtedly does not include effective tariff rates. For example, China utilizes a 17% VAT tax on tariff-applicable goods. As such, goods that are subject to a listed 20% tariff rate would, practically speaking, face an effective tariff rate of 37%. For further discussions of this 'effective' tariff issue, see 1998 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN BARRIERS 46-7, OFFICE OF THE USTR (released Mar. 31, 1998) [hereinafter 1998 NTE REPORT].

122. *See* 1998 NTE REPORT, *supra* note 121, at 49.

123. *Id.* at 45.

124. *Id.* at 53.

125. *See* TRADE COMPLIANCE CENTER: 1999 INVESTMENT CLIMATE REPORT, MARKET ACCESS UNIT OF THE INT'L TRADE ADMIN., DEP'T OF COM. (visited Jan. 30, 1999) <http://www.mac.doc.gov/tcc/> (located in the Market Access Information Database) [hereinafter INVESTMENT CLIMATE REPORT].

126. *See* 1997 ANNUAL REPORT, *supra* note 66, at 189.

127. *See id.*

128. *See* 1998 NTE REPORT, *supra* note 121, at 53.

129. *See* Barshefsky Testimony, *supra* note 90.

130. *See* 1998 NTE REPORT, *supra* note 121, at 53.

(predominantly pursuant to the 1992 Market Access MOU).[131] China slashed the number of commodities subject to export licensing by 50% in January 1999, reducing the number from 115 commodities in 1998 to 58 this year.[132] China has also started to provide more liberal trading rights by granting full importing and exporting rights to 27 private Chinese manufacturers in early 1999, marking the first time in history that non-State enterprises have been permitted to conduct foreign trade on their own.[133]

China has taken significant steps towards legal transparency by creating the Ministry of Foreign Trade and Economic Cooperation ("*MOFTEC*") Gazette, which is designed to publish all trade and investment-related laws and regulations.[134] MOFTEC is also taking advantage of modern technology by maintaining several Internet websites that post various trade and investment-related laws and regulations.[135] In addition, China enacted its first unfair competition law in 1993, which forbids the use of materials, money, and other means for bribery.[136] Moreover, China has consented to the resolution of the right to judicial review of administrative decisions relating to international trade.[137]

Notwithstanding the foregoing accomplishments, China's greatest accession achievement is, without qualification, the conclusion of the November bilateral trade agreement with the United States. The favorable terms of the trade pact run deep

131. *See id.* at 47.

132. *See China Reduces Number of Licensed Commodity Exports*, CHINAONLINE, Feb. 2, 1999 (on file with author) (citing an January 26, 1999 article reported in the Zhonggou Huagong Bao, or China Chemical News). According to the news report, this information was made public when MOFTEC released the latest catalog of commodities subject to export licensing requirements. *See id.*

133. *See Private Firms Given Go-Ahead To Engage in Foreign Trade in China*, 16 INT'L TRADE REP. 9, Jan. 6, 1999.

134. *See* 1998 NTE REPORT, *supra* note 121, at 48; INVESTMENT CLIMATE REPORT, *supra* note 125. Beijing also recently announced that it will revamp several Chinese trade laws. Accordingly, the revised laws "should make China's rules more transparent." Ian Johnson, *China Weighs Lifting Curbs on Foreign Firms*, WALL ST. J., Jan. 10, 2000, at A17 (citing an article in the China Daily Business Weekly).

135. For example, MOFTEC is maintaining websites at <http://www.cei.gov.cn> and <http://www.moftec.com.cn>.

136. *See* TRADE COMPLIANCE CENTER: 1999 TRADE REGULATIONS AND STANDARDS REPORT, MARKET ACCESS UNIT OF THE INT'L TRADE ADMIN., DEP'T OF COM. (visited Jan. 30, 1999) <http://www.mac.doc.gov/tcc/> (located in the Market Access Information Database) [hereinafter TRADE REGULATIONS & STANDARDS REPORT].

137. *See* 1997 ANNUAL REPORT, *supra* note 66, at 191.

into the Chinese commercial and political environment, including:

i. *Telecom.* China will allow foreign companies to own up to 49% of China's telecommunication outfits after accession, and that percentage will increase to 50% after two subsequent years.[138]

ii. *Internet.* China will allow foreigners to invest in minority shares of Chinese Internet content providers.[139]

iii. *Agriculture.* China will reduce tariffs on priority agriculture products to an average of 14.5% (from an average of 31.5% today) and will wholly eliminate agriculture export subsidiaries. China also agreed to phase out State trading of soy oil.[140]

iv. *Distribution.* China will allow foreigners distribution rights, which will be phased in over three years after accession.[141] Restrictions on services auxiliary to distribution will also be phased out within four years, at which time foreign services providers can establish wholly-owned subsidiaries in China.[142]

v. *Banking.* China will allow 100% foreign ownership of banking entities after the year 2005, and all present geographic restrictions on bank ownership will be phased out immediately.[143] China will also permit foreign banks to conduct local currency business with Chinese operations two years after accession and retail business five years after accession.[144] In addition, foreign banks will be permitted to provide auto financing[145] and own up to 50% of local life insurance entities.[146]

vi. *Entertainment.* China has agreed to all foreign firms to participate in 50% of the distribution profits for 20 films annually.[147]

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138. *E.g., Welcome to the Club*, *supra* note 2; *Highlights of China-US WTO accord*, REUTERS, Nov. 18, 1999 (visited Jan. 9, 1999) <http://cnn.com/ASIA-NOW. . /bc.wto.highlights.reut/index.html>. The November Agreement is said to mark the first bilateral agreement to open China's telecommunications sector, both in scope and direct investment. *See Summary of US-China Bilateral WTO Agreement*, US-CHINA BUSINESS COUNCIL (visited Jan. 10, 2000) <http://www.uschina.org/public/991115a.html> [hereinafter The Summary].

139. *See, e.g., Welcome to the Club*, *supra* note 2; *Highlights of China-US WTO accord*, *supra* note 138. For an excellent discussion of foreign investors ability to invest and operate in the Chinese Internet market, see Leslie Chang and Ian Johnson, *China Internet Investors Face Web of New Rules*, WALL STREET J., Dec. 13, 1999, at A25.

140. *See, e.g., Welcome to the Club*, *supra* note 2; *Highlights of China-US WTO accord*, *supra* note 138. For the first time in history, China will also permit the right of private agriculture trade without having to use Chinese SOEs. China also committed to eliminate SPF barriers associated with agriculture products. *See* The Summary, *supra* note 138.

141. *See, e.g., Welcome to the Club*, *supra* note 2; *Highlights of China-US WTO accord*, *supra* note 138.

142. *See* The Summary, *supra* note 138.

143. *See Welcome to the Club*, *supra* note 2.

144. *See Highlights of China-US WTO accord*, *supra* note 138.

145. *See Welcome to the Club*, *supra* note 2.

146. *See Highlights of China-US WTO accord, supra* note 138.

147. *See Welcome to the Club*, *supra* note 2. *But cf. Highlights of the China-US WTO accord*, *supra* note 138 (providing that China "will allow 49 percent

vii. *Travel and Tourism.* China has agreed to allow unfettered access to the hotel market, with foreign businesses having the ability to establish wholly-owned operations in China three years after accession.[148]

viii. *Safeguards.* China has agreed that United States safeguards shall be remain in place for 12 years after China's accession to the WTO in order to prevent sudden (and unstoppable) surges in imports from harming domestic producers.[149] China has also agreed to be subject to the United States' stringent antidumping methodology (applicable to non-market economies) for another 15 years.[150]

ix. *Industrial Tariff Reductions.* China has agreed to reduce import tariffs for automobiles[151] and wood/paper,[152] and undertake a chemical harmonization initiative which will cap tariff rates (6% maximum rate) based on the classification of a chemical.[153]

x. *Securities.* China will allow minority, foreign-owned enterprises to participate in funds management on the same terms as Chinese firms, and such enterprises will gain greater engagement rights as the Chinese market expands.[154]

xi. *Protocol Provisions.* Upon accession, China will implement the TRIMs Agreement; eliminate (and refuse to enforce) local content requirements and trade and foreign exchange balancing requirements; and enforce laws relating to technology transfer only if they are in accordance with WTO agreements.[155]

xii. *SOEs.* China has agreed to ensure that its SOEs will purchase and sale goods exclusively on commercial considerations, such as quality, price and marketability.[156] Chinese SOEs are to be

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foreign participation" in distribution joint ventures and has "also agreed to import 40 foreign films after accession, rising to 50 films in three years").

148. *See Welcome to the Club*, *supra* note 2; *Highlights of the China-US WTO accord*, *supra* note 138.

149. *See Welcome to the Club*, *supra* note 2 (noting that import surges may by the United States with temporary, higher tariffs during such time); *Highlights of the China-US WTO accord*, *supra* note 138. *See also* Claude E. Barfield and Mark A. Groomsbridge, *Two Sides to China's WTO Membership*, CENTER FOR TRADE POLICY STUDIES, Nov. 22, 1999 (visited Dec. 5, 1999) <http://www.freetrade.org/pubs/articles/mg-11-22-99.html> (noting that under the November accord, the Chinese agreed to be subject to the present United States policy regarding safeguards for a period of nine years in relation to textiles).

150. *See Welcome to the Club*, *supra* note 2; *Highlights of the China-US WTO accord*, *supra* note 138 (noting that during such time, the United States will retain its current method for evaluating whether China is dumping goods into the United States market).

151. *See Highlights of the China-US WTO accord*, *supra* note 138 (reducing import tariffs to 25% from the present levels – 80 to 100% import tariffs – by the year 2006).

152. *See id.* (reducing import tariffs to between 5 and 7.5 percent from the present levels – between 12 and 20 percent – upon accession to the WTO).

153. *See* The Summary, *supra* note 138.

154. *See id.*

155. *See id.*

156. *See id.*

> subject to WTO rules rather than being subject to State influence, and the purchase of goods and/or services by SOEs will not fall within the category of "government procurement."[157] Furthermore, the status of China's SOEs under the SCM Agreement has apparently been resolved.[158]

B. BEWARE: REMAINING ASSIMILATION PROBLEMS

Despite the accession overhaul and superficial favorableness of the terms of the bilateral accord signed in November, it is difficult to imagine that the terms of the recent trade agreement cover the gambit of complex trade issues that plagued Sino-US bilateral accession relations these past few years. A brief examination of eight non-tariff issues will demonstrate the breadth and complexity of the issues as viewed by the United States government and American businesses prior to the November trade agreement. Moreover, these eight issues will almost certainly be revisited by Congress when debate over the Sino-US trade accord heats up in 2000.

i. Transparency

A staple of the GATT/WTO regime, transparency goes "to the heart of a country's legal infrastructure, and more precisely to the nature and enforcement of its administrative law regime."[159] Article X of the GATT provides all trade-related "[l]aws, regulations, judicial decisions, and administrative rulings of general application . . . shall be published promptly in such a manner as to enable governments and traders to become acquainted with them."[160] The imposition of new or more burdensome trade-related measures (whether in the form of requirements, restrictions, prohibitions, changes in duty rates, etc.) will not be enforced before the changes have been "officially published."[161] Transparency thus serves an important enforce-

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157. *Id.*

158. *See id.* While reporting that the status of SOEs under the SCM Agreement has been resolved, the US-China Business Council fails to discuss the extent of such clarification.

159. Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 1, 2 (1998) (explaining the GATT/WTO concept of transparency, which is admittedly "imprecise").

160. GATT 1994, *supra* note 30, at art. X(1).

161. *Id.* at art. X(2). The text provides that "[n]o measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments, shall be enforced before such measure has been officially published." *Id.*

ment purpose: prompting WTO members to administer published laws in a "uniform, impartial and reasonable manner."[162]

While moving towards a more transparent, rules-based system, China's multi-tiered legal system continues to reveal an overall "lack of transparency."[163] Laws and regulations published in the MOFTEC Gazette are recurrently untimely and incomplete;[164] they are also replete with ambiguities and highly generalized, affording a tremendous amount of discretion to the bureaucrats who implement the laws and regulations.[165] It is also noteworthy that the Gazette neither publishes provincial and local laws nor normative documents (i.e., informal administrative directives that carry the same weight as formal law).[166] The result is the absence of any "single inquiry point" through which the scope of Chinese law can be ascertained,[167] which is clearly at odds with any meaningful concept of transparency under the GATT/WTO regime.

ii. Inspection Standards, Certification, and Testing

Under Chinese law, goods that are included on a disclosed Inspection List or otherwise subject to Chinese laws and regulations must be inspected prior to importation, use or sale in China. China enforces a 'checking scheme' predominantly in two fashions: statutory conformity assessment procedures and licensing requirements.[168] Conformity assessment procedures (i.e., statutory inspection requirements) apply to more than 750 imported goods, and a far greater number of goods require inspection upon export.[169] More than 100 tariff-line items fall subject to China's safety licensing requirements.[170] However,

162. *Id.* at art. X(3)(a).
163. INVESTMENT CLIMATE REPORT, *supra* note 125.
164. *See* 1998 NTE REPORT, *supra* note 121, at 48.
165. *See* INVESTMENT CLIMATE REPORT, *supra* note 125; Ostry, *supra* note 159, at 13 (noting that Chinese law lacks specific procedures through which policy is developed).
166. *See* Ostry, *supra* note 159, at 13. Ostry further notes:
"Below the formal system of laws and administrative regulations is another body of 'rules,' termed normative documents. These documents are used extensively by administrative bodies, especially at the local level. Indeed, they are a relic of the pre-reform period when legal mechanisms were largely absent . . . and [normative documents] are probably binding on the bureaucrats who use them."
Id.
167. *See id.* at 13.
168. *See* 1998 NTE REPORT, *supra* note 121, at 49.
169. *See id.*
170. *See id.*

China's safeguarding system, demonstrates considerable problems, including: a lack of transparency (rendering it difficult to determine what the appropriate standards should be or are); the use of different standards contingent upon the import's national origin, which differs altogether from the standards applied to domestic goods; and, application of standards that deviate from international standards for no apparent reason.[171]

Under China's Import and Export Commodity Inspection Law, the standard of inspection of an import's country of origin will be applied if China has yet to develop its own standards for the particular item.[172] A widget manufactured in Australia, for example, would be inspected under different (perhaps lower) standards at a Chinese port of entry than a widget manufactured in the United States, assuming the two nation's domestic standards differ and China does not have its own inspection standards for widgets. This type of "to each his own" treatment is clearly at odds with the principle of national treatment upon which the WTO stands, especially in the context of Article IX of the GATT 1994.[173]

China also requires that all imported, manufactured goods receive a quality license before entering Chinese borders.[174] With few exceptions, China does not honor quality certifications of American origin with respect to manufacturing procedures or

171. *See id. See also* 1997 ANNUAL REPORT, *supra* note 66, at 190 (noting that "duplicative and discriminatory standards and or licensing requirements [are] also common").

172. *See* Regulations for the Implementation of the Law of the People's Republic of China on Import and Export Commodity Inspection, art. 10 (visited Feb. 17, 1999) <http://www.chinaexpo.com/laws/law06/law0602.html> (approved by the State Council on Oct. 7, 1992; and promulgated by Decree No. 5 of the State Administration for Import and Export Commodity Inspection on Oct. 23, 1992) [hereinafter Commodity Regulations]. More specifically, Article 10(4) provides:

> "In the absence of compulsory standards or other inspection standards which must be complied with as specified by laws or administrative regulations, and in case inspection standards are either not agreed upon or agreed upon unclearly in the contract, the inspection shall be conducted according to the standards of the manufacturing country, or relevant international standards or the standards designated by the State Administration for Commodity Inspection."
>
> *Id.*

173. *See* GATT 1994, *supra* note 30, at art. IX (providing that the contracting parties "shall accord to the products of territories of other contracting parties treatment with regard to making requirements no less favorable than the treatment accorded to like products of any third country").

174. *See* Commodity Regulations, *supra* note 172, at arts. 13-23. *See also* 1998 NTE REPORT, *supra* note 121, at 50.

product quality.[175] Assuming that a quality certification is required and that China will not honor such from the United States, American industries desiring to export to China are forced to choose between turning to other nations for quality certifications or going a re-exporting route, alternates that are both expensive and time-consuming. Thus, many United States exporting industries consider China's inspection and licensing requirements to violate the WTO Agreement on Technical Barriers to Trade (*"Technical Barriers Agreement"*),[176] which encourages "international standards and conformity assessment systems" by removing standards that concoct needless barriers to international trade.[177] The Technical Barriers Agreement, pursuant to the GATT principle of national treatment, requires that products coming from WTO members receive the same treatment accorded to products of a domestic origin or goods produced in non-WTO countries, which China fails to do.[178]

Moreover, though the 1992 Market Access MOU obligates China to base its sanitary and phytosanitary measures on "sound science," China's agriculture import quarantines are grounded in questionable, if not unsupported, scientific methodologies.[179] China simply does not recognize international standards, such as those provided in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (*"SPM Agreement"*), on a consistent basis.[180] For instance, China points to past Mediterranean fruit fly experiences to justify an import ban on citrus fruits from the United States even though Mediterranean fruit flies were never evidenced in the part of the country from which the imports originate.[181] China uses this type of reasoning to uphold import bans on, at a minimum, cit-

175. *See* 1998 NTE REPORT, *supra* note 121, at 50.

176. *See id.*

177. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Preamble, WTO Agreement, *supra* note 31, at Annex 1A [hereinafter Technical Barriers Agreement].

178. *See id.* at Annex 3D. *See also* BXA REPORT, *supra* note 112, at 66 (hypothesizing that the certification requirements "likely contradict[] WTO provisions").

179. *See* 1998 NTE REPORT, *supra* note 121, at 50. *See also* 1997 ANNUAL REPORT, *supra* note 66, at 190 (noting that "China maintains restrictions on many agriculture imports based on questionable scientific grounds").

180. *See* 1997 ANNUAL REPORT, *supra* note 66, at 190.

181. *See* 1998 NTE REPORT, *supra* note 121, at 50. *See also* 1997 ANNUAL REPORT, *supra* note 66, at 190 (reporting that China "continues to prohibit all exports of US citrus, without regard to strict quarantine procedures or the existence of pest-free areas").

rus and Pacific Northwest wheat.[182] These practices violate the SPM Agreement, which prohibits WTO members from implementing "arbitrary and unjustifiable" measures, and furthers the use of "harmonized sanitary and phytosanitary measures . . . on the basis of international standards, guidelines and recommendations developed by the relevant international organizations."[183]

iii. IPR Protection

The protection of IPR remains a major trade issue notwithstanding China's efforts to provide more IPR protection since the early 1990s. At the multilateral level, IPR protection is governed by the TRIPs Agreement.[184] The TRIPs Agreement requires WTO members to treat foreign holders of IPR no less favorably than domestic IPR holders.[185] The TRIPs Agreement is essentially a "floor" of IPR protection, setting minimum protection standards based on substantive provisions of internationally recognized conventions applicable to the specific IPR involved, such as trademarks, patents, copyrights, undisclosed information, and so forth.[186]

Most of the United States's IPR-related accession demands have not regarded a lack of Chinese IPR law but, rather, a lack of enforcement of those laws.[187] IPR enforcement is terribly spotty in China's provinces, complicated by the fact that a "significant level of unauthorized use" continues in both SOEs and the Chinese government itself.[188] Piracy remains rampant in

182. *See* 1997 ANNUAL REPORT, *supra* note 66, at 190; 1998 NTE REPORT, *supra* note 121, at 50.

183. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Preamble, WTO Agreement, *supra* note 31, at Annex IA. *See also* 1998 NTE REPORT, *supra 121,* at 50; 1997 ANNUAL REPORT, *supra* note 66, at 190.

184. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1999, WTO Agreement, *supra* note 31, at Annex 1C [hereinafter TRIPs Agreement].

185. *See id.* at art. 3.

186. *See generally id.* at art. 1(3), 2, Part II, and Part IV.

187. *See* 1997 ANNUAL REPORT, *supra* note 66, at 190.

188. *See id. See also* Richard H. Holton and Xia Yuan Lin, *China and the World Trade Organization: can the assimilation problems be overcome?*, 38 ASIAN SURVEY 745 (Aug. 1998) (providing that Chinese enforcement "is apparently hampered in part by the fact that some of the enterprises in violation of intellectual property laws are owned by either the government or the People's Liberation Army"); *China: Beijing's Illegal CD Market: Battle Against Piracy*, INT'L MARKET INSIGHT REP., July 17, 1998, *available at* 1998 WL 13711854 (noting that China's local governments often turn to piracy as a way to raise revenue when their budget is low).

China, especially with respect to CDs, trademarks, and computer software;[189] piracy levels have reached 100% for motion pictures, over 95% for entertainment and business computer software, and almost 55% for recordings and music in China.[190] Pirated movies can be purchased for as little $2 per movie before the movie is even released in China[191] and pirated computer software programs that otherwise cost as much as $15,000 in the US have been sold in China for less than 1% of the original cost.[192] In fact, the International Intellectual Property Alliance estimates that IPR piracy cost American companies some $2.8 billion in sales in 1997 alone.[193]

The United States also sought greater market access with regard to certain IPR-protected products, including motion pictures. China only allows about ten movies to be imported annually even though there are no formal import quotas on motion pictures.[194] However, China maintains a de facto quota for first-

189. *See, e.g.*, 1997 ANNUAL REPORT, *supra* note 66, at 190; 1998 NTE REPORT, *supra* note 121, at 53-4; Holton and Lin, *supra* note 188, at 748; BXA REPORT, *supra* note 112, at 67-68. According to one Chinese software firm, overall software piracy rates reached upwards of 70% in 1997; that same year the Software Publications Association reported that China's piracy quota was over 95%. *Id.* (citations omitted).

190. *See* Eric M. Griffin, *Stop Relying on Uncle Sam! - A Proactive Approach to Copyright Protection in the People's Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 171 n.17 (1998) (citation omitted). *See also* Valenti Testimony, *infra* note 193 (testifying that "China's domestic market continues to be plagued with extremely high levels of piracy – 90 percent for home video entertainment in 1998").

191. *See* Seth Faison, *China Turns Blind Eye To Pirated Disks*, NY TIMES, Mar. 28, 1998, at D2 (reporting that a video CD of the movie "Titanic" could be purchased for a mere $2 a month before its theatrical release in the US).

192. *See* International Intellectual Property Alliance, 1995 Special 301 Submission 3 (1995).

193. *See* WAYNE M. MORRISON, CHINA-US TRADE ISSUES, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF FOR CONGRESS 91121 (Nov. 10, 1998) (visited Feb. 16, 1999) <http://www.cnie.org/nle/econ-35.html>. *Cf.* PRESS RELEASE OF THE FEDERAL DOCUMENT CLEARING HOUSE, *Boxer Outlines Vision For "The New Economy" in Major Policy Address* (Aug. 13, 1998), *available at* 1998 WL 7326364 (quoting Senator Barbara Boxer as saying: "American companies are losing $2.3 billion a year to piracy, much of it in China"). *See also Hearing on United States-China Trade Relations and the Possible Accession of China to the World Trade Organization Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 106th Cong. (1999) (statement of Jack Valenti, President and CEO of the Motion Picture Association) (testifying that the United States filmed entertainment industry lost $120 million to piracy in China in 1998) [hereinafter Valenti Testimony].

194. *See, e.g.*, 1998 NTE REPORT, *supra* note 121, at 54; Valenti Testimony, *supra* note 193. *Cf.* Michael White, *Chinese Film Execs Woo Hollywood*, AP ONLINE, Feb. 24, 1999, *available at* 1999 WL 12933177 (noting that Chinese

run motion picture imports as only one SOE is entitled to import foreign films for theatrical release.[195] In addition, China's Broadcasting and Television Administrative Regulations ("*B&T Regulations*"), promulgated by the State Council on August 11, 1997, virtually cut off market access to China's media industry.[196] The B&T Regulations constitute an "outright ban on foreign investment enterprise involvement in broadcast media" by prohibiting the establishment of foreign investment enterprise that would engage in television and radio broadcasting or merely operate television and radio stations.[197]

Some American industries, such as the semiconductor industry, also fear that misappropriation is imminent as soon as China develops the capability to produce advanced, technical products.[198] This misappropriations concern may be part of the reason why the United States is also seeking to strengthen Chinese IPR laws in all intellectual property areas protected under the TRIPs Agreement, especially with regard to the protection of Underwriters' Laboratory safety certification marks.[199]

iv. Foreign Investment and Service Industries

China's Foreign Trade Law[200] provides that national treatment will be accorded on a reciprocal basis to contracting parties

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governmental quotas allow "only about 20 foreign films into the country each year").

195. *See, e.g.*, 1998 NTE REPORT, *supra* note 121; INVESTMENT CLIMATE REPORT, *supra* note 125; Valenti Testimony, *supra* note 193; *Report 25: New Broadcasting Regulations*, CHINA BUS. L. GUIDE (CCH) 4 (Sept. 30, 1997) (on file with author).

196. *See Report No. 25*, *supra* note 195, at 3-4; *Government controls on radio and TV*, 6 CHINA L. NEWS (CCH) 6, Dec. 1997.

197. *See Report No. 25*, *supra* note 195, at 3-4; *Government controls on radio and TV*, *supra* note 196, at 6.

198. *See China Trade Policy: Hearings Before the Subcomm. Telecomm., Trade and Consumer Protection of the House Comm. on Com.* (May 14, 1998), *available at* 1998 WL 11518071 (statement of Michael C. Maibach, Vice President of Intel, on behalf of the Semiconductor Indus. Ass'n) [hereinafter Maibach Testimony].

199. *See* 1998 NTE REPORT, *supra* note 121, at 53 *with* BXA REPORT, *supra* note 112, at 66-67.

200. Foreign Trade Law of the People's Republic of China, art. 6 (adopted at the Seventh Session of the Standing Committee of the Eighth National People's Congress on May 12, 1994), *translated version available at* <http://www.c-b-r.com/English/law/foreigntrade.html> [hereinafter Foreign Trade Law]. Article 6 provides:

> "The People's Republic of China shall, under international treaties or agreements to which the People's Republic of China is a contracting party or a participating party, grant the other contracting parties or participating parties, or on the principles of mutual advantage and rec-

of international treaties to which China is a party. Article 23 of the Foreign Trade Law further provides that market access and national treatment will be extended to services under similar circumstances.[201] As a practical matter, however, China's constrictive foreign investment and trade regulations stifle the principle of national treatment in nearly all industrial and service sectors.[202]

China's investment guidelines (the Catalogue of Industries Open to Foreign Investment) prohibit or restrict foreign investment in numerous market sectors, channeling foreign investment toward state-labeled "encouraged" market sectors.[203] Under the investment guidelines, foreign investment projects are prohibited or restricted because their objectives do not conform with the State's economic development plan. China's foreign investment restrictions and prohibitions reflect several common themes, including: a protection of domestic industries that China fears may quickly succumb to foreign companies without such restrictions; a goal of restraining consumer luxuries or requiring massive imports of raw materials or components; and an aim of avoiding excess capacity.[204] Nor have Chinese officials been afraid to declare their intent in limiting certain foreign investment, noting that the guidelines "were designed to encourage and move foreign investors away from labour-intensive projects in manufacturing and real estate and toward joint ventures . . . involving advanced technology and high value-added goods."[205]

Foreign investment prohibitions range from telecommunications to power and public utility industries, to trade and finance industries.[206] Foreign investment restrictions are prevalent in mechanical industries (such as automotive-related

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iprocity, grant the other party most-favored-nation treatment or national treatment within the field of foreign trade."

Id.

201. *See id.* at art. 23 (providing that China "grants the other contracting parties and participating parties market access and national treatment").

202. *See* INVESTMENT CLIMATE REPORT, *supra* note 125.

203. As of February 15, 1999, a translated, updated version of China's Investment Catalogue was available at the China Council for the Promotion of International Trade's website at the following Internet address: <http://www.ccpit.org/engVersion/cp_law/cp_wsdx/cc_wsd1.html> [hereinafter Investment Guidelines]. This website also provides translated versions of several other Chinese laws and regulations. *See also* Provisional Regulations on Foreign Investment Guidelines, CHINA BUS. L. GUIDE (CCH) ¶ 13-420 (1998).

204. *See* 1998 NTE REPORT, *supra* note 121, at 57.

205. BXA REPORT, *supra* note 112, at 27 (citation omitted).

206. *See* Investment Guidelines, *supra* note 203.

manufacturing), electronic industries (e.g., televisions, video cameras, cellular phones), and various service industries (e.g., foreign trade, tourism, accounting and legal services).[207] China also unilaterally reserves the right to restrict or prohibit "other industries [restricted/prohibited] by the State."[208] Where foreign investment is allowed, it is typically subject to stringent approval procedures[209] and administrative oversight,[210] especially in the context of corporate takeovers and acquisitions.[211] Simply stated, China's implementation and adherence to this type of broad- sweeping investment "Catalogue" breaches the TRIMs Agreement, which seeks to safeguard free competition and ensure the avoidance of investment measures that distort and restrict trade.[212]

Formal permission to maintain foreign service operations in China comes largely through tightly hoarded "experimental" licenses.[213] These licenses are characterized by exacting operational requirements, limits on the form of business entity, and issuance governed by investment quotas.[214] Consider, for exam-

207. *See id.*

208. *Id.*

209. *See* Approval Procedures for Establishment of Service Trade Enterprises, *translated by* China Council for the Promotion of International Trade (visited Feb. 18, 1999) <http://www.ccpit.org/engVersion/cp_law/cp_law8.html>. Several investment projects require the approval of multiple state agencies and administration; accordingly, this may transform restricted foreign investment industries into prohibited industrial projects as a practical matter. *See also* 1998 NTE REPORT, *supra* note 121, at 57.

210. *See* 1998 NTE REPORT, *supra* note 121, at 57 (noting that foreign investors are often forced into joint venture arrangements "in which they are often required to sell down to minority positions over a specified period of time").

211. *See* INVESTMENT CLIMATE REPORT, *supra* note 125 (reporting that the concept of acquisitions and takeovers, "as understood in the West, is not applicable to the foreign investment climate in China").

212. Reading Art. 2(2) of the TRIMs Agreement together with the Annex attached thereto, the TRIMs Agreement prohibits certain TRIMs that are inconsistent with Art. XI of the GATT 1994. Article XI of the GATT provides in part "[n]o prohibitions or restrictions other than duties, taxes or other charges [whether direct or indirect] shall be instituted and maintained by any contracting party on the importation of any product." Because China's investment "Catalogue" effectively restricts certain imports under Art. XI of the GATT, and indirectly restricts imports that may be used in local Chinese operations as described in the TRIMs Agreement Annex, the "Catalogue" effectively constitutes an impermissible TRIMs under the TRIM Agreement. For further discussion of the TRIMs Agreement, which makes clear why this Chinese practice violates WTO standards, see Part IV(B), *infra*.

213. *See* 1998 NTE REPORT, *supra* note 121, at 55.

214. *See id.* (noting that "foreign service providers are only allowed to operate under selective 'experimental' licenses with strict operational requirements, limits on the forms of establishment for entry, and restrictions on the geo-

ple, the insurance services market in China.[215] China supposedly took steps to liberalize its insurance services market with the introduction of a new insurance law in 1993; however, while approving more than 180 branch offices of foreign insurance companies, only three insurers (one American) have been granted the requisite license to operate in China.[216] In addition, no foreign insurance companies have been permitted to compete directly against a state-run or quasi-private Chinese insurance company.[217] Hence, these Chinese practices assuredly violate the General Agreement on Trade in Services (*"GATS Agreement"*).[218]

Under the GATS Agreement, WTO members are to accord national treatment "immediately and unconditionally to services and service suppliers" of other members.[219] Article VI of the GATS Agreement provides that members shall apply domestic regulations relating to services in "a reasonable, objective and impartial manner."[220] Article VI further provides that licensing requirements, which are not unfair trade barriers per se, should not "in themselves [constitute] a restriction on the supply of the service."[221] Notwithstanding the GATS Agreement's exemption

graphic scope of activities"); INVESTMENT CLIMATE REPORT, *supra* note 125 (explaining that foreign investment is limited by a maximum number of foreign investors allowed and location).

215. *See Official Insurance Industry Newspaper Tips Future Policy for Foreign Companies*, CHINAONLINE, Feb. 2, 1999 (on file with author). Citing a recent government publication, the article discusses ways to control foreign participation in the Chinese market so that foreign competition will not harm the nation's fledgling insurance industry. The article notes, for example, that "China should set up quotas for foreign market share to protect local companies and the market should be opened at a gradual rate." *Id.* The article further notes that the State hopes that Chinese companies will form joint ventures with foreign companies in order to effectively exchange market share for technology. *See id.*

216. *See* 1998 NTE REPORT, *supra* note 121, at 55.

217. *See id.*

218. General Agreement on Trade in Servives, Apr. 15, 1994, WTO Agreement, *supra* note 31, at Annex IB [hereinafter GATS Agreement]. *See also* Rosen, *supra* note 102, at 1549 (citing Import and Export Controls, China Bus. L. Guide (CCH Int'l) ¶ 80-252, p. 82,204 (Sally A. Harpole ed., 1991)). Rosen explains that foreign service providers may only operate under tightly guarded 'experimental licenses' and are geographically restricted; the rules for such licenses are not transparent; and that foreign service providers are not accorded national treatment. *Id.* (citations omitted). As a result, Rosen concludes that "[r]estrictions on foreign service providers have the effect of closing off most of China's market to foreign competition." *Id.*

219. GATS Agreement, *supra* note 218, at art. II(1).

220. *Id.* at art. VI(1).

221. *Id.* at art. VI(4)(c). Technically speaking, art. VI(4) provides that the WTO's Council on Trade and Services may take disciplinary action against

for certain financial services' regulations,[222] it does not appear that China's insurance provider licensing requirements ensure "the integrity and stability of the financial system" or comply with the other aforementioned obligations.[223] China's regulatory licensing scheme therefore violates the GATS Agreement. Moreover, it is noteworthy that insurance services are but one of many service industries quintessentially remaining closed out of the Chinese market, with telecommunications, retailing, distribution, and professional service industries similarly situated.[224]

v. Local-Content Requirements

Local-content requirements, an import substitution practice also known as domestic-content requirements, obligate foreign investors to purchase or use domestic products in the course of operations rather than importing those products. Local-content requirements are used to promote decisions benefitting the host country – that is, "local-content requirements are designed to promote domestic production to the disadvantage of foreign producers."[225] Local-content requirements impair free trade by restricting a foreign party's freedom to contract for the cheapest goods available, in turn thwarting a foreigner enterprises's ability to independently manage and operate its invest abroad.

Local-content requirements are specifically proscribed in the TRIMs Agreement.[226] Besides calling for greater TRIMs-related transparency, the TRIMs Agreement defines impermissible local-content requirements to include (1) requirements or restrictions that are "mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage," and (2) measures requiring the purchase or use of products of a domestic source or ori-

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members "to ensure that such requirements are, *inter alia* . . . in the case of licensing requirements, not in themselves a restriction on the supply of the service." *Id.* Thus, WTO members should act upon their own initiative to ensure that such licensing requirements are permissible rather than waiting for disciplinary action to be administered by the Council on Trade and Services.

222. *See id.* at Annex on Financial Services. Insurance and insurance-related services are classified as financial services for purposes of the Annex on Financial Services. *See id.* at 5(a) (defining financial services).

223. *See id.* at 2(a). This conclusion is based on the number of foreign service providers whose operations have not been permitted to operate in China, as well as the limited number of permitted operations.

224. *See* 1998 NTE REPORT, *supra* note 121, at 55-57.

225. Robert H. Edwards, Jr. and Simon D. Lester, *Towards a More Comprehensive World Trade Organization Agreement on Trade-Related Investment Measures*, 33 STAN. J. INT'L L. 169, 170 (1997).

226. *See* Part IV(B), *infra*.

gin, or which restrict an enterprise's ability to import products used in or related to its local production.[227] Local-content requirements meeting either of the foregoing standards violate the TRIMs Agreement per se.

Although the 1992 Market Access MOU promised that all import substitution policies have been eliminated and that products would not be subject to such measures in the future, local-content requirements are all too common in China today.[228] In 1994, China revealed an automotive industrial policy ("*Automotive Policy*") that employs local-content requirements, regardless of whether domestic products are comparable in price or quality to imports.[229] Under the Automotive Policy, foreign joint ventures will not be approved unless the venture ensures a "high percentage" of local content;[230] in fact, the Automotive Policy requires 40% local content at start up, 60% local content by the second year, and 80% local content by the third year for passenger vehicles, and these percentages are much higher for trucks.[231] A recently report compiled for the Commerce Department's Bureau of Export Administration reveals that through a combination of trade barriers, including local-content requirements, China has reduced auto imports from 80% in 1986 to under 10% today, and hopes to eliminate all auto imports by the year 2010.[232]

Local-content requirements are not limited to the Automotive Policy. In late 1998, the Ministry of Information Industries ("*MII*") issued a circular directing telecommunication enterprises to purchase components from domestic suppliers; about the same time, the State announced that certain power generation facilities were prohibited from using imported equipment.[233] A representative of the United States semiconductor industry has testified that China's sectoral industrial policies contain local-content requirements,[234] and the US High-Tech Industry Coalition in China has reported that foreign manufac-

227. TRIMs Agreement, *supra* note 29, at Annex para. 1(a) and 2(a).

228. *But cf.* Reginald Dale, *Doing Business Abroad: The Word From China*, INT'L HERALD TRIB., Jan. 22, 1999, *available at* 1999 WL 5109298 (arguing that "China's notorious demands that companies meet stringent . . . local-content requirements . . . are less onerous than is often thought, thanks to loopholes and tax enforcement" according to managers of foreign companies in China).

229. *See* 1998 NTE REPORT, *supra* note 121, at 49.

230. *See* INVESTMENT CLIMATE REPORT, *supra* note 125.

231. *See* BXA REPORT, *supra* note 112, at 49 (citation omitted).

232. *See id.* at 52.

233. *See id.* at 55.

234. *See* Maibach Testimony, *supra* note 198.

turers operating below a 40% local-content level are subject to rigorous "inspection and other requirements applicable to imports, thus denying national treatment for such products."[235] In addition, there have been indications that some Chinese ministries, including the MII, intend to impose additional requirements not expressly written into China's published law in the future.[236] Moreover, China continues to push for further local-content requirements, particularly in the context of domestic infrastructure projects.[237]

These localization practices undermine the TRIMs Agreement for at least two reasons. First, China's local-content laws and policies are hardly transparent.[238] Seldom do China's foreign investment laws and regulations textually address local-content requirements, but those that do generally reflect requirements facially violative of the TRIMs Agreement. Article 9 of the Law of the People's Republic of China on Sino-foreign Joint Equity Enterprises ("*Joint Equity Law*") requires joint venture enterprises to give first priority to domestic sources when purchasing raw materials, fuels, accessories and other

235. POSITION PAPER OF THE US HIGH-TECH INDUSTRY COALITION ON CHINA 6, Nov. 17, 1998, *available at* WORLD TRADE ONLINE, Archives Library (visited Mar. 2, 1999) <http://www.insidetrade.com> (on file with author) [hereinafter POSITION PAPER]. The US High-Tech Industry Coalition on China is comprised of the American Electronics Association, Business Software Alliance, Electronic Industries Alliance, Information Technology Industry Council, Semiconductor Industry Association, Software Publishers Association, Telecommunications Industry Association, and the US Information Technology Office. *See id.* at 1. This paper was submitted to the USTR to assist in the accession negotiations, ultimately concluding that China "should be pressed to expeditiously bring its laws and *practices* impacting high technology into compliance with WTO rules." *Id.* at 7 (original emphasis).

236. *See id.* at 1.

237. *See China's Contractors Ordered to Buy Domestic Products with Economic Stimulus Funds*, CHINAONLINE, Jan. 8, 1999 (on file with author) (reporting that according to a recent article in the Shichang Bao (Market Daily), a directive issued jointly by the State Economic and Trade Commission and the State Development Planning Commission "instructs all construction companies who receive government funds to buy domestically-produced items whenever possible," items that will be selected from a "list of approved products and equipment"); *China's Infrastructure Projects To Use Domestic Products*, CHINAONLINE, Jan. 29, 1999 (on file with author) (noting that a recent State circular demonstrated China's belief that "no [construction industry] company should need to import any equipment or materials").

238. *Cf.* POSITION PAPER, *supra* note 228, at 4 (noting that all of China's foreign investment laws "contain clauses stating that, when conditions are the same, preference should be given to purchasing within China rather than from overseas," citing Article 57 of the Equity Joint Venture Law Implementing Regulations as an example).

such operating necessities.[239] Although Article 9 further provides that such purchases may be made on the international market, the ability to invoke this provision is called into question by foreign exchange limitations and China's history of bending over backwards to protect domestic producers.[240] Similar such provisions are also included in China's Sole Foreign-Owned Enterprises Law and the Sino-Foreign Co-operative Ventures Law.[241]

Second, and more damaging to the WTO itself, local-content requirements are commonly subject to negotiation.[242] An American automobile manufacturer, for example, forms a joint venture with a Chinese company to produce luxury sedans. In order to gain State approval under the Automotive Policy, the enterprise's charter provides for 60% local content over the first four years of operation based on negotiations with the various Chinese agencies. Assume that a Japanese automobile manufacturer takes an identical path so as to prevent the American company from hoarding market share, but that the Japanese manufacturer was able to negotiate for a 40% local-content level over the next few years of operation. Not only does the approval process (i.e., trading approval based on local-content assurances) blatantly violate the TRIMs Agreement, but the process eviscerates the GATT/WTO principle of national treatment. Under the described approval scheme, China is unilaterally able to discriminate against companies from one country over another, which is undeniably inconsistent with the notion of competitive trade. This problem is significant as these negotiations could ultimately lead to considerable reductions in taxes, import and export duties, and priority treatment for basic infrastructure projects.[243]

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239. CHINA BUS. L. GUIDE (CCH) ¶ 6-500, art. 9 (amended April 4, 1990). Article 9 provides:

"When purchasing raw materials, fuels, accessories and other such requirements, a joint enterprise shall, as far as possible, give first priority to Chinese sources, but may also use its own foreign exchange funds to purchase the directly on international markets."

Id.

240. The language of Article 9, i.e., "use its own foreign exchange funds" limitation, is magnified in light of China's strict foreign exchange control laws, regulations, and policies. *See* Part III(B)(viii), *infra*.

241. *See* Edwards and Lester, *supra* note 225, at 182 (citation omitted).

242. *See* INVESTMENT CLIMATE REPORT, *supra* note 125.

243. *See id.*

vi. *Trading Rights (i.e., Import / Export Quotas and Licensing)*

Clearly, contentious accession issues remain regarding the complex web of non-tariff trade barriers employed by China. One of the most consequential non-tariff barriers involve restrictions on trading rights. Going to the heart of market access, trading rights deal with governmental restrictions on the types and numbers of entities that have the legal right to engage in international trade within a nation,[244] restrictions which often take the form of measures designed to control the right to import and export goods and commodities.[245] Unimpeded trading rights are ingrained in the meaning behind and text of the GATT, a pillar of the WTO.[246] And if GATT principals are not "convincing" enough, at least two framework agreements specifically safeguard trading rights: (A) the TRIMs Agreement prohibits measures violative of national treatment principles or constituting unequal import/export restrictions[247] and (B) the WTO Agreement on Import Licensing Procedures[248] explicitly recognizes that import licensing "should not be used to restrict trade,"[249] and seeks to ensure such by requiring members to publish sufficient notification and information to allow foreign traders to navigate the legal grounds upon which import licenses will be granted.[250]

China inhibits trading rights primarily in two manners: licensing requirements and quota allocations for both imports and exports. China's continued adherence to stringent import licens-

244. *See* 1998 NTE REPORT, *supra* note 121, at 48 (noting that, in the context of trading rights and other restrictions, "China restricts the types and numbers of entities within China which have the legal right to engage in international trade").

245. *See* O'Quinn, *supra* note 41 (noting that China "controls imports and exports through a licensing system known as trading rights, which requires companies to receive Beijing's approval for each of their imports or exports"). *See also* Maibach Testimony, *supra* note 198 (using "trading rights" as a general heading to discuss "the ability to import and export from China"); US-China Business Council, *supra* note 88 (using trading rights synonymously with the right to import or export).

246. *See* GATT 1994, *supra* note 30, at arts. 1, 3, 13, 16.

247. *See* Part IV(B), *infra*.

248. Agreement on Import Licensing Procedures, Apr. 15, 1999, WTO Agreement, *supra* note 31, at Annex 1A.

249. *Id.* at Preamble (recognizing that, among other things, automatic licensing procedures "should not be used to restrict trade," and that "non-automatic licensing procedures should be no more administratively burdensome than absolutely necessary").

250. *See generally id.*

ing requirements[251] has prompted one United States industry representative to interject that China "remains unique among the major trading nations by restricting the ability of domestic and foreign firms to import finished products, to sell directly to the domestic market, and to distribute freely within the domestic market."[252] Import licenses are required for items ranging from passenger vehicles to steel;[253] China's import licensing, specifically import permits, constitutes the "largest impediment facing US heavy equipment sales in China."[254] Not withstanding having pledged to extend full trading rights within three years of WTO accession, China is seeking to exempt dozens of goods and commodities from this commitment, including grains and other agriculture-related commodities, petroleum products, wools, and certain automobiles.[255]

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251. *See, e.g.,* Implementing Measures of the Ministry of Foreign Economic Relations and Trade Concerning Application for Import and Export Licenses by Foreign Investment Enterprises, CHINA BUS. L. GUIDE (CCH) ¶ 51- 617 (promulgated Jan. 24, 1987 by the Ministry of Foreign Economic Relations and Trade); Detailed Rules for the Implementation of the Administrative Measures of the People's Republic of China on Codes for Import and Export Enterprises in Respect of Foreign Investment Enterprises, CHINA BUS. L. GUIDE (CCH) ¶ 50-742 (promulgated Aug. 25, 1997 by MOFTEC); Notice of the Ministry of Foreign Economic Relations and Trade and the General Administration of Customs on Issues Involving the Empowering of Specially Commissioned Offices to Issue Vehicle Import Licenses to Sino-foreign Joint Equity Enterprises and Sino-foreign Co-operative Enterprises and Customs' Supervision, Control and Clearance of Vehicles Imported by Foreign Investment Enterprises, CHINA BUS. L. GUIDE (CCH) ¶ 51-626 (issued Feb. 15, 1990 by the Ministry of Foreign Economic Relations and Trade and the General Administration of Customs); Notice on Applications for Import Licenses, CHINA BUS. L. GUIDE (CCH) ¶ 51-636 (promulgated Sept. 16, 1996 by MOFTEC). *See also* TRADE REGULATIONS & STANDARDS REPORT, *supra* note 136; 1997 ANNUAL REPORT, *supra* note 66, at 190-91; INVESTMENT CLIMATE REPORT, *supra* note 125; 1998 NTE REPORT, *supra* 121, at 48 (noting China's restrictions of trading rights regarding import control policies).

252. POSITION PAPER, *supra* note 235, at 2.

253. *See* TRADE REGULATIONS & STANDARDS REPORT, *supra* note 136; US-China Business Council, *supra* note 88 (implying that China still utilizes import licensing requirements for items such as timber, wool, acrylic, natural rubber, and steel). *See also* 1998 NTE REPORT, *supra* note 121, at 48 (noting that "China's traditional non- tariff barriers include import licenses, import quotas, and other import controls," and that "far too many [non-tariff measures] still remain in place").

254. *China: Highway Construction Industry*, INDUSTRY SECTOR ANALYSIS (Mar. 1998) *available at* 1998 WL 11163240 [hereinafter HIGHWAY ANALYSIS] (discussing Chinese market access barriers faced by the US highway construction industry).

255. *See* US-China Business Council, *supra* note 88; TRADE REGULATIONS & STANDARDS REPORT, *supra* note 136. *See also China May Restrict Soybean Imports To Shore Up Domestic Production*, CHINAONLINE, Feb. 4, 1999 (on file with

Import quotas, intrinsically linked to import licensing requirements, are also widespread under China's regulatory scheme. To a much greater degree than import licensing requirements, import quotas are difficult to ascertain because they are largely non-transparent;[256] nevertheless, quota measures can be observed in various provisions of China's hard-to-obtain laws and regulations.[257] For example, the Notice of the Ministry of Foreign Economic Relations and Trade and the General Administration of Customs on Issues Involving the Empowering of Specially Commissioned Offices to Issue Vehicle Import Licenses to Sino-foreign Joint Equity Enterprises and Sino-foreign Co-operative Enterprises and Customs' Supervision, Control and Clearance of Vehicles Imported by Foreign Investment Enterprises[258] provides that import licenses for vehicles will be issued "[b]ased on the annual import quotas allocated" by the appropriate State agency.[259] China's heavy reliance on import quotas is further demonstrated by the Notice on Applications for Import Licenses,[260] which provides that certain "import commodities subject to quota controls" must be pre-approved for import and requires documentation of a "General Commodities Import Quota Certificate issued by a quota control department authorized by the State Planning Commission" upon application to import.[261]

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author) (citing an article recently published in the Quihuo Ribao, or Futures Daily). China has previously set protective prices to protect domestic wheat, corn, and rice productions, and the proposed "[p]rotective prices combined with restricted imports would stabilize domestic production." *Id.*

256. Notwithstanding China's published list of which goods fall subject to quota allocation, the author questions whether this represents the true extent of quota allocation in China. Research for this article failed to ascertain precise quota amounts, which is consistent with the Trade Compliance Center's statement that China's "[q]uota allocation largely remains non-transparent to outsiders." TRADE REGULATION & STANDARDS REPORT, *supra* note 136.

257. *See, e.g.*, Administrative Measures of the People's Republic of China on the Codes for Import and Export Enterprises, CHINA BUS. L. GUIDE (CCH) ¶ 50-734 (promulgated Aug. 25, 1997 by MOFTEC); Notice on Applications for Import Licenses, *supra* note 244; Foreign Trade Law, *supra* note 193. The European Commission has recognized that the practice of employing import balancing requirements, of which import quotas are an integral cog, "is endemic in China." *Market Access Sectoral & Trade Barriers Database: China*, European Comm. (1999) (visited Aug. 6, 1999) <http://www.mkaccdb.eu.int/mtdb/chksel.pl>.

258. CHINA BUS. L. GUIDE (CCH) ¶ 51-626, *supra* note 251.

259. *Id.* at art. 1(1).

260. CHINA BUS. L. GUIDE (CCH) ¶ 51-636, *supra* note 251.

261. *Id.* at art. II(1).

Export quotas and licensing which also severely restrict trading rights in (and to) the Chinese market appear more intertwined than import licensing and quotas. A prime example of this trade-negating interconnection, which is basically an alternative to naked export quota regulation, are the Measures on Invitations to Tender for Value for Export Commodity Quotas ("*Measures*").[262] Designed to "perfect the quota allocation system"[263] - oxymoronic in a WTO sense - the Measures provide that "tendering for value for quotas . . . [is] a process where an enterprise voluntarily submits an active tender, enters into competitive bidding, obtains the quota for value and then uses the quota for which its tender was successful."[264] The Measures govern all commodities subject to export quota control (more than 55 commodities)[265] as determined by MOFTEC,[266] which prescribes the tender quota amounts based on "the commodity's export performance under the previous year's quota, international market demand and current supply factors within China."[267]

While foreign investment and import/export enterprises are permitted to submit tender offers under the Measures, the tenders may only be submitted "in relation to commodities produced by these production and foreign enterprises themselves," thereby negating tenders for any type of re-export commodities

262. CHINA BUS. L. GUIDE (CCH) ¶ 50-720 (promulgated Apr. 17, 1995 by MOFTEC) [hereinafter Measures].

263. *Id.* at art. 1 (providing that these Measures "are formulated in order to perfect the quota allocation system, to establish a mechanism to promote fair competition, to protect the overall interests of the State and the legal rights of and interests of foreign trade enterprises and to maintain normal order for foreign trade exports").

264. *Id.* at art. 2. For an explanation as to how this process fails to be a truly "competitive" process in light of China's state-enterprise operations, see generally Part IV, *infra*.

265. *See China lifts export requirements on silk garments to the US*, AGENCE FRANCE-PRESSE, Jan. 18, 1999 *available at* 1999 WL 2530814 (reporting that MOFTEC reduced the number of commodities subject to export quotas by roughly half, "to just 58," in January 1999); *China Reduces Number of Licensed Commodity Exports*, CHINAONLINE, Feb. 2, 1999 <http://www.chinaonline.com/csubs/econ_news/en_b2-99020145.asp> (on file with author) (noting that MOFTEC "cut the number of commodity subject to export licensing by 50%, from 115 commodities in 1998 to 58 this year").

266. *See* Measures, *supra* note 262, at arts. 4-5.

267. *See id.* at art. 8. *See also* John Kingery, et al., *Future Challenges: The Proposed Accession of China, Russia, and Others*, 32 INT'L LAW. 883, 893 (1998) (noting that "[i]mport demand in many sectors is still set by consultations between government ministries, not the marketplace," a policy that is not permitted under the WTO).

or goods of other export value.[268] Assuming that such enterprises qualify to submit tender offers, these companies must first overcome several burdensome (and arguably discretionary) administrative obstacles, including: obtaining MOFTEC approval prior to submitting a tender; registering with appropriate State industry and commerce administrations; belonging to "their relevant import-export chamber of commerce;" and demonstrating "sound export performance" with respect to the commodity under tender.[269] Once a successful tender quota is achieved, companies must also apply for an export license.[270] Moreover, if the company has the misfortunate of winning the tender quota but is unable to assert it (i.e., cannot procure the necessary export license), then the company must attempt to transfer the quota, inevitably falling subject to a "quota transfer administration fee."[271]

What are the results of these impediments? Under the Provisional Measures on the Control of Export Commodities[272] as amended, the central government retains unfettered discretion in determining what goods and commodities fall subject to export quotas.[273] In light of China's tightly controlled export licenses, companies face the very real threat of expending tremendous amounts of time and money only to come up short,

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268. Measures, *supra* note 262, at art. 11 (reading Art. 11 in light of the Foreign Trade Law makes clear that enterprises submitting tenders are also prohibited from exporting products that are prohibited from being imported). *See also* POSITION PAPER, *supra* note 235, at 2 (noting that unless foreign firms "engage in local manufacturing, foreign companies are required to sell through Chinese trading agents who charge a transaction fee equal to about 1-3% of the contract value," and that these agents generally provide "no value-added so that their transaction fee represents an additional business tax").

269. Measures, *supra* note 262, at art. 11.

270. *See id.* at art. 19.

271. *Id.* at art. 20.

272. CHINA BUS. L. GUIDE (CCH) ¶ 50-708 (promulgated Dec. 30, 1992 by the Ministry of Foreign Economic Relations and Trade).

273. *See id.* at I. As provided under Part I of the Provisional Measures on the Control of Export Commodities:

> "These are mainly the following export commodities: bulk exports of resources *that are of importance to the national economy and people's livelihood*, and the bulk of traditional products that account for a large portion of China's total exports; *key commodities that have a dominant effect on the whole or specific markets of the world* and goods with quotas imposed by foreign countries or through *China's own initiative* after requests by foreign countries; commodities that are exported in huge quantities but which *easily create problems being exported*; important brand name, top quality, or *special local products*, and *those having to meet other specific export conditions*."

Id. (emphasis added).

even having to pay a demoralizing fee; combining trading right impediments with the previously discussed foreign investment guidelines, import and export restrictions greatly hamper foreign investors. The negative effects of these anti-free trade measures become magnified with concerns that "there is not consistent treatment of export control requirements among China's major trading partners,"[274] and that some Chinese ministries "intend to impose their own requirements" on export caps above and beyond those written into China's published policies.[275]

Moreover, China's licensing requirements hinder, if not nullify, distribution efforts in China's domestic market.[276] The result has been the development of "a large illegal 'grey' market" for many goods and commodities, ultimately reducing the official demand (in supply and price terms) of imports and thus, American industries' profit margins.[277] Additionally, China's quota system as it relates to SOEs is noteworthy. While China's export quota policy professes to establish a competitive tender offer system, it arguably entails the State submitting bids to itself. In other words, because SOEs remain under State control (at least until divesting more than 50% ownership and imposing fewer approval requirements), the State indirectly controls tenders made by SOEs. At a minimum, this reeks of impropriety; at its worst, it undercuts the notion of competitive bidding in an already dubious export quota system.[278] [This is but one prob-

274. Maibach Testimony, *supra* note 198.

275. POSITION PAPER, *supra* note 235, at 1, 6.

276. *See* Maibach Testimony, *supra* note 198; POSITION PAPER, *supra* note 235, at 3 (noting that only when foreign companies are provided full "distribution rights, trading rights, and after-sales service" will the companies be able "to conduct business completely and fully").

277. 1998 NTE REPORT, *supra* note 121, at 48 (discussing the fact that "China's real demand for these type of imported products greatly exceeds the supply made available through the official system") *and* 59 (citing medical equipment and low-end computers as examples, stating that the "existence of this parallel gray market, resulting in part from controlled demand, deprives US firms of sales that would otherwise occur on the legitimate market"). *See also* 1997 ANNUAL REPORT, *supra* note 66, at 190 (providing that "China promulgated a series of measures which impede market access for many products covered by the [1992] MOU, including registration requirements, the auto industrial policy and restrictions on medical equipment"); Dexter Roberts and Bruce Einhorn, *A Crackdown on Smugglers — And Foreign Companies*, BUS. WK., Nov. 9, 1998, at 70 (noting that foreign manufacturers in the computer industry "have relied on gray imports").

278. *See* Barshefsky Testimony, *supra* note 90 (testifying that China's state-owned enterprises raise serious questions regarding "conflicts of interest for government bodies which both own and regulate enterprises").

lem associated with determining "where the State ends, and private enterprise begins."[279]]

vii. Foreign Currency Exchange Restrictions

In paradoxical fashion, China aggressively encourages foreign investment and trade while maintaining foreign exchange restrictions that limit foreigners' access to China's domestic market.[280] The utilization of foreign exchange requirements, in direct violation of the TRIMs Agreement[281] and several provisions of the GATT 1994,[282] effectively prevents foreign investors from extracting profits from their Chinese operations in their respective national currencies.[283] At least one commentator notes that a "panoply of regulations restrict the ability of foreign investors in China to take profits out of the country in hard currency;"[284] however, even this broadly accurate statement arguably underscores the difficulty surrounding the remittance of profits in hard, foreign currency.[285]

279. Rosen, *supra* note 102, at 1543 (citing GOVERNMENT STRUCTURES, *in* CHINA TRADE AND MARKETING MANUAL 181-82 (Donald Lewis ed., 1994)) (noting the problems associated with planned economies as in China's hybrid socialist-communist economy).

280. *See, e.g.*, INVESTMENT CLIMATE REPORT, *supra* note 125; TRADE REGULATIONS & STANDARDS REPORT, *supra* note 136; POSITION PAPER, *supra* note 235, at 6; Rosen, *supra* note 102, at 1542-43.

281. TRIMs Agreement, *supra* note 29, at art. 2(1) *with* Annex (2)(b). *See also* Rosen, *supra* note 102, at 1542 (citation omitted).

282. *See generally* GATT 1994, *supra* note 30, at arts. III, XI, XII, XV.

283. *See* Rosen, *supra* note 102, at 1542-43 (citing John D. Parsons, *China's Re-Accession to the GATT and the Impact of the Uruguay Round Agreement*, 1 HONG KONG L. SCH. REV. 46, 51-53 (1994)).

284. *Id.* at 1542 n.143 (citations omitted).

285. A plethora of Chinese exchange restrictions undermine foreign enterprises' abilities to remit profits in their respective national currency, especially by requiring advance permission and/or approval to do such. For various examples of Chinese law containing approval-related exchange requirements, see, e.g., Regulations of the State Council concerning the Balance of Foreign Income and Expenditure by Sino-Foreign Joint Equity Ventures, CHINA BUS. L. GUIDE (CCH) ¶ 6-590 (1986); Provisional Regulations on Handling the Turnover to the State of Foreign Exchange Quotas and the Verification and Allocation of Retained Foreign Exchange Quotas, CHINA BUS. L. GUIDE (CCH) ¶ 8-757 (1991); Regulations on the Administration of Foreign Exchange Banking Operations, CHINA BUS. L. GUIDE (CCH) ¶ 8-687 (1993); Regulations on the Administration of the Foreign Exchange Adjustment Market, CHINA BUS. L. GUIDE (CCH) ¶ 8-764 (Feb. 6, 1994); Provisional Measures on the Administration of Foreign Exchange Accounts, CHINA BUS. L. GUIDE (CCH) ¶ 8-570 (1994); Law of the People's Republic of China on the People's Bank of China, CHINA BUS. L. GUIDE (CCH) ¶ 8-450 (1995); Notice on the Issue of the "Provisional Measures on the Administration of Foreign Investment Enterprises' Foreign Exchange Accounts in China," CHINA BUS. L. GUIDE (CCH) ¶ 8-796 (1996); Administrative Meas-

The Rules of the People's Republic of China on Foreign Exchange Control ("*Exchange Control Law*")[286] demonstrate the restrictive nature of China's foreign exchange control. Applicable to foreign exchange revenues and expenditures of foreign operations in China,[287] the Exchange Control Law prohibits "any pricing and settlement of accounts in foreign currency," which encompasses the settlement of bank accounts involving foreign currency unless otherwise permitted by Chinese law.[288] The Exchange Control Law requires the foreign exchange earnings of domestic organizations (i.e., any enterprise operating in China, including foreign investment enterprises) "be remitted back into China," and that "[i]t is not permitted to make unauthorized deposits of foreign exchange outside Chinese territory in violation of relevant State regulations."[289]

The Exchange Control Law further provides that all "[f]oreign exchange earnings derived . . . from current account items must, in accordance with the regulations of the State Council on the administration of foreign exchange, settlements, sales and payments, be sold to designated foreign exchange banks or, subject to approval, deposited in foreign exchange accounts" opened with certain State-approved foreign exchange banks.[290] The Exchange Control Law imposes similar such requirements on foreign exchange earnings derived from capital account items,[291] which are "those international revenue and expenditure dealings which because of inflow and outflow of capital produce increases or reductions in debt and equity, including

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ures on Special Turnover Funds for Foreign Exchange and Foreign Affairs, CHINA BUS. L. GUIDE (CCH) ¶ 8-798 (1997).

286. CHINA BUS. L. GUIDE (CCH) ¶ 8-545 (promulgated Jan. 29, 1996 as Directive No. 193 of the State Council of the PRC, amended Jan. 14, 1997 in accordance with State Council Decision to Revise the Rules of the People's Republic of China on Foreign Exchange Control) [hereinafter Exchange Control Law].

287. *See id.* at art. 4.

288. *See id.* at art. 7 (providing that "[a]ny pricing and settlement of accounts in foreign currency is also not permitted," in addition to any general circulation of foreign currency in China).

289. *Id.* at art. 9 *with* art. 52(1) (defining domestic organizations as any "enterprise, institutional unit, government organ, social organization, the armed forces, etc., within the territory of the People's Republic of China, and includes foreign investment enterprises").

290. *Id.* at art. 10 *with* at art. 52(6) (defining current account items as "those international revenue and expenditure dealings which occur on a current basis, including revenue and expenditure in trade and labour services, and unilateral transfers, etc.").

291. *See id.* at Chapter III (emphasis on arts. 19, 20).

direct investment, various types of loans and investment in securities, etc."[292]

As a result, American businesses continue to be impaired by such foreign exchange regulations.[293] According to a December 1998 survey conducted by the US-China Business Council, 80% of the surveyed companies reported that recent Chinese measures, which were designed to crackdown on illegal foreign exchange smuggling, "adversely affected" their business.[294] Concerns have been expressed regarding China's new highway law because it fails to guarantee private foreign investors that they will be able to exchange sufficient renminbi for foreign currency to repay loans and remit dividends;[295] the US High-Tech Industry Coalition On China notes that because foreign firms are exposed to legal uncertainties, foreign companies are exposed to potential allegations of contractual wrongdoings.[296] No matter the use or application, eliminating foreign exchange balancing requirements and providing safeguards against China's use of foreign exchange requirements to control market access will be essential to China's conformance with the WTO principles and framework.

viii. Export Subsidies / Export Performance Requirements

Export subsidies and export performance requirements are prohibited non-tariff measures under the WTO regime. More

292. Exchange Control Law, *supra* note 286, art. 52(7) (defining capital account items).

293. *See, e.g,* Maibach Testimony, *supra* note 198; POSITION PAPER, *supra* note 235, at 6; HIGHWAY ANALYSIS, *supra* note 254.

294. *See* US-China Business Council, *Impact of Recent Foreign Exchange Circulars on US Companies (Executive Summary)*, Dec. 1998 (visited Mar. 30, 1998) <http://www.uschina.org/public/fxsurveyresults.html> [hereinafter Survey].

295. *See* HIGHWAY ANALYSIS, *supra* note 254 (noting that Chinese officials have reported that such guarantees will only be provided to foreign joint-venture partners). This report cites several remaining problems associated with foreign exchange restrictions, including: (1) foreign-investor enterprises are limited to one foreign exchange account; (2) capped amounts of foreign investor-held foreign currency; (3) State-mandated annual inspections of foreign exchange accounts; (4) non-freely convertible capital account transactions (meaning "repatriation of equity investments and repayments of loan principal still must be approved"); and, (5) registration requirements for international borrowing. *See id.*

296. *See* POSITION PAPER, *supra* note 235, at 6 (noting that although foreign-investment enterprises are legally bound to balance foreign exchange, the requirement "is not being enforced by the State Administration of Exchange Control . . . [which] tends to create uncertainty and exposes foreign firms to potential allegations of violating contractual commitments").

specifically, direct and indirect export subsidiaries are expressly prohibited under the SCM Agreement[297] and export performance requirements are impermissible under the TRIMs Agreement.[298] Practically speaking, these types of trade barriers are conceptual opposites of the principles embedded in the WTO Agreements.

Nevertheless, export subsidies and export performance requirements tarry Chinese law and regulations.[299] China provides export subsidies in a sundry of fashions: higher value-added tax rebates[300] and other tax benefits;[301] export credits;[302] industrial policies promoting domestic enterprises,[303] including State-mandated support from central banks;[304] direct subsidization;[305] and multifarious practices involving SOEs, absorption of debt in particular.[306] Naked export subsidization ranges from direct price support of agriculture commodities (such as China's subsidization of corn exports in 1997, which were sold between $20 and $30 below domestic corn prices)[307] to the outright provision of energy, materials and labor.[308] All of these subsidization practices thwart the WTO goal of free, competitive global trade because they make it easier for China's domestic exporters "to

297. *See generally* SCM Agreement, *supra* note 28, at art. 3.1(a).

298. *See generally* TRIMs Agreement, *supra* note 29, at art. 2 *with* Annex (1).

299. *See, e.g.*, INVESTMENT CLIMATE REPORT, *supra* note 125; REGULATIONS & STANDARDS REPORT, *supra* note 136; 1998 NTE REPORT, *supra* note 121, at 52-53; Greg Mastel, *The WTO and Nonmarket Economies*, 21 WASH. Q. 5 (Summer 1998).

300. *See Foreign trade & payments: Tightening the trade regime*, THE ECONOMIST INTELLIGENCE UNIT LTD., Nov. 26, 1998, *available at* 1998 WL 22843508. As of late July 1999, MOFTEC is contemplating further increases in tax rebates. *See Report: More Tax Rebates Possible If Exports Stay Weak*, INSIDE CHINA TODAY, July 22, 1999 (on file with author).

301. *See* POSITION PAPER, *supra* note 235, at 5; 1998 NTE REPORT, *supra* note 121, at 52.

302. *See* POSITION PAPER, *supra* note 235, at 5; 1998 NTE REPORT, *supra* note 121, at 52. *See also* Lingle, *supra* note 97.

303. *See* US-China Business Council, *supra* note 88. *See also* Part IV, *infra*.

304. *See* US-China Business Council, *supra* note 88; 1998 NTE REPORT, *supra* note 121, at 52.

305. *See* US-China Business Council, *supra* note 88; 1998 NTE REPORT, *supra* note 121, at 52-53.

306. *See* Part V, *infra*.

307. *See* 1998 NTE REPORT, *supra* note 121, at 52.

308. *See* Charles E. Roh, et al., *Future Challenges: The Proposed Accession of China, Russia, and Others*, 32 INT'L LAW. 883 (1998) (comments of Greg Mastel, vice president of the Economic Strategy Institute).

export goods at a below-market price, and thus . . . underprice goods from countries without similar subsidies."[309]

Consider just a few provisions of Chinese law and regulations. The Administrative Measures of the Customs of the People's Republic of China Governing Import and Export Commodities Involved in Import Processing provide that (A) parts and materials "imported *exclusively for processing products for exports* shall be exempted by Customs from import duty and product tax (or value-added tax), based on the actual amounts used in the processing of exports" and (B) such finished products "shall be exempt from export duty when exported after processing."[310] Chinese income tax law effectuates export subsidization by imposing a 20% income tax against foreign competitors even if the foreign enterprise "has no establishment or place in China but derives profit" from sources inside China;[311] regulations involving the importation of materials and goods for certain real estate construction, which may apply to domestic exporters, effectively constitute indirect export subsidization.[312] These examples clearly demonstrate China's dedication to fostering its domestic export industry at the expense of foreign competition, which undeniably violates the basic tenets of the WTO.

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309. Rosen, *supra* note 102, at 1545 (explaining how China's export subsidization practices violate the GATT/WTO framework).

310. Administrative Measures of the Customs of the People's Republic of China Governing Import and Export Commodities Involved in Import Processing, art. 3, CHINA BUS. L. GUIDE (CCH) ¶ 50-675 (promulgated May 6, 1988 by the General Administration of Customs of the People's Republic of China) (further providing that if the exempted, imported material is not "completely consumed in the process," then Chinese Customs are allowed to tax or levy a duty against the surplus portions based on their estimated value).

311. Income Tax Law of the People's Republic of China for Enterprises With Foreign Investment and Foreign Enterprises, art. 19 (visited Feb. 17, 1998) <http://www.chinaexpo.com/laws/law03/law0301.html> (adopting the Fourth Session of the Seventh National People's Congress on Apr. 9, 1991, effective as of July 1, 1991).

312. *See* Notice of the State Council on Issues concerning the Levying and Collection of Taxes on Materials and Goods Imported for Real Estate Construction, CHINA BUS. L. GUIDE (CCH) ¶ 50-615 (Decision No. 10 promulgated Apr. 23, 1995 by the State Council) (providing in Article 3 that "[m]aterials, goods and equipments" imported for enumerated projects or into geographic zones relating to real estate construction "can enjoy preferential treatment in the way of reduction of and exemption from import duty and import circulating taxes"). A textual interpretation of this Notice would mean that domestic exporting enterprises would able to import cheap goods or materials at no cost, which is effectively a subsidization of the building or construction costs and in turn, subsidization for the market cost of the enterprise's exported product.

China, while formally removing most such requirements from the text of Chinese law, also continues to exact formidable export licensing requirements.[313] Strongly encouraged by various State agencies such as MOFTEC, export requirements are contractually stipulated in many Sino-foreigner enterprises agreements.[314] Whether an enterprise is able to accomplish export performance requirements (export targets in particular), which are normally negotiated directly between the enterprise partners and State agencies, factors into whether the enterprise's annual certification is renewed, certification of which is necessary to obtain foreign exchange under the Chinese legal system.[315]

Article 3 of the Detailed Implementing Rules for the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises[316] is but one example of formal Chinese law still imposing export performance requirements. Article 3 provides that wholly foreign-owned enterprises must either (1) transfer advance technology to the Chinese operation or (2) export "more

313. *See* INVESTMENT CLIMATE REPORT, *supra* note 125. *See also* 1998 NTE REPORT, *supra* note 121, at 52 (noting that China "also generates exports by imposing export requirements on Chinese foreign trade corporations (FTCs) and foreign-invested enterprises"); POSITION PAPER, *supra* note 235, at 5; Holton and Lin, *supra* note 188, at 745 (noting that "[f]oreign investment projects commonly have had to assure that some minimum percentage of output would be exported").

314. *See* INVESTMENT CLIMATE REPORT, *supra* note 125.

315. *See id. See also* Laws of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, art. 13 (Apr. 1 4, 1990) *as published in* Baker & McKenzie, Doing Business in China 41 (Oct. 1997) (hereinafter Baker & McKenzie) (providing that "if one party fails to fulfill its obligations under the contract . . . [then] the contract may be terminated"); Implementing Regulations for the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, art. 102 (Dec. 21, 1987) *as published in* Baker & McKenzie, *id.* at 75-76 (clarifying that a joint venture "is to be dissolved" upon "the failure of one of the joint venture parties to perform the obligations stipulated in the joint venture agreement, contract or articles of association," as well as its inability "to attain its business goals"); Law of the People's Republic of China on Chinese-Foreign Cooperative Joint Ventures, art. 9 (Apr. 13, 1988) *as published in* Baker & McKenzie, *id.* at 82 (grounds for dissolution); Detailed Implementing Rules for the Law of the People's Republic of China on Chinese-Foreign Cooperative Joint Ventures, art. 48 (Sept. 4, 1995) *as published in* Baker & McKenzie, *id.* at 107 (providing that cooperative joint ventures "shall be dissolved . . . if one, several or all of the Chinese and foreign parties fail to perform their obligations under the contract for and articles of association of the cooperative joint venture").

316. *See* Detailed Implementing Rules for the Law of the People's Republic of China on Wholly Foreign- Owned Enterprises, art. 3 (Dec. 12, 1990) *as published in* Baker & McKenzie, *supra* note 315, at 116 (clarifying terms required as a condition precedent to establishing a wholly foreign-owned enterprise in China).

than 50% of the output value of all the products produced in the year concerned."[317] Although this law is currently being redrafted (probably without a similar provision), reports indicate that at least one State ministerial will likely continue specifying and enforcing export requirements, even imposing 100% export requirements on wholly-owned foreign enterprises.[318] The combination of formal law and quasi-mandatory export performance requirements (i.e., "pressed" contractual export requirements[319] and informal agency policies) certainly impairs foreign companies' abilities to be competitive in both the domestic and international market.

IV. China's Subsidization of SOEs and the GATT/WTO Framework

A central WTO accession issue for China has involved a contention that China is subsidizing its SOEs in manners not allowed under the GATT/WTO framework. SOEs play crucial roles in China's socialist market planning, consistent with Communist ideals of collectively owned and operated property. Simply stated, SOEs "remain the most important sector in the Chinese economy" because of the domestic economy's great de-

317. *Id.* Article 3 reads:

"The establishment of wholly foreign-owned enterprises must be beneficial to the development of China's national economy and yield notable economic benefits. In addition, either of the following two conditions shall be met:

The enterprise will use advanced technology and equipment, develop new products, save energy and raw materials, upgrade and replace existing products and/or produce products that can substitute imports; or

The output value of products exported each year will be more than 50 percent of the output value of all the products produced in the year concerned, and a balance of foreign exchange revenue and expenditure or a surplus of foreign exchange revenue can be achieved."

Id.

318. *See* POSITION PAPER, *supra* note 235, at 6 (reporting that the Ministry of Information Industries "plans to specify a 100% export requirement for [wholly-owned foreign enterprises], 70% for 70%-owned [foreign-invested enterprises], etc."). *See also* Maibach Testimony, *supra* note 198 (testifying that early reports of the in- progress draft law "indicated that the electronics industrial policy could proscribe foreign majority ownership of semiconductor Firms, establish export requirements for Sino-foreign joint ventures, and provide the basis for eventual displacement of foreign semiconductors in China by domestically-made devices").

319. *See* Maibach Testimony, *supra* note 198 (testifying that "many US companies have been pressed by the Chinese approval authorities to agree to export targets").

pendence on SOE-manufactured goods and the prodigious percentage of the citizenry employed by SOEs.[320]

State-owned enterprises are pervasive in all aspects of the Chinese economy. China's industrial infra-structure relies heavily on SOEs, especially in areas demanding substantial capital investment.[321] China's banking industry is also heavily comprised of SOEs – in fact, "the banks in China all belong to the state."[322] State enterprises include both large and small scale operations;[323] SOEs provide stability in rural and urban area, having employed 75% of the urban labor force in past years.[324] An estimated one to two hundred million Chinese[325] are employed by the 300,000 plus state enterprises.[326] State operations have accounted for 70% of China's Trade Development

320. *See* K. Matthew Wong, *Securities Regulation in China and Their Corporate Finance Implications on State Enterprise Reform*, 65 FORDHAM L. REV. 1221, 1226 (1996).

321. *See, e.g.*, BACKGROUND NOTES, *supra* note 5 (noting that SOEs pervade, among others, the steal, coal, iron, machine building, armaments, and light industrial products industries); EDWARD S. STEINFELD, FORGOING REFORM IN CHINA: THE FATE OF STATE-OWNED INDUSTRY at 16 (Cambridge Univ. Press, 1998). Steinfeld writes:

"The SOE monopoly over more capital-intensive industries, however, remains unchallenged. Overall, therefore, while SOEs are producing a smaller share of China's national industrial output than in the past, that remaining share has become even more concentrated in such core heavy industries as coal mining, petroleum extraction, metallurgy, and machine building."

Id.

322. *Why the RMB Is Not Devalued*, CHINA FOCUS (PRINCETON CHINA INITIATIVE), July 1, 1998, *available in* 1998 WL 10472477.

323. *See China to Reform Small State-Owned Enterprises*, ASIA PULSE, Dec. 1, 1998, *available in* 1998 WL 19984611 (noting that 99% of China's SOEs are small operations, which generate "about half of all output value and pre-tax profits and employing some 70% of workers in the state-owned sector"); Pamela Yatsko, *The Bigger, The Better: China is set on building its best state-owned enterprises into conglomerates that can compete globally; But can it avoid the mistakes of Korea's chaebols?*, FAR EASTERN ECON. REV., May 21, 1998, *available in* 1998 WL-FEER 6521835.

324. *See* Wong, *supra* note 320, at 1224 (noting that SOEs employed 75% of China's urban labor force in 1993). Though this number is declining, SOEs still employ a hearty percentage of the urban labor force. In 1995, for example, SOEs employed almost 65% of the total urban workforce in China); *See* STEINFELD, *supra* note 321 (citing China's State Statistical Bureau).

325. *See* Roh, *supra* note 308, at 893 ("SOEs employ between one and two hundred million Chinese and appear to provide the majority of jobs in several major Chinese cities").

326. *See, e.g.*, Yatsko, *supra* note 323 (noting that China's 305,000 SOEs are "thought to be highly leveraged"); Mariko Hayashibara, *The Thorn in China's side*, AB 1998 (visited Feb. 23, 1999) <http://web3.asia1.com.sg/timesnet/data/ab/docs/ab1590.html> (noting that China's 306,000 SOEs employ almost 60% of the urban labor force and "gobble up 70% to 80% of bank credit").

Council's $1.3 billion budget;[327] China's SOEs exported more than $63 billion and imported roughly $35 billion worth of goods in the first eight months of 1998 alone.[328] State enterprises are also China's principal source of tax revenue.[329] The importance of SOEs to China is immeasurable, thus helping to explain Beijing's reluctance to liberalize its state enterprise system and reduce subsidization to SOEs immediately.

A flip of the coin, however, reveals why the United States is claiming "foul" with respect to China's SOEs. State enterprises get special privileges (such as exclusive access to raw materials, technology, money, and so forth)[330] from the central, provincial, and local governments.[331] For example, more than 100 would-be conglomerate SOEs "get priority when listing on the stockmarket and obtaining bank loans . . . [can] trade overseas without going through state trading companies . . . [receive] a 15% annual tax refund," many of which are also eligible for "more than 20 perks, such as 100% tax refunds and the write-off of debts amassed during state-planning days."[332] China's SOEs require heavy subsidization, subsidization that is suspected to go far beyond WTO-proscribed limits, because SOEs are, for the most part, incredibly inefficient and poorly run.[333]

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327. *See* Clarence Tsui, *Subsidy Should Continue, Says TDC*, S. CHINA MORNING POST, Nov. 14, 1996, *available in* 1996 WL 3773994 (noting that the remaining 30% would be subsidized by the State through ad valorem levies on imports and exports).

328. *See Exports of China State-Owned Enterprises Worth US$63.8 BLN*, ASIA PULSE, Oct. 13, 1998, *available in* 1998 WL 19977188. *See also* Hartcher, *supra* note 111, at 12 (noting that "some 7,000 State-owned firms" have special trading rights).

329. *See* Jiang Hong, *China: Role of State-Owned Enterprises in a Market Economy*, BEIJING REV., Oct. 28, 1996, *available in* 1996 WL 11665060.

330. *See The "Red Hat" Enterprises*, CHINA FOCUS (PRINCETON CHINA INITIATIVE), June 1, 1998, *available in* 1998 WL 10472451.

331. *See* Yatsko, *supra* note 323. SOEs are, however, conceptually and legally distinct from other types of collective enterprises in China, such as town enterprises, village enterprises, and private (rural) enterprises. For example, the so-called town-village enterprises ("TVEs") are hybrid institutions – alliances between TVE entrepreneurs and local government officials, or the local government itself. For further discussion of the distinctions between and functions of these types of collectively-owned enterprises, see Satya J. Gabriel, *Ambiguous Capital: The Success of China's New Capitalists in the Township and Village Enterprises and Their Impact on the State Sector*, China Essay Series No. 13, Mar. 16, 1999 (visited Aug. 5, 1999) <http://www.mtholyoke.edu/courses/sgabriel/TVE.html>; Shuhe Li, *supra* note 27.

332. *See* Yatsko, *supra* note 323.

333. *See* Roh, *supra* note 308, at 893 (noting that most of China's SOEs are "poorly run and require heavy state subsidies far in excess of WTO prescribed limits to survive"); STEINFELD, *supra* note 321, at 2 (noting that SOEs "still suf-

As noted by a 1999 report prepared by the USTR, SOEs continue to enjoy "certain advantages because they are fully integrated into the national economic system;" unlike most American businesses in China, SOEs have free and direct access to China's domestic market.[334] The central government, for example, is providing more than $60 billion through the year 2000 to promote domestic capabilities in SOEs in the so-called "pillar industries" (e.g., automotive, electronics, petrochemical, machinery and construction industries),[335] industries which also generally receive "preferential treatment in terms of government resources and funding for new or existing facilities."[336] Additionally, State-run stock markets have been a primary funding mechanism for China's SOEs.[337]

China obviously believes, and has maintained, that much of the foregoing funding does not constitute impermissible subsidization.[338] To analyze whether China's plea of "subsidization innocence" is warranted, an examination of the WTO's SCM Agreement, TRIMs Agreement, and the Article XVII Understanding is warranted (collectively, the *"Relevant WTO Instruments"*).

A. THE SCM AGREEMENT

Recognizing that subsidization has protective, anti-competitive trade effects, the SCM Agreement obligates WTO governments to eliminate the bulk of industrial subsidies.[339] According to the United States International Trade Administration, a subsidy "distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production, and lessoning world wealth."[340] The SCM Agree-

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fer from habitual overstaffing, notoriously low productivity, and ever-declining profit performance – all the traditional ills of socialist production").

334. *See* 1999 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN BARRIERS 64, OFFICE OF THE USTR (Apr. 1999). As previously noted, it is estimated that some 7,000 SOEs hold special importing and exporting rights. *See* Hartcher, *supra* note 111, at 12.

335. *See* BXA Report, *supra* note 112, at Executive Summary (iii).

336. *See id.* at 34.

337. *See* Wong, *supra* note 320, at 1229; Francesco Lao Xi Sisci, *China Listing for Private Firms*, ASIA TIMES, June 23, 1997, *available in* 1997 WL 10405442.

338. *See China Insists Export Tax Rebates Not Subsidy*, REUTERS, Jan. 26, 1999 (on file with author).

339. *See* SCM Agreement, *supra* note 28, at art. 3. *See also* GATT 1994, *supra* note 30, at art. XVI(B)(2).

340. ITA, *Carbon Steel Wire Rod from Poland: Final Negative Determination*, 49 Fed. Reg. 19,374, 19,375 (1984).

ment, however, does not require members to purge all subsidization; subsidies to certain research, regional development, and environmental-related projects are perfectly acceptable assuming specific conditions are met.[341] As a result, the SCM Agreement is commonly discussed in terms of "green-light" subsidies (non-actionable), "yellow-light" subsidies (permissible but actionable) and "red-light" subsidies (impermissible).[342]

A subsidy is deemed to exist per se under the SCM Agreement if "there is a financial contribution by a government or any public body within the territory" that results in a benefit being conferred.[343] Financial contributions are conferred when (i) governmental practices directly transfer funds or potentially transfer funds or liabilities;[344] (ii) governmental revenue otherwise due is either foregone or simply not collected;[345] (iii) governmental practices provide services or goods (excluding basic infrastructure) or purchases goods;[346] or (iv) governmental practices transfer payments to external funding mechanisms for the purpose of carrying out any of the three preceding practices, "which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments."[347] Alternatively, the SCM Agreement provides that "any form of income or price support" is the functional equivalent of a financial contribution.[348]

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341. *See generally* SCM Agreement, *supra* note 28, at Part IV (setting forth the conditions associated with non-actionable subsidies).

342. *See* Jianming Shen, *A critical analysis of China's first regulation on foreign dumping and subsidies and its consistency with WTO agreements*, 15 BERKELEY J. INT'L LAW 295 (1997) (on file with author) (citing R.H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM ORIENTED COURSEBOOK 507-11 (3rd ed., West Publishing Co. 1995)).

343. SCM Agreement, *supra* note 28, at art. 1.1(a)(1).

344. *See id.* at art. 1.1(a)(1)(i) (providing that "a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)").

345. *See id.* at art. 1.1(a)(1)(ii) (providing that "government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)").

346. *See id.* at art. 1.1(a)(1)(iii) (providing that "a government provides goods or services other than general infrastructure, or purchases goods").

347. *Id.* at art. 1.1(a)(1)(iv) ("a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments").

348. *Id.* at art. 1.1(a)(2).

The SCM Agreement is only concerned about "specific" subsidies.[349] The determination of specificity is guided primarily by three principles. First, subsidies are specific if the granting authority, or legislation pursuant to such authority (cumulatively, the "*Authority*"), explicitly limits subsidization access to certain enterprises.[350] Second, subsidies are not specific if the Authority institutes objective conditions or criteria governing the eligibility and amount of a subsidy, assuming automatic eligibility and strict adherence to such guidelines.[351] Third, despite the otherwise non-specific appearance of a subsidy under the aforementioned principles, other factors may be considered if "there are reasons to believe that the subsidy may in fact be specific."[352] The 'other factors' comprise such things as usage of a subsidization program by a limited number of certain enterprises, subsidy use predominance by certain enterprises, and grants of disproportionately large amounts of subsidization to certain enterprises.[353]

As previously noted, only certain kinds of specific subsidies are impermissible per se under Part II of the SCM Agreement. For example, export performance subsidies, whether contingent in law or fact, are prohibited,[354] as are subsidies contingent on local content requirements — i.e., "the use of domestic over imported goods."[355] These are examples of red-light subsidies.[356]

If, however, the specific subsidy is not explicitly impermissible, it may still be subject to countervailing duties by another WTO member under Part III of the SCM Agreement if the subsidy causes "adverse effects to [that member's] interests."[357] Ad-

349. SCM Agreement, *supra* note 28, at art. 1.2 ("A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V *only if* such a subsidy is specific in accordance with the provisions of Article 2.") (emphasis added).

350. *See id.* at art. 2.1(a).

351. *See id.* at art. 2.1(b) (also noting that the conditions and criteria "must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification").

352. *Id.* at art. 2.1(c).

353. *See id.* at art. 2.1(c).

354. *See id.* at art. 3.1(a) ("subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" are prohibited). Exports are contingent in fact "when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings." *Id.* at fn. to Art. 3.1(a).

355. SCM Agreement, *supra* note 28, at art. 3.1(b).

356. *Id.* at art. 3.1(a).

357. *Id.* at art. 5.

verse effects include injuring a member's domestic industry, impairing or nullifying other directly or indirectly accrued benefits under the GATT 1994, or causing "serious prejudice to the interests of another Member."[358] Serious prejudice encompasses subsidization of an industry's operating losses,[359] debt forgiveness (i.e., clemency toward government-held debt or providing grants to cover debt repayment),[360] subsidization effectuating an increased world market share of the product or commodity being subsidized,[361] and other harmful subsidization effects.[362] These types of permissible yet actionable subsidies constitute yellow-light subsidies.

Finally, Part IV of the SCM Agreement addresses green-light subsidies, i.e., those that are both permissible and non-actionable. Green-light subsidies include subsidies that do not meet the specificity requirements contained in Article 2,[363] and subsidies that "which are specific within the meaning of Article 2 but"[364] constitute various research and development-oriented subsidies; grants to geographically disadvantaged areas of the member country; or environmental advancement subsidies.[365] The SCM Agreement further establishes stringent criteria and requirements for these type of subsidies to ensure that these they are truly "non-actionable" nature and not merely a pretext for impermissible subsidies.

B. THE TRIMS AGREEMENT

Designed to protect domestic industries, non-tariff barriers often take the form of government limitations on an enterprise's ability to negotiate with foreign parties willing to enter the Chinese market (i.e., restrictions on trading rights).[366] The Preamble of the TRIMs Agreement explains that the WTO is striving to protect free competition and ensure the avoidance investment measures that distort and restrict trade, or non-tariff barri-

358. *Id.*
359. *See id.* at art. 6.1(b).
360. *See* SCM Agreement, *supra* note 28, at art. 6.1(d).
361. *See id.* at art. 6.2(d).
362. *See generally id.* at art. 6.
363. *See id.* at art. 8.1(a).
364. *Id.* at art. 8.1(b).
365. *See generally id.* at art. 8.2.
366. *See A Summary of the Final Act of the Uruguay Round*, WTO (visited Apr. 14, 1999) <http://www.wto.org/wto/legal/ursum_wp.htm> (on file with author).

ers.[367] The TRIMs Agreement theoretically assures foreign investors that they can buy and sell, even for import or export purposes, goods produced from beyond the borders in which their investment is located. The TRIMs Agreement illustrates, for example, that local-content requirements comprise impermissible TRIMs even if in the form of trade inducements rather than facial mandates.[368]

The heart of the TRIMs Agreement lies within Article II, which proscribes any TRIM inconsistent with Articles III and XI of the GATT 1994.[369] Article III of the GATT 1994 broadly guards the principle of national treatment by prohibiting local-content requirements, trade-balancing requirements (i.e., limits on purchases or usage of imported items based on the value or volume of local exports), and foreign exchange balancing requirements (i.e., where foreign exchange access is tied to an investor's foreign exchange earnings).[370] Article XI of the GATT 1994 bans any TRIM inconsistent with the elimination of quantitative restrictions, such as domestic sales or foreign exchange requirements.[371] Cumulatively, Articles III and XI greatly strengthen the notion of non-discrimination in international trade.

C. THE ARTICLE XVII UNDERSTANDING

The purpose of the Article XVII Understanding, which is officially a part of the GATT 1994,[372] is to "ensure the transparency of the activities of state trading enterprises."[373] The Article XVII Understanding requires all members to notify the Council for Trade in Goods ("*Council*") of their respective SOEs; the submitted information is then subject to a SOE review mechanism consisting of a working party established on the Council's behalf.[374] State trading enterprises, as defined by the Article XVII Understanding, are "[g]overnmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including

367. *See* TRIMs Agreement, *supra* note 29, at Preamble. *See also A Summary of the Final Act of the Uruguay Round*, *supra* note 359 (noting that the TRIMs Agreement was designed to eradicate non-tariff barriers).
368. *See* TRIMs Agreement, *supra* note 29, at Annex.
369. *See id.* at art. 2 *with* GATT 1994, *supra* note 30, at arts. III, XI.
370. *See* GATT 1994, *supra* note 30, at art. III.
371. *See id.* at art. XI.
372. *See* note 30, *supra*.
373. Article XVII Understanding, *supra* note 30, at para. 1.
374. *See id.*

statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."[375] In addition, the Article XVII Understanding requires such notification regardless of whether exports or imports have in fact taken place.[376]

Article XVII of the GATT 1994 sheds further light on the Article XVII Understanding. Construing Article XVII together with the Article XVII Understanding, WTO members are required to give notice to the Council concerning SOEs even if a member's SOEs are located outside of its national borders.[377] Article XVII also clarifies, pursuant to the Article XVII Understanding, that the notification requirements are triggered by both formal and informal grants of special rights or privileges.[378] Any special rights or privileges either bestowed on SOEs through custom or simply assumed by state enterprises are therefore required to be reported to the Council, assuming the SOE would otherwise meet the notification requirements.

Moreover, Article XVII is important for substantive, non-notification reasons. First, Article XVII provides that SOEs must act pursuant to national treatment principles when purchasing or selling goods involving imports or exports.[379] In other words, private traders are supposed to be on equal footing in these kinds of commercial transactions, i.e., receive non-discriminatory treatment. Second, and complementing the preceding point, SOEs are required to "make such purchases or sales solely in accordance with commercial considerations."[380] Practically speaking, commercial considerations are those factors taken into account in a free market transaction, ranging from price and quality considerations to availability and marketability considerations, to transportation and other relevant considerations.[381] Finally, Article XVII provides that other members' companies are to have an "adequate opportunity, in accordance with cus-

375. *Id.*

376. *See id.* at para. 3.

377. *See generally id. with* GATT 1994, *supra* note 30, at art. XVII(1) (reading the "wherever located" language of Article XVII in conjunction with the Article XVII Understanding).

378. *See* GATT 1994, *supra* note 30, at art. XVII (1) ("grants to any enterprise, formally or in effect").

379. *See id.*

380. *Id.* at art. XVII (2).

381. *See id.* (noting that commercial considerations include "price, quality, availability, marketability, transportation and other conditions of purchase or sale").

tomary business practice, to compete for participation in such purchases or sales."[382]

D. APPLICATION OF THE GATT/WTO PROVISIONS TO VARIOUS CHINESE SUBSIDIZATION PRACTICES RELATING TO STATE ENTERPRISES

While it is beyond the scope of this article to discuss all Chinese SOE-related practices that are suspect under WTO guidelines and agreements, this section examines one particularly well-documented SOE-related practice: State absorption of SOE debt and losses. This practice will be analyzed under the Relevant WTO Instruments in an effort to illustrate why Congress would deduce that this subsidization practice violates WTO standards. Because the United States contends that China should join the WTO as a developed nation,[383] it is assumed that China cannot qualify for any exceptions available to developing nations. Before performing such analysis, however, a few more words on China's loss-making SOEs are necessary to fully describe the extent of SOE debt and loss absorption occurring in China today.

According to the World Bank, more than 44% of China's SOEs are losing money.[384] Between January and November 1998, the central government paid more than US$12 billion to loss-making SOEs;[385] today, China's output-oriented SOEs face

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382. *Id.*

383. *See, e.g.*, Marcus Noland, *US-China Economic Relations*, INST. FOR INT'L ECON. WORKING PAPER 96-6 (June 1996) (visited Apr. 5, 1999) <http://207.238.152.36/CATALOG/WP/1996/96-6.htm>; Rosen, *supra* note 102, at 1519.

384. *See* Hayashibara, *supra* note 326 (citing World Bank estimates). But as Edward Steinfeld points out:

"Several [SOEs] are essentially insolvent. . . . Ultimately, many SOEs end up being net destroyers of assets; what they consume is of far greater value than what they produce. However, none of this is immediately apparent from the firms' financial records." STEINFELD, *supra* note 321, at 7. After discussing the percentage of loss-making SOEs in China, Steinfeld then notes:

"Nevertheless, these figures on losses actually *understate* the severity of the crisis in state industry today. Many (and arguably the vast majority) of nominally profitable SOEs in China today teeter on the brink of insolvency. In other words, even the approximately 50 percent of industrial SOEs that do declare profits are beset by problems."

Id. at 18.

385. *See China State-owned Enterprises' Losses in 1998*, ASIA PULSE, Feb. 4, 1999, *available in* 1999 WL 5083854 [hereinafter *SOEs' Losses*] (noting that the total losses sustained by China's SOEs "added up to nearly 100 billion yuan (US$12.08 billion) by the end of November 1998").

US$200 billion in bad debts.[386] While the number of loss-making SOEs has decreased since 1997 at a surprisingly positive rate, the central government is still expected to convert US$ 145 million of bad SOE loans into equity via the Chinese stockmarkets in the near future.[387]

Examine for a moment China's banking industry. The banking industry (remembering that all Chinese banks are SOEs) is reportedly unable "ante up" on 4.5 trillion RMB worth of individual deposit accounts.[388] In January 1999, People's Bank of China Governor Dai announced that more than 20% of Chinese bank loans are nonperforming.[389] This announcement came only six months after Beijing made public that it would inject more than $32 billion into the banking industry to "recapitalize state-owned banks, which are carrying a significant amount of non-performing loans to state-owned enterprises."[390] Moreover, not only are China's commercial banks carrying a "heavy percentage of non-performing loans" of non-banking SOEs, but the State continually pressures the banks to accept uneconomic policy loans."[391]

386. *See* Kit Marlow, *A Week of Praise and Promises for China's SOE Reformers*, CHINAONLINE, Aug. 6, 1999 (on file with author). Just two years ago, a paltry (by comparison) 27.5 million renminbi worth of government subsidies were distributed to loss-making SOES. *See Shape of Things to Come: North will Rise Again*, BUS. CHINA, Jan. 4, 1999, *available in* 1999 WL 2497753.

387. *See* Marlow, *supra* note 386. According to statistics provided by China's deputy director of the State Economy and Trade Commission, Zheng Silin, the number of loss-making SOEs in 1997 (6,599) was decreased by almost 1,500 loss-making SOEs in 1998 (5,121). However, there is skepticism that such figures are badly skewed by shady accounting practices and unreported debt. *See id.*

388. *See Why the RMB Is Not Devalued*, *supra* note 322. *See also China's SOEs Identified As Main Hindrance to Economic Development*, CHINAONLINE, Dec. 17, 1998 (on file with author).

389. *See* John G. Fernald and Oliver D. Babson, *Why Has China Survived the Asian Crisis So Well? What Risks Remain?*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. INT'L FIN. DISCUSSION PAPERS NO. 633, Feb. 1999 (visited Aug. 1, 1999) <http://www.bog.frb.fed.us/pubs/ifdp/1999/633/default.htm> (citations omitted). While Governor Dai went on to state that only five to six percent of the nonperforming loans are "unrecoverable," the authors note that most Westerners estimate that the proportion of unrecoverable loans is most likely far greater than that reported by Governor Dai. *Id.* at 8-9.

390. Hayashibara, *supra* note 326.

391. INVESTMENT CLIMATE REPORT, *supra* note 125. *See also* STEINFELD, *supra* note 321, at 5. Steinfeld reports that "[s]tate financial institutions in China today provide credit at ever-expanding levels, but rarely on market terms. Banks neither effectively select borrowers nor effectively monitor funds once dispersed. As a result, state firms end up with capital but with precious few incentives to direct that capital toward productive uses." *Id.*

The banking sector is not the only industry requiring direct financial support or debt alleviation. Reports indicate that "SOEs consume 70% of China's financial resources," industries which contribute far less than half that amount to GDP and economic growth.[392] Fujian Enterprises Ltd., an international holding company owned by China's Fujian provincial government, made headlines recently when it defaulted on the principal of an $80 million syndicated, foreign-credit backed loan;[393] a recent government report noted that "China's largest state companies, security forces, power utilities and even insurance and securities firms misappropriated or otherwise lost more than $10 billion" in 1998.[394] In addition, Chinese officials announced in March 1999 that China closed several loss-making textile mills and coals mines, and that numerous petroleum, petrochemical and metallurgical SOEs are being restructured.[395] As noted by a leading Chinese economist, the State "in practice has to be responsible for all the SOE's losses" because managers of the enterprises ascribe their losses to various State policies.[396]

i. The SCM Agreement

The starting point in analyzing whether China's financial absorption constitutes an actionable or impermissible subsidy under the SCM Agreement is determining whether China's economic "ingestion" satisfies the Agreement's two-prong definition of a subsidy (i.e., whether a financial contribution by a government or any public body results in a benefit being conferred).[397] The absorption of debt undeniably satisfies the "financial contribution" aspect as a government practice involving transfers of liabilities,[398] equity injections,[399] or forgone or uncollected reve-

392. *China's SOEs Identified As Main Hindrance To Economic Development*, *supra* note 388 (citing an article in the China Building Materials News).

393. *See* Craig S. Smith and Karby Leggett, *In China, Defaults Expected to Continue*, WALL ST. J., Jan. 25, 1999, *available in* 1999 WL-WSJ 5438046.

394. Craig S. Smith, *How China Managed to Lose $25 Billion On Its Grain Program*, WALL ST. J., Jan. 26, 1999 at A1.

395. Erik Eckholm, *Prime Minister Cautions on Social Unrest*, INT'L HERALD TRIB., Mar. 18, 1999 at 15.

396. Julan Du and Yong Zhang, *Unchaining China's SOEs*, HARV. CHINA REV., Summer 1998 (visited Feb. 23, 1999) <http://www.harvardchina.org/magazine/article/soereform1.html> (on file with author) (quoting Justin Yifu Lin, Director of the China Institute for Economic Research).

397. *See generally* SCM Agreement, *supra* note 28, at art. 1.

398. *See id.* at art. 1.1(a)(1)(i).

399. *See id.*

nue,[400] if not all three. It is equally clear that a benefit has been conferred in these situations. As such, the real question is whether such actions are "specific" to constitute impermissible subsidies, and whether another provision of the SCM Agreement applies that would render the absorption of financial debt or losses permissible.

Depending on the business operations of the SOE in question, China's economic bailout may be specific per se under the SCM Agreement. Under Article 3, in conjunction with Annex I, the absorption of debt (a subsidy by definition) is deemed a specific export subsidy if the State exempts or defers certain monies owed relating to importing,[401] exporting,[402] or taxes or social welfare charges[403] in the context of export operations; this also holds true if such absorption "operates directly or indirectly to increase exports of any product from, or to reduce imports of any product" into China.[404] For example, if a loss-making, exporting SOE is unable to pay its debts (such as monies owed for exporting charges) at year-end and the State simply writes off, defers or directly covers that debt, then Article 3 deems that subsidy specific per se and therefore impermissible under the SCM Agreement.

Assuming that a financial bailout is not specific under Article 3 as an export subsidy, Article 2's specificity guidelines must be addressed. Article 2's first two specificity principles provide limited guidance as few, if any, of China's laws and regulations speak to either the State's responsibility to absorb SOEs' debts and losses, or criteria that would enable the State to do so.[405] China's absorption of debt or losses would, however, qualify as a specific subsidy if China's laws or regulations "explicitly limits access" of such subsidies to an SOE or industry composed of SOEs,[406] and that access was not based on "objective criteria or

400. *See id.* at art. 1.1(a)(1)(ii). Based on the various laws and regulations discussed in Part V, it is apparent that annual revenues are owed by the SOEs to the State. As such, any non-payment would automatically constitute foregone or uncollected revenue that is otherwise owed under Article 1 of the SCM Agreement.

401. *See id.* at Annex I (i).

402. *See id.* at Annex I (e)-(h), (j)-(k).

403. *See id.* at Annex I (e), (h).

404. GATT 1994, *supra* note 30, at art. XVI (pursuant to Annex I(l) of the SCM Agreement).

405. For an examination of laws and regulations that might satisfy this requirement, see Part V, *infra*.

406. SCM Agreement, *supra* note 28, at art. 2.1(a).

conditions governing the eligibility for, and the amount of, [the] subsidy."[407]

The Article 2 guidelines also subject subsidies that otherwise appear non-specific to further scrutiny if, based on positive evidence,[408] "there are reasons to believe that the subsidy may in fact be specific."[409] Such "other factors" include the "use of a subsidy programme by a limited number of enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy."[410] Under Article 2, the following facts are thus relevant: (A) China's absorption of SOE debt and losses is authorized with unfettered discretion and is clearly "disproportionately large" to "certain enterprises" (regardless of which economic sector the relevant SOEs are in);[411] and (B) this particular subsidy program (debt relief) is limited strictly to SOEs — that is, the alleviation of debt and losses is unavailable to non-SOEs, such as Sino-foreign joint ventures or wholly-owned foreign enterprises. These facts strongly support a conclusion that China's absorption of debt

407. *Id.* at art. 2.1(b) (note that based on the meaning ascribed to "objective" in fn. 2 — i.e., "criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature" — it is highly doubtful that China's coverage of SOE debts and losses exclusively parallel any type of objectivity).

408. *See id.* at art. 2.4.

409. *Id.* at art. 2.1(c).

410. *Id.* Under Art. 2, "certain enterprises" refers to "an enterprise or industry or group of enterprises or industries." *Id.* Thus, the use of "certain enterprises" is somewhat of a misnomer as an otherwise impermissible subsidy to a single enterprise can constitute a violation of the TRIMs Agreement. Moreover, it is significant that the "disproportionately large" subsidization does not require an enterprise or group of enterprises to be in the same economic sector for "actionable" status to be conferred; rather, a singularly "disproportionately large" subsidy to several enterprises in different economic sectors would each constitute violations of the TRIMs Agreement, assuming the other requirements for "impermissible" classification are present.

411. It is virtually impossible to determine whether a particular SOE is receiving "disproportionately large" subsidization because no such information has been made public by the central government. It is, however, possible to conclude that "disproportionately large" subsidization has been provided to "certain enterprises" in the context of certain industries. The so-called "pillar industries" provides one such example, as does the State's absorption of debt and losses of the banking industry. These type of subsidies are not available to all sectors of Chinese industry, and whatever minimal subsidization that does occur pales by comparison to the large financial amounts provided to, for example, the "pillar industries" or banking sector as previously noted in Part IV.

and losses constitutes an specific, impermissible (or actionable) subsidy under Article 2 of the SCM Agreement.

Can China's debt absorption practices find safe harbor under the SCM Agreement as a non-actionable subsidy? It appears doubtful. Article 5 sets forth the conditions for "actionable subsidies," which are basically those subsidies that cause injury to the domestic industry of another member, nullify or impair benefits accruing to the other members, or seriously prejudice another member's interests.[412] In defining the parameters of "serious prejudice," the applicable portions of Article 6 provide that serious prejudice exists when (A) subsidies "cover operating losses sustained by an industry;"[413] (B) subsidies "cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;"[414] and/or (C) "direct forgiveness of debt, i.e., forgiveness of government-held debt, and grants to cover debt repayment."[415] China's practice of absorbing SOE debts and losses ostensibly falls within the parameters of Article 6.

Moreover, notwithstanding Article 6's potential escape route to non-actionable subsidy status,[416] it is impractical to believe China could demonstrate that its subsidization does not harm competition in light of the monstrous financial figures involved, as well as the fact that China is "eating" such losses in SOE reformation targeted at export expansion. Article 6 cannot be invoked if the subsidization displaces or impedes another country's imports or exports;[417] significantly undercuts the price of a like product from another country;[418] significantly suppresses or depresses competitors' prices, or causes lost sales;[419] or causes an increase in world market share of the subsidized product.[420] As such, China's practice of absorbing SOEs' debt and losses almost assuredly constitutes an impermissible subsidy under the SCM Agreement and, therefore, is impermissible under WTO standards.

412. *See* SCM Agreement, *supra* note 28, at art. 5.
413. *Id.* at 6.1(b).
414. *Id.* at art. 6.1(c).
415. *Id.* at art. 6.1(d).
416. *See id.* at art. 6.2.
417. *See id.* at art. 6.3(a)-(b).
418. *See* SCM Agreement, *supra* note 28, at art. 6.3(c).
419. *See id.*
420. *See id.* at art. 6.3(d).

ii. The TRIMs Agreement

A report authored by the USTR provides that various goods and commodities of "great commercial value to both China and its trading partners, such as grains, cotton, vegetable oils, petroleum, and certain related-products are imported principally through state trading enterprises,"[421] most likely the result of China's ominous import quota measures, trading restrictions, and a host of other impermissible non-tariff measures falling within the scope of the TRIMs Agreement. This importation reality may also result from China's absorption of SOE debt and losses, which enables SOEs to lower their internal costs and, in turn, out-compete other domestic importers, be they Chinese national trading companies or foreign-investment entities. As such, it would seem logical that these monopolistic advantages constitute impermissible non-tariff barriers prohibited by the TRIMs Agreement. Arguably, a broad, strictly textual interpretation of the TRIMs Agreement suggests that the framework agreement does in fact prohibit China's monopolist subsidization practices. Nevertheless, this is not the case.

Incorporated through Article II of the TRIMs Agreement, Article III of the GATT safeguards the principle of national treatment.[422] The language of Article III[423] facially encompasses those laws and regulations related to taxes and other monies owed, including SOEs. In other words, Article III neither expressly nor implicitly carves out an exception that allows a member's SOE to comply with national treatment principles while at the same time avoid paying charges, taxes and so forth that foreign investors and traders are otherwise obligated to pay. This textual approach is further strengthened by the "to avoid [ ] adverse effects on trade" language contained in the Preamble of the TRIMs Agreement.[424]

Despite the breadth of TRIMs-restrictive language in both the GATT and the TRIMs Agreement itself, the scope of the TRIMs Agreement is very narrow as it relates to SOEs. According to the US International Trade Commission, the WTO negoti-

421. 1998 NTE REPORT, *supra* note 121, at 48.

422. *See* GATT 1994, *supra* note 30, at art. III.

423. *Id.* at art. 3(4). The language referred to follows: "The products of any contracting party imported into [another] contracting party *shall be accorded treatment no less favorable* than that accorded to like products of national origin in respect to all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." *Id.* (emphasis added).

424. TRIMs Agreement, *supra* note 29, at Preamble.

ators "in fact concluded a very narrow TRIMs Agreement early in the Uruguay Round that applies to some specific instances in China but applies less to the rather overarching 'statist trade policy' that China fashioned as both a centrally planned economy after World War II, as well as a millennial 'Confucian' economy."[425] The practical result is that the TRIMs Agreement is thus ineffective in chastising China for its subsidization of money-losing SOEs through the absorption of debt and losses.

iii. The Article XVII Understanding

Beginning with the proposition that the Article XVII Understanding's notification requirements are not yet applicable to China's precarious SOE situation (because such notification is premature at this point in the accession process), the most felicitous provision of the Understanding becomes Article XVII of the GATT. Article XVII protects foreign traders by requiring WTO members to act in a non-discriminatory manner when purchasing or selling imports and exports through state enterprises.[426] Article XVII also obligates SOEs to make such purchases or sales exclusively "in accordance with commercial considerations."[427]

It is unclear whether China's subsidization of SOEs facially violates the Article XVII provisions and thus, the Article XVII Understanding. This uncertainty hinges largely on the type of operations performed by SOE in question, what the absorbed debts were originally owed for, and several other fact-specific matters. However, one can easily envision situations in which China's absorption of loss-making SOEs' debt violates these provisions.

For example, assume that China's SOE in the shipping industry, China Ocean Shipping Co. ("*Cosco*"), is a loss-generating SOE. Also assume that Cosco has borrowed more than 200 million renminbi from the People's Bank of China over the last few years to pay various export-related charges and other expenses, loans that Cosco is now unable to pay back. In its present efforts to reform SOEs, China's central government or some other arm of the State decides to act (per the newly developing tradition) on one of four options: (A) absorb any Cosco losses and debt owed for duties, taxes and etc.; (B) "cover" (through money

425. This statement is based on the author's various conversations with staff members of the United States International Trade Commission.

426. *See* GATT 1994, *supra* note 30, at art. XVII *with* art. III.

427. *Id.* at art. 3 (1)(b).

transfers or absorption) the monies owed to the People's Bank that Cosco would otherwise forfeit; (C) pay Cosco's debts, loans, or so forth directly; or (D) absorb both the losses specifically generated by Cosco and the bank's losses caused by Cosco's loan forfeiture. Regardless of which path is selected, none of these options are available to non-SOEs on the brink of bankruptcy that owe money to the State, whether the debt is owed directly to the central government or one of its branches (arguably including such entities as China's banking SOEs). This scenario does not provide non-discriminatory treatment to foreign importers/exporters similarly situated as required by the Article XVII Understanding.

Alternatively, suppose that China Steel, China's monopolistic SOE in the steel industry, is required to export X amount of steel or import Y amount of raw materials each year (the specific amounts and units are irrelevant), and that China's other SOEs are pressured through informal directive to buy China Steel products. Further assume that by carrying out this directive, both China Steel and the affected SOEs are potentially subjecting themselves to financial debt or losses (e.g., overproducing inconsistent compared with input costs, other inefficiency of scales, producing itself into bankruptcy, etc.).[428] In this situation, China Steel is not importing or exporting based on "commercial considerations" as required by Article XVII, nor are "commercial considerations" being heeded if forcing China's other SOEs to buy China Steel products runs counter to their normal purchasing operations (perhaps the forced products are entirely unnecessary). Article XVII explicitly provides that SOEs "shall . . . make such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability . . . and other conditions or purchase or sale."[429] Chinese mandates, in this scenario, clearly run counter to the language of and principles behind Article XVII. Therefore, any subsidization that ultimately results (i.e., State absorption of the SOEs' losses or debt) may indirectly violate Article XVII Understanding.

428. Assuming for the moment that we are, in fact, dealing with a Chinese bank (i.e., SOE), there may be other reasons besides the government directive that would prompt the bank-SOE to take this course of action. For example, the bank could be receiving pressure from the local government to extend preferential treatment (e.g., loans at below-market rates) to favored firms. *See* STEINFELD, *supra* note 321, at 21.

429. GATT 1994, *supra* note 30, at art. 17(1)(b).

Finally, assume that the appropriate State ministry directs the People's Bank of China to lend (even on competitive terms) to China Steel, loans based solely on policy directives that would not otherwise be made by the bank. China Steel would not be operating on "commercial considerations," and the State's potential expunging of the People's Bank's debt or losses that results from such lending arguably constitutes an indirect violation of the Article XVII Understanding, too.

V. Chinese Law Governing SOEs: Passing GATT/WTO Muster?

Few of China's transparent laws and regulations speak directly to SOEs, and those that are SOE-specific hardly address the issue of subsidization. However, recapitulating some of the textually problematic portions of various laws and regulations applicable to SOEs, both directly and indirectly, may be useful to further understand the legal basis for, and extent of, China's SOE subsidization problems.[430] This examination also illustrates what the United States Congress would see if it were to consider the Chinese legal infrastructure in its impending debate over the future of Sino-US trade relations after the November bilateral agreement. In other words, this section will demonstrate that the country's laws and regulations are not compatible with the WTO as they relate to Chinese SOEs.

A. PROVISIONAL REGULATIONS OF STATE-OWNED INDUSTRIAL ENTERPRISES (THE "*SI REGULATIONS*")[431]

The SI Regulations, promulgated in 1983, are some of the earliest crystalized Chinese regulations directly relating to the operation of SOEs. The regulations portray China's SOEs as "economic setups of a socialist character . . . [that] are basic production and management units operating under the guidance of State planning."[432] Under the SI Regulations, SOEs are charged with fulfilling State plans and accumulating "funds for

430. For purposes of this section, any reference to a SOE assumes the enterprise is currently participating in global trade otherwise subject to WTO standards.

431. CHINA BUS. L. GUIDE (CCH) ¶ 13-500 (promulgated Apr. 1, 1983 by the State Council).

432. *Id.* at art. 2 *with* art. 4 (providing that SOEs "are to carry out factory director (or manager) responsibility system under the leadership of the Party committee") *and* art. 7 (providing that the production and management activities of SOEs "should be conducted under the guidance of state planning while at the same time using market-regulation *as a supplement*) (emphasis added).

the State."[433] The SI Regulations also specify that the State will bear the burden of financial losses brought about by "mistakes" resulting from centralized control and guidance, with Article 65 providing that the responsible departments "should shoulder economic responsibilities . . . [for] losses suffered by enterprises due to mistakes on the part of departments in charge of enterprise."[434] (This provision seems especially relevant in the wake of China's penniless banking industry, where the State is absorbing massive financial losses). Article 65 of the SI Regulations arguably, therefore, approves State-ingested monopoly losses, which undeniably violates the previously-discussed Relevant WTO Instruments.

B. LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON INDUSTRIAL ENTERPRISES OWNED BY THE WHOLE PEOPLE (THE "*INDUSTRIAL ENTERPRISE LAW*")[435]

The fundamental purposes of the Industrial Enterprise Law are to ensure the "stability and development" of China's industrial SOEs, safeguard their legal rights and interests, and "increase their vitality" while accelerating China's "socialist modernisation."[436] Under the Industrial Enterprise Law, which is applicable to most SOEs,[437] an industrial SOE is a "commodity production or operational unit of a socialist character which . . . has autonomy in management, takes full responsibility for its profits and losses and practises independent business accounting."[438] Industrial SOEs operate primarily to create wealth and increase China's savings "in accordance with State

433. *Id.* at art. 2.

434. *Id.* at art. 65.

435. CHINA BUS. L. GUIDE (CCH) ¶ 13-534 (adopted Apr. 13, 1988 at the 1st Session of the 7th National People's Congress) [hereinafter Industrial Enterprise Law].

436. *Id.* at art. 1 (providing that this law was formulated "to ensure the stability and development of economic ownership by the whole people, to clarify the rights and liabilities of industrial enterprises owned by the whole people, to safeguard the enterprises' legal rights and interests, to increase their vitality and to accelerate China's socialist modernisation").

437. *See id.* at art. 65 (providing that this law applies to SOEs that "engage in transport, post and telecommunications, geological prospecting, construction and installation, commerce, foreign trade, goods and materials, agriculture, forestry and irrigation").

438. *Id.* at art. 2.

plans and market demands,"[439] thereby "support[ing] the socialism road."[440]

The most problematic subsidization-related provisions of the Industrial Enterprise Law are embedded in Chapter VI, which defines the relationship between SOEs and the State. The central government, for example, guarantees to provide SOEs with access to materials and goods required for the fulfillment of State plans.[441] In fact, local municipalities are obligated to supply SOEs with the "required amount of goods and materials subject to local planning or control."[442] A broad interpretation of these provisions arguably means that SOEs may receive materials and goods at discounted costs or no cost at all. As such, the law is facially incompatible with both the principles underlying the WTO as well as the Relevant WTO Instruments.

Despite its superficial liberalization of SOE autonomy, the Industrial Enterprise Law might generally be considered a rouse by realists. In trying to create legal separation from the State, the Industrial Enterprise Law implicitly defines various SOE "operating rights," which include, among other rights, "the right to possess, use and legally dispose of property which the State has authorised it to operate and manage."[443] The problem, however, is that the exercise of such rights is subject to the limited scope circumscribed by the State via administrative regulation.[444] This basically means that management of the SOEs is still squarely controlled by countless arms of the State, including subsidization matters regarding raw materials, intangible benefits, and the ability — if not the requirement — to absorb losses.

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439. *Id.* at art. 3 (providing that industrial SOEs' primary tasks include developing commodity production, creating wealth, increasing savings, and satisfying "the ever-growing material and cultural needs of society").

440. *Id.* at art. 5.

441. *See* Industrial Enterprise Law, *supra* 435, at art. 55 (providing that government shall "ensure that enterprises have access to goods and materials subject to planned supply in amounts required for the fulfillment of the mandatory plans").

442. *Id.* at art. 57 ("local government at the county level or above in the locality of an enterprise shall supply the enterprise with its required amount of goods and materials subject to local planning and control").

443. *Id.* at art. 2 (providing that SOEs "shall enjoy" such rights).

444. *See, e.g., id.* at art. 2 (providing that an SOE's property "shall belong to the whole people and shall be operated and managed by the enterprise with the authorisation of the State"); art. 6 (providing that an SOE "shall make effective use of the property which the State has authorised it to operate and manage").

C. PROVISIONAL REGULATIONS ON THE CONTRACTED OPERATION RESPONSIBILITY SYSTEM FOR INDUSTRIAL ENTERPRISES OWNED BY THE WHOLE PEOPLE (THE "*CORSI REGULATIONS*")[445]

Professing to instill autonomy in SOEs by making them "solely responsible for any profits and losses" accrued,[446] the CORSI Regulations provide insight as to the potential extent of which State subsidization may be legally mandated. Article 3 provides that "the contracted operation responsibility system . . . shall utilize the enthusiasm of enterprise operators and producers, tap the potential of enterprises, [and] safeguard the profits turned over to the state."[447] Profits payments take many forms, such as "reducing losses (or compensating) for enterprises experiencing losses."[448]

The CORSI Regulations also provide that "where the tax paid exceeds the amount of profit turned over to the state as prescribed in the contract of contracted operations, the enterprises shall be *reimbursed 80% of the extra amount each season by the finance department* . . . [and] [p]ayment shall be guaranteed."[449] Herein lies the heart of the problem: this type of "reimbursement" is clearly impermissible under the GATT/WTO regime. The CORSI Regulations are not specific to developing, scientific, or other SCM Agreement "green light" industries, but rather "shall be referred to" by "businesses of communications, construction, forestry, goods and materials, commerce or foreign trade" — running the gambit of industrial SOEs.[450]

D. REGULATION ON THE MANAGEMENT OF EQUIPMENT USED IN INDUSTRIAL AND COMMUNICATION ENTERPRISES OWNED BY THE WHOLE PEOPLE (THE "*MANAGEMENT REGULATIONS*")[451]

The Management Regulations are not limited in scope to industrial and communication enterprises, but "shall apply in

445. Provisional Regulations on the Contracted Operation Responsibility System for Industrial Enterprises Owned by the Whole People, 5 STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA ¶880227 (UEA Press Ltd. and Institute of Chinese Law (Publishers) Ltd., 1989).

446. *Id.* at art. 2.

447. *Id.* at art. 3.

448. *Id.* at art. 9(4).

449. *Id.* at art. 11 (emphasis added).

450. *Id.* at art. 43.

451. Regulations on the Management of Equipment Used in Industrial and Communication Enterprises Owned by the Whole People, 3 STATUTES AND

principle also to [SOEs] which engage in post and telecommunications, geology, engineering and construction, forestry, and irrigation."[452] The Management Regulations set forth the duties of the relevant State departments and agencies; among others, these duties include the duty to "coordinate the management of equipment *in a unified way*,"[453] and "organize and utilize the exchange of advanced equipment management methods."[454]

The regulations also establish various State-provided financial (purchasing, maintenance, and repair) and vocational activities that are called into question as impermissible subsidization. Article 20 provides that a respective SOE "shall follow the relevant regulations of the state *in drawing on or using funds* for an overall repair;"[455] Article 33 provides that the various State departments and levels of government "shall create the conditions for and systematically undertake the training of technical staff in equipment management and maintenance . . . [and] educate the working management cadres."[456] These type of government sponsored activities most likely allow SOEs to avoid costs they would otherwise have to pay, thus potentially constituting an impermissible subsidy under the Relevant WTO Instruments.

E. VIEWS ON THE REFORM OF OLD ENTERPRISES WITH FOREIGN INVESTMENT (THE "*VIEWS*")[457]

Although technically neither law nor regulation, the Views most likely carry the weight of law in China.[458] The Views provided guidance during early SOE reformation efforts in the 1980s; as such, the Views may provide valuable insight as to

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REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA ¶870728 (UEA Press Ltd. and Institute of Chinese Law (Publishers) Ltd., 1988).

452. *Id.* at art. 39 (supplementing the provisions of Article 2).

453. *Id.* at art. 9(2) (articulating the duties of the State Economic Commission) (emphasis added).

454. *Id.* at art. 10(4).

455. *Id.* at art. 20 (while noting that if the SOE "is short of the large-scale repair funds, [it shall] relocate money from the depreciation reserves for such," it is implicit that the funding will come from the State should all funds be deplete) (emphasis added).

456. *Id.* at art. 33.

457. Views on the Reform of Old Enterprises with Foreign Investment, STATUTES AND REGULATIONS, *supra* note 431, at ¶880502.4 (handed down May 2, 1988) [hereinafter Views].

458. The precise legal categorization of the Views is unknown. The Views, however, as titled, were handed down as part of China's efforts to reform "Old Enterprises" during the late 1980s. It is not known which State authority promulgated the Views.

how the present-day restructuring of China's SOEs might progress over the next few months and years.

Several statements within the Views are noteworthy. First, the Views speak to the contributions of the State to the anticipated "reformed" enterprise, noting that "[o]ld enterprises may put up existing land, buildings, equipment, industrial production licenses, self-own funds and funds for technology reform as contribution [other business formations] in exchange for technology reform performed on the enterprises in question."[459] Second, and going to State absorption of losses, the Views provide that "the funds required shall be absorbed as part of a yearly plan, and accordingly given preferential treatment."[460] Third, the Views provide that "[a]dditional requirements of an old enterprise for water, electricity, energy and communication and transport resulting from reform with the use of foreign investment shall be absorbed as part of the overall supply plan, and accordingly given preferential treatment."[461]

VI. Conclusion

Until November 15, 1999, China was analogous to an elderly man seeking a drivers license after having surrendered his license decades ago in favor of a pedestrian lifestyle. The gentleman's first efforts to obtain a license resulted in the driving instructor cutting the driving test short after a few blocks. The gentlemen's second attempt was hardly better as he still drove deficiently. In fact, many weeks (and driving tests) passed and elderly man's driving skills only marginally improved; needless to say, he failed to obtain a drivers license during this time. To his credit, however, the elderly man demonstrated enough improvement each time to prompt the driving instructor to offer words of encouragement.

This stylized, oversimplified example represents China's bid to accede to the WTO. China is the elderly gentleman and the driving instructor is the United States, one of many instructors provided to ensure that China is ready to drive the accession path into the WTO. On the surface, the driver's license represents WTO membership; down deep, the license represents the benefits of globalization. The gentleman's marginal improve-

459. Views, *supra* note 449, at prov. 4.

460. *Id.* at prov. 10 (while it is not textually addressed as to who will "absorb" the costs, a negative inference would assume that it is either the State, a State agency or department, or a lower level of governmental entity).

461. *Id.* at prov. 11.

ment represents China's slow-coming efforts to liberalize its market and develop "commercially viable" terms of accession. The troublesome parts of the driving test represents the GATT/ WTO principles and agreements that China has been unable to navigate thus far, and the most problematic areas represent China's subsidization of money-losing SOEs.[462] And, of course, each new attempt to pass the driving test represents China's piece-meal progress and attempt to join the WTO.

Like the elderly gentleman, China is determined to get its "driver's license," which China believes (i) demonstrates its importance as an world class trading nation and (ii) proves that China is worthy of WTO membership. Like the driving instructor, the United States suffers through the pains of China's repeated failures to pass the driving test while wondering whether China can eventually overcome this preliminary obstacle and join the WTO. To its credit, China is truly trying hard to get its license and the Sino-US WTO agreement suggests China has almost cleared the hurdle.

The question is not whether China can overcome the problems it currently faces in its WTO accession efforts but, rather, *when* should China will be allowed to join the WTO? Herein lies the problem. The simple truth is that China is a "bad fit" with the WTO, the ultimate rules-based, market-driven organization. China's long-standing economic polices are too deeply ingrained in institutional principles (such as China's Socialist command economy) that run contrary to full trade liberalization. Even assuming that China can demonstrate sufficient market liberalization to accede to the WTO, Chinese trading policies and practices will inevitably inhibit the implementation of the fundamental WTO principles. China has yet to demonstrate to the United States that China can live up to any set of higher trading expectations based China's past compliance with multilateral and bilateral agreements, compliance that has produced mixed results at best. In fact, Beijing is still trying to solidify the support of its own citizenry, including both the masses and Chinese officials in charge of areas critical to international trade, people who must support China's accession efforts to make China's inevitable tenure in the WTO a success.[463]

462. As one commentator so keenly described, "[s]tate industrial restructuring has become the proverbial albatross hanging around the Chinese leadership's collective neck." STEINFELD, *supra* note 321, at 2.

463. *See* Mark A. Groomsbridge, *Can Zhu deliver on WTO promise*, J. COMM., Apr. 8, 1999 at 5A. Groomsbridge reports that not only is it well-known that China's minister of post and telecommunications is against foreign partici-

China represents a paragon of international trade uncertainty to the West. On one hand, a more liberalized Chinese market will undoubtedly provide immense economic opportunities to American businesses; on the other, the United States (whether the government, industries, or citizenry) must be leery of overly opportunistic estimates of the great amounts of successful trade that will occur with China's market liberalization. Simply stated, there are no ways to separate trade with China from Chinese culture and politics. The idea of "visions of sugarplums" appearing when contemplating the billions of dollars worth of economic benefits that will be reaped from an open Chinese market remains "despite repeated demonstrations that it is a myth and nothing more."[464] China's overnight entry into the WTO does nothing to transform this myth into reality; arguably, allowing China to join the WTO in the immediate future may do

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pation in China's still-developing telecommunications market, but that a Chinese dissident magazine recently quoted a senior official as saying, "Only the trade ministry wants to join the WTO. The rest of us are against it." *Id. See also* Thomas Friedman, *The Globalution Game*, NY TIMES, Apr. 20, 1999 (on file with author). Despite arguing that China should be allowed to join the WTO before the US misses "this opportunity," which apparently means in the immediate future, Friedman recognizes the internal strive going on within the Chinese government regarding whether China should join the WTO. Friedman quotes Michael Oksenberg, a Stanford University China scholar, as saying, "[T]he biggest opposition in China is coming from elements in China's national defense area who are saying to Zhu, 'You are putting us into a globalized world and we are going to lose control.'" *Id. See generally* Willy Wo-Lap Lam, *Beijing rift over accession*, S. CHINA MORNING POST, May 26, 1999 (visited July 24, 1999) <http://www.chinabulletin.com/e/rift-wto.txt> (reporting that "anti-WTO feelings climaxed at a recent meeting" between MOFTEC and State agriculture officials, even to the point where MOFTEC officials were said to have been "overwhelmed by the hostility of agriculture cadres, who had mobilised scores of experts to buttress claims that the concessions were unacceptable").

464. VICTOR H. LI, LAW AND POLITICS IN CHINA'S FOREIGN TRADE 3-4 (Victor H. Li ed., 1977). Li is referring to the misconception that there are 800 billion Chinese citizens who are all ready to buy foreign goods, a misconception that is based on the idea that China is a wealthy nation. Although Li made this statement more than 20 years ago, it remains relevant today. An updated version of this myth would assume that China's 1.2 billion citizens are ready to spend billions when international trade floodgates open, which simply isn't true.

China is a still poor nation in general. Although 200 million Chinese "living in absolute poverty have been raised above the minimum poverty line" over the past 20 years, more than 270 million Chinese continue to live on less than US$ 1 a day. *The World Bank and China*, The World Bank (1999) (visited Aug. 16, 1999) <http://worldbank.org/html/extdr/offrep/eap/cn2.htm>. Thus, Li's reference to "keeping our feet" on solid ground when speculating as to the actual economic benefits received from increased trade opportunities with China rings true today.

more harm than good to various American interests, particularly potential economic gains.

With the landmark November 15th bilateral agreement, the Clinton administration has placed the United States Congress in a precarious position – the proverbial rock and hard place, so to speak. The decision whether to accord China full WTO member treatment via permanent normal trade relations status (having regard for China's trading history with the United States and the GATT/WTO regime) goes to the core of the WTO compact: extending MFN treatment to WTO members under the GATT/WTO framework (meaning permanent normal trade relations treatment under domestic law) is the "cornerstone of the WTO and an open global trading system."[465] Unfortunately, only time will tell whether Congress will welcome the view that China occupies a similar position to former Soviet bloc countries (e.g., Mongolia, Hungary, the Czech Republic) and exempt China from the Jackson-Vanik Amendment. Rest assured, however, that with multiple Congressmen and Presidential candidates[466] advocating against China's entry into the global trade body, the United States Congress will scrutinize the facts associated with China's trading history, including those discussed herein, in legislating for the good of the nation.

And so, notwithstanding the expectation that China will accede to the WTO in the near future with or without the support of the United States Congress, this author is convinced that the United States Congress should to demand that China pass its driving test before helping provide the nation with a license to drive the road leading into the WTO. At the end of a Congressional day, China is far closer to being our trade enemy than our trade friend.

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465. *Questions and Answers: US-China WTO Agreement*, *supra* note 120.

466. Gary Bauer, Bill Bradley, Pat Buchanan, Steve Forbes, and Alan Keyes are among the early Presidential candidates to speak out against China's accession to the WTO (for numerous different reasons) under the terms of the Sino-US WTO agreement. *See Trade Policy Positions*, NY TIMES (ON THE WEB) (visited Jan. 15, 2000) <http://nytimes.com/library/politics/camp/whouse/policy-trade.html>.