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## Articles

# Catching Flies with Chopsticks': China's Strategic Leap into Wireless Telecommunications

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Advanced telecommunications are redefining China's relationship with the West as China enters the Communications Revolution. China seeks foreign capital to propel a twenty-first century telecommunications infrastructure, but remains wary of foreign ownership. Western businesses seek the benefits of a market of over one billion consumers, but face the daunting risk of losing their investment without legal recourse. In the past, American movement into the Chinese market has been tepid; however, this American reluctance towards Chinese ventures will not last.

The World Bank predicts that China will be the world's second largest trader by 2020.<sup>2</sup> The growth in the Chinese economy combined with the development currently taking place in Chinese telecommunications law and China's entrance into the World Trade Organization (WTO) will contribute to increased foreign investment. The developing economic and political structure will allow American businesses to compete on a level

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1. MUSASHI MIYAMOTO, *THE BOOK OF FIVE RINGS* (Bantam 1992) (1643) (The ability to catch flies with ones' chopsticks is indicative of one with superior skill and discipline). The art can be traced to Japanese martial arts master and author Musashi Miyamoto. The concept was later reprised in a scene with Karate Master Mr. Miyagi in the movie "*The Karate Kid*."

\* J.D., 2001, Catholic University of America, Columbus School of Law; B.S., 1998, Boston University.

2. Yukon Huang, Director, World Bank China Program, Realizing China's Potential, Address at the Asian Investment Conference (March 2000) (transcript available at <http://www.worldbank.org.cn/english/content/529z6146591.shtml>); see also Will Martin & Christian Bach, *The Importance of State Trading in China's Trade Regime*, in *CHINA IN THE WORLD TRADING SYSTEM* 155 (Frederick M. Abbott ed., 1998).

playing field while providing the businesses with their desired legal security.

In exchange for entrance into the WTO, China has promised unprecedented access to foreigners to invest in its telecommunications market. The terms of entry open the Chinese telecommunications service market by allowing as much as fifty percent foreign ownership in some sectors over the next two years, up from a complete absence of foreign ownership presently.<sup>3</sup> China's membership in the WTO will provide legal recourse for failed foreign investments and represent China's promise to be bound by international law.<sup>4</sup>

China has strategically acquiesced to unprecedented market entry for foreign telecommunications providers, while reserving market power in the wireless field. For three years, China will reap the benefits of foreign investment in wireless technology without granting those investors power of management.<sup>5</sup> In so doing, China will "leapfrog" obsolete wireline technology and introduce the cyber-cel connector.<sup>6</sup> Wireless technology will provide the backbone needed to bring voice and data services into remote areas. The expansion of telecommunications services into rural areas will help curb the risks of rural uprisings and urban migration, alleviate the digital divide, and encourage legal uniformity by widely disseminating information. China will guide this growth with pro-leapfrogging policy that encourages telecommunications providers to provide wireless services to underserved communities.

Part I of this Article traces the history of China's accession

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3. See European Commission, *EU-China WTO Accession Negotiations, Highlights of the EU-China Agreement on WTO*, at <http://europa.eu.int/comm/trade/bilateral/china/high.htm> (last visited Sept. 15, 2001); see also Clay Chandler, *China Clears Barrier to WTO*, WASH. POST, Sept. 15, 2001, at D1.

4. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round vol. 1, Annex II, art. 3, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement]. The dispute resolution mechanism of the General Agreement on Tariffs and Trade was established in 1994 to administer and adjudicate disputes regarding trading rules in a judicial-type dispute settlement system. *Id.* Nations must accept this mechanism to enjoy the privileges of WTO membership. *Id.*

5. See European Commission, *supra* note 3.

6. Sundeep Reddy, *Innovation Leaps Past Tradition in China's Emergence*, ROCHESTER DEMOCRAT & CHRON., June 25, 2000, available at [http://www.rochesterbusinessnews.com/extra/0625china\\_innovation.html](http://www.rochesterbusinessnews.com/extra/0625china_innovation.html). This article discusses leapfrogging solely in the context of wireless and wireline technologies. The "cyber-cel connector" represents the possibilities of wireless technology, which can bring Internet access (cyber) and phone services (cel) to remote areas more quickly and easily than deployment of wireline infrastructure.

to the WTO and the commitments China has agreed to uphold regarding its telecommunications sector. Part II describes the development of China's telecommunications industry and its rapid growth in recent years in anticipation for foreign competition as it prepares to become the largest telecommunications market in the world. Part III explains how some characteristics of China's legal system may make it difficult to apply WTO standards in China's marketplace, and concludes those differences can be resolved. Part III also examines the restrictions on market entry China intends to retain and the risks involved in state ownership of its domestic communications providers, ultimately concluding that the risks arising from these arrangements will decrease with time. Part IV analyzes the leapfrogging policy, which would encourage the implementation of wireless technology in rural and urban areas. This Article concludes that China should pursue leapfrogging policy, making strides toward universal service, better interconnection of its government, and a telecommunications infrastructure unburdened by past regulation of obsolete technologies, which will enable further investment and development.

## I. TELECOMMUNICATIONS' ROLE IN CHINA'S ACCESSION TO THE WORLD TRADE ORGANIZATION

### A. HISTORY OF CHINA'S EFFORT TO JOIN THE WTO

After World War II, twenty-three countries negotiated the tariff reductions embodied in the 1947 General Agreement on Tariffs and Trade (GATT).<sup>7</sup> China was one of the original contracting parties.<sup>8</sup> However, after the Communists came to power in Beijing and China's Nationalist government fled to Taiwan in 1949, China withdrew from the GATT.<sup>9</sup> More than

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7. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]; see also JEFFREY S. THOMAS & MICHAEL A. MEYER, *THE NEW RULES OF GLOBAL TRADE* 3-4 (1997). GATT 1947 was replaced by the GATT 1994, which established the World Trade Organization (WTO). See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, April 15, 1994), reprinted in H.R. Doc. No. 316 at 1381 (1994).

8. GATT 1947 and GATT 1994 are legally distinct, so a contracting party of the former must be granted separate membership to the WTO Agreement before it can obtain rights or obligations under the latter. See THOMAS & MEYER, *supra* note 7, at 52.

9. Greg Mastel, *China and the World Trade Organization: Moving Forward*

thirty years passed before China successfully opened its market to the West with its experimental Open Door Policy.<sup>10</sup> In the mid-1980's, China expressed interest in reinstating its GATT obligations in order to obtain GATT trading benefits.<sup>11</sup> Momentum towards reentry faltered as China's relations with the West soured in 1989 after the Chinese government sent forces to quash the democratization movement at Tiananmen Square.<sup>12</sup> Time has significantly healed the rift between China and the West, leading to a rebirth in negotiations for China's accession to the WTO.<sup>13</sup>

### 1. *Jackson-Vanik Amendment*

The United States expressed its condemnation of China's totalitarian reaction to the Tiananmen Square uprising by using trade as leverage to demand policy changes from China.<sup>14</sup> Invoking an obscure emigration Amendment to the Trade Act of 1974,<sup>15</sup> the Jackson-Vanik Amendment,<sup>16</sup> the United States complicated China's yearly renewal of its "most favored nation" (MFN) status by linking China's trade privileges with an annual review of its human rights practices.<sup>17</sup> MFN status permits

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*Without Sliding Backward*, 31 LAW & POL'Y INT'L BUS. 981, 982 (2000). The GATT was never a formal international organization, but became the primary multilateral trade agreement when the ITA failed. THOMAS & MEYER, *supra* note 7, at 4-5. The GATT served as the framework for negotiations on trade issues, such as the Tokyo and Uruguay Rounds, that resulted in the development of the World Trade Organization. *Id.*

10. JOHN K. FAIRBANK ET AL., *EAST ASIA: TRADITION & TRANSFORMATION* 980 (1989).

11. Mastel, *supra* note 9, at 981-82.

12. See KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 141-42 (1995) (description of the political underpinnings of the Tiananmen Square incident).

13. See Mastel, *supra* note 9, at 981-82.

14. See Di Jiang-Schuerger, *The Most Favored Nation Trade Status and China: The Debate Should Stop Here*, 31 J. MARSHALL L. REV. 1321, 1333 (1998).

15. Trade Act of 1974, Pub. L. No. 93-618, § 1, 88 Stat. 1978 (1975), (codified as amended at 19 U.S.C. §§ 2101-2487 (2000)).

16. 19 U.S.C. § 1677(18)(A) (codified as amended at 19 U.S.C. § 2432 (2000)). The 1975 Jackson-Vanik Amendment applies to nonmarket economies, generally Communist countries, defined as "any foreign country that the administering authority determines does not operate on market principles or cost or pricing structures, so that the sales of merchandise in such a country do not reflect the fair value of the merchandise." *Id.*; see also Jiang-Schuerger, *supra* note 14, at 1329, 1342.

17. Trade Act of 1974, Pub. L. No. 93-618, § 1, 88 Stat. 1978 (1975), (codified as amended at 19 U.S.C. §§ 2101-2487 (2000)); see also The Jackson-Vanik Amendment to the Trade Act of 1974, § 402 of the Trade Act (codified at 19 U.S.C. § 2432 (2000)); Permanent Normal Trade Relations for China Act, Pub. L. No. 106-286, 114 Stat.

nonmarket economies, which are generally Communist nations, to engage in frictionless trade with the United States on the same nondiscriminatory terms given to other nations.<sup>18</sup> MFN status from the Trade Act and the 1979 Agreement on Trade Relations between China and the United States<sup>19</sup> endowed China with nondiscriminatory export privileges and access to the United States' market.

## 2. *Congressional Approval to Exempt China from Annual MFN Renewal*

The United States ended this controversial, ten-year practice in September 2000 by granting China "permanent normal trade relations" (PNTR). This action eliminated heated yearly negotiations and allowed China to market its goods in the United States on a nondiscriminatory basis.<sup>20</sup> For this right, China made significant concessions to open its market to foreign trade. China and the United States set forth these concessions in the United States-China Bilateral Market Access Agreement of March 2000, which was negotiated for three years between China and the United States Trade Representative (USTR).<sup>21</sup> China also pursued bilateral negotiations with every WTO member country, seeking unanimous approval for WTO membership. Following the United States-China agreement, EU-China negotiations achieved more favorable terms. The favorable terms will apply to all WTO members regardless of whether those members themselves achieved them, because the goal of the WTO is nondiscriminatory access for all member countries.<sup>22</sup>

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880 (2000) (to be codified at 19 U.S.C. § 2431). In June 1999 "most favored nation" tariff treatment was renamed "normal trade relations" for United States Trade Law purposes. The WTO still uses "most favored nation" in WTO agreements and other trade agreements. See GOV'T ACCOUNTING OFFICE, WORLD TRADE RELATIONS ORGANIZATION: CHINA'S MEMBERSHIP STATUS AND NORMAL TRADE RELATIONS ISSUES (1994); see also Leo Wise, *Trading With China*, 38 HARV. J. ON LEGIS. 567 (2001).

18. White House China Trade Relations Working Group, *The 1979 Agreement* (2000) (on file with author).

19. Agreement on Trade Relations, July 7, 1979, U.S.-P.R.C., 1202 U.N.T.S. 180, 31 U.S.T. 4651.

20. See Permanent Normal Trade Relations for China Act, Pub. L. No. 106-286, 114 Stat. 880 (2000) (to be codified at 19 U.S.C. § 2431); see also Jiang-Schuerger, *supra* note 14, at 1338; Wise, *supra* note 17, at 567 (detailing the historical procession of China-United States trade agreements).

21. See Agreement on Market Access, U.S.-P.R.C. available at <http://www.uschina.org>.

22. See European Commission, *supra* note 3; see also Mastel, *supra* note 9, at

### 3. *United States-China Bilateral Accession Agreement: Telecommunications*

One of the defining features of China's membership in the WTO is the market accessibility China has allowed foreign telecommunications providers. With the signing of the Information Technology Agreement, China will open its market to foreign telecommunications goods. To allow foreign competition in telecommunications services, China will sign the WTO Basic Telecommunications Agreement.<sup>23</sup> The Clinton Administration gained Congressional support for China's accession by touting the deal as a win-win situation: the United States had nothing to lose and everything to gain because the benefits of joining alone was persuasion enough for China to concede foreign investment opportunities in telecommunications.<sup>24</sup> Upon accession, China must equalize its trade relationships internationally.<sup>25</sup>

#### a. Telecommunications Goods: "Information Technology Agreement"

China's endorsement of the Information Technology Agreement (ITA)<sup>26</sup> should significantly reduce or eliminate the tariff, quota, and other restrictions China currently places on United

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23. Agreement on Telecommunications Services, Fourth Protocol to the General Agreement on Trade in Services, 36 I.L.M. 354 (1997); The White House, *The U.S.-China WTO Accession Deal: A Clear Win for U.S. High Technology, Greater Openness and U.S. Interests* 36-37 (April 6, 2000) available at <http://www.mac.doc.gov/China/Docs/ExportAmerica/finalEA36-38.pdf> [hereinafter *W.H. Clear Win Memo*].

24. See Bureau of Public Affairs, United States Dept. of State, *China: WTO Accession and Permanent Normal Trade Relations (PNTR)*, Fact Sheet, Bureau of Public Affairs (2000), available at [http://www.state.gov/www/regions/eap/fs-china\\_pntr-wto\\_000524.html](http://www.state.gov/www/regions/eap/fs-china_pntr-wto_000524.html). "This agreement will require no new market opening steps by the U.S. . . . Instead, the U.S. will simply maintain the market access policies we currently apply." *Id.*; see also United States-China Business Council, *Questions and Answers: U.S.-China WTO Agreement* (Dec. 1, 1999), available at <http://www.uschina.org/public/wto/b4ct/qanda.html>; The White House, China Trade Relations Working Group, *Examples of How The China WTO Agreement Will Help America's High-Tech Industries* (March 1, 2000), available at <http://www.mac.doc.gov/China/docs/hightechhelp.htm> [hereinafter *W.H. High Tech Memo*].

25. Mastel, *supra* note 9, at 987.

26. Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16, Dec. 13, 1996 available at [http://www.wto.org/english/tratop\\_e/inftec\\_e/itadec\\_e.htm](http://www.wto.org/english/tratop_e/inftec_e/itadec_e.htm).

States companies selling telecommunications goods. Present restrictions limit sales when telecommunications goods and tariffs averaging thirteen percent tack \$200 onto a \$1500 computer.<sup>27</sup> United States companies are also required to set up joint ventures with state-run middlemen; foreign companies have had no direct access to Chinese customers.<sup>28</sup> Joint venture laws require foreign companies to transfer technology to their Chinese partners and use a percentage of locally sourced parts.<sup>29</sup>

The ITA requires several actions by China. The country is to eliminate quotas, grant trading and distribution rights to foreign companies by 2003, and eliminate all tariffs on telecommunications equipment by 2005.<sup>30</sup> American companies in China will be permitted to import American goods into China and operate distribution networks with direct access to consumers, rather than routing the sale of their products through Chinese factories and partners.<sup>31</sup> Finally, China will not condition import licenses and investment approval on performance or technology requirements, as it has done in the past.<sup>32</sup>

Even with the traditional restrictions discussed above, China is the world's fastest growing telecommunications market, second in size only to the United States.<sup>33</sup> China's information technology equipment market is growing annually at an estimated twenty to forty percent.<sup>34</sup> In personal computer sales, some predict China will be the industry leader within the next five to ten years.<sup>35</sup> In landlines, China installs enough phone infrastructure each year to replace networks the size of Pacific

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27. *W.H. High Tech Memo*, *supra* note 24, at 1.

28. *Id.*

29. *Id.*

30. *Id.* (reporting that China agrees to commit "to eliminate tariffs on all products covered by the ITA—two-thirds of ITA products by 2003 and the remaining one-third by 2005"). Another White House report states that "China will eliminate information technology tariffs by 2005, grant trading and distribution rights by 2003." *W.H. Clear Win Memo*, *supra* note 23, at 37. See also Remarks by Ambassador Charlene Barshefsky, United States Trade Rep., Computer and Communications Industry Ass'n, *Information Technology and Trade Policy: A Look Back, A Look Ahead* (June 5, 2000) (on file with author).

31. *W.H. High Tech Memo*, *supra* note 24. United States firms can import anywhere into China without geographic restrictions. *W.H. Clear Win Memo*, *supra* note 23.

32. *W.H. Clear Win Memo*, *supra* note 23, at 37. This enables American businessmen to export from the United States rather than opening a business in China to sell products in China. *Id.*

33. *W.H. Clear Win Memo*, *supra* note 23, at 36.

34. *Id.* at 38.

35. See Chandler, *supra* note 3, at D1.



Bell.<sup>36</sup> At the end of 1999, China had about forty million telephone subscribers.<sup>37</sup>

b. Telecommunications Services: "Basic Telecommunications Agreement"

China's exponential growth in telecommunications equipment production parallels its progress in the telecommunications service market, where it recently overtook the United States as the world leader in mobile phone subscriptions.<sup>38</sup> In an unprecedented show of openness to foreign competition in its bid for WTO accession, China agreed to comply with the pro-competition regulatory principles of the Basic Telecommunications Agreement (BTA).<sup>39</sup> Although not every WTO member has signed on to the BTA, the Agreement successfully opened ninety-five percent of the world telecommunications market to competition and covered nearly one trillion dollars in telecommunications trade following its 1997 adoption.<sup>40</sup>

Upon accession to the WTO, China will gradually increase the percentage of foreign investment permitted in its telecommunications service market, thus lifting the ban on foreign involvement in this sector.<sup>41</sup> Telecommunications providers in WTO member countries will enjoy access to China's existing telecommunications infrastructure. China will permit domestic and foreign telecommunications service providers to interconnect the incumbent supplier's public telecommunications networks under nondiscriminatory terms and at cost-orientated rates, supervised by an independent regulatory authority.<sup>42</sup>

The United States-China agreement specifies which tele-

36. *W.H. Clear Win Memo*, *supra* note 23, at 36.

37. *Id.* at 36-37.

38. Chandler, *supra* note 3, at D1.

39. *W.H. Clear Win Memo*, *supra* note 23, at 36.

40. Barshefsky, *supra* note 30. The new rules for basic telecom took force on January 1, 1998. THOMAS & MEYER, *supra* note 7, at 248.

41. Remarks by Ambassador Charlene Barshefsky, United States Trade Rep., Nortel Network Policy Forum, *China's WTO Accession: America's Choice* 4 (Feb. 23, 2000) (on file with author).

42. See Reference Paper to the Fourth Protocol to the General Agreement on Trade in Services, Apr. 30, 1996, 36 I.L.M. 354, 367 [hereinafter Reference Paper of the Basic Telecommunications Agreement]; see WTO, Negotiating Group on Basic Telecommunications, Note by the Chairman, Revision, Notes for Scheduling Basic Telecom Services Commitments, S/GBT/W/2/Rev.1 (Jan. 16, 1997), 36 I.L.M. 354, 371 (1997).

communication sectors are included, but does not identify those that are excluded. This raises the potential for China to limit foreign investment in specified areas, making exceptions at will. The BTA covers "basic telecommunications," which includes local, long distance, and international services, for public and non-public uses, offered through any technology, such as cable, wireless, or satellite, on a facilities basis or by resale.<sup>43</sup> Specific technologies included in basic service should be outlined in China's "schedule," an itemized compilation of trade terms that countries file with the WTO and agree to maintain.<sup>44</sup> As a WTO member China will open its telecommunications service market to foreign investment in a number of important respects.

In the area of paging and value-added services, China will permit thirty percent foreign ownership upon accession, forty-nine percent after one year, and fifty percent two years after accession. Value-added services include e-mail, voice mail, online information and database retrieval, facsimile, and online information services.<sup>45</sup>

China will permit twenty-five percent foreign ownership in mobile services on accession, thirty-five percent after one year, and a forty-nine percent foreign ownership share three years after accession.<sup>46</sup> Mobile services include voice and data, analogue/digital cellular, and PCS services.<sup>47</sup>

China will allow twenty-five percent foreign ownership of its domestic and international service three years after accession, thirty-five percent after five years, and forty-nine percent foreign ownership six years after accession. Telecommunications services open for investment include voice, packet-

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43. *Id.* A Facilities based carrier "owns most of its own facilities . . . such as Bell Atlantic." NEWTON'S TELECOM DICTIONARY 340 (16th ed. 2000). A Resale carrier is "a long distance company that does not own its transmission lines . . . but buys them from other carriers." *Id.* at 746.

44. China committed itself to technology-neutral scheduling. *W.H. Clear Win Memo*, *supra* note 23, at 37; *cf.* Reference Paper of the Basic Telecommunications Agreement, *supra* note 42, at *Note by Chairman*. Basic Telecom includes local, long distance and international services for public and non-public use, provided by facilities basis or resale and any means of technology (e.g. cable, wireless, satellites). *Id.*

45. Agreement on Market Access, *supra* note 21; *see* China Online, *China's Mobile Phone Market After WTO Entry* (September 29, 2000), at <http://www.chinaonline.com/industry/telecom/currentnews/secure/c00092955.asp>.

46. European Commission, *supra* note 3. The European Union improved on the United States-China agreement by negotiating a more aggressive implementation timeline with China. This then resulted in better terms applicable to all members including the United States. *Supra* note 22.

47. Agreement on Market Access, *supra* note 21.

switched, circuit-switched, and facsimile services.<sup>48</sup>

Notably, European Union negotiations achieved an accelerated timeline for opening the mobile market, shaving two years from the five-year compromise negotiated by the United States months earlier.<sup>49</sup> The improved terms allow foreigners to invest in mobile services immediately upon accession and reach forty-nine percent ownership in three years. The terms of the United States-China agreement would have postponed even minimal investment until one year after accession and prevented forty-nine ownership for five years.<sup>50</sup>

## B. WTO PRINCIPLES: CHINA'S COMMITMENTS

China's specified market access commitments supplement the core principles of the WTO. The WTO is a rule-based international body with basic tenets that each member has agreed to uphold. To resolve complaints of noncompliance, the WTO's Dispute Resolution Mechanism acts as a judicial organ to interpret and enforce members' commitments. It is this principle of judicial review that has many investors excited. Though investors have no private right of action, the dispute resolution mechanism provides investors with an extra layer of security, lessening the risk of flagrant violations in a country with an underdeveloped legal system.

Four overarching agreements embody the commitments of WTO members.<sup>51</sup> The WTO's most basic commitments are found in Annex 1,<sup>52</sup> which includes the GATT for the trade of

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48. *Id.* All geographic restrictions will be eliminated the same year the equity percentage reaches its maximum allotment. *Id.*

49. General Agreement on Trade in Services, WTO Agreement, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 325 (GATT Secretariat 1994), 33 I.L.M. 1167 (1994) [hereinafter GATS]; see also GATS, Most-Favored Nation Treatment, part II, art. II; China Online, *supra* note 45; European Commission, *EU-China WTO Accession Negotiations, Overview of China's Economic Reforms and WTO Negotiations*, at <http://europa.eu.int/comm/trade/bilateral/china/chr.htm> (last visited Jan. 20, 2001).

50. Agreement on Market Access, *supra* note 21; see also Geoff Winestock, *China, EU Gain an Edge in WTO Deal: Three Major Concessions For U.S. Involve Retail, Insurance and Telecom*, WALL ST. J., May 22, 2000, at A30 (quoting EU officials saying that the "accelerated timetable will allow dominant EU companies [such as Nokia Corp. and Ericsson] to expand in China at a time when the industry is taking off fast and before U.S. companies can catch up").

51. General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (the Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, 33 I.L.M. 112.

52. GATT, *supra* note 7, at Annex 1A.

goods and the General Agreement on Trade in Services (GATS) for services.<sup>53</sup> GATT governs the trade of telecommunications equipment, but the more lucrative investment involves telecommunications services governed by the principles of GATS.<sup>54</sup>

## 1. GATS

GATS requires commitments of Transparency and Most Favored Nation treatment from all WTO members, and elicits specific sectoral commitments related to Market Access and National Treatment from individual nations. These commitments are outlined in Member's Schedules and were the focus of bilateral accession negotiations in which China made concessions to other nations to achieve their approval for WTO membership.

### a. Transparency

Amid negotiations for a new international trading system, the concept of transparency in GATT 1994 first appeared in GATT 1947 as the publication requirement. The same year of GATT 1947 negotiations, the United States adopted the Administrative Procedure Act, introducing public participation into federal regulatory agency rulemaking.<sup>55</sup> Without apparent controversy, GATT 1947 signatories incorporated a State Department document entitled "Publication and Administration of Trade Regulations" as the publication requirement of Article X of GATT 1947, which became the transparency requirement of GATT 1994.<sup>56</sup> The transparency requirement that requires international access to and awareness of member countries' domestic law stems from public notice tenets of American law.<sup>57</sup>

Transparency more closely resembles its American adminis-

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53. GATS, *supra* note 49, at Annex 1B.

54. MILTON MUELLER & ZIXIANG TAN, CHINA IN THE INFORMATION AGE 105 (1997). Even the World Bank and Asian Development Bank will gradually eliminate loans to telecom projects in China because they believe the telecom sector is profitable enough to attract foreign investment. *Id.* at 108.

55. Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 1, 3 (1998).

56. See GATT, *supra* note 7, at art. X; see also WTO Agreement *supra* note 4, Art. X; U.S. Dep't. of State, Suggested Charter for an International Trade Organization of the United Nations (1946). Unlike other articles of original American proposals for international trade regulation that involved considerable compromise, Article X "was not altered nor were any interpretive notes required." Ostry, *supra* note 55, at 3-5.

57. Ostry, *supra* note 55, at 11.

trative law roots today than when it originated. The creation of the WTO vastly expanded the concept of transparency from its early, minor role in assisting the tariff bargaining process as Article X of GATT 1947.<sup>58</sup> The publication requirement became essential to the evidentiary requirements of the WTO's Dispute Resolution Mechanism.<sup>59</sup> The transparency requirement in Article X of GATT 1947, of which China was an original signatory, appears significantly more demanding today.<sup>60</sup>

American administrative law requires that regulatory agencies publicize their actions, offer the public notice and comment opportunities, and subject themselves to judicial review.<sup>61</sup> The American system is designed to encourage significant transparency, and all Western countries developed similar administrative laws after World War II. China lacks the same domestic publication requirements, or transparency, in its government.<sup>62</sup> Thus transparency, a basic tenet of American law that has become the underpinning of international trade policy, will present a challenge to an underdeveloped Chinese legal system.

b. Nondiscrimination: MFN and National Treatment

Two principles embodied in GATS ensure that member countries provide nondiscriminatory access to their respective markets.<sup>63</sup> The Most Favored Nation (MFN) obligation of GATS Article II requires that each member provide "treatment no less favourable than that it accords like services and service suppli-

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58. *Id.* at 6-7, 11. GATT 1947 proved ineffective at resolving disputes, but its principles launched efforts to create an international body for world trade (the WTO) and international trade policy based on rules and remedies. *Id.* at 3, 6, 9.

59. The GATT lacked the necessary teeth and its dispute settlement mechanism was weak, which led to its restructuring. *Id.* at 6-7, 11.

60. *Id.* at 12 (analyzing how transparency requirements are more stringent under the GATT current iteration); cf. Nextlinx Corporation Website 11, (on file with author) (identifying a 1992 Memorandum of Understanding on Market Access signed between China and the United States committing China to improve the transparency of its trade regime.)

61. Ostry, *supra* note 55, at 2-5.

62. *Id.* at 4-5. All Western countries developed administrative laws to establish a procedure for bureaucratic governance due to the expanded role of government following World War I. *Id.* Contrary to parliamentary systems, which are based on a legislative primacy and a strong executive power, the United States' three-branch government further delegates to regulatory agencies with their own judicial and legislative powers. *Id.*

63. Lawrence J. Spiwak, *From International Competitive Carrier to the WTO: A Survey of the FCC's International Telecommunications Policy Initiatives 1985-1998*, 51 FED. COMM. L.J. 111, 169 (1998).

ers of any other country.”<sup>64</sup> Exceptions are granted under specified terms if WTO members review and agree to the exceptions.

Similarly, the National Treatment provision of GATS Article XVII obligates a member country to afford “treatment no less favourable than it accords to its own [domestic] like services and service suppliers.”<sup>65</sup> Unlike MFN, this provision permits members to qualify this blanket provision with conditions specified in their own Schedules. Members are encouraged, but not required, to equalize service competition by keeping terms consistent.<sup>66</sup> Foreign suppliers may be treated differently but not disadvantaged in their efforts to compete with another foreign or domestic supplier.<sup>67</sup>

### c. Market Access

Specific Market Access commitments of Article XVI made by each member country must be specified in the members’ Schedules. Each member must grant the other member countries “treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified.”<sup>68</sup> In those service sectors where a member commits to Market Access, members cannot adopt specified limitations unless such limitations are detailed in their Schedule. The Market Access commitment of “treatment no less favourable” seemingly incorporates both the National Treatment and Most Favored Nation requirements to give all foreign competitors equal opportunities and identical treatment to that of domestic suppliers. Thus, unless exceptions are stated in a member’s Schedule, the Market Access and National Treatment provisions both afford foreign companies the same right of ownership and investment as a country’s nationals enjoy.

## 2. *Reference Paper of the Basic Telecommunications Agreement*

Two years after negotiations concluded in the establishment of the WTO, the Reference Paper created within the 1997 Basic

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64. GATS, *supra* note 49, at art. II.

65. *Id.* at art. XVII.

66. “Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or services suppliers of any other Member.” *Id.*

67. Spiwak, *supra* note 63, at 169.

68. GATS, *supra* note 49, at Art. XVI.

Telecommunications Agreement established a broad range of “pro-competitive” market access commitments for services in the telecommunications industry service sector.<sup>69</sup> Previous WTO negotiations only addressed access to existing service and networks by users;<sup>70</sup> however, the Reference Paper introduced the ability to sell services and enter telecommunications markets. China has agreed to principles set out in the Reference Paper, which include competition safeguards, interconnection, transparency of licensing criteria, independence of the regulator, allocation of scarce resources, and universal service.<sup>71</sup>

Basic telecommunications was targeted for sector-specific negotiation due to its complex domestic legal structures, highly regulated business environment, economic importance, capital-intensive nature, and national security importance within domestic infrastructure.<sup>72</sup> Many telecommunications infrastructures are nationally owned, highly regulated monopolies.<sup>73</sup>

Not every member country signed on to the Reference Paper. Out of 132 WTO members, 69 members made concessions, and only 54 members, including the United States, which was the “driving force” behind the agreement, agreed to some or all of its principles.<sup>74</sup> For those that agreed to be bound by its tenets, the agreement is fully enforceable under the WTO Dispute Mechanism.<sup>75</sup>

#### a. Anti-Competitive Practices

The Reference Paper prohibits certain anti-competitive practices. The practices prohibited include cross-subsidization, using a competitor’s information with anti-competitive results,

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69. Reference Paper of the Basic Telecommunications Agreement, *supra* note 42; *see also* Spiwak, *supra* note 63, at 171.

70. GATS, *supra* note 49, at Annex on Negotiations on Basic Telecommunications (requiring nondiscriminatory access to networks, transparency, and reasonable access to particular service sectors set in a Member’s Schedule).

71. Reference Paper of the Basic Telecommunications Agreement, *supra* note 42; *see also* Spiwak, *supra* note 63, at 171.

72. THOMAS & MEYER, *supra* note 7, at 243.

73. *Id.*

74. *Id.* at 45-48, 246-48; *see also* Spiwak, *supra* note 63, at 171, 176. Three countries agreed to adopt some amount in the future; eight agreed to adopt some amount; and three stated they would make no additional regulatory commitments. *Id.*

75. Reference Paper of the Basic Telecommunications Agreement *supra* note 42, at 2.5 Interconnection: dispute settlement; *see also* Spiwak, *supra* note 63, at 172.

and withholding commercially relevant information from other service suppliers regarding facilities necessary to provide service.<sup>76</sup> Members may take "appropriate measures" to prevent suppliers from engaging in these practices.<sup>77</sup> The Reference Paper includes a preventative component, requiring each member country to establish an independent regulator that is authorized to make impartial decisions for suppliers of basic telecommunication services.<sup>78</sup>

To encourage the widespread dissemination of telecommunications, the Reference Paper does not consider universal service policies<sup>79</sup> per se anti-competitive if "they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary."<sup>80</sup> China can define its own terms of universal service and within those limits can cross-subsidize to benefit high-cost rural carriers by burdening lower-cost urban business users.

To prevent anti-competitive practices in licensing, the Reference Paper requires all terms, conditions, and timelines for decision making to be made publicly available. All frequencies, numbers, and rights of way must also be allocated in an objective, timely, transparent, and non-discriminatory manner. The public is free to inquire as to the state of any frequency not allocated for government use.<sup>81</sup>

b. Interconnection

China's regulatory regime historically has been reluctant to mandate the interconnection that the Reference Paper requires.<sup>82</sup> Upon accession, China must permit competitors interconnection with its public telecommunications networks at "any

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76. Reference Paper of the Basic Telecommunications Agreement, *supra* note 42, at 1.2 Safeguards.

77. *Id.* at 1.1 Prevention of anti-competitive practices in telecommunications.

78. *Id.* at 5 Independent regulators.

79. Universal service is the concept given to policy promoting affordable phone service for all at just and reasonable rates. FCC Memo, *Connecting the Globe: A Regulator's Guide to Building a Global Information Community, Universal Service*, part VI, June 16, 1999, available at <http://www.fcc.gov/connectglobe/sec6.html>.

80. Reference Paper of the Basic Telecommunications Agreement, *supra* note 42, at 3 Universal service.

81. *Id.* at 4 Public availability of licensing criteria; *id.* at 6 Allocation and use of scarce resources.

82. See Rachelle B. Chong & Wendy Chow, *Financing Telecommunications Project in Asia: A Promising Regulatory Perspective*, 52 FED. COMM. L.J. 1, 14 (1999).



technically feasible point" under non-discriminatory terms.<sup>83</sup> The interconnection rates must be nondiscriminatory, cost-orientated, transparent, reasonable, economically feasible, and sufficiently unbundled.<sup>84</sup> Interconnection procedures and agreements must be made publicly available.<sup>85</sup>

The interconnection obligations provide an additional avenue of enforcement for violations of the GATS National Treatment provision, which can be easily undermined in a member's Schedule. The Reference Paper's obligation to provide equal interconnection to all requires members to provide a foreign carrier with the same market access as a domestic carrier.<sup>86</sup>

## II. CHINA'S TELECOMMUNICATIONS ENVIRONMENT

### A. HISTORICAL DOMINATION OF CHINA'S TELECOMMUNICATIONS SECTOR BY FOREIGN INVESTORS

Foreign companies have been streaming into China to invest in telecommunications since the Qing dynasty in the 1880s.<sup>87</sup> China began nationalizing its telecommunications in 1908 and eventually revoked foreign ownership rights in submarine cables in 1924.<sup>88</sup> After taking control of the government in 1949, the Communists created a state monopoly on China's

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83. Reference Paper of the Basic Telecommunications Agreement, *supra* note 42, at 2 Interconnection.

84. *Id.* at 2.2 (a); *id.* at (b).

85. *Id.* at 2.3 Public Availability of the procedures for interconnection negotiations; *id.* at 2.4 Transparency of interconnection arrangements.

86. Spiwak, *supra* note 63, at 173.

87. In 1870, the Qing emperor of China permitted the British to connect five port cities to Shanghai with submarine cables, the first telecommunications technology. See Zhou He, *A History of Telecommunications In China: Development and Policy Implications*, in *TELECOMMUNICATIONS AND DEVELOPMENT IN CHINA* 55, 57-58 (Paul S.N. Lee ed., 1997). As a result of the Qing decree, a Danish company took the lead, beating the British to be the first to build the lines beginning China's international telecommunications backbone with ownership and operation in the hands of a foreign company. *Id.* at 58. The British laid cables from Shanghai to Hong Kong in 1883. *Id.* at 58-59. In the 1880s the Danish opened China's first telephone switchboard in Shanghai. *Id.* at 61. In 1901, China created the Ministry of Posts and Telecommunications (MPT) and began constructing state-run telecommunications facilities between big cities with funding from the military budget, which soon ran too low to continue. *Id.* at 61-63. The MPT was a hollow shell for six years. *Id.* at 62-63. Four years after the MPT's creation, China, for roughly \$6250, purchased the first long-distance telephone line ever laid in China, which connected the two main cities in northern China. *Id.* at 61-62.

88. *Id.* at 63, 65.

telecommunications market.<sup>89</sup> Shortly thereafter, insufficient government funding made telecommunications a low priority. Although the government succeeded in connecting most provincial capitals, rural areas were left behind.<sup>90</sup>

In 1994, China made a conscious effort to begin improvements in its telecommunications network.<sup>91</sup> Long distance lines in south and central China were so congested that only about fifteen percent of calls were connected.<sup>92</sup> The intra-city success rate was not much better, hovering around sixty percent.<sup>93</sup> Consumers could wait up to two years for the installation of a telephone.<sup>94</sup> Networks were poorly connected and increased capacity was sorely needed.<sup>95</sup>

## B. RECENT DEVELOPMENTS IN CHINA'S TELECOMMUNICATIONS GOVERNANCE

### 1. *Restructuring Telecommunications Governance: Ministry of Information Industry*

Today, China is spearheading a new wave of telecommunications growth, overhauling telecommunications policy and raising eyebrows around the world. In March 1998, China merged three Ministries to create the Ministry of Information Industry (MII).<sup>96</sup> This restructuring of telecommunications governance is significant for several reasons: it illustrates a significant shift in China's telecom policy, provides clearer avenues for foreign investment, and paves the way for WTO accession. The next stage in China's telecommunications development will include promulgation of a comprehensive telecommunications law and policy

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89. *Id.* at 67.

90. *Id.* at 67, 69, 85; see also Paul S.N. Lee, *Uneven Development of Telecom in China*, in TELECOMMUNICATIONS AND DEVELOPMENT IN CHINA 113, 121, 127 (Paul S.N. Lee ed., 1997).

91. He, *supra* note 87, at 79.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Morrison & Foerster LLP, *China's Telecommunications Industry: The New Ministry of Information Industry (MII) and Foreign Investment Opportunities* (March 1, 1998), available at <http://mofo.com/practice/ArticleDetail.cfm?MCatID=&concentrationID=&ID=303&Type=3>. The MII replaced the MPT, the Ministry of Electronics Industry (MEI), and the Ministry of Radio, Film, and Television (MRFT). *Id.*

encouraging stability among domestic telecommunications providers that will ensure equitable competition with large foreign telecommunications players.<sup>97</sup>

## 2. Telecommunications Law

Upon WTO accession, foreign investors should expect a gradual timeline for opening China's telecommunications service market.<sup>98</sup> This process will require promulgation of a comprehensive telecommunications law, but many drafts have been rejected since 1980.<sup>99</sup> However, as a result of China's recent WTO concessions, efforts have been stepped up to regulate this sector domestically.<sup>100</sup>

In September 2000, China released the Telecommunications Administration Regulations as a preview of the anticipated comprehensive Telecommunications Law.<sup>101</sup> The regulations divide telecommunications services into "basic telecommunications" and "value-added telecommunications services." For basic telecommunications services, the state-owned equity holding must be at least fifty-one percent, permitting forty-nine percent foreign ownership.<sup>102</sup> A percentage limit is not specified for value-added services.<sup>103</sup> Telecommunications service providers must obtain a license as either a proprietary or nonproprietary

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97. *China: Telecoms—What Slowdown?*, CHINA ECON. REV., July 26, 2001; see also MUELLER & TAN, *supra* note 54, at 113 (arguing that neither MPT nor MEI is capable of competing against British Telecom, Singapore Telecom, AT&T, or MCI in the telecom services market).

98. See China Online, *Wu Jichuan: No Business Volume Limitations For Foreign Investors in Telecom*, at <http://www.chinaonline.com/topstories/000926/1/c00092619.asp> (Sept. 26, 2000). Wu Jichuan, the Minister of MII, indicated that "MI will gradually open China's telecom market." *Id.*

99. United States Embassy, China, *New Ministry of Information Industries*, <http://www.usembassy-china.org.cn/english/economics/miiweb.html> (last visited Sept. 22, 2001); see also HE, *supra* note 87, at 77. China began drafting the Telecommunications Law in 1980. It has gone through many drafts and has not yet been approved as of December 2000. See *id.*; see also Peter Wonacott, *China Maps IPO to Gird for Foreign Telecom Invasion*, WALL ST. J., Dec. 6, 2000.

100. United States Dept. Commerce, Int'l Trade Admin., Office of Telecomm. Technologies, *China/MII Submits Draft Telecom Regulations to Council*, Asia Telecomm. Newsletter available at <http://infoserv2.ita.doc.gov/ot/newsarch.nsf/64e14978f46d75a18525667f004cc7a6/543732832cc3aa098525697c0052e18d!OpenDocument> (September 8, 2000) [hereinafter MII Memo].

101. China Legal Change, *The Regulations of the People's Republic of China on Telecommunications* (September 25, 2000) <http://www.chinalegalchange.com/archives/arch0019.html>.

102. *Id.*

103. *Id.*

network.<sup>104</sup> MII retains authority to decide who can set up a proprietary network. Therefore, China still controls which foreigners may sell service to the public on their own telecommunications infrastructure rather than on resale.<sup>105</sup>

The regulations also require foreign investors providing telecom services to partner with Chinese companies in joint ventures.<sup>106</sup> The Chinese investor must appoint the Chairman of the Board of Directors and recommend the General Manager for the joint venture.<sup>107</sup> Chinese authorities retain flexibility to permit only those foreigners that demonstrate "sound performance and experience in the industry" to invest in telecom services.<sup>108</sup>

There is also a financial restriction placed on those businesses that can enter the market. Only the foreign firms interested in China's "infrastructure telecommunications business" who have made \$10 billion annually over the last two years can enter the market.<sup>109</sup> The prohibitive clause, which the head of the MII deems "trivial," bars all but a dozen or so of the world's largest phone companies from the Chinese market.<sup>110</sup> Further limiting foreign firms investment opportunities, the regulations only permit those qualified foreign firms to partner with state-owned Chinese firms with annual revenues of \$360 million.<sup>111</sup>

### 3. *The First Competitor: China Telecom Meets China Unicom*

China realizes that established domestic telecommunications companies are an important factor in establishing a competitive environment for foreign investment.<sup>112</sup> Though one

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104. *MIJ Memo*, *supra* note 100; CompetitionNOW, *Telecom Regulations Set in China* (Sept. 22, 2000), at <http://www.competitionnow.com/ArchivesDetail.asp?objectId=33218>. Proprietary network operators own their own infrastructure, while nonproprietary networks are resellers. *Id.*

105. *MIJ Memo*, *supra* note 100.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Matt Forney, *China Fails to Clarify Proposals Limiting Foreign Firms' Access to Telecom*, WALL ST. J., Sept. 26, 2000. The article quotes Wu Jichuan as saying, "Government regulations on foreign access to the telecom market won't touch on such trivial details and specific issues." *Id.*

111. *Id.* "[Wu Jichuan] noted that the new rules would not include any clauses to impose annual operational revenue restrictions on foreign investors. However, China will 'have qualifications for those who want to participate in the sector after it becomes a WTO member.'" China Online, *supra* note 98.

112. Tony Munroe, *It's a Family Affair: China Telecom in Talks to Buy Networks*

Chinese official estimates that this domestic development could take upwards of twenty years, the WTO will require China to open certain markets in less than a year.<sup>113</sup>

China Telecom is the largest telecommunications company in China. It was the first state monopoly of telecommunications in fixed-line network service under the control of the Ministry of Posts and Telecommunications (MPT), one of the three merged MII ministries.<sup>114</sup> Another of the merged ministries, the Ministry of Electronics Industry (MEI), created a second state-owned telecom service provider in 1994. That provider, China Unicom, successfully signed over forty agreements with foreign companies in its first year of existence, arranging indirect joint ventures in the telecommunications equipment markets and using the funding to gain a foothold in the growing mobile phone market.<sup>115</sup> China banned these investments in 1998 declaring the underlying contracts illegal, and required China Unicom to refund foreigners' investments to companies such as Motorola, Inc. and Sprint Corp.<sup>116</sup>

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*From Parent*, Reuters, June 26, 2000 (noting that Chinese telecom companies' success depends on having a critical mass carrier in place well in advance of foreigners coming into the market).

113. *MIJ Memo*, *supra* note 100. Minister Wu Jichuan has estimated that the development of domestic companies capable of competing with large foreign telecom companies could take twenty years. *Id.*

114. Chew Boon Chuan et al., *Telecommunications and Information Technology*, in *BUSINESS OPPORTUNITIES IN NORTHEASTERN CHINA* 241, 244 (John J Williams et al. eds. 1999); *see also* China Online, *China Telecom Hankering to Become 3rd Mobile Player* (Sept. 25 2000), <http://chinaonline.com/industry/telecom/currentnews/secure/C00092209.asp>.

115. *MIJ Memo*, *supra* note 100; Steven Yeong, *China: The Commercial and Regulatory Environment*, Datapro (April 15, 1999), at <http://res.ufgartner.ufl.edu/datapro/3806-1.htm> (stating that China Unicom had forty-six joint venture contracts); *see also* Chuan, *supra* note 114, at 244-45 (noting that China Unicom won approval from the State Council to be the second national network in 1994); *Co's Angle for China Internet Market*, Associated Press, Nov. 3, 1999 (stating that over forty joint ventures in China Unicom were used to finance mobile network expansion).

Although Chinese law prohibits China Unicom's partners from securing an equity position in the projects, foreign partners are allowed to first form joint ventures with local partners that, in turn, fund the Unicom projects for a set rate of return. For example, Sprint and Sumitomo are partners in a joint venture with a local company known as Tianjin Global Communications. Tianjin Global is China Unicom's partner in a fixed-line business in the City of Tianjin.

Morrison & Foerster, *supra* note 96.

116. Some sources identify this refund as \$1.4 or \$1.5 billion. *See* Associated Press, *supra* note 115; *see also* Matt Forney & Sara Webb, *China Phone Firm Remains Ensnared By Bureaucracy*, WALL ST. J., June 13, 2000 (stating that those con-

China Unicom's ability to induce competition is an indicator of the potential competitive market for China's telecommunications services. In wireless services, China Unicom opened competing cellular phone service in China's four largest cities, and forced the MPT to slash cellular phone prices by twenty percent and waive start-up fees.<sup>117</sup> In domestic wireline, the government permitted China Unicom to charge a lower connection fee, which brought down the cost of phone installation from a national average of \$480, to \$240 in 1997 and \$120 in 1998.<sup>118</sup> China Telecom is under pressure to reduce service charges on alternative communications technologies such as call-back, internet telephony, resale of leased lines, and satellite transmissions.<sup>119</sup>

Realistically, China Unicom is hardly a true competitor to the state's larger mobile phone companies. China Mobile owns seventy-three percent of the market, and China Telecom holds a virtual monopoly on wireline with a greater than ninety-nine percent market share.<sup>120</sup> However, even though its market shares remain small at twenty-six percent and less than one percent respectively, China Unicom signifies the potentially dramatic impact of competition to come.

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tracts deemed illegal had been tacitly approved by top government officials). Singapore Technologies, which invested \$48 million was, embroiled in proceedings against China Unicom to reclaim the value of a paging system it financed and remains unsatisfied with China Unicom's offer to return the investment with interest. *Id.*; See also Yeong, *supra* note 115 (listing some of the investors as Motorola Inc., Sprint Corp., Deutsche Telekom, France Telecom, and Sumitomo Corp.).

117. Chuan, *supra* note 114, at 244; see also Forney & Webb, *supra* note 116 (stating that China Unicom charged China Mobile with illegally matching its lower prices and waiving start-up fees for those customers who switch from China Unicom to China Mobile).

118. *MII Memo*, *supra* note 100, at 3. In 1998 installation began at \$226 and fell to a maximum installation charge of \$120 after March 1, 1998. CHINA ONLINE, *Telecom Modernization Faces Challenges in China* (Oct. 10, 2000); see also Forney & Webb, *supra* note 116. The competitive edge was not simply the result of competition. The Chinese government permitted China Unicom to set prices slightly lower than those charged by China Mobile, the largest state-run mobile phone company with nearly ninety percent of the country's customers. Thus, China Unicom was still dependent on the government's ability to set prices. *Id.*

119. *MII Memo*, *supra* note 100, at 4

120. *Id.* at 3; see also Forney & Webb, *supra* note 116 (noting that China Mobile has nearly ninety percent of China's mobile phone users connected); see also Hui Yuk-Min, *Beijing Must Step Up Efforts to Break Sector's Monopoly*, SOUTH CHINA MORNING POST, Sept. 14, 2001 (indicating that China Unicom's market share of the mobile phone business is twenty-six percent); see also PEOPLE'S DAILY, *Scheme Devised to Break Up Monopoly*, Oct. 16, 2001 (citing MII statistics that indicate China Telecom owns over ninety-nine percent of the market).

Recently, with unexpected urgency, Beijing's leadership mandated the break up of China Telecom's monopoly in the fixed-line sector, which will consequently shift market share when implemented.<sup>121</sup> As WTO accession nears, splitting China Telecom is the most recent indicator of Beijing's plans to rapidly establish domestic competition in preparation for foreign investment.

#### 4. *Inducing Competition*

In a massive restructuring that began and continues as we go to press, the hundred percent state owned monopoly China Telecom will split into northern and southern regional providers and merge with a smaller provider of data services in the north.<sup>122</sup> Signs of this evolution began in March 1999, when China Telecom split into four competing service units: fixed-line telephone (China Telecom), mobile (China Mobile), paging (given to China Unicom), and satellite (ChinaSat).<sup>123</sup> Rather than stirring competition, critics suggested this split would create new monopolies in each service area, or "supercarriers" surrounded by a competitive fringe.<sup>124</sup>

China Telecom and China Unicom were the only significant local and long-distance fixed-line providers until China Railcom announced it would enter the fixed-line business in March 2001.<sup>125</sup> China Telecom owns the nationwide fiber optic cable network and China's principal computer network, ChinaNet.<sup>126</sup>

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121. Leslie Chang & Matt Pottinger, *China Telecom, Once Split, Will Service Separate Regions; IPO May Be Speeded*, WALL ST. J., Oct. 17, 2001 (noting that the State Council essentially sidelined the powerful telecom regulator, MII, in making the breakup decision itself).

122. *Id.* China Telecom will merge with China Netcom to become China Netcom Corp. in the north. *Id.*

123. Zhao Huanxin, *Telecom Needs Competition*, China Daily, June 10, 1999 (on file with author); see also Letter from Daniel Brody, Managing Director, U.S. Information Technology Office, to Rachael Abramson (Nov. 25, 2000) (on file with author).

124. Huanxin, *supra* note 123.

125. Michael Ma, *Railcom Launches Phone Service Offer*, SOUTH CHINA MORNING POST, March 3, 2001. China Railcom is a spin-off from the Ministry of Railways and already has an elaborate communications system for railway use, from which the MII will allow it to offer local, long distance, data, and Internet service at discounted prices to compete with China Telecom. *Id.*

126. Jianhong Wang, *Breakup of China Telecom*, U.S. & Foreign Commercial Service (May 2000). As of April 24, 2000, China Telecom had fixed assets of over \$48 billion and net assets over \$24 billion. At the end of 1999, China Telecom had 110 million telephone subscribers. *Id.*

China Unicom has been the only fully-licensed telecommunications operator in China able to provide fixed, mobile, data, satellite, international gateways, Internet backbone, and any other service.<sup>127</sup> The merger between China Telecom and China Unicom's patron ministries, which created the MII, has largely solved interconnection problems between the two, however new entrants are likely to face similar interconnection issues.<sup>128</sup> Critics suggest that any united front could pose difficulties for new competitors.

China has two wireless providers, China Unicom and China Mobile, but indicators suggest new licenses will be awarded soon. The wireless market in China is the world's biggest in number of subscribers; its growth rate was reported at seventy-eight percent at the end of 2000.<sup>129</sup> Recent contracts with Ericsson, Lucent, Motorola, and Nortel provide investment for China Unicom's plans to build the world's largest code division multiple access (CDMA) mobile phone network for fifty million subscribers by the end of 2004.<sup>130</sup> China Unicom is the baby brother of China Mobile, which has the dominant market share; however, growth rates and government restructuring efforts could quickly even out the playing field.<sup>131</sup>

China Unicom and China Mobile have held initial public offerings (IPO) on the Hong Kong stock market. China Unicom sold over twenty percent of its market share on both the Hong

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127. Letter from Daniel Brody, Managing Director, U.S. Information Technology Office, to Rachael Abramson (Nov. 25, 2000) (on file with author).

128. Sarah Lubman, *Beijing Still Far From Open Internet Access: WTO Membership May Mean Progress, But Advisers Say Don't Expect Miracles*, ASIA REPORT Nov. 24, 1999. Such interconnection problems plagued Sprint's \$30 million fixed-line investment in China Unicom in 1998, when China Telecom refused to connect Sprint's network to its own network, preventing subscribers from calling anyone outside their chosen network. *Id.* The problem was rectified in July 2000. *MIJ Memo*, *supra* note 100; *see also* Yeong, *supra* note 115.

129. Peter Wonacott, *China Maps IPO to Gird for Foreign Telecom Invasion*, WALL ST. J., Dec. 6, 2000 (insert); *see also* *China Unicom First Half Profit to Surge*, ASIAPORT DAILY NEWS, Sept. 12, 2001.

130. *China Unicom's Interim Profit Soars*, ASIAPORT DAILY NEWS, Sept. 14, 2001. China Mobile and China Unicom also have GSM networks-- the largest in the world-- although there has been a push for CDMA rollout in recent months. *Home Grown 3G Age Faces Tough Future*, ASIAPORT DAILY NEWS, Sept. 12, 2001.

131. *China Unicom First Half Profit to Surge*, ASIAPORT DAILY NEWS, Sept. 12, 2001; *see also* Blaise Zerega, *Communications Watch: China braces for telecom breakup Tech Soundings: Chinese startups and overseas investors line up as the People's Republic plans the deregulation of telephony services*, REDHERRING.COM, Sept. 17, 2001. China Mobile had thirty-eight million mobile users by the end of 1999, equaling ninety percent of the country's total. Wang, *supra* note 126, at 3.



Kong and New York Stock Exchange to raise \$5.65 billion.<sup>132</sup> China Telecom is expected to announce the next telecom IPO despite repeated delays.<sup>133</sup> Smaller state-run companies are also vying for a piece of the pie.<sup>134</sup> Created at the behest of Prime Minister Zhu Rongji, and boasting Premier Jiang Zemin's eldest son as a director, Netcom was the upstart positioned to upset China Telecom's monopoly in data broadband communications before announcement of the merger between northern China Telecom and China Netcom.<sup>135</sup> China Netcom built a 5300 mile fiber optic network and was expected to launch a bid for a long distance license and a mobile license.<sup>136</sup> China Netcom will now incorporate China Telecom's northern fixed-line equipment already in place into its business plan, and will be in a position to compete with southern China Telecom for a mobile license when China issues a third.<sup>137</sup>

China Jitong is another developing player. As the sister startup to China Unicom, China Jitong had a six year head start, but suffered from poor management and has been slow to take any initial steps.<sup>138</sup> Like China Netcom, China Jitong provides data broadband communications, but its operating costs are funneled into leasing capacity from China Telecom because it has few transmission lines of its own.<sup>139</sup> China's broadband market is still in its infancy, but China Telecom, China Unicom, China Mobile, China Netcom, and China Jitong all run competing Internet protocol (IP) phone services.<sup>140</sup> IP services will be divvied up according to new merger plans.

Additional promise for competition in the wake of China Telecom's split could include additional mergers, reports have speculated.<sup>141</sup> If merger occurs, and the remaining merged tele-

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132. Wonacott, *supra* note 129.

133. Chang & Pottinger, *supra* note 121.

134. Joe Leahy, *China: Foreigners Eye the China Pie*, FIN. TIMES, Nov. 13, 2000.

135. Chang & Pottinger, *supra* note 121; *see also Answering the Call*, S. CHINA MORNING POST, Aug. 26, 2001; *see also* Michael Dwyer, *Murdoch In Step With China*, AUSTL. FIN. REVIEW, Sept. 8, 2001.

136. *Answering the Call*, *supra* note 135; Leahy, *supra* note 134; Letter from Andrew Batson, Strategic Intelligence, to Rachael Abramson (Nov. 14, 2000) (on file with author).

137. PEOPLE'S DAILY, *supra* note 120.

138. Leahy, *supra* note 134.

139. Xiao Hou, *Telecom Firm Eyes SOE Backing*, CHINA DAILY, Aug. 3, 2001.

140. Leahy, *supra* note 134.

141. Chang & Pottinger, *supra* note 121; *see also* Lester J. Gesteland, *State Council Approves China Telecom Breakup, Sector Consolidation*, CHINAONLINE NEWS, Oct. 16, 2001. Rumors suggest China Unicom will merge with China Railcom to become China Unicom Group and China Mobile will merge with China Jitong to

com companies are fully licensed to provide fixed, data, and mobile services, those companies with a full spectrum of services might attract market share more equally and jump start true domestic competition without further government guidance.

### III. THE DISCONNECT BETWEEN CHINESE LAW AND WTO COMPLIANCE

#### A. HISTORY OF THE PROBLEM

To sustain any growth, telecommunications companies positioning themselves domestically in China need foreign investment. Investors want transparency in law, to measure the risk they are willing to take by their legal limits. As rapidly as China introduces foreign competition, China is creating the rules of the game and causing mixed feelings for investors who are weighing their risk. China's legal system resembles a civil system, based on written statutes and not common law. To attract foreign investment, China began to enact laws in 1979 after signing a bilateral Agreement with the United States.<sup>142</sup> China first enacted the Joint Venture Law and Foreign Trade Law granting legal protection to both state and privately owned Western businesses.<sup>143</sup> In 1993 China continued this trend by promulgating the Company Law to impose a uniform standard of corporate behavior and outline the rights of shareholders.<sup>144</sup> The importance of law in China's economic development achieved widespread philosophical acceptance when China adopted the concept of a "socialist market economy" in an amendment to its Constitution in 1993.<sup>145</sup>

China has also looked to the law of other countries for guidance in developing its own. However, the cross-cultural transfer of legal language does not result in a perfect translation. While

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become China Mobile Group. *Id.*

142. Agreement on Trade Relations, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4651; see also Benjamin M. Vandegrift, *Making Deals In China: What You'll Find; How It's Done*, 8 BUS. L. TODAY 40, 43.

143. Jiang-Schuerger, *supra* note 14, at 1342.

144. Vandegrift, *supra* note 142, at 43.

145. Constitution of the People's Republic of China, Decision of the CPC Central Committee on Some Issues Concerning the Establishment of a Socialist Market Economic Structure, Nov. 14, 1993; see also Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 127 (1999).

familiar to foreign investors, the legal terminology used is not central to the Chinese experience and is often interpreted differently.<sup>146</sup> For instance, there is only one Chinese word for the English concepts of "legal system/rule of law" and "rule by law."<sup>147</sup> In Chinese, the concept of democracy imbued in the former is also interpreted as autocracy, as conveyed by the latter. In a democracy, 'rule' is a noun and a safeguard belonging to every individual. In an autocracy, 'rule' is a verb providing a ruler with the effective means to hold onto power. In the above two phrases, 'law' either acts as the central, operative word as the modifier of a noun, or is objectified as the verb's instrument to describe the verb's source of power.

Traditionally, the political philosophy of Legalism in China was synonymous with totalitarianism because it served as a leader's instrument for controlling the masses.<sup>148</sup> Though Legalism is largely considered extinct in modern Chinese philosophy, the inherent conflict in the very term for the most basic interpretation of the role of law in Chinese society is evident in its multiplicity of translation.

Legal concepts incompatible with a civilization are not internalized and not enforceable.<sup>149</sup> For instance, in China, law students are taught to memorize and not theorize. Law is the study of the rules that exist, not what could be argued to exist. Traditionally, China has not been a litigious society.<sup>150</sup> Disputes should be dissolved, rather than resolved, according to Confucian teaching, the underpinning of the Chinese value system.<sup>151</sup> Confucianism requires submission of individual desire to the good of the group.<sup>152</sup> As such, harmony is virtuous and litigation

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146. See A. Dan Tarlock, *Hong Kong: One Country, Two Systems or Two Countries, One System*, in CHINA IN THE WORLD TRADING SYSTEM 139, 146 (Frederick M. Abbott ed., 1998).

147. Chen, *supra* note 145, at 135 (discussing the multiplicity of meaning in the Chinese term "fazhi"); see also Ostry, *supra* note 55, at 14 (commenting that Chinese leaders seem to mean "rule by law" rather than "rule of law" when they speak of accomplishments in creating legal institutions).

148. "Contemporary Chinese scholars are almost unanimous in rejecting the alleged equivalence between Legalism and the rule of law." Chen, *supra* note 145, at 129.

149. *Id.* at 134; see also C. David Lee, *Legal Reform in China: A Role For Non-governmental Organizations*, 25 YALE J. INT'L L. 363, 373 (2000) (suggesting that the goal of reform is to "internalize into legal workers a sense of moral responsibility to act in ways that affirm the rule of law").

150. Vandegrift, *supra* note 142, at 45.

151. Tarlock, *supra* note 146, at 146. Dissolving a dispute is a Confucian notion.

152. See Chen, *supra* note 145, at 129-30, for a discussion of the roles of Confucianism and Legalism in ancient China and today.

humiliating and uncertain.<sup>153</sup> In fact, only recently have Chinese citizens been permitted to sue their employers and the government.<sup>154</sup>

Today, ideological discourse in China increasingly invokes Marxism, which teaches that the economics of a society determines the stability of a political system, and thus provides leaders with a source of legitimacy.<sup>155</sup> Law is the key to China's long-term stability and prosperity, and a vehicle to escape the historical dynastic cycles in which each regime has traditionally declined and fallen.<sup>156</sup> China's WTO accession is affirmative acceptance of such a rule-based system.<sup>157</sup>

## B. NON-TRANSPARENCY IN CHINESE LAW

Sweeping legal reform rides the undercurrent of China's problems. China will resist any transparency requirement that threatens to weaken the regime. Balance of power is conceptually absent from Chinese politics and consciously ignored.<sup>158</sup> Administrative law facilitates effective balance of power between arms of government, and thus exemplifies the basic difference between American and Chinese law.<sup>159</sup> Thus, China will not expand its transparency requirement to the exhaustive length expected by the United States.

Chinese law is highly generalized and lacks procedural guidelines.<sup>160</sup> The bureaucrats who implement the laws have a high degree of discretion. There is no right of public comment or consultation for suggestions when drafting regulations, especially at the provincial level. Laws for foreign trade are published in the Gazette, but local laws are not included. Normative documents are a pervasive genre of law used exten-

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153. Tarlock, *supra* note 146, at 146; *see also* Chen, *supra* note 145, at 129.

154. Catharin Dalpino, Brookings Institution, Remarks at the Brookings Press Briefing, The China Trade Vote (May 23, 2000).

155. U.S. Embassy Beijing, *China's Top Worries: Lagging Political Reform, Corruption, Environment* (May 2000), at <http://www.usembassy/china.org.cn/english/sandt/poll-reform.htm> (citing a prominent Chinese academic who said if the Party can gradually accept democratic reforms, it can continue in power indefinitely). "Chinese ideological discourse increasingly refers to Marx and Engels and much less to Lenin and Mao Zedong." *Id.*

156. Chen, *supra* note 145, at 138-39.

157. Mastel, *supra* note 9, at 991 (stating that the WTO is the "ultimate rule-based international institution").

158. Ostry, *supra* note 55, at 15.

159. *Id.*

160. Lee, *supra* note 149 at 368.

sively by local administrative bodies, but are not binding on those bureaucrats who use them.<sup>161</sup> There is limited governmental oversight of local legislative and administrative action, which causes rampant local protectionism and no effective transparency.<sup>162</sup> These traits will not mesh well with the WTO generally.

The WTO requires a single access point for Chinese law and regulations.<sup>163</sup> China must streamline the multilayered complexity that plagues its present-day legal system.<sup>164</sup> Otherwise, the lack of transparency threatens to frustrate efforts to secure reliable information for the evidentiary-intensive WTO Dispute Mechanism.<sup>165</sup>

WTO accession encourages future strides in China's legal transparency to improve access to distribution channels and market liberalization. The United States, however, should not expect a level of transparency from China that the WTO itself does not honor. There is inadequate publication of WTO meetings and pleadings, and decisions of the Dispute Mechanism are released months after they are decided.<sup>166</sup> As long as transparency problems plague the WTO, there should be little condemnation for China, which is making remarkable strides towards building a new legal system.

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161. Ostry, *supra* note 55, at 13.

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. . . Whether they are legal or not (and no clear ruling exists), they are not published and are probably not binding on the bureaucrats that use them.

*Id.*

162. The majority of judges are appointed without prior legal experience. See Lee, *supra* note 149, at 368. See William P. Alford, "Seek Truths From Facts" – Especially When They Are Unpleasant: American's Understanding of Chinese Efforts at Law Reform, in CHINESE LAW: BASIC CONCEPTS OF CHINESE LAW 295 (Tahirih V. Lee ed., 1997) (for a discussion of the inadequacies of the Chinese judiciary).

163. Ostry, *supra* note 55, at 13.

164. *Id.* at 12.

165. *Id.* at 19; see also Brad Bacon, *The People's Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma*, 9 MINN. J. GLOBAL TRADE 369, 387 (2000).

166. See Andrea Kupfer Schneider, *Unfriendly Actions: The Amicus Brief Debate at the WTO*, 7 WIDENER L. SYMP. J. 87, 94 (2001); see also Remarks by Thomas J. Schoenbaum, Professor of Law, University of Georgia, to Catholic University of America, Columbus School of Law, Dispute Resolution and the WTO (Sept. 20, 2000). Prof. Schoenbaum deemed the WTO litigation process "very secretive," noting that neither the process nor written pleadings are open to the public thereby creating an atmosphere of distrust whereby people doubt the legitimacy of decisions. *Id.*

### C. RESTRICTIONS ON MARKET ACCESS

China's market access commitments reflect protectionist tendencies, but also prospective progression. The November 1999 United States-China Bilateral Agreement was classified until March 2000.<sup>167</sup> The final agreement was released with strike-outs and pen-ins that show negotiated additions and alterations, indicating that disagreement in telecommunications negotiations centered on foreign ownership percentages and the timeline for gradual entry.<sup>168</sup> The final agreement for telecommunications includes two categories: value-added services and basic telecommunication services.

Value-added services include e-mail, voice mail, value-added facsimile services, and online information and/or data processing.<sup>169</sup> The agreement permits thirty percent foreign investment in joint ventures within China's three major cities upon accession. Negotiators' alternations to the next step, which expands foreign investment to fourteen additional cities, indicate a change in the timeline and percent, from thirty-five two years later, to forty-nine percent one year later.<sup>170</sup> The third stage initially permitted fifty-one percent foreign ownership four years later, but negotiators refigured the third stage to include fifty percent ownership two years later with no geographic restrictions.<sup>171</sup>

Basic Telecommunication Services include paging, mobile, and domestic and international voice and data services.<sup>172</sup> The paging service sector's percentage ownership and timeline are identical to the terms and corrections made in negotiations for value-added services. Mobile services include voice and data, analog/digital and PCS services. The agreement offers twenty-five percent foreign investment opportunities in joint ventures in China's three major cities one year after accession, thirty-five percent in fourteen additional cities after three years, and forty-nine percent anywhere in China after five years.<sup>173</sup> There was no apparent disagreement over these figures.

The basic telecommunication services identified as "domestic and international services" include voice, packet and circuit-

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167. Agreement on Market Access, *supra* note 21.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Agreement on Market Access, *supra* note 21.

switched data transmission, and facsimile services.<sup>174</sup> This category seemingly includes any telecommunications service not specifically mentioned, such as domestic wireline Plain Old Telephone Service (POTS). Under the same three-step geographic gradation, twenty-five percent foreign investment is permitted three years after accession, thirty-five percent after five years, and forty-nine percent after six years. Foreigners must wait three years to invest in telephony, other than that specified as a mobile or value-added service.<sup>175</sup>

Interestingly, a correction on the agreement includes a hand-written crossed-out sentence in both the value-added and paging service portions of the agreement.<sup>176</sup> The eliminated sentence sought to condition the fifty percent foreign investment "with operation and management control permitted."<sup>177</sup> Though it is evident that negotiators did not agree to this explanatory sentence, China's recent Telecommunication Regulations effectively accomplish its purpose.<sup>178</sup>

China's Telecommunications Regulations reveal that China anticipated containing its requirements to few competitors early on. The regulations limit investment to high-profit foreign firms and high-profit Chinese firms.<sup>179</sup> The select group of foreign investors must have telecom revenues greater than \$10 billion during the two years prior to applying to operate in China.<sup>180</sup> Additionally, by giving the Chinese joint venture partner power over chairperson appointments, China retains control over foreign investment.<sup>181</sup> The regulations narrow the pool of foreign firms qualified to enjoy China's market access commitments and raise questions about China's degree of commitment.

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Telecommunications Regulations of the People's Republic of China (Guowuling No. 291) (Sept. 25, 2000); see also ASIA PULSE, *China to Honor Free Trade Commitments in Telecom Sector*, 2000 WL 26878649 (Sept. 26, 2000) (stating that Minister of Information Industry Wu Jichuan announced in a press conference that qualified private firms will be permitted to invest in China's telecommunications sector).

179. Matt Forney, *Chinese Investors Offer Static on Telecom Rules: Smaller Foreign Investors May Get Shut Out*, ASIAN WALL ST. J. Sept. 26, 2000; see also Laura B. Sherman, *China After the WTO, What You Need to Know Now: The Impact of China's WTO Entry on the Telecommunications and IT Sectors*, PLI Order No. A0-0095, at 230-31 (Feb. 2001).

180. Vivienne Bath & Cindy Chong, *China's New Telecommunications Regulations*, (Nov. 2000), at <http://www.coudert.com/practice/chinanewtelecom.htm>.

181. Forney, *supra* note 179.

GATS Article XVI Market Access commitments restrict members from adopting specified limitations unless they are detailed in the member's Schedule.<sup>182</sup> The intent of the commitment is designed to remove all entry barriers unless candidly expressed. Seemingly, China has already undermined this commitment.<sup>183</sup> Arguably though, China can restrict the threshold requirements for qualified foreign firms before the market access commitments apply. There is no MFN violation when all foreign firms are treated under the same screening process. However, it is open to interpretation whether the Market Access commitments must apply to all foreign firms or only to qualified foreign firms. The generalized commitment to Market Access lends itself to a broader reading, which arguably could allow a member to condition market entry with prerequisites before the Market Access commitments can be applied and enforced.

China's recent regulations also implicate National Treatment concerns.<sup>184</sup> Delegating joint venture authority to Chinese nationals to determine "qualified" foreigners for management positions affords favorable treatment to "its own like . . . service suppliers."<sup>185</sup> Foreigners can be treated differently only if specified in China's Schedule or if they are not disadvantaged in their efforts to compete.<sup>186</sup> Foreigners are competitively disadvantaged when they risk investing in a company in which their voice in decision making is not based on percent ownership, but rather a partner's whim. China has replied that restricting the qualification of foreign partners is an international practice.<sup>187</sup>

In contrast to these vagaries, China has been laudably explicit about percentage ownership and timelines for entry. Though the reasons for selecting percentages lower than forty-nine percent is unclear, China rejected WTO members' efforts to exact concessions of foreign member ownership at fifty-one percent as "politically unacceptable."<sup>188</sup> Carefully selected figures suggest Chinese domestic law implications in cases where company control hinges on percent ownership. Domestic law should clarify the implications of joint venture ownership versus pub-

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182. GATS, *supra* note 49, at Market Access, part III, art. XVI.

183. Sherman, *supra* note 179, at 230-31.

184. GATS, *supra* note 49, at National Treatment, part III, art. XVII.

185. See ASIA PULSE, *supra* note 178.

186. GATS, *supra* note 49, at National Treatment, part III, art. XVII.

187. See ASIA PULSE, *supra* note 178.

188. Winestock, *supra* note 50.



licly held stock ownership. Percentage limits on foreign ownership largely reflect protectionist efforts, which have been the context of heated debate in United States politics. Congressional legislation introduced in 2000 threatened to cap foreign investment in American telecommunications companies at twenty-five percent, which raised national treatment and market access concerns within the WTO.<sup>189</sup>

The United States is bound to honor its Reference Paper commitments. It has faced the challenge of removing existing barriers in telecommunications policy but must work to prevent their future emergence.<sup>190</sup> Efforts to pass a congressional bill contrary to WTO commitments raise questions about national sovereignty and the binding nature of international commitments. The uncertainty of international agreements helps explain China's interest in carefully tailoring its foreign ownership percentages from the beginning of its commitment. American law permits the government to block foreign investment over twenty-five in an American telecommunications company based on a subjective "public interest" standard.<sup>191</sup> China's restrictive market access criteria accomplish the same goal.

#### D. THE RELATIONSHIP BETWEEN STATE-OWNED ENTERPRISES AND THE INDEPENDENT REGULATOR

Upon accession, China must appoint an independent regulator to self-regulate its compliance with WTO commitments. To assure true independence, the regulator may have no inter-

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189. Foreign Government Investment Act of 2000, S. 2793, 106th Cong. (2000); see Foreign Government Ownership of American Telecommunications Companies: Hearing Before the Subcomm. On Telecommunications, Trade & Consumer Protection, 106th Cong. (2000) (statement of Ambassador Richard Fisher, Assistant U.S. Trade Rep.); Foreign Government Ownership of American Telecommunications Companies: Hearing Before the Subcomm. On Telecommunications, Trade & Consumer Protection, Foreign Government Ownership of American Telecommunications Companies introduced by Sen. Ernest Hollings (D-SC); Testimony by Ambassador Richard Fisher, Assistant U.S. Trade Rep., to Subcommittee on Telecommunications Trade & Consumer Protection, 106th Cong. (2000) (statement of William E. Kennard, Chairman, Federal Communications Commission); See also Caron Carlson, *Lawmakers Prepare Move Against Foreign Ownership*, WIRELESS WEEK, Sept. 11, 2000, available at [http://www.wirelessweek.com/index.asp?layout=print\\_page&articleID=CA13806&doc\\_id=](http://www.wirelessweek.com/index.asp?layout=print_page&articleID=CA13806&doc_id=). The European Union and Japan have threatened to challenge the United States at the WTO if the legislation becomes law. *Id.*

190. Barshefsky, *supra* note 30.

191. Communications Act of 1934, 47 U.S.C. § 310 (1994).

ests in the telecommunications industry.<sup>192</sup> The MII will likely evolve into the independent regulator, although at this stage the benefactor of this role is yet unclear.<sup>193</sup>

The problem lies in the historically intimate relationship and conflict of interest between carrier and regulator.<sup>194</sup> State-run companies have little to fear from the regulator that nursed them.<sup>195</sup> The MII retains one hundred percent of China Telecom and eighty percent of China Unicom. Both companies are still operated and regulated by the same entity.<sup>196</sup> China has little choice but to hire those state officials who ran China Telecom from within the Ministries until just a few years ago. Practically speaking, the knowledge pool from which to choose carrier and regulator officials is limited to those who know the industry. Therefore, nepotism between carrier and regulator is rampant, but justifiable.

For instance, in a two-month period at the beginning of 2000, the MII's Telecommunication Administration Bureau went through two Director-Generals.<sup>197</sup> The first was quickly promoted to Vice Minister of MII and the second was reassigned to be Vice President of the newly split China Telecom.<sup>198</sup> The third and present Director-General was a Bureau Director of the old China Telecom.<sup>199</sup> Additionally, the former Vice Minister of MPT heads China Telecom.<sup>200</sup>

China seeks to spin off the former ministries that were merged to form the MII into independent corporations. Enterprises associated with those former ministries include China's major postal, computer, and electronics companies. With state-run beginnings, China is depending on those former ministries to evolve into competitive companies that meet the standards the WTO Reference Paper demands. Ultimately, the people

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192. Bing Zhang & Mike W. Peng, *Telecom Competition, post-WTO Style*, CHINA BUS. REV., May 1, 2000 at 5.

193. Matt Forney, *China Gives Foreign Firms Telecom Access: New Rules May Open Sector, Maintain Regulatory Ties*, ASIAN WALL ST. J., July 7, 2000.

194. Leahy, *supra* note 134.

195. *Id.*

196. Yeong, *supra* note 115. China Unicom complained that MPT was both its competitor and its regulator, when the MPT still existed and commissioned China Telecom. See MUELLER & TAN, *supra* note 54, at 62.

197. Wang, *supra* note 126.

198. See *id.* (including Zhang Chunjiang and Chang Xiaobing).

199. See *id.* (including Su Jinsheng, the previous director of the Mobile Communication Bureau of the old China Telecom).

200. See *id.* (referring to Zhou Deqiang as the president and party chief of the new China Telecom).

needed to manage tomorrow's private companies are the government officials of today.

If MII is to be the independent regulator the WTO Reference Paper requires, it must sever its connection with China Telecom and China Unicom, an unlikely occurrence in the short term.<sup>201</sup> As a tactical move, China has structural, political, and economic incentives to favor state-owned domestic carriers and delay entry of foreign carriers.<sup>202</sup> Creating the independent regulator is often slow and time-consuming because it involves sensitive legal and political considerations. Several WTO member countries, such as Indonesia and Thailand, have signed the Reference Paper but have yet to create independent regulators.<sup>203</sup>

With the addition of newcomers to each telecommunications service sector through government license grants, the market will require each existing player to develop innovative marketing and distribution techniques to compete. To fulfill these market requirements, companies will seek the competitive expertise of foreign partners.<sup>204</sup> China has pledged that it will not attempt to influence, directly or indirectly, the commercial decisions of state-owned or state-invested companies, except as consistent with the WTO.<sup>205</sup>

China will also face pressure from foreign partners. Recently, state-owned China Unicom sold more than a twenty percent share on the New York and Hong Kong stock exchanges, raising 5.65 billion dollars.<sup>206</sup> The larger the percent sold, the less control the government retains over its telecommunications network. A foreign investor with a high percent of ownership will presumably demand voting rights or a degree of influence in management.<sup>207</sup> The Chinese government is cautiously sculpting a domestic telecommunications environment that will meet WTO commitments and fuel a competitive economy. To facilitate this process, China must clearly delineate its policy

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201. Zhang & Peng, *supra* note 192, at 5.

202. *Id.* at 9.

203. See Chong & Chow, *supra* note 82, at 7.

204. Leahy, *supra* note 134 (stating that more licenses lead to more competition which in turn leads to a need for foreign expertise).

205. Agreement on Market Access, *supra* note 21, Working Party Report Language on Commercial Operation of State-Owned and State-Invested Enterprises.

206. Wonacott, *supra* note 129.

207. Leahy, *supra* note 134 (quoting an executive of a Vodafone rival as saying, "They (Vodafone) have an equity interest but not much management control" regarding Vodafone's recent deal with China Mobile).

and guidelines in published law.

#### IV. PROSPECTS FOR "LEAPFROGGING"

##### A. PROTECTIONIST POLICY TO MONITOR AND YET ENCOURAGE "LEAPFROGGING"

China's WTO negotiations have been successful, if only for one reason: the market potential for wireless communication. China is primed to leapfrog into mobile services, the highest revenue generator in the telecommunications services market, with the necessary infusion of foreign capital and investors whose management and control interests are limited for three years.<sup>208</sup> Mobile services are the "crown jewel" in China.<sup>209</sup> The President of AT&T China expects China's telecommunications market to double in size in the next five years, increasing in value to 100 billion dollars. He forecasts that forty percent of the market will be wireless.<sup>210</sup> If his prediction proves true, investors will be lame ducks during those three years of growth.

China is uniquely positioned to avoid the current technological shortcomings of existing telecommunications systems and "leapfrog" into advanced telecommunications.<sup>211</sup> Developed countries are heavily committed to older infrastructure that constrains advancement into new technologies such as digital telephony.<sup>212</sup> The prohibitive cost of reconstructing infrastructure requires them to adapt rather than start anew.<sup>213</sup> Older systems have a long life and can be financially difficult to up-

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208. Wang, *supra* note 126 (noting that mobile telecom services are the highest revenue generator in China's telecom service market). This assumes investors will have limited power to influence management and operation with a twenty-five percent or thirty-five percent investment within the first three years. See *supra* notes 28, 32-33 and accompanying text.

209. Leahy, *supra* note 134.

210. "Twenty percent will be data, four percent will include Internet, and the remainder fixed line." Leahy, *supra* note 134.

211. L. KWABENA RIVERSON, TELECOMMUNICATIONS DEVELOPMENT: THE CASE OF AFRICA 30-31 (1993); see also MICHAEL HOBDA, TELECOMMUNICATIONS IN DEVELOPING COUNTRIES: THE CHALLENGE FROM BRAZIL 71 (1990) (explaining the possible advantages of technological leapfrogging over industrialized economies that are heavily committed to investment in previous technologies). Fully digital systems are less costly and more efficient than electromechanical systems. See *id.* at 70.

212. HOBDA, *supra* note 211, at 71.

213. *Id.* at 71 (commenting that advanced economies must find piecemeal ways of patching in new digital services when demand is perceived to be sufficiently high).

grade.<sup>214</sup> China will have the benefit of the mistakes and expertise of industrialized countries.<sup>215</sup>

Though an attractive theory, leapfrogging has critics who say the concept is little more than wishful thinking. The diffusion of telecommunications is a gradual process and the new builds on the old.<sup>216</sup> The basis of this criticism, however, comes from the 1980s, when today's possibilities of a wireless world driven by new computer technology were not anticipated. In China today, leapfrogging to wireless is possible and necessary.

#### B. CHINA CHOOSES WIRELESS

Wireless technologies are more appropriate for the scattered populations of rural areas.<sup>217</sup> If China is prepared to leapfrog, its policies will encourage wireless infrastructure outgrowth and divert wireline investment into wireless. Funneling foreign capital into the next generation of telecommunications is the most efficient allocation of resources. Other countries, such as East Germany, have used cellular service to reduce the pressure on the standard network while rebuilding and extending their existing wireline network.<sup>218</sup> China's efforts at wireless penetration will provide the initial information system to create an expansive digital wireline network. Once the wireless network is established, if wireless has equal or better capabilities than existent wireline, China will have bought enough time to avoid wireline outgrowth altogether. Thus, China will have allowed technology to prove its investments sound and strategic predictions correct.

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214. RIVERSION, *supra* note 211, at 30-31 (noting the long life of many telecom capital investments which are made for thirty to forty years).

215. Analysts estimated that developing countries installing one million telephone lines in the late 1970s paid three to five times less than the developed countries paid thirty to forty years prior. *Id.* at 71 (addressing the "economics of late-ness").

216. *Id.*

217. Paul S.N. Lee, *Telecommunications and Development: An Introduction*, in TELECOMMUNICATIONS AND DEVELOPMENT IN CHINA 3, 15 (Paul S.N. Lee ed., 1997).

218. Benjamin J. Bates, *Learning From the Evolution of Telecommunications in the Developed World*, in TELECOMMUNICATIONS AND DEVELOPMENT IN CHINA 21, 46 (Paul S.N. Lee ed., 1997) (noting an effort in East Germany after unification to bring the East's telecom network up to par with the West's, which employed cellular service to reduce pressures on the wireline system while it was built out).

### C. WIRELESS LEAPFROGGING POLICY TO SHRINK THE DIGITAL DIVIDE

Rather than anticipating a significant digital divide, leapfrogging supports the theory of technology acting as a cyber-cel connector.<sup>219</sup> A well-defined policy promoting the build-out of wireless infrastructure will bring both telephone use and the Internet to remote areas quicker than wireline. China is an ideal testbed for wireless Internet access, or Wireless Access Protocol (WAP), an example of the possibilities of convergence where the wireless acts as a cyber-cel connector to bring phone and Internet service into one hand piece.<sup>220</sup> In a country of 1.3 billion people, fewer than eleven million Chinese surf the web and only sixty-five million Chinese subscribe to cellular phone service.<sup>221</sup> China is, however, one of the fastest growing cellular phone markets in the world. Analysts anticipate increasing basic cellular subscribership and six million wireless Internet users by 2002. These numbers translate into about 386 million dollars a year in revenue.<sup>222</sup> Once rural areas are connected, the digital divide will begin to shrink and leapfrogging will enable the growth of an information economy.

### D. EFFECTIVE POLICY TO MINIMIZE THE RURAL RISK IN CHINA

The effects of expanded and cheaper telecommunications on rural commerce are well documented. In China, more than four out of five persons reside in the countryside and ninety percent of households entered the twenty-first century without tele-

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219. HOBDAV, *supra* note 211, at 5 (positing the potential for exploiting the technological gap).

220. Wang, *supra* note 126 (noting that China Mobile is vigorously building out its CMNet network to provide for WAP service). Convergence describes "a trend, now that most media can be represented digitally, for the traditional distinctions between industries to blur and for companies from consumer electronics, computer and telecommunications industries to form alliances, partnerships and other relationships, as well as to raid each others markets." NEWTON'S TELECOM DICTIONARY 223 (16th ed. 2000).

221. China Online, *supra* note 98 (noting the existence of over sixty-five million cellular subscribers as of Sept. 20, 2000); Paul Mooney, *The Mainland Unplugged: China's Mobile Masses Put WAP on Trial*, ASIaweek, May 12, 2000, at 47 (identifying the cellular phone subscribership in China at forty-three million users in 1999).

222. Mooney, *supra* note 221; see also XINHUA GENERAL NEWS (WIRE SERVICE), *Shanghai Aims at Most Wired City*, available at LEXIS, News Library, XINHUA Aug. 29, 2000. "[M]ore than half of the residential communities of Shanghai will be wired for online shopping, news, distance learning and medical services by the end of 2002." *Id.*

phones.<sup>223</sup> Telecommunications can counteract the rural exodus to cities and promote balanced economic development throughout a country. Increased communication availability brings specialized expertise from cities to rural areas, resulting in more efficient production.<sup>224</sup> The commercial emphasis on telecommunications, however, leads to investment policies that favor urban areas, leaving rural areas underserved.<sup>225</sup> Higher densities are less expensive to serve and produce higher investment returns.<sup>226</sup> Telecommunications privatization will attract the capital investment necessary to develop rural telecommunications, but without government intervention, investors will only fund profitable, urban areas.<sup>227</sup>

### 1. *Pro-Rural Policy Benefits the Country*

Connecting rural areas can contribute to national unity, understanding, and political stability.<sup>228</sup> Raising the quality of rural life contributes to the modernization of a nation. Policy-makers that integrate telecommunications into the national planning process can curb the growing divide between the information haves and the information have-nots, but they must relinquish centralized control of information.<sup>229</sup> Assessing a value to these benefits is incalculable but imperative.<sup>230</sup> Ignoring rural communities can result in significant disparity and cause social and political instability.<sup>231</sup> Telecommunications can

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223. Alford, *supra* note 162, at 304; *see also* MUELLER & TAN, *supra* note 54, at 116 (noting the lack of telephone penetration in China).

224. RIVERSON, *supra* note 211, at 16.

225. *Id.* at 18.

226. *Id.*

227. *See* Lee, *supra* note 217, at 14. China claimed that liberalization undermines the goal of universal service by sacrificing economies of scale in telephone service. *See* MUELLER & TAN, *supra* note 54, at 121 (noting that remote areas have inadequate phone capacity and long waiting lists); *see also* Lee, *supra* note 90, at 91; Bates, *supra* note 218, at 41 (noting that in Great Britain, penetration rates substantially increased when the country privatized its telecommunications sector).

228. RIVERSON, *supra* note 211, at 21.

229. *Id.*; *see also* MUELLER & TAN, *supra* note 54, at 119.

230. RIVERSON, *supra* note 211, at 31. "Cost-benefit analysis fails to consider the true benefits of the telecommunications infrastructure because of the lack of understanding of the economic and social impact of telecommunications." *Id.*

231. The gap between telecom rich and telecom poor is a situation ripe for political instability. *See* He, *supra* note 87, at 84; *see also* John Ure, *China's Telecommunications: Options and Opportunities*, in TELECOMMUNICATIONS AND DEVELOPMENT IN CHINA 245, 248 (Paul S.N. Lee ed., 1997).

China is a vast country with many minorities from the northern plains of

both threaten and empower a regime. Government policies are therefore necessary to encourage telecommunications investment in rural areas.<sup>232</sup>

## 2. *Pro-Rural Policy Benefits the Government: Promoting Countrywide Legal Cohesion*

Widely available telecommunications affects governance and the development of the rule of law in China.<sup>233</sup> Telecommunications can provide a means of effective governance. Though China's leadership is centered in Beijing and a few powerful members of the Chinese Communist Party, governance is delegated to provinces and local social units. Implementation of new federal policy must filter down to local leaders and citizenry. Illustratively, China has projected that the ministerial-level telecommunications reforms creating the MII will not be implemented at the local level for one to three years.<sup>234</sup>

## 3. *Pro-Rural Policy Benefits Foreign Investors*

The increased speed of transmitting information permits well-informed and coordinated decision making.<sup>235</sup> However, China is caught in a Catch-22: Telecommunications infrastructure is necessary to publicize new federal law, but new federal law is the source of government permission for the outgrowth of telecommunications infrastructure. Thus, the underdevelopment of China's information system threatens to impede the promises of legal stability for foreign investors in telecommuni-

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Inner Mongolia to the western high mountains of Tibet, and from the Moslem peoples of Xinjiang province in the Northwest to the Cantonese speakers of Guangdong province in the South, China has many different languages, including eight major dialects, ethnic groups, cultural traditions, and local loyalties to meld together. Long distance telecommunications are essential both for effective military maneuvering, and for national identification.

*Id.*; see also LASZLO LADANY, *LAW AND LEGALITY IN CHINA: THE TESTAMENT OF A CHINA-WATCHER* 17 (University of Hawaii Press, 1992). "There is extraordinary cohesion among people of individual provinces, and even greater cohesion among people from particular districts in a province." *Id.*

232. The relationship between telephone density and Gross Domestic Product is well understood. It maximizes the efficient utilization of resources. See RIVERSON, *supra* note 211, at 27.

233. *Id.* at 16.

234. "Premier Zhu Rongji has publicly stated that the structural reforms at all levels should be completed within three years." MII Memo, *supra* note 100.

235. RIVERSON, *supra* note 211, at 27.



cations services and the commitments of WTO entry.

Telecommunications policy that incorporates leapfrogging can minimize the risks for investors. Low return on investment in rural areas is an obvious disincentive for the state, so the burden to develop rural telecommunications will fall on the advanced urban core and foreign investors.<sup>236</sup> The WTO Reference Paper encourages members to institute a policy of Universal Service to make residential service affordable for all. A Universal Service policy acts as a cross-subsidy by charging business telephone users a higher rate and adding a surcharge to urban users' phone bills, to fund carriers that service high-cost rural areas.<sup>237</sup> The high price of phone installation acts as a cross-subsidy and means of raising capital for network expansion.<sup>238</sup> Any policy resembling Universal Service will assist to push infrastructure throughout China's remote areas to provide a connection to the urban core, leading to countrywide legal cohesion and legal stability for foreign investors.

Considering the advantages of leapfrogging, China should not look to the United States for answers to telecommunications policy, but rather for preventive guidance to avoid its mistakes. The United States telecommunications policy is burdened by its systematic development of a regulatory regime that today fails to answer questions of service convergence. Thus, for China, the United States' approach to telecommunications development and regulation is not necessarily a prescription for its own development.<sup>239</sup> Rather, leapfrogging infrastructure requires leapfrogging policy. It will soon be the United States' turn to follow China's lead.

## V. CONCLUSION

China will not reverse course at this juncture, or curb its progress by undermining WTO obligations. China is heavily committed to telecommunications development both internationally and domestically. China will honor WTO commitments

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236. Lee, *supra* note 90, at 120.

237. Communications Act of 1934, 47 U.S.C. 151 (1994) (defining the Universal Service objective as "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."); *see also* NEWTON'S TELECOM DICTIONARY 931, 939, 940 (2000).

238. The cost went down to \$240 in 1998. MII Memo, *supra* note 100, at 3.

239. Bates, *supra* note 218, at 37.

to the extent its leaders view the WTO as supporting their legitimacy by sustaining economic growth domestically.<sup>240</sup> The world that is about to witness an explosion of cheap ubiquitous communications services presents China with the challenge to open its markets and relax the hand of government.<sup>241</sup> Absent foreign capital, China will be left behind. China's sweeping telecommunications reforms in the last two years evidence the intent to counteract this possibility.

China is strategically positioned to leapfrog obsolete infrastructure and adopt a wireless backbone. Most notably, China must also leapfrog its outmoded telecommunications policy. China is uniquely situated to be a forerunner in the development of new policy to address the issues of convergence. Rather than manipulating old policy, as Western countries must, China begins with a clean slate and dedication to participating in the international marketplace.

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240. MUELLER & TAN, *supra* note 54, at 115.

241. *Id.* at 119.

