

**THE IMPACT OF CHINA'S WTO ACCESSION ON
HER FOREIGN TRADE-RELATED LAWS:
A CRITICAL APPRAISAL**

BY

LING LING HE

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TO

MY MOST BELOVED PARENTS

ZHENG MING HE AND YUN QING GONG

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STATEMENT OF AUTHENTICATION

As the author of this dissertation I hereby declare that it entirely results from my own investigation undertaken in fulfillment of the requirement for the degree of Master of Law (Honours), University of Western Sydney. It has not previously been submitted fully or partially for any degree at this or any other institution.

I further declare that all the ideas and arguments expressed in this study are to the best of my knowledge and belief, original except as acknowledged in the thesis, through mentioning relevant sources and references in appropriate manner.

Signature:

Name: Ling Ling He

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ABBREVIATIONS

EU:	European Union
FTA:	Free Trade Agreement
FTL:	Foreign Trade Law of the PRC
FTO:	Foreign Trade Operator
GATT:	General Agreement on Tariffs and Trade
GATS:	General Agreement on Trade in Services
IBRD:	International Bank for Reconstruction and Development
IPR:	Intellectual Property Rights
MFN:	Most-Favored Nation
MOC:	Ministry of Commerce, China
NME:	Non-Market Economy
NPC:	National People’s Congress of China
NPCSC:	National People’s Congress Standing Committee of China
NT:	National Treatment
PNTR:	Permanent Normal Trade Relations
PRC:	People’s Republic of China
PTA:	Preferential Trade Agreement
SCM:	Agreement on Subsidies and Countervailing Measures
SOE:	State-Owned Enterprise
SDR:	Special Drawing Rights
STE:	State-Trading Enterprises
SWF:	Sovereign Wealth Fund
TRIPS:	Trade-Related Intellectual Property Rights

TRM:	Transitional Review Mechanism
TRIMS:	Trade-Related Investment Measures
US:	United States
USTR:	United States Trade Representative
WPR:	Report of Working Party on the Accession of China's
WTO:	World Trade Organization

ABSTRACT

China was admitted to the WTO after 15 years of difficult negotiation in December 2001. China committed to undertake a series of accession commitments and to open and liberalise her domestic market as required by the Protocol on the Accession of the People's Republic of China to the WTO and the core WTO agreements, namely, General Agreement on Tariff and Trade (GATT); General Agreement on Trade in Services (GATS) and the Trade-Related Intellectual Property Rights (TRIPS). This dissertation explores why China decided to rejoin the WTO, despite what appeared to be very onerous accession commitments, and how she went about effecting changes to her trade-related laws to fit in with the requirements of the WTO laws. It argues that China's WTO admission has been beneficial for her and that her trade liberalisation has benefited both herself and the other WTO members.

CHAPTER I

INTRODUCTION TO THE THESIS

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INTRODUCTION TO THE THESIS

1.1 Introduction

The ambivalent relationship that previously existed between China and some members of GATT/World Trade Organisation extended the process of China's admission into the WTO. Ultimately the comparative advantages and gains from trade that would flow from trade with China seems to have prevailed, and China gained admission into the WTO in December 2001 following 15 years of difficult negotiation. China's admission into the WTO marks her formal integration into the global trade system, and a watershed in terms of her opening up to the world – a world she had become wary of as a result of over a century of western domination of her national affairs following the Opium War (1839 -1842). Prior to China's decision to regain WTO membership; China was very sensitive to foreign interference in her domestic affairs, even in respect of building up trade relations with western countries. With this background, it seems puzzling as to why China resolved to rejoin the WTO at the cost of binding herself not only to Western norms of transparency, market liberalisation, and intellectual property protection, but also to undertake the onerous commitments that had been imposed on her – commitments which appear to have far exceeded those required of other nations that had previously sought to join the WTO. Nonetheless, after more

than seven years of WTO membership, China appears to have carved out for herself a major seat at the WTO table, and has used it to also dramatically improve her international standing. It now has grown from having a negligible role in world trade to being one of the world's largest exporters, as well as a substantial importer of raw materials, intermediate inputs and other goods. More importantly, China seems to have drawn more attention on herself recently by reason of her investment activities through her huge sovereign wealth funds, alleged RMB devaluation, and increasing participation in preferential bi- and multilateral trade negotiations with selected trading partners.

As a condition of her admission, China had to commit herself to various undertakings included in the Accession Agreements as contained in the Report of the Working Party on the Accession of China¹ and the Protocol on the Accession of the People's Republic of China (PRC).² These required China to comply with the WTO agreements of GATT, GATS and TRIPS. The commitments were, first, market access to goods and with it a commitment to foreign trade liberalisation and tariff barrier reduction under GATT, whereby China agreed to reduce tariffs on industrial goods to an average rate of 8.9% and to sustain this average against future increases.³ Secondly, market access to services, whereby China agreed to lift the bans on market access as required under GATS. Consequently, a number of service sectors that were previously closed or severely restricted to foreign investment e.g.

¹ WTO Doc WT/ACC/CHN/49. Hereafter WPR.

² Ibid 73, hereafter Protocol.

³ Above n 1, Annex 8.

finance, telecommunications, and insurance, were required to be liberalised. Thirdly, in relation to TRIPS, China agreed to accept and adhere to international norms to protect and enforce the intellectual property rights of foreign companies and individuals in China. The nature of these commitments is not the focus of this thesis; rather its focus is on China's performance in relation to first, her acceptance of the governing laws, regulations and institutional structure of the WTO, and secondly, the amendments made to her existing domestic laws as well as the enactment of new laws to give effect to WTO laws and regulations.

With this in mind, this thesis seeks to explore and explain the following issues: first, as to why China decided to rejoin the WTO given the rigorous and exacting conditions she had to fulfil; secondly, it examines how the changes to China's trade-related laws (both domestic and foreign) fit in with the requirements of the WTO laws; and finally the impact of China rejoining the WTO both on herself and on the WTO. Based on this framework, this thesis discusses first, China's legal culture and the evolution of her trade-related laws dating back to the Opium War with a view to providing the historical context for China's decision to rejoin the WTO. Thereafter, it investigates the changes made to China's domestic laws with respect to foreign trade as required under her Accession Agreements, followed by an examination of the continuing legal convergence of China's trade-related laws and WTO laws as against the divergent trends emerging from her core trading partners, the US and the EU, in the aftermath of the current global economic meltdown. Also examined are

the yet unresolved problems in the WTO compliance regime for China's membership, which have been the frequent target of WTO disputes. The latter include, e.g. China's purported failure to legislate as well as enforce intellectual property rights (IPR) protection, and the role of her state-trading enterprises (STE). It argues that WTO admission has been beneficial for China and her trade liberalisation has benefited both China and the WTO members. While the influence of China's resurgence is still evolving, it will undoubtedly be shaped by a vast number of international players and factors in the years to come.

The discussion in the thesis is structured as follows:

Chapter I provides an introduction to the general structure of this thesis, followed by an examination of key provisions of the WTO agreements, relating to GATT, GATS and TRIPS with a view to providing context to the narrative of the changes to China's trade laws examined in this thesis.

Chapter II provides a historical perspective of China's trade-related laws. It introduces China's legal culture and the evolution of her trade-related laws dating back to the Opium Wars. Then it examines in this context the origins and evolution of China's trade-related laws and her regulatory structure, focusing on how laws were made then and now and the core pieces of law relating to foreign trade during each of the periods. The discussion is structured into five phases: (1-2) a historical perspective to China's trade-

related laws before and after the Opium War; (3) the new era from 1949 when the People's Republic of China was established; (4) the formulation of a new legal framework for foreign trade with the introduction of the "Open and Reform Policy" in 1978; and (5) the legal hierarchical system of the present trade-related laws' system in China.

Chapter III examines the reasons which motivated China to rejoin the WTO. It looks at, in this connection, the problems of China's foreign trade-related laws prior to her WTO admission to indicate the necessity for change, and provides a historical context as to why China decided to rejoin the WTO. Her motivations are mainly explained under two headings: Economic concerns, and Political concerns.

Following this, Chapter IV discusses the Concessions China had to make to gain admission, her previous ambivalent historical relationships with the then major players of the WTO, and the bilateral agreements she had to conclude with the US and the EU as a result. These agreements formed the cornerstones for China's admission into the WTO. The discussion shows that while the US and EU held differing attitudes to supporting China's application for admission during the negotiation phase, they were in agreement on the need for China to liberalise access to her domestic markets. However, the main focus of this chapter is on the evaluation of the specific provisions China was required to undertake pursuant to the Protocol and the WPR relating to

the market access commitments in goods and services, as well as the requirement relating to intellectual property rights protection.

Chapter V discusses the major changes in China's domestic laws relating to foreign trade, investment and intellectual property rights protection to fulfil her commitments to WTO accession. The Chapter examines how the new laws and regulations fit in with the core provisions of GATT, GATS and TRIPS.

Chapter VI discusses the issues of legal convergence and divergence in China's trade laws in Post-WTO China. It reveals the ineluctable legal convergence of China's domestic laws with WTO laws in respect of both her operating principles and norms, which is continuing in post-2001.

Chapter VII examines some continuing issues of discord between China and some WTO members. It explores the frequently disputed subjects between China and her main trading partners, viz., the US and the EU. These disputes include China's accession commitments implementation (especially the enforcement problem of IPR protection) and the subsidy problem of State-owned Enterprises (SOE). It explains why they cause special concern to her WTO trading partners and explores the difficulties in overcoming these issues in the short term.

Chapter VIII concludes the discussion by drawing on the main findings of the dissertation, and more importantly, it discusses the way forward as to China's

role in the world. It concludes that China's persistent and successful performance of the WTO commitments has contributed to her rapidly growing economic power, which in turn has led to a strengthening of her political power in the international forum. All of these offer China an indispensable place in the international table to reshape the WTO, especially in light of the impasse in the current Doha Round. The Chapter also highlights new issues of dispute relating to China's sovereign wealth fund (SWF) and currency devaluation. It makes the point that there are new challenges to the continuing liberalisation of world trade. It concludes by pointing out that while the influence of China's resurgence is still evolving, it will undoubtedly be shaped by a vast number of international players and factors in the years to come.

1.2 Introduction to the core WTO Agreements relating to the thesis

The GATT, GATS and TRIPS agreements are representative of the WTO laws, which form the basis of the investigation in this thesis. It is the norms of these WTO agreements that have compelled the evolution of China's trade-related laws. Consequently, a general introduction to these agreements is provided to set the background for the discussion in this thesis.

As stated above, the concessions China was required to make relate largely to goods, services, and intellectual property rights regulated by GATT, GATS and TRIPS respectively. These key WTO agreements are structured around the following core concepts. The first flows from David Ricardo's theory of

comparative advantage that trade between nations benefits all of the nations engaged in it. In other words that a nation trades because the “amount of a good that must be sacrificed internally to produce a unit of another good varies across countries.”⁴ The exploitation of these advantages enables producers to experience growth in wealth which in turn strengthens the global economy. This wealth growth would be particularly useful in aiding the development of the developing and the less developed countries. Secondly, flowing from the above, as far as possible trade barriers whether in the form of quotas, tariffs, or non tariff barriers, e.g. administrative regulations, which have the effect of hindering the flow of trade should be removed. Thirdly, all nations should agree to open their markets to goods and services and protect but enforce the intellectual property rights unless excluded in their accession commitments when joining the WTO. Fourthly, members should agree to the granting of MFN (Most-Favoured Nation) and NT (National Treatment) status to all other members of the WTO based on their commitments. Finally, all parties agree to settle their trade disputes by recourse to the Dispute Settlement Understanding of the WTO.

1.2.1 GATT

The GATT, along with the IMF and IBRD (International Bank for Reconstruction and Development), were established in 1947 as part of the 1945 Bretton Woods Agreement to stimulate recovery following World War II. GATT was

⁴ John H. Jackson, William J. Davey and Alan O. Sykes. Jr, *Legal Problems of International Economic Relations: Cases, Materials and Text* (4th ed, 2002), West Group, 12.

seen as heralding a new era in international trade based on a system of codified rules agreed to by all of its member states, with the IMF providing financial assistance to overcome balance of payments and currency problems, and the IBRD providing financial assistance for the development of infrastructure. As stated in its preamble, the aims of GATT were to promote free trade between all nations with a view to “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.”⁵ China, was one of the original GATT (1947) contracting parties, but was deprived of its position following its Revolution of 1949 and the establishment of an alternative seat of government by the “Nationalist Party” in Taiwan.

However, GATT (1947) suffered from several serious structural shortcomings amongst which were the lack of a co-ordinating umbrella body (the contemplated International Trade Organisation never being made operational), as well as the lack of a dispute enforcement method as decisions by the

Council were made by consensus meaning that any party, including the losing party, could prevent the GATT Council from adopting a Dispute Panel Report. Consequently, GATT was amended in 1994 following the Uruguay Round of talks to include a dispute settlement system under the umbrella of a new body,

⁵ See the preamble to GATT 1947.

the WTO. The new GATT, followed by GATS (1995) and TRIPS (1995), along with a host of other agreements were incorporated as Annexes to the WTO Agreement itself.

The basic idea of GATT is to promote the principles of free international trade through the imposition of obligations, disciplines and restraints on national governments, and rely on trade sanctions as the enforcement mechanism. These principles are embraced in its core provisions, which provide the standards for revision of China's domestic laws after 2001 and form the major area of investigation in this thesis. The key provisions of GATT are Art I (Most-Favoured Nation), Art III (National Treatment), Art VI (Antidumping), Art XI (General Elimination of Barriers other than Tariffs), Art XVI (Subsidies), Art XX (General Exceptions) and Art XXIII (dispute settlement). These provisions are examined in the context of China's foreign trade regime in Chapter V of this thesis. Chapter V will examine how they were adopted by China's trade-related laws for the purpose of measuring WTO commitment performance. The MFN and National Treatment (NT) principles allow business entities to be established and function without hindrance in member countries. These underlying principles of GATT allow the choice between domestically produced goods and partially or wholly foreign goods. They give business entities the freedom to choose the most cost efficient product or that which will make them more competitive, without government intervention. For example, In *Canada - Certain Measures Affecting the Automotive Industry*,⁶ certain conditions were

⁶ *Canada –Certain Measures affecting the Automotive Industry* WTO Doc WT/DS139 & 142/R (2000) (Report of the Appellate Body).

placed on an import duty exemption, which ultimately meant that the “advantage” was only available for motor imports from a small number of countries which also produced equivalent products domestically based to a prescribed formula. This was found to be a “hindrance” to a number of the other automotive companies, as the structure of the Canadian automotive industry acted to prevent other sellers from benefiting from the exemption. Consequently, it was found to be contrary to Canada’s obligations under GATT Art I (Most-Favoured Nation Treatment). Likewise, in *Korea - Measures Affecting Imports of Fresh Chilled and Frozen Beef*,⁷ the Korean government measure of requiring the separation of selling outlets of imported and frozen beef was found to be contrary to Korea’s obligation under Art III (National Treatment on International Taxation and Regulation) of GATT 1994. It was held that the government could not instruct retailers to sell only imported, or only domestic products, as this modified the “conditions of competition” and constituted discrimination.

More importantly, GATT Art VI prevents the dumping of below cost goods on international markets. It has proved to be of special relevance to China given the dispute of her market/non-market status, which is examined in Chapter VII. The purpose of Art VI is to prevent "serious harm being caused to domestic industry"⁸ by foreign corporations offloading on to the market their cheaper

⁷ *Korea- Measures Affecting Imports of Fresh Chilled and Frozen Beef* WTO Doc WT/DS161 & 169/AB/R (2001) (Report of the Appellate Body)

⁸ GATT, Art. VI.1

products. An illustration of this is the *Japan – Trade in Semi-Conductors*⁹ case where the US wished to stop exports from Japan of below cost semi-conductors to protect its domestic industry whereas the EC wanted it to continue in order to keep the retail cost of computers down.¹⁰ Upon litigation by the EC the Panel found against Japan holding the application of the restriction to include the EU to be too wide.

Furthermore, GATT contains many exceptions that member countries may invoke in order to afford protection to domestic industries.¹¹ An example which affects corporations trading in multiple member countries is found in Art XVI¹² and the *Agreement on Subsidies and Countervailing Measures (SCM)*.¹³ Subsidies are classified as prohibited, actionable, or non actionable and reflect the different degree of egregiousness of these practices.¹⁴ The removal of subsidies is intended to create a level playing field for international corporations. This is due to the level of transparency that GATT offers by removing the majority of government protection for domestic industries. Moreover, trade between nations is more easily facilitated where goods are traded at fair market value between member countries. An example of allowable subsidies is a government offering grants for research and development as well as funding for compliance with new legislative regimes.¹⁵

⁹ *Japan – Trade in Semi-Conductors*, BISD 35S/116 (Report by GATT Panel Adopted on 4 May 1988).

¹⁰ *Ibid*, 118

¹¹ GATT, Articles II, VI, XVI, XIX, XX & XXI.

¹² *Ibid*, Article XVI.

¹³ *Agreement on Subsidies and Countervailing Measures*, 1994.

¹⁴ *Ibid*, Articles II, V & VIII

¹⁵ *Ibid*, Article 8 (2).

Another exception contained in GATT Art XXI is the general exception to member's obligations for certain measures "necessary for the protection of its essential security interests." This is a provision mirrored also in the GATS¹⁶ and TRIPS Agreement.¹⁷ Art XXI (b) of GATT provides three specific situations which allow for protection of security interests, while Art XXI (c) exempts members' obligations for the "maintenance of international peace and security". The breadth of these exceptions have been widely criticised with some arguing that through them, the WTO has placed itself "in the vanguard of political skirmishing over globalisation."¹⁸

1.2.2 GATS

Economies reputedly tend to produce more services than goods. GATS seeks to facilitate trade in services as between member countries. With this in mind, it defines services broadly to encompass any activity associated with selling.¹⁹ It also recognises that service industries operate not only via cross border supply of service but also when entities have a commercial presence in a country;²⁰ that some enterprises may participate in both trade in services and trade in

¹⁶ GATS, Article XIV (Exceptions to the Rule of Non-discrimination) *bis*.

¹⁷ TRIPS, Article 73.

¹⁸ David Robertson, *Setting the Record Straight: Free Trade, NGOs and the WTO* (2000) Policy <<http://www.cis.org.au/POLICY/spr00/polspr00-4.htm>> at 10 August 2008.

¹⁹ Services are defined in GATS Article 1.2(a)-(d); see also *EC – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc, WT/DS27AB/R (adopted by DSN 25 September 1997).

²⁰ *CANADA – Certain Measures affecting the Automotive Industry* WTO Doc WT/DS139 & 142/R (2000) (Report of the Appellate Body).

goods;²¹ and that while not all services are tradeable those that are include engineering, banking, accounting, insurance, telecommunications and consulting.²²

The basic premise of the GATS Agreement is similar to all other WTO Agreements in that it is a system based around the removal of any favourable treatment being bestowed upon single nations.²³ Thus GATS also protects those engaging in the trade of services by three ways largely, namely the MFN (Art II), market access (Art XVI) and National Treatment (Art XVII). All China's efforts examined in this dissertation to accommodate GATS after its WTO membership related to these principles. However, in contrast with the GATT national treatment obligation, which applies to imported goods regardless of whether they are bound under Members' Goods Schedules, the national treatment obligation of a Member under the GATS is limited to the scope of its specific commitments set out in its Services Schedule.²⁴ According to GATS Art XVII, for those service sectors to which it has granted market access in the sectors inscribed in its Schedule, the Member must accord services and service suppliers of any other Member, treatment no less favourable than that it accords to its own like services and service providers, subject to any conditions and qualifications provided in the Services Schedule.

²¹ *European Communities – Regime for the Importation, Sale and Distribution of Bananas* WTO Doc WT/DS27/AB/R.

²² Andreas F. Lowenfeld, *International Economic Law* (2002) 111.

²³ Most Favoured Nation and National Treatment articles are common in WTO Agreements, for GATS, see Article II.

²⁴ GATS Articles XVI and XVII.

These provisions in GATS clearly represent an international system that advocates freedom of trade across international borders, and have clearly influenced the revisions and amendments to Chinese domestic laws directed at liberalising her international trade after 2001. Moreover, Art XVI removes some of the potential hindrances to market access by providing that a member shall not restrict the “number of service suppliers”, limit “the total value of service transactions or assets”, or the total “number” or total “output of service operations, nor restrict the number of employees by supplier or sector”.²⁵ Further more, such measures must not “restrict or require specific types” of service supplier, or “limit the participation of foreign capital”.²⁶

1.2.3 TRIPS

Intellectual property rights (IPR) make up an important part of the rights to trade. They provide various fixed period monopoly rights in trade. International agreements on intellectual property date back over a century. From the late 1970s there was a growing realisation particularly in the United States, that counterfeiting of trademarked products, and products introduced on the grey market,²⁷ were having a considerable adverse impact upon trade revenues.

²⁵ Ibid, Article XVI (2)(a), (b), (c) and (d).

²⁶ Ibid, Article XVI (2) (e) and (f).

²⁷ Parallel or grey market imports are not imports of counterfeit products or illegal copies. These are products marketed by the patent owner (or trademark- or copyright-owner, etc) or with the patent owner's permission in one country and imported into another country without the approval of the patent owner.

During the 1980s, there was a rapid increase in international trade and a substantial shift to high-technology products. Businesses, and particularly multinational corporations, were very concerned about the protection of their products whilst trading. The widely varying standards in the protection and enforcement of (IPR) and the lack of a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods became a source of tension in international economic relations.²⁸ This led to the voicing of concerns about piracy, lax intellectual property rights enforcement and the establishment of minimum standards for IPR protection as well as effective international mechanisms for their enforcement. As a result, the United States and other developed countries increased global pressure to include the protection of IPR in the GATT 1994 and forced developing countries to initiate negotiation of a new agreement on TRIPS with the clear objective of universalising the standards of IPR protection.²⁹

The preamble to TRIPS states that its purpose is to "promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade". Consequently, like GATT and GATS, TRIPS too introduces the MFN³⁰ and National Treatment³¹ principles into intellectual property law. This ensured that a member's treatment of foreign

²⁸ GATT Focus Newsletter, December 1993, at 12-14.

²⁹ Correa CM, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (2000), Zed Books.

³⁰ TRIPS, Article IV.

³¹ *Ibid*, Article III.

corporations was “no less favourable” than that which it accords to domestic corporations, and that an advantage granted to a corporation from one member is “immediately and unconditionally” available to all other members.³² Three main types of IPR regulated by TRIPS are patent, copyright and trademarks. These three compose the basic IP laws of China and are examined below. While the Chinese Copyright Law and Trademark Law were both revised in 2001, its Patent Law was the first one to be amended among these three, and recently had its third amendment in 2008 to reflect the Chinese Government’s goal of an “innovative country”.³³

The most significant feature of TRIPS is that it obligates WTO-member countries to (1) provide minimum intellectual property rights protection through domestic laws; (2) provide effective enforcement of those rights; and (3) agree to submit disputes to the WTO dispute settlement system.³⁴ Articles 7 (Objectives) and 8 (Principles) of TRIPS provide a framework for the interpretation and implementation of IPR. Art 7 specifically states that,

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology ... and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

³² Ibid, Articles III and IV.

³³ *New China Patent Law is unveiled* (2009) Intellectual Property Protection in China <http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=265466&col_no=934&dir=200902> at 10 March 2009.

³⁴ TRIPS, Articles VII & VIII.

The principles in Art 8 build on the Art 7 objectives by acknowledging that member countries may adopt measures to promote the public interest in sectors that are vital to their individual socio-economic and technological development.³⁵ These provisions are critical to exploring the enforcement problems in China, which have been a long-debated issue, and which is examined further in Chapter VII below.

1.3 Conclusion

Overall, the WTO agreements have resulted in a reduction of governmental restrictions on access to markets and of regulations that dictate how parties must operate within the market. GATT and GATS allow entities to make use of the free movement of goods and services to their advantage. TRIPS ensures that entities receive protection from the unauthorised use of their ideas, inventions, and reputation that enable them to continue carry on their operations. Therefore, WTO Agreements have been said to be not only about “freeing up” trade between members, but also as enabling business entities to function without hindrance within member countries.

However, it also has been argued that the requirement that all nations reduce trade barriers with a view to free trade pursuant to the WTO are “naive” and “manipulative”, given the resulting difficulties for developing nations as seen in the response to the International Labour Organisation (ILO) Report on

³⁵ Ibid, Article VIII.

Indonesia.³⁶ Some perceive globalisation as “the latest clever way of continuing a process that has used slavery... as the mechanism of market penetration,”³⁷ and WTO policies as effectively freeing up trade for developed countries only and allowing them to protect their own industries. More importantly, the change of the geographical power relationships indicated by the current Doha Round has challenged the old international governance order of the WTO. The bipolar trading system once driven by the US and the EU largely has been questioned due to the emergence of large developing countries, such as China, India and Brazil, and the mandate and purpose of the WTO being seen as being incapable of responding to these new political realities and the power relationships in the international economic system today.

Nonetheless, in its favour the WTO has been instrumental in unifying policies of member nations for global goods and services. With 153 member nations representing more than 95% of total world trade,³⁸ it must be credited with much success in its global efforts. As the only organisation responsible for rules of trade between nations,³⁹ it represents the principles and practice of

³⁶ The ILO, viewed as the “competent body” through which the WTO recognises “core labour standards” – namely, the right of association, collective bargaining, prohibition of forced labour, child labour exploitation and non discrimination in employment - had in a 1992 review of employee rights in Indonesia found violations in each of the internationally recognised core labour standards in Indonesia. For example, it found the requirement that all unions be members of a nationwide union heavily influenced by the government to be an infringement of workers’ rights, as was the limitation on the right to organise and bargain collectively to the members of such national union.

³⁷ *Some Important Myths about Globalization* (2002) National Observer – Australia and World Affairs <http://goliath.ecnext.com/coms2/gi_0199-2029379/Some-important-myths-about-globalisation.html> at April 20, 2008.

³⁸ Ian F. Fergusson, *The World Trade Organization: Background and Issues* (2007) Congressional Report Service 2.

³⁹ *The WTO in brief* (2008) World Trade Organization <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm> at 21 September 2008.

international economic law. It is these rules and principles as demonstrated in GATT, GATS and TRIPS at large which govern the international trade system. It is also these rules and principles that China's trade-related laws seem to be rapidly converging with, despite some diverging trends from other WTO members flowing from the 2008 economic meltdown. Chapter II now turns to look at the historical context of China's trade-related laws.

CHAPTER II

HISTORICAL PERSPECTIVES OF CHINA'S TRADE-RELATED

LAWS

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HISTORICAL PERSPECTIVES OF CHINA'S TRADE-RELATED LAWS

2.1 Introduction

The evolution of China's trade-related laws is a product of policy decisions of the Central Government to build an institutional framework to support economic growth. It is thus influenced by various conditions, along with the different development phases in China's history. The focus of this Chapter is to provide a historical perspective of the evolution of China's trade-related laws' system. It examines how laws were made then and now and the core pieces of law relating to foreign trade during different periods, to see how the foreign legal norms interplay with the Chinese local legal conditions. But first, it introduces China's legal culture by reference to her profound philosophies, which continue to influence China's legal system until today.

2.2 The context - China's legal culture

China has possessed a well-developed legal system for over 2,000 years, complete with detailed legal codes, procedures for law-making, rules for the hierarchical ordering of legislation, a multi-level court system, and procedural

rules governing all aspects of litigation.⁴⁰ In order to develop an understanding of her trade-related laws, it is imperative to appreciate the social, cultural and historical aspects of Chinese legal tradition that shaped her current status. Such analysis is helpful, not only in understanding the influences and ideologies supporting the current institutions of law in China, but also in grasping the fundamental differences between western and Chinese legal culture, as well as in conceptualising the character of the “rule of law”, and of the problems and difficulties China faces in the process of integrating her domestic laws with the WTO rules.

China’s current legal system reflects a number of influences including the deeply-rooted philosophies and culture of classical China, such as Daoism, Confucianism and Legalism.⁴¹ By far the most significant influence is from the latter two schools, which have been termed “*li*” and “*fa*” respectively. These two are the foundation of China’s traditional legal order.

Legalism, as opposed to Confucianism, believes that it is impossible to teach people to be good. Law and punishment, therefore, are essential to maintain public order by instructing people what to do and what not to do. Its view is that the promulgation of written codes is a necessary instrument for regulating conduct and enforcing the authority of the state. The legalist approach denies the usefulness of benevolence, righteousness and morality as means of ending

⁴⁰ Randall Peerenboom, *China’s Long March Towards the Rule of Law* (2002), Cambridge University Bridge, 36.

⁴¹ James M. Zimmerman, Esq, *China Law Deskbook: A Legal Guide for Foreign-Invested Enterprises* (2005) American Bar Association 31.

disorder or as an aid to governing, and advocates rewards and punishments by which to keep all people in order. It claims that “a sage ruler relied upon law, not upon himself.”⁴² It not only opposed the Confucian use of virtue to regulate behavior, but also argued that its continued operation was ultimately harmful to the successful ordering of the state. This view gathered force during the Qin Dynasty (221 BC-206 BC), which marked the beginning of Imperial China. However, Legalism has itself been criticised for benefiting those governing, rather than being an instrument of divine sanction or supreme authority.⁴³ Thus, the “rule of law” in ancient China has been characterised as a rule of man, and differentiated from its understanding in western society.

To explain further, Confucianism maintains that the ruling class is controlled by virtue rather than by law. Moral rules should therefore be used to regulate behavior in harmony with the universe. Consequently, there has never been a rigid code of law given that good conduct had to come from within the person and could not be enforced by some organisation.⁴⁴ The Confucian School believes that the good or bad intentions of people depended on education, and that this education resulted from the moral influence exerted by some individuals at the top. The man who holds the highest position is the one with the greatest ability to influence. Viewed from this perspective, the principle of

⁴² Yan Wang, *Chinese Legal Reform: The Case of Foreign Investment Law* (2002) Routledge 21.

⁴³ For an analysis of the ideal of a rule of law in ancient China, see Turner, Rule of Law Ideals (1992) 6 *Journal of Chinese Law* 1.

⁴⁴ Patricia Blazey and Kay-Wah Chan (eds), *The Chinese Commercial Legal System* (2008) Lawbook Co. 22.

“rule by man” was actually derived from that of “rule by virtue”.⁴⁵ Consequently, “rule by man” was the conventional way of guiding human relations in China, with the leader of the group resolving disputes and dictating the instructional program by which the group is to learn appropriate behavior. It was seen as better to have a leader ruling with virtue than a set of impersonal laws prescribing proper behavior. As Confucius explained in the *Analects*,

” Govern the people by regulations, keep order among them by chastisements, they will flee from you; govern them by moral force, keep order among them by ritual, they will keep their self-respect and come to you of their own accord”.⁴⁶

Confucianism was officially incorporated into Chinese law in the Han Dynasty (206 BC – 220 AD), which played a unique position in linking the legal system of the former while laying the foundation for the later. Effectively, this refers to the incorporation of the spirit, and sometimes of the actual provisions, of the Confucian philosophy into the legal codes.⁴⁷

In summary, both Confucianism and Legalism played paramount roles in the development of the Chinese legal system. They were products of the political and social changes occurring during the period of China’s Warring States (476 BC-221 BC). They coexisted but took different approaches in searching for the reunification of the then divided China. Both approaches were employed by the

⁴⁵ Wang, above n 42, 20.

⁴⁶ Confucius, *The Analects* (2004) First World Publishing 55.

⁴⁷ Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch’ing Dynasty Cases with Historical, Social and Juridicial Commentaries* (1973) 29.

Chinese emperors to govern the country. While the Confucianist viewed legal institutions as being secondary to the judgment of moral men, the Legalists insisted that the ruler was above the law. In other words, they both relied on the principle of “rule of man”, with the former dominated by virtue and the latter by law. These two philosophies have blended over the centuries, but most of the time, the Confucian doctrine of “*li*” dominated both law and society in traditional China. The element of “*li*”, which was absent in the ancient law enacted by the Legalist, however, was incorporated into it by the Confucianists at a later date. The Confucianization of law is a gradual process. After the Tang dynasty (618-970), law was crystallized by the Confucianists.⁴⁸ Since then, the law retained its general characteristic for centuries with no fundamental changes to it throughout the history of China until her promulgation of modern laws.

China has now moved a long way from the primarily “rule of man” governance approach of traditional China toward establishing a “rule of law” system that increasingly seeks to restrain the arbitrary exercise of state and private power, and assist its transition from a centrally planned economy to a socialist market economy. For example, China is now on the way from a single internal draft based law making process, where the National People’s Congress simply proclaimed the enactment of a law, to a more open public participation process. Greater participation by individuals, businesses and social

⁴⁸ The Confucianization of law began in Han Dynasty (206 B.C.-202) and continued through the Southern and Northern Dynasties (420-589) and fully developed during Sui (581-618) and Tang (618-907) Dynasties.

organizations through public hearings, soliciting expert and interest group views, and publishing draft rules and policies for widespread comment is now increasingly recognised to be an important mechanism for gathering the information and expertise on which rational regulation is based.⁴⁹ However, the influences of the traditional philosophies posed on Chinese history and her laws still remain considerable. The rule of man still has its influence in contemporary China. Consequently, Chinese legal history is essentially an exploration of the relationship between “*li*” and “*fa*” competing system of law, ultimately resulting in an unsettled fusion that continues to persist until today.⁵⁰

2.3 Evolution of China’s foreign trade-related laws’ system

For 2000 years China maintained a feudal dynasty of governance emphasising complete isolation. The overall political structure within China remained relatively constant from the beginnings of the Qin Dynasty (221 BC - 206 BC) until the Ch’ing Dynasty (1644 -1911) – the last feudal dynasty in the history of China. The autocratic rule promoted little exchange of culture or commerce beyond the Great Wall. The Opium War (1839 -1842) marked China’s first official contact with foreign culture and the beginning of China’s tortuous process of learning from Western legal systems and resulting in a struggle between self-affirmation and self-navigation of the Chinese people. The

⁴⁹ Jamie P. Horsley, *The Rule of Law in China: Incremental Progress* (2008) Center for Strategic and International Studies
<http://www.chinabalancesheet.org/Documents/Paper_Rule_of_Law.PDF> at 4 May 2008.

⁵⁰ Blazey and Chan (eds), above n 44, 23-24.

founding of the People's Republic of China (PRC) in 1949 did not stop the transplanting of foreign legal concepts and principles, though the cultural source was the Soviet Union alone which caused the generation of a legal system based on a rigid economy, combined with the politicisation of law during the Cultural Revolution (1966 -1976). It was not until "Open and Reform" policy of 1978,⁵¹ that the construction of foreign trade-related laws' system started, a move which gradually led to China's efforts to gain WTO admission.

2.3.1 Before the Opium War

China has been, for much of her history, a "forbidden kingdom" from which foreigners were excluded. The sheer extent of China - her size, resources and population - led her to ignore and dismiss developments outside as irrelevant or dangerous. The proud and self-sufficient Chinese refused to admit a need for industrial products from the West, typified in Emperor Ch'ien-lung's remarks to an emissary of King George III, "We possess all things."⁵² Furthermore, the practice of trade even within China remained underdeveloped by reason of the merchant class being regarded as forming the lowest rank of Chinese society during the Chou Dynasty (1100-256 BC). This society emphasised intellect over wealth and physical strength, and her citizenry was ranked as follows: scholars; farmers; artisans; merchants; and lastly, soldiers, thieves and

⁵¹ It refers to the program of economic reforms called "Socialism with Chinese characteristics" in PRC, which was started in 1978 by pragmatists within the Communist Party of China (CPC) and led by Deng Xiaoping and are ongoing as of the early 21st century. The goal of Chinese economic reform was to generate sufficient surplus value to finance the modernization of the mainland Chinese economy.

⁵² Immanuel C. Y. HSU, *The Rise of Modern China* (1995) Oxford University Press 142.

brigands.⁵³ Because of the influence of the mercantile system, there was little space for domestic trade regulations, not to mention the foreign business laws.

The early Han dynasty saw the recorded trade between China and her outside neighbors ranging from the Roman Empire to the Tibetan mountains to provinces throughout Central Asia. However, no official Codes were created to regulate these early foreign business activities. The Confucian value system (which replaced the Legalist philosophy that had dominated the Qin Dynasty), was reinstated as the basis of imperial government and directed the domestic as well as the minor foreign business matters.⁵⁴ During the transitional period from late Ming to early Ch'ing Dynasties, Western Europeans and Russians began to arrive to trade in China.⁵⁵ However, the Chinese attitude to trade in that period had as its basis the notion of tributes to the ruler than formal trade concession:

“The Chinese took for granted that their emperor was everyone's overlord and that de facto...rulers of non-Chinese tribes, regions, and states were properly his feudatories. Foreign rulers were thus expected to honor and observe the Ming ritual calendar . . . and . . . to send periodic missions to the Ming capital to demonstrate fealty and present tribute of local commodities. Tributary envoys ...were permitted to buy and sell private trade goods at specified, officially supervised markets . . . On balance, the combined tribute and trade activities were highly advantageous to foreigners ... so much so that the Chinese early

⁵³ Ibid, 92.

⁵⁴ John W. Head, 'Codes, Cultures, Chaos and Champions: Common Features of Legal Codification Experiences in China, Europe and North America' (2003) 13 (1) *Duke Journal of Comparative and International Law* 17-18.

⁵⁵ HSU, above n 52, 92.

established limits for the size and cargoes of foreign missions and prescribed long intervals that must elapse between missions.”⁵⁶

As a result, the foreign trade activities were significantly restricted, and only a few trading items were permitted. This strict trade policy, however, encouraged the widespread smuggling of goods between Chinese merchants and foreign traders. By the late Ming period, thousands of venturesome Chinese had migrated to become mercantile entrepreneurs in the various regions of Southeast Asia and even in Japan. In an attempt to enforce its foreign trade regulations the Ming court closed all maritime trade ports, except the one at Canton in the early 16th century.⁵⁷

2.3.2 After the Opium War

These restrictive foreign trade regulations ended with the Opium War in 1839, which forced China to open her doors to foreign traders on terms calculated to give every possible advantage to those traders at the expense of China’s domestic economy and industry. Various “spheres of interest” were established on Chinese territory by the provisions of unequal treaties that China was forced to sign with the Western countries. In addition, China was also compelled to open up some special ports and trading centers in which extraterritoriality and a degree of separate jurisdiction were granted to foreign nations. Consequently, China was fully open to foreign exploitation, making the

⁵⁶ New Encyclopaedia Britannica, China (1987) 113-128.

⁵⁷ Clyde D. Stoltenberg, ‘China and WTO: The Implications of Membership in Historical Context’ (2002) 45 (4) *Thunderbird International Business Review* 447.

development of domestic industry extremely difficult, not to mention the development of legal progress. China remained in this semi-colonial status for almost a century and her economy gradually but steadily deteriorated to the point of almost total collapse.

This experience made China realize that it had been surpassed by the superior technology and superior systems of modern Western countries, and in which the legal system occupied a central position.⁵⁸ Consequently, attempts were made to study these foreign systems. For example, some officials and students were sent to Japan and Europe in the late Ch'ing Dynasty (1644-1911) to study the foreign legal culture.⁵⁹ Based on the European capitalist legislation, the *Ch'ing Commercial Code* was drafted, while some other new laws copying Western patterns on a broad basis.⁶⁰ Moreover, the National Government, which replaced the Qing Dynasty in 1911, promulgated a series of comprehensive legal codes based on a combination of the European continental model used in Germany and later Japan as well as the Anglo-American model.⁶¹ These laws introduced Western legal principles to China for the first time and were known as the *Collection of the Six Laws*.⁶² Unfortunately, due to the incompatibility of the newly-designed legal system with the conservative social and legal structure, none of these laws were effectively implemented throughout the territory of China.

⁵⁸ Wang, above n 42, 9.

⁵⁹ *Ibid*, 10.

⁶⁰ *Ibid*, 28.

⁶¹ Albert HY Chen, *An Introduction to the Legal System of the People's Republic of China* (1988) Butterworths Asia 22.

⁶² *Ibid* 30.

2.3.3 The founding of the PRC (1949)

Following the civil revolution of 1949, the People's Republic of China was founded. Given the humiliation China had suffered at the hand of foreign powers, she adopted a very stringent protective trade policy focusing on the need for domestic industrialisation and strict control of import and export activities. China closed her doors to almost all foreign countries, except the Soviet Union. As a consequence of the influence of Marxist-Leninist principle, a Soviet-style political and legal system and socialist legality was introduced into China under the first Constitution of the PRC in 1954.⁶³ A legal system based on the Soviet model was formed and many Soviet laws were adopted. Most of these laws, however, soon became ineffective due to subsequent internal political skirmishes. During the Cultural Revolution (1966-1976), the Chinese legal system reflected the shifting currents of class struggle while at the same time facilitating a highly centralised planned economic system.⁶⁴ Economic plans and administrative orders, rather than law, bound local governments and enterprises across all sectors of manufacturing, distribution, and service. As a result, the legislation in respect of the foreign trade-related laws lagged some decades behind those of her trading partners.

⁶³ Albert H. Y. Chen, '*Legal Thought and Legal Development in the People's Republic of China 1949-2008*' (2009) Social Science Research Network <<http://ssrn.com/abstract=1369782>> at 22 May 2009.

⁶⁴ Stoltenberg, above n 57, 447.

2.3.4 The Opening up of China since 1978

Learning from the failure of the Cultural Revolution, the focus of strategic development during this period was to shift to "socialist modernization" through the Third Plenary Session of the Eleventh Central Committee in 1978.⁶⁵ This, together with Deng Xiaoping's "Open Door Policy", pursued a policy of promoting economic development and foreign investment. Since then, the PRC leadership has consistently called for improvements to China's legal system to further her economic development plans. The formulation of a legal framework for foreign trade and investment attracted great attention. As the General Secretary Zhao Ziyang stated in his report to the thirteenth Party Congress in 1987, there was an imminent need to "further perfect legislation governing business dealings with foreign firms."⁶⁶ Moreover, Deng Xiaoping's legendary tour of southern China in 1992 highlighted the significance of the role of law in facilitating the construction of a socialist market economy.⁶⁷ Furthermore, the report adopted at the Fifteenth Party Congress in 1997 officially embraced the policy of "ruling the country according to the rule of law and constructing a socialist rule of law state."⁶⁸ As a result, a speeding up of legislative work on economic matters was called for. Hundreds of foreign trade laws and regulations governing import and export administration, foreign-funded enterprises, custom tariffs, foreign exchange control, and quality control were

⁶⁵ Naughton, B, *Growing out of the plan: Chinese economic reform, 1978-1993* (1995) Cambridge University Press 112.

⁶⁶ Zimmerman, Esq., above n 41, 52.

⁶⁷ Chunming Jin, *A Brief History of the People's Republic of China 1949-2004* (2007) 35 <<http://ssrn.com/abstract=1369782>> at 28 June 2008.

⁶⁸ Chen, above n 63, 16.

promulgated, such as *Foreign Capital Enterprises Law*,⁶⁹ *Customs Law*⁷⁰ and *Import and Export Commodity Inspection Law*.⁷¹ These laws were intended to remove uncertainties associated with investing and trading with China, as well as facilitating China's integration into the world trading community. A legal framework governing foreign business activities was emerging gradually.

2.4 The regulatory system and the legislative hierarchy in China

As China is a unitary state in which state power is an individual whole, the legislature (referred to as the National People's Congress (NPC)), is officially the highest organ of state power. It is the only authority to adopt and amend the Constitution. Besides NPC, there are also some other organs which enact legislation at various levels. While the NPC Standing Committee (NPCSC) has the power to enact and amend laws other than those that are enacted by the NPC, and to supplement and amend those laws made by the NPC while the NPC is not in session, the State Council is empowered to enact administrative

⁶⁹ First approved by the Fourth Session of the Sixth National People's Congress on April 12, 1986, revised in accordance with the Decision to Revise the Foreign Capital Enterprises Law of the People's Republic of China made at the 18th meeting of the Standing Committee of the Ninth National People's Congress on October 31, 2000.

⁷⁰ First adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress and promulgated by Order No. 51 of the President of the People's Republic of China on January 22, 1987, amended in accordance with the Decision on Amending the Customs Law of the People's Republic of China adopted at the 16th Meeting of the Standing Committee of the Ninth National People's Congress on July 8, 2000.

⁷¹ First adopted at the Sixth Meeting of the Standing Committee of the Seventh National People's Congress on February 21, 1989, amended according to the Decision on Amending the Law of the People's Republic of China on Import and Export Commodity Inspection of the 27th Meeting of the Standing Committee of the Ninth National People's Congress on April 28, 2002.

regulations to implement national laws as well as regulations regarding matters falling within its administrative power. Ministries under State Council, e.g. People's Bank of China and the administrative organs directly under the central government are in charge of enacting ministerial and departmental rules relevant to the specific matters they regulate. The same hierarchical system applies to the local government as well.

Five main types of legal sources are employed currently in China, with scope of application and level of authority in a hierarchical order, namely, Constitution; National Laws; National Administrative Regulations, or Provisions or Measures; National Ministerial Rules or Regulations and Local Regulations. As a general rule, none of the laws or regulations at any level must contravene the Constitution, and legislation enacted by the former legislative hierarchy always takes precedence over the latter.⁷² As such there exists a multiplicity of legislative bodies and administrative systems that add to the complexity of the Chinese legal system and her administration.

⁷² It should be noted that there are also some types of legal interpretation that have close relation with foreign business, with Legislative Interpretation holds the highest significance, followed by the Administrative and the Judicial and Procuratorial Interpretations. For example, the *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues in the Concrete Application of the Law in Handling Criminal Cases of Intellectual Property Infringement* in 2007.

Figure 1. The Legislative Hierarchy of China

Legislature	Legal Norm
NPC	Constitution
NPCSC	National Law
State Council	Administrative Regulation
Ministries	Ministerial Rule
Local Governments	Local Regulation and Rule

2.5 Conclusion

China's legal system has experienced a disruptive evolutionary process that has been shaped by her history. Unlike the Western legal system, where law is supposedly considered to be an expression of popular will and as enforcing social norms, the legal system in China is viewed largely as a mechanism of social control within the dominant ideological framework. Seen this way, law is to a large extent a reflection of the culture, ideology and social environment it seeks to regulate. Viewed from this point, it is not difficult to understand that the influence of the traditional philosophies, Confucianism in particular, still exists in shaping the direction of China's legal development even today. It is consequently remarkable that China embraced the onerous commitments imposed by WTO accession. As will be shown in Chapter IV, this has brought substantial alignment in commercial matters between China's domestic laws

and international laws. The next Chapter examines the reasons why China decided to rejoin the WTO and to undertake the commitments that it required.

CHAPTER III

CHINA'S DECISION TO REJOIN THE WTO

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3.1 Introduction

As noted above, the semi-colonial status made China sensitive to foreign interference in domestic affairs, even with respect to building up foreign trade relations with western countries. Viewed from this perspective, one wonders why China rejoined the WTO at the cost of opening up its domestic market to the world, as well as binding herself to Western norms of transparency, procedural fairness and intellectual property protection. China's humiliation in the Opium War resulted in the strict foreign trade policies following the establishment of the PRC in 1949. However, it also inspired China to realise the importance of national development, and that without national prosperity, the country's security could never be guaranteed. Under Chairman Mao's leadership (1949 -1976), China developed, on the one hand, a well-ordered central planned social system which enabled China to stand on its own, while on the other, she suffered the downside of being almost isolated from the world. Her stringently protective trade policy emphasised the need for domestic industrialisation and strict control of import and export activities during the early years of the new PRC. As a result, within a few decades after the 1949 Revolution, China's development levels had begun to lag far behind those of the developed Western economies. By contrast, other trading nations

having learnt from the shortcomings of insularity in trade in the years following World War II, had regrouped under a much more rejuvenated GATT established under the WTO umbrella in 1994. Their success made clear that no trading nation of any worth could afford to be outside it. It was in this context and in the face of the untrammelled ability of major players such as the US to slap onto China unilateral sanctions, trade retaliation measures, constant trade wars and no avenue for redress of such treatment, as well as China's own realisation of the benefits of foreign direct investment (FDI) that China decided to bite the bullet. In other words, the opening up of the domestic market to the world was seen as being the way to national prosperity. Having realized this, successive Chinese Governments changed their attitude to Westerners and started to engage with foreign businesses.

Deng Xiaoping's "Open and reform" policy in 1978 mirrored this landmark transfer. China's subsequent remarkable economic growth showed the entire world the success of this "open door" policy. After more than a decade of adopting this policy, however, some economic and social problems surfaced and blocked the way towards her continuing economic growth. Moreover, while the nascent legal framework governing the foreign trade played an indispensable role in foreign business activities, it also had some drawbacks, e.g. the conflicts between the laws promulgated by the various administrative levels. Different lawmaking entities sometimes issued inconsistent legal rules on the same or related subjects. And also, some regulations or rules were changed without immediate notice or widespread publication. As a result, it

seemed it was time for China to start a new era of the “open door” policy to assist in the resolution of all these problems. Consequently, China made the decision to rejoin the WTO and further open her market to the world for full international integration. To give it focus, I introduce first David’s theory of Comparative Advantage and Gains from Trade to provide a theoretical foundation to China’s decision, and proceed to discuss her concerns to rejoin the WTO under the headings – political concerns and economic concerns. However, the core concern was economic from the Chinese perspective, political security lay in economic strength.

3.2 The international trade theory – Comparative Advantage and Gains from Trade

International trade is generally justified under the theory of comparative advantage, which evolved from the theory of absolute advantage by David Ricardo more than 150 years ago to cope with (or explain) the international trade.⁷³ It holds that nations trade because the amount of a good that must be sacrificed internally to produce a unit of another good varies across countries. Different goods require different factor inputs; and different countries have different factors endowments. A country has a comparative advantage in an industry if its relative performance in that industry is better than its relative performance in other industries. It will specialise in that production and export

⁷³ Jackson, Davey and Sykes, above n 4, 9.

of those goods for which it is best suited, given its endowments of factors of production. In this case, every country has a possibility to have a comparative advantage in something. Even a country that has no absolute advantage when compared with other countries will nevertheless have a comparative advantage in the industry where its performance is least deficient.⁷⁴ With each country specialising, a basis for trade exists, since each can produce its specialty goods cheaper than the other.⁷⁵ By trading with each other for the products which the other holds a comparative advantage, both countries become better off than it was prior to trade and gain from international trade. Thus seen, the theory of comparative advantage has encouraging implications for developing countries since many of them do not have an absolute cost advantage in the production of any single product.

Correspondingly, the theory of Comparative Advantage also provides a rationale for trade liberalisation. As there is always some product that can be produced relatively less inefficiently in one country than that in the other, the need of free trade to allow each country to obtain from other countries those products that do not have comparative advantage in the domestic market is of central significance. It was in this spirit that GATT was enacted (together with the IBRD or World Bank and the IMF). In its early phase, GATT dedicated itself to the reduction of tariffs. This was followed by the launch of the WTO in 1995 which further strengthened the global commitment to free trade.⁷⁶ Although

⁷⁴ Ha-Joon Chang and Ilene Grabel, *Reclaiming Development* (2004) Zed Books 53.

⁷⁵ Jackson, Davey and Sykes, above n 4, 12.

⁷⁶ Chang and Grabel, above n 74, 75-79.

sometimes governments resort to tariffs as a way to raise revenue or to provide temporary protection to the infant industries that are of national importance, the virtues of trade liberalisation have been acknowledged by most of the countries around the world. The establishment of the regional agreements, e.g. North American Free Trade Agreement (NAFTA), provided further impetus for trade liberalisation.

3.3 Concerns preceding China's WTO Application

3.3.1 Economic concerns

Domestically, there were two major concerns about China's WTO admission. First, China used WTO accession as a lever for promoting domestic economic reform and enhancing the living standards of Chinese citizens. While Deng Xiaoping's "Open and reform" policy in 1978 had initiated a process of economic reform within China, stagnation began to set in the form of political factionalism, local protectionism and bureaucratic inertia.⁷⁷ Moreover, to undertake regulation of regional economic development, the local regulators were entitled to either adopt local decrees or local rules to enforce laws or regulations issued by the NPC or the State Council, and to adopt local rules on its own initiative. A plethora of government regulations and laws from both the central and local levels soon came into existence, which often were not necessarily uniform or coordinated. It was in this context that China saw WTO

⁷⁷ Ching Cheong and Ching Hung Yee, *Handbook on China's WTO Accession and Its Impacts* (2002) World Scientific 192.

membership as enabling her to break through the various political and economic deadlocks. More importantly, the increased competition the WTO membership would bring to China's domestic market was seen as an essential additional source of pressure on state-owned banks and enterprises, forcing them both to undertake badly needed structural reforms.⁷⁸ The pressures from external economies, which could bring the enhanced foreign competition inherent in market access commitments and the multilateral disciplines imposed by the WTO, were expected to have a positive effect on China to proceed through the difficult stages of economic reform. Secondly and most profoundly, the WTO membership was also expected to accelerate the transition of China's market economy. As Long Yongtu, Vice-Minister of Foreign Trade and China's chief global trade negotiator, said,

"Countries with planned economies have never participated in economic globalization. China's economy must become a market economy in order to become part of the global economic system, as well as to effectively participate in the economic globalization process."⁷⁹

This makes clear that China had realised that further integration into the world economy required transition from the planned economy to the market economy.

⁷⁸ Nicholas R. Lardy, 'Issues in China's WTO Accession' (2001) US-China Security Review Commission 3.

⁷⁹ Ibid, 5.

Internationally, China's WTO admission was based on the general assumptions of the Comparative Advantage theory and expected gains from trade. It demonstrated China's desire to trade with the WTO members all over the world. WTO membership was seen to be essential to accelerate China's integration into the global economy and leading China's market to become more interdependent with other economies worldwide. Having learned from the Asian Crisis, China realised that production of an increasing range of goods was global rather than national.⁸⁰ Globalisation of production was the only viable alternative, and, indeed, one that China could benefit from. By participating in the global production trend, China could gain a wonderful opportunity to participate in cross-border production networks. She also recognised that deeper participation in the global networks, in return, could provide a new and sustainable base for the continued growth and development of their domestic economy. Moreover, by opening up her domestic market, China could gain access to raw materials and strategic resources of other countries as well as the markets for her finished products. she could also export intensive labor dependent products over which it held comparative trade advantage to access the benefits of international trade. The opportunity to attain high rates of output and employment growth, to increase productivity and efficiency, and to enhance living standards of her citizens and consumption choices formed the core concern of China's application to regain the WTO membership. Furthermore, WTO membership was intended to facilitate and promote foreign business activities between China and the developed

⁸⁰ Jackson, Davey and Sykes, above n 4, 237.

countries. The expansion of foreign trade and foreign direct investment (FDI) from developed countries would in return promote the much needed changes to the industrial structure of the Chinese economy as well as enhancing the competitive ability of her domestic industries.

3.3.2 Political concerns

China's motive in rejoining the WTO was also political. It goes without saying that WTO accession is not merely a matter of economic concern for China. The right to participate in multinational trade talks was one of the most crucial expectations of the Chinese Government. Like other developing countries, China displayed her dissatisfaction with the existing international order from time to time and had joined the developing world in calling for the reconstruction of a new, fairer international economic order. This reflected the view that as China was emerging on the international scene, she must strive for international recognition and prestige to perform in international activities. Otherwise, her dissatisfaction would not work as a country that remained outside the WTO; nor would China reap the WTO economic benefits from the WTO membership. Thus, China realised she had no other alternative but to accept the existing WTO rules in order to participate in the international rule-making process.

Another concern underlying under China's political agenda was the possibility of addressing the Taiwan issue peacefully within the WTO framework, so as to

cement her leadership for the political future. The WTO membership was expected to bring about the conditions for a peaceful political unification with Taiwan. This was one of the reasons China made the enormous concessions to the US during the bilateral negotiation for the WTO accession. After September 11, 2001 terrorist attacks in the US, China saw the timing for the political integration with Taiwan as advantageous. While it diminished the ability of the US to absorb Taiwanese exports, it also pushed the US to shelve the Taiwan issue for the time being as it needed China's support for the campaign against terrorists in Afghanistan.⁸¹ In addition, the WTO membership was also expected to lead to more stable and interdependent Sino-US relations, which would certainly curtail the separatist movement in Taiwan. There was also the expectation that the WTO membership could lead to stronger trade and investment ties between China and Taiwan. It might be able to also push Taiwan to end her long-standing bans on direct shipping between the two, and to eliminate important non-tariff barriers on Chinese goods, notably the import bans imposed on a large number of goods of Chinese origin.⁸² On this basis, it was expected that the social ties resulting from a closer economic relationship could provide a platform of mutual trust and provide contacts for a broader cross-straits dialogue which might further reduce the tensions between the two and finally reach the national reunion.

⁸¹ Ching Cheong, 'Beijing Sees a First Step towards Unification' (2001) *Straits Times* 1, <<http://journals.cambridge.org/download.php?file=%2FCQY%2FCQY176%2FS0305741003000572a.pdf&code=61b6f753de0ffe8cead73b8e039e5e6c>> at August 11, 2008.

⁸² Lardy, above n 78, 7.

3.4 Conclusion

On balance then, China had realised that she had more to gain than to give away by engaging with the outside world economically, politically, and socially. It is to the credit of China's leaders that they realised that the best way to achieve internal institutional and structural changes for further progress was through engagement with the outside world and the pressures and commitments these forced on her. The next Chapter considers the process leading to WTO accession and the concessions China made to rejoin the WTO.

CHAPTER IV

CHINA'S WTO ACCESSION ROAD AND CONCESSIONS CHINA

MADE TO GAIN ADMISSION

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CHINA'S WTO ACCESSION ROAD AND CONCESSIONS CHINA MADE TO GAIN ADMISSION

4.1 Introduction

This Chapter examines the prolonged WTO membership application process China had to endure. In this context, it compares the terms and condition of her bilateral accession negotiations with the EU and the US. The evidence shows that although the US and the EU approached the issues differently, their concerns were similar, namely to maximise the liberalisation of China's domestic markets. The focus of this chapter, however, is on an examination of the China-specific provisions in her Accession Agreements, namely, additional WTO obligations (WTO-plus obligations) and reduced WTO rights (WTO-minus rights), and their impact on China's future international trade practice. It concludes that China's WTO admission outcome was a compromise, with each party getting its share of the cake.

4.2 Reasons for the delay of China's WTO entry

Almost no country seems to have endured as lengthy an accession process to the GATT/WTO as China has, nor it would seem has any country been asked to take on as many accession commitments as the price for admission. Almost fifteen years lapsed between the dates that China was first granted observer

status to the GATT, to the date that China finally acceded to the WTO.⁸³ The turbulent relationship between China and the GATT/WTO regime dates back to the establishment of the GATT 1947. China was a founding member of GATT 1947,⁸⁴ the legal predecessor of the WTO, but China's tenancy was short-lived as the "Nationalist Party" of Taiwan, who "represented" Chinese government then, withdrew China from the GATT in 1950,⁸⁵ largely owing to its inability to fulfil the commitments it had entered into on behalf of Mainland China.⁸⁶ Due to the "closed door" economic policy and political relationships adopted by the PRC when first founded,⁸⁷ it was not until 1986 that China demonstrated an interest in renewing ties with the multilateral trade body, when she applied for "resumption" of her membership as an original GATT Contracting Party, followed by a Working Party established in 1987 to consider its entry.⁸⁸ Although numerous intervening events prolonged the accession process,

⁸³ China was granted observer status in the GATT in November 1982 and became a member of the WTO in December 2001-nineteen years and one month later. For an official account of the chronology from the Chinese side, see Ministry of Foreign Affairs of the PRC, Bilateral Agreement on China's Entry to the WTO between China and the United States (Nov. 17, 2000) (on file with author) [hereinafter PRC Ministry of Foreign Affairs].

⁸⁴ China was an original Contracting Party to the GATT. After the 1949 revolution and the split between the Communists and the Kuomintang (KMT) – Nationalist Party, the KMT leaders withdrew China from the GATT. See, Jeffrey L. Gertler, 'The Process of China's Accession to the World Trade Organization', in Frederick M. Abbott (ed), *China In The World Trading System* (1998) 65-66.

⁸⁵ Jackson, Davey and Sykes, above n 4, 236.

⁸⁶ Hsieh PL, 'Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization' (2005) 39 (6) *Journal of World Trade* 1197. After the Communist Party found the People's Republic of China in mainland in 1949, the Nationalist Party moved to Taiwan. The concerns on withdrawing the GATT membership also refer to that most products that gained GATT tariff concession then came from Mainland China rather than from Taiwan. And also due to the small volume of Taiwan's trade in the 1950s, it could obtain preferential tariffs deduction through bilateral trade agreements from its major trade partners even without the GATT membership.

⁸⁷ China adapted "self-development" economic policy in the beginning of the establishment of the PRC, which resisted the communication with the other countries, especially the Westerns and the US. The same attitude applied to the political movement Culture Revolution (1966-1976) too.

⁸⁸ Jan Hoogmartens, *EC Trade Law Following China's Accession to the WTO* (2004) Kluwer Law International 52.

China and the United States had by the Spring of 1989 almost completed their bilateral negotiations on the terms of China's membership to the GATT. However, the negotiation was suspended following the event of Tian'anmen Square in 1989.⁸⁹ It was not until 1992 that the talks were resumed, largely due to the increasing massive inflows of cheap Chinese products into the industrial countries. Nevertheless, none of the subsequent meetings of the GATT Working Party yielded any concrete results for China's resumption of GATT membership. China failed to rejoin GATT before 1 January 1995, when it was replaced by the WTO. After that, the GATT Working Party was converted to a Working Party on China's accession to the WTO to continue the process. Momentum on China's application was finally provided when China and the United States concluded a bilateral agreement in November 1999. This led to the conclusion of a bilateral accession agreement between China and the EU, the passage of Permanent Normal Trade Relations (PNTR) legislation by the US Congress, and ultimately the WTO vote on China's accession, which occurred at the Doha Ministerial Meeting in November 2001.⁹⁰ The events leading up to China's WTO accession are summarised in Figure 2 below.

⁸⁹ "Tiananmen Incident" refers to a series of demonstrations in and near Tiananmen Square in Beijing beginning on April 14, 1989. Led mainly by students and intellectuals, the protests occurred in a year that saw the collapse of a number of communist governments around the world.

⁹⁰ WTO successfully concludes negotiations on China's entry (2001) World Trade Organization < http://www.wto.org/english/news_e/pres01_e/pr243_e.htm > at 13 April 2008.

Figure 2. Events Leading Up to China's WTO Accession

Year	Event
1948	GATT came into effect with China as a Contracting Party
1950	China withdrew from GATT
1982	China was granted observer status in GATT
1986	China notified GATT of intent to renegotiate terms of membership
1987	Working Party on China's membership to GATT established
1989	Discussions of China's membership suspended until 1992 due to Tian'anmen Square events
1992	Accession talks resumed
1994	Uruguay round of trade negotiations completed with China as a signatory
1995	WTO entered into force; China applied for accession to the WTO
1999	Sino-US Bilateral Agreement on China's accession
2000	U.S. Congress passed PNTR legislation; Sino-EU Bilateral Agreement on China's accession
2001	China's accession to WTO became effective (Taiwan joined shortly thereafter) ⁹¹

⁹¹ Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (2nd ed, 2001) Oxford University Press 65.

4.3 China's WTO accession road

With a view to having a global reach in its membership, the WTO invites applications from interested governments. According to Article XII of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), a government may accede to the Agreement “on terms to be agreed between it and the WTO”.⁹² All the WTO accession processes begin with a letter from the requesting government addressed to the Director-General. The item is then placed on the agenda of the WTO General Council for action, which generally establishes a “Working Party”, composed of representatives of Members, to examine the application. The applicant generally obtains observer status in the WTO to become familiar with its activities. As a general rule, all the acceding countries are required to submit a Memorandum on its foreign trade regime in one of the three official languages (English, French or Spanish), describing in detail the regime (including copies of relevant legislation) and providing data.⁹³ Questions may then be submitted by Members, to which the acceding country is invited to respond, to establish a basis for dialogue on its trade regime and its conformity with WTO obligations. Members of the Working Party may initiate bilateral market-access negotiations on goods and services and on the other terms to be agreed, only if the examination of the foreign trade regime is sufficiently advanced.

⁹² WTO Doc WT/ACC/7/Rev.1.

⁹³ WTO and China, World Trade Organization, <http://www.wto.org/english/thewto_e/countries_e/china> at 30 May 2008.

The success of the bilateral negotiation is the prerequisite for the following multilateral negotiation. Generally, the bilateral negotiation focuses on two types of issues: general issues and more complicated market access issues. Firstly, current members seek assurances that the acceding country will fully apply all binding WTO rules and principles. Typically, this involves checking existing legislation for consistency with the various WTO agreements, GATT, GATS and TRIPS at large, and identifying required changes that the applicant country then commits itself to implementing. While the majority of technical issues, e.g. customs user fees or rules for customs valuation, are relatively straightforward, some WTO rules leave much more room for interpretation, e.g. the implicit assumption that WTO members are market economies does not translate easily into specific commitments on privatization that could be required of applicant countries.⁹⁴ Secondly, the bilateral negotiations deal with market access issues in the acceding country for WTO members. It embodies the acceding country's promises to an individual member about opening its market on a government-to-government basis. As explained by the WTO Secretariat,

“Each accession is principally a negotiation between the WTO Members and the applicant, the pace of which depends in large measure on the capacity of the acceding government to negotiate actively at the bilateral and multilateral level.”⁹⁵

⁹⁴ Rolf J. Langhammer & Matthias Lücke, ‘WTO Accession Issues’ (1999) 22 (6) *World Economy* 846.

⁹⁵ Accession to the WTO - State of Play, WTO Doc WT/GC/W/100 (Sept. 30, 1998) <<http://www.wto.org/wto/about/GCW100.html>> at 4 October 2008.

Each WTO member, therefore, effectively wields a veto power over prospective members should the WTO member refuse to conclude bilateral market access negotiations, which in turn prevents an accession protocol from being submitted to the General Council for an accession decision. The successful bilateral negotiation finally leads to the multilateral negotiation, where the working party prepares a Report, a draft Protocol of Accession, and Schedules of Concessions and commitments on Goods and Services. The Protocol of Accession contains terms and conditions of entry into the WTO. China acceded to the WTO when the WTO members by a two-thirds majority decision and the Government of the PRC accepted the Protocol Accession.⁹⁶

4.4 Concessions China made in the bilateral agreements prior to WTO admission: Sino-US and Sino-EU

China's accession effort overcame important hurdles with the conclusion of bilateral agreements with the US in 1999 and the EU in early 2000.⁹⁷ These two agreements are milestones towards China's WTO membership and offered a close glimpse of the price of China's WTO accession. While the general principles concerning transparency, national treatment and other matters of broad regulatory significance were retained, the bilateral negotiations also

⁹⁶ Sylvia A. Rhodes and John H. Jackson, 'United States Law and China's WTO Accession Process' (1999) *Journal of International Economic Law* 498.

⁹⁷ See "Agreement on market access between the People's Republic of China and the United States of America" (USTR 15 Nov 1999); "Eu-China Agreement on WTO" (European Union News Release, 19 May 2000).

indicated the extent to which particular industries were affecting the terms of China's entry to the world trade system. The discussion following compares the terms of these two agreements.

4.4.1 Different attitudes

In contrast with the EU's supportive attitude, the accession negotiation between China and the US was a lengthy and turbulent process. The United States and the PRC formally re-established full diplomatic relations in 1979, when the United States concluded a bilateral trade agreement with the PRC.⁹⁸ After that, numerous other bilateral terms were negotiated between these two countries. However, when China indicated an interest in reacquiring Contracting Party status in the GATT in 1986, the United States devised a multifaceted plan for China's membership into the GATT,⁹⁹ which called for greater transparency, the establishment of a national trade regime, deconstruction of non-tariff barriers inconsistent with GATT principles, a demonstrated commitment to trade and price reforms, and provisions safeguarding against possible market disruptions caused by China's non-market practices. More importantly, the US's attitude was complicated by the grant of the MFN status to China. Pursuant to Title IV of the *US 1974 Trade Act*, the United States cannot grant non-discriminatory treatment (formally MFN

⁹⁸ Ibid.

⁹⁹ *Building American Prosperity in the 21st Century - Report of the Commission on US-Pacific Trade and Investment Policy 99* (1997) Office of the United States Trade Representative <<http://www.ustr.gov>> at 21 September 2008.

treatment, since 1998 termed “permanent normal trade relations”) to products of a communist country that denies its citizens the right to emigrate, or imposes conditions on emigration.¹⁰⁰ Under the WTO MFN principle, the US must extend permanent, unconditional MFN treatment to China once she became a member of the WTO, unless the US invokes the “opt out” provision.¹⁰¹ Otherwise, the basis of the compliance of the *1974 Trade Act* amendment could not be guaranteed. As recorded, the US first granted MFN treatment to China in 1980, which was required to be reviewed annually by the terms of the *US 1974 Trade Act*.¹⁰² The MFN status not only helped cement favorable Sino-US trade relations but also prompted trade between the two nations to double over the next year.¹⁰³ However, it was suspended the United States following the Tiananmen Square events. A series of trade agreements were then conducted in response to this incident, which include a Memorandum of Understanding (“MOU”) to improve IPR protection in China, and three agreements relating to commercial spacecraft launch services, technology safeguards, and liability.¹⁰⁴ Although two Section 301 actions¹⁰⁵ were brought against China for IPR infractions and other market access barriers during this time, the ultimate outcome - a 1992 Market Access MOU with China - was a

¹⁰⁰ *United States Trade Act of 1974, S 401*. This freedom of emigration requirements were intended to promote the opportunity for emigration from the Soviet Union.

¹⁰¹ GATT Article I.

¹⁰² *Agreement on Trade Relations Between the United States of America and the People’s Republic of China*, 7 July 1979, US-PRC, 31 UST 4651.

¹⁰³ Above n 99.

¹⁰⁴ *Ibid.*

¹⁰⁵ Section 301 of the Trade Act of 1974 is the principal US statute for addressing foreign unfair trade practices affecting US exports of goods or services. Section 301 may be used to enforce US rights under bilateral and multilateral trade agreements and may also be used to respond to unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict US commerce. See, Annual Report of the President of the United States on the Trade Agreements Program (1997) 238.

positive step towards accomplishing many current WTO requirements.¹⁰⁶ It resulted in China's commitment to remove numerous non-tariff barriers, reduce certain tariff rates, increase transparency of Chinese trade law, curb import substitution policies, and eliminate non-tariff barriers in the form of import testing and standards requirements.

Under the Clinton Government (1993-2001), greater emphasis was placed on generating trade with Pacific Rim countries. In order to make available all the rights under the WTO regime with China, President Clinton, who had criticised the Bush Administration's policy, renewed China's MFN treatment but declared his intent to link MFN treatment to improvements of China's human rights performance.¹⁰⁷ However, the accession negotiation was stalled again in 1994 after the Uruguay Round negotiation, which broadened the scope of commitments of the WTO members by adding services and intellectual property rights.¹⁰⁸ An unfortunate consequence of these additional accession negotiations was the rising disagreement over China's acceding commitments.¹⁰⁹ It was not until 1997 that the Sino-US bilateral negotiation was rejuvenated when China put forth new proposals towards liberalising her markets for goods and services. Chinese President Jiang Zemin and Trade Minister Wu Yi presented phase out offers that would reduce tariff rates to an average of 10% and eliminate all non-tariff barriers by 2005, contingent on

¹⁰⁶ Above n 99.

¹⁰⁷ William J. Clinton, *Statement on Most-Favored-Nation Trade Status for China* (1993) 29 Weekly Comp. Pres. Doc. 981-2.

¹⁰⁸ Jackson, Davey and Sykes, above n 4, 227.

¹⁰⁹ Above n 99.

China's accession to the WTO.¹¹⁰ China also agreed to comply with TRIPS upon accession, and removed most formal quotas and import licensing requirements applicable to products covered by the 1992 Market Access MOU.¹¹¹ Consequently, the bilateral agreement was achieved in 1999 and the US granted China the permanent normal trade relations (PNTR) by the passing of a historic trade bill through the US House of Representatives and the Senate¹¹² in 2000. The controversy of China's MFN status was finally resolved.

The EU's attitude to China's WTO application was much clearer; as its economic relations with China appeared to be less encumbered by ideology than that of China-US relations. China had developed closer ties with the EU since the 1970s.¹¹³ From "A Long-term Policy for China-Europe Relations" in 1995 to "Building a Comprehensive Partnership with China" 1998,¹¹⁴ the EU expressed the hope of having a stable and lasting partnership in the 21st century with China. A key reason why China-EU relations have prospered is perhaps because they are not burdened with the same national security concerns as that of the US.¹¹⁵ In contrast to the outspoken US opposition to a quick and easy WTO accession for China, the EU has taken a more positive

¹¹⁰ Stanley O. Roth, *Renewal of Normal Trade Relations with China* (1999) <<http://www.mtholyoke.edu/acad/intrel/rothchin.htm>> at 1 September 2008.

¹¹¹ Above n 99.

¹¹² Mark A. Groombridge, 'China's Long March to a Market Economy – The Case for Permanent Normal Trade Relations with the People's Republic of China' (2000) *Trade Policy Analysis* 10.

¹¹³ Huaqun Zeng, 'Promoting a New Bilateral Legal Framework for China-EU Economic Relations' (2004) 3 *Chinese Journal of International Law* 191.

¹¹⁴ *Ibid*, 200.

¹¹⁵ Christopher M. Dent, *China's Economic Relationship with the European Union* (2005) <http://www.uscc.gov/hearings/2005hearings/written_testimonies/05_07_21_22wrts/dent_christopher_wrts.pdf> at 20 March 2009.

stance and its position was consistently based on stressing cooperation. Although the EU has at times sought to press China on some sensitive matters, such as the rule of law and human rights, the prevailing European view was that it was better to bring China into the various multilateral frameworks and work constructively alongside her rather than engage in confrontational stand-offs.¹¹⁶ On this basis, the EU advocated a flexible strategy aimed at easing China into the international political and economic system while paying due respect to the gradual pace of economic reform that had been chosen by the Chinese government. In return, China also offered support in the launching of the Euro.¹¹⁷ Consequently, the EU played a role as a strong supporter of China's accession to the WTO, maintaining the view that a WTO without China was not truly universal in scope. Nonetheless, close comparison of the negotiation documents of China with the US and EU prior to 2001 shows common concerns by them as to what commitments China had to undertake to gain WTO membership.

4.4.2 Common concerns

The aim of both the US and the EU were to ensure maximum liberalisation of the Chinese market. Compared to the EU, however, the US missionary zeal to convert China into a democratised and market-oriented society was far stronger. There are complex social, political and historic reasons for this that relate perhaps more to the US's perceived role in the world than the EU's own

¹¹⁶ Ibid.

¹¹⁷ Zeng, above n 113, 201.

less well-defined role.¹¹⁸ The discussion below summarises the terms, which the two concerned themselves most within the negotiation process to China's membership. The terms for each of GATT, GATS and TRIPS are discussed below.

4.4.2.1 Concerns relating to GATT

I. Transparency

The concept of transparency is a fundamental feature of the GATT/WTO regime, as it goes “to the heart of a country's legal infrastructure, and more precisely to the nature and enforcement of its administrative law regime.”¹¹⁹ It also serves an important enforcement purpose: prompting WTO members to administer published laws in a “uniform, impartial and reasonable manner.”¹²⁰ The transparency problem regarding China's legal system was of paramount concern for the US and the EU during the negotiation process. They claimed that while moving towards a more transparent, rules-based system, China's multi-tiered legal system continued to reveal a lack of transparency. For example, the publication status of the national laws and administrative regulations and their availability were far from adequate, especially in the case

¹¹⁸ Dent, above n 115.

¹¹⁹ Sylvia Ostry, ‘China and the WTO: The Transparency Issue’ (1998) 3 *International Law and Foreign Affairs* 2, explaining the GATT/WTO concept of transparency, which is admittedly “imprecise”.

¹²⁰ GATT Article X(3) (a).

of provincial and local rules. The ambiguities and uncertainty of these kinds of provisions afforded a tremendous amount of discretion to the bureaucrats entrusted to implement them.

II. Non-tariff barriers

During the bilateral negotiation, the US and the EU highlighted the obstacles of non-tariff barriers in China in the form of product certification, labelling standards, import approval requirements and customs clearance delays. They also expressed concerns about the unreasonable sanitary and health requirements, which could create barriers that hampered exports to China, in particular for agricultural products. In addition, the lack of uniform law application and divergence from accepted international standards were also concerns.

III. Application of the National Treatment principle

(i) Subsidies

It was argued that China channelled significant subsidies to favored national industries, in particular companies destined to become national or regional champions. These companies were claimed to benefit from preferential policies, such as privileged access to the banking sector. In some cases, such as the automotive and steel sectors, whole sectors

benefited from an integrated industrial policy intended to support domestic production and boost exports.¹²¹ This is no longer the case since China's WTO membership in 2001.

(ii) Competition policies

Some policies were said to be promote a China first approach, and were inconsistent with the non-discriminatory principles of the WTO. There were also complaints that a number of industries in China, such as automobiles, steel semiconductors, and shipbuilding, were imposing local content requirements on foreign firms, either through direct legislation or investment authorisation, limiting EU exports and unfairly aiding local industry. In addition, there was a growing risk that competition policy would be used against foreign operators and that the lack of independence or transparency of many regulators could result in decisions favoring domestic operators.

4.4.2.2 Concerns relating to GATS

The GATS concerns of the US and EU lay in the market access limitations and restrictions. They complained that in some key industries, such as telecommunications and financial services, foreign firms were restricted from expanding significantly because of high capital requirements and geographical restrictions. As with foreign investment in services, these GATS concerns are

¹²¹ European Union Preparatory Acts. Closer Partners, Growing Responsibilities. A policy paper on EU-China trade and investment: Competition and Partnership. Commission working document accompanying COM (2006) 631 final, 6.

normally related to the regulation of the Agreement on Trade-Related Investment Measures (TRIMS), whose principal aim is to eliminate the limitations of local content, export performance and foreign exchange balancing. One of the most problematic regulations referred to was *Guiding the Direction of Foreign Investment Interim Provisions (1995)*,¹²² which was claimed to be too strict so that the access capacity of the US and EU as investors was very limited. Art 6 of it sets out the prohibited categories ranging from telecommunications to power and public utility industries and to trade and finance industries. Art 7 dealt with the restricted industries prevalent in mechanical industries (such as automotive-related manufacturing), electronic industries (e.g. televisions, video cameras, cellular phones), and various service industries (e.g. foreign trade, tourism, accounting and legal services). It was also claimed that even where foreign investment was allowed, it was typically subject to stringent approval procedures and administrative oversight, especially in the context of corporate takeovers and acquisitions.¹²³ As a result, the United States Trade Representative (USTR) concluded that these foreign investment restrictions and prohibitions imposed by China were designed to protect her domestic industries, to restrain consumer luxuries, or limit massive imports of raw materials or components, and to avoid excess capacity.¹²⁴

¹²² Replaced by the *Provision on Guiding Foreign Investment Direction*, which was approved and promulgated by the State Council on Feb 21, 2002.

¹²³ National Trade Estimate Report on Foreign Barriers 56, Office of the USTR (released March 31, 1998).

¹²⁴ Ibid.

4.4.2.3 Concerns relating to TRIPS

The adequate protection of intellectual property rights such as patents, copyrights and trademarks is central to the exercise of the comparative advantage of the US and the EU in innovation, design and high-value production. From the perspective of the US and the EU, the failure has not been due to a lack of Chinese IPR law but, rather a lack of enforcement of those laws.¹²⁵ They argued that the infringement of the intellectual property rights involved in ignoring copyright and patents was already very sizable in China. While China had made progress in setting up an intellectual property regime, loopholes remained and effective implementation and enforcement of laws were still uneven or lacking. Insufficient protection of intellectual property represents a pressing challenge for their businesses in China. According to the estimate of the International Intellectual Property Alliance estimates, the IPR piracy cost to American companies trading with China reached \$2.8 billion in sales in 1997 alone.¹²⁶ Hence, they were unwilling to let the admission of China's WTO application pass without obtaining a much stronger commitment to IPR protection.

¹²⁵ 1997 Annual Report of the President of the United States on the Trade Agreements Program 188.

¹²⁶ Wayne M. Morrison, China-US Trade Issues, Congressional Research Service Issue Brief for Congress 91121 (November 10, 1998).

4.4.3 Comparison of the concessions China made in the Sino-US and Sino-EU Agreements

With the purpose of freeing access to China's market, both agreements included terms of trade in goods and services, and provided increased market access for the US and the EU exports across a broad range of commodities. More importantly, they also provided for the elimination of various non-tariff barriers. For the US, tariffs fell from an overall average of 24.6% in 1997 to an overall average of 9.4% by 2005, and 7.1 % on the U.S. priority industrial products. The EU got substantial reductions on import tariffs around 8-10% for over 150 leading European exports, such as machinery, ceramics and glass, textiles, clothing, footwear and leather goods, cosmetics and spirits.¹²⁷ As to the quotas and other quantitative restrictions, China agreed in the Sino-US Agreement to eliminate these restrictions with phase-in limited to five years.¹²⁸ These well addressed US non-tariff concerns.

As to market access in services, both agreements have provisions for the elimination of the foreign equity restrictions and the reduction of access level. US firms were granted market access for after sale service, repair, maintenance, and transport without use of intermediaries. In addition, some industries, such as, the telecommunications, insurance, banking, securities,

¹²⁷ *Highlights of the EU-China Agreement on WTO* (2000) European Commission <http://ec.europa.eu/external_relations/china/index_en.htm> at 29 April 2008.

¹²⁸ U.S. - China Bilateral WTO Agreement November 15, 1999 <<http://clinton4.nara.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html>> at 20 March 2008.

audio visual, and professional service sectors, gained the right to expand market access under the agreement.¹²⁹ On the EU side, the concessions China made were also substantial. In the telecommunications sector, the Chinese commitments entitled EU operators to acquire up to a 25% interest in telephone service companies from the date of accession. The permitted holding increased to 35% one year later and to 49% three years after that.¹³⁰ In the insurance sector, the EU companies were granted seven new licences - two for damage insurance, and five for life insurance. European insurance companies were also allowed progressively to sell the same products as their Chinese competitors. More importantly, the scope of these companies' businesses was permitted to extend to health insurance, pensions, group life insurance, and other insurance other than statutory insurance two years after China's accession.¹³¹ In the distribution sector, the EU was granted the right to sell goods other than their own on the retail market and to offer other services connected to distribution, such as transportation, maintenance, repairs, and after sales services.¹³²

The Sino-EU Agreement further expanded the rights on insurance and telecommunications contained in the Sino-US agreement. Under the Sino-EU agreement, the EU obtained significant duty concessions over and above the commitments given to the United States on some 150 specific industrial and

¹²⁹ Ibid.

¹³⁰ Olivier Prost and Song Li Wei, 'China's Accession to the WTO: How will This Benefit European Undertakings?' (2000) *Fordham International Law Journal* 2.

¹³¹ Ibid, 3.

¹³² Ibid, 2.

agricultural products. For instance, the duty rate reduction the US negotiators gained on wine imports, from the current 65 percent to 20 %, was considerably reduced by their EU counterparts to 14 percent.¹³³ After the completion of these negotiations, EU Trade Commissioner Pascal Lamy concluded that more than 80 % of the European Union's objectives for improvement had been obtained.¹³⁴

4.4.4 Evaluation

The achievement of the Sino-US and Sino-EU Agreements were major steps towards WTO admission for China. These paved the way for China's bilateral negotiations with the other WTO members. After this achievement, the other WTO members were free to negotiate and implement their own respective trade deals with China. Though some unresolved issues remained after the negotiations, these bilateral agreements were believed to benefit all of them. On the one hand, China moved a major step towards WTO admission and enjoyment of capital goods, knowledge and technology brought in by the US and EU companies that helped the development of her productive capacity; on the other hand, the sharp and permanent reduction of the import tariff and other non-tariff barriers provided a more attractive and predictable business environment for the US and EU investment in China. Reciprocal trade with China helped to promote economic growth and employment through increasing exports, continuing specialisation in high-value products and services, and

¹³³ Daniel Arthur Lapres, The EU-China WTO Deal Compared (2002)
<<http://www.chinabusinessreview.com/public/0007/lapres.html>> at 4 April 2008.

¹³⁴ Ibid.

strengthening the global competitiveness of the US and EU companies. After the signing up of the Sino-EU agreement, EU exports to China increased by more than 100% between 2000 and 2005, much faster than EU's exports to the rest of the world.¹³⁵

4.5 The Protocol on the accession of the PRC

Following fifteen years of negotiations on the terms of China's WTO membership, the Working Party recommended China for formal acceptance to the WTO to the Ministerial Conference on September 2001. The Doha Round of the WTO Ministerial Conference accepted the recommendation on November 2001 by consensus. China finally notified ratification of the Accession Agreement on 11 December 2001.¹³⁶ The commitments China was required to implement are summarised in the Protocol, which represents the terms and conditions of all the bilateral negotiation agreements between China and the WTO members. Thus, the Protocol, in effect, is a contract between China and the existing parties in their joint capacity. In particular, it outlines China's current trade laws and policies, while noting the differences between her regime and the minimum WTO requirements. It also states how and when China intends to correct these differences.

China's WTO Accession Protocol mirrors the core negotiation terms of the bilateral agreements between China and the US and the EU. Apart from the

¹³⁵ Above n 121.

¹³⁶ Blazey (ed), above n 44, 160.

regular concession terms required by the WTO membership, such as market access in goods and services, intellectual property rights protection and transparency requirements, some China specific provisions were also included in the accession Protocol. These made China's commitment package exceed the WTO's existing members' obligations in many respects. Taking into account the size of China's economy and its developing country status, the extent of China's commitments is regarded as unprecedented. The discussion below highlights a series of special rules to be applied between China and other WTO members in its Protocol. These are divided into two groups, WTO-plus obligations, and WTO-minus rights.

4.5.1 WTO-plus obligations

4.5.1.1 National treatment principle

National treatment, a major WTO principle, extends to trade in goods, services and trade-related intellectual property rights, stipulated in GATT Art III and GATS Art XVII respectively. The scope of the national treatment obligation, however, varies depending on specific WTO provisions. The GATT national treatment obligation applies to imported products only, i.e., goods that have already cleared customs and other import procedures. Specifically, it requires a WTO Member to treat products imported from any other Member no less favourably than like domestic products in respect of (i) internal taxes and other

charges, and (ii) all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. Apparently, the GATT national treatment applies to imported goods regardless of whether they are bound under Members' Goods Schedules.

By contrast, the national treatment obligation of a Member under GATS is limited to the scope of its specific commitments set out in its accession Services Schedule.¹³⁷ According to GATS Art XVII, for those service sectors to which it has granted market access in the sectors inscribed in its Schedule, the Member must accord services and service suppliers of any other Member, in respect of all measures affecting the supply of the services, treatment no less favourable than that it accords to its own like services and service providers, subject to any conditions and qualifications provided in the Services Schedule. Thus, the GATS national treatment is applicable to imported services that are specified in the admission Schedule.

National treatment clause is also included in TRIMS, which regulates the investment measures that may affect the internal sale of imported goods and prohibits a member from applying any investment measure that is inconsistent with the national treatment norm and results in a preference for domestic products over imported products. It identifies two specific types of measures in its Annex as inconsistent with the national treatment obligation: (a) laws and regulations that require an enterprise to purchase or use domestic products

¹³⁷ GATS Articles XVI and XVII.

(local content requirements), and (b) laws and regulations that limit an enterprise's purchase or use of imported products to an amount related to the volume or value of local products that it exports (trade balancing requirements).

However, under China's accession Protocol, the norm of national treatment seems to be side stepped. The investigation of the relevant provisions scattered throughout the Protocol¹³⁸ found that while some of these provisions merely confirm the existing WTO obligations, others prescribe national treatment obligations that are not contained in the WTO agreements. These WTO-plus obligations require China to accord national treatment to foreign individuals and enterprises with respect to their investment and business activities in China, rather than the imported goods and services. For example, Section 3 of the Protocol provides:

“Except as otherwise provided for in this Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favorable than that accorded to other individuals and enterprises in respect of:

- (a) the procurement of inputs and goods and services necessary for production and the conditions under which their goods are produced, marketed or sold, in the domestic market and for export; and
- (b) the prices and availability of goods and services supplied by national and sub-national authorities and public or state enterprises, in areas

¹³⁸ Protocol, Sections 3, 5, 7 (2), 8 (2), 11 (4) and 13 (4).

including transportation, energy, basic telecommunications, other utilities and factors of production.”

Similar provisions are in section 5.2 of the Protocol, which reads

“Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favorable than that accorded to enterprises in China with respect to the right to trade”.

Obviously, the requirement of the national treatment obligation applies to treatment of foreign individuals and foreign-funded enterprises with respect to the conditions affecting their production of goods and their trading opportunities in China, not the treatment of imported goods or services or measures inconsistent with the WTO regulations. This provision is therefore clearly beyond the scope of GATT, or GATS or TRIMS, and thus exceeds the existing WTO requirements.

4.5.1.2 Transitional review mechanism

Pursuant to the Trade Policy Review Mechanism (TPRM) set forth in Annex 3 of the WTO Agreement, all WTO Members are subject to periodical review of their trade policies and practices. The purpose of such review is to achieve greater transparency in, and understanding of, Members’ trade policies and

practices, thereby improving adherence by all Members to WTO rules and commitments and the smoother functioning of the multilateral trading system. The frequency of the review for individual Members depends on their share of world trade in a recent representative period: the first four trading Members so identified (United States, European Union, Japan, and Canada) are reviewed once every two years, the next 16 trading powers, including China, every four years.¹³⁹

However, Section 18 of the Protocol stipulates a special Transitional Review Mechanism (TRM) to examine China's implementation of her WTO obligations. Pursuant to this TRM, China is subject to a total of nine reviews during the first ten years after its accession: the first eight will take place annually and the last one in the tenth year or an earlier date to be decided by the General Council. Each review is to be conducted at two levels, first by the 16 subsidiary bodies of the WTO that have a mandate covering China's commitments, and then by the General Council. Prior to each review, China must provide to the 16 subsidiary bodies the information specified in Annex 1A of the Protocol, which sets out a comprehensive list covering each area of China's commitments under the WTO Agreement and the Protocol.¹⁴⁰ That is to say, instead of the normal trade policy review under the TPRM, China will be constantly monitored and scrutinised by the WTO for its compliance with WTO rules and its specific commitments during the first ten years of its

¹³⁹ Julia Ya Qin, 'WTO-Plus Obligations and Their Implications for the World Trade Organization Legal System - An Appraisal of the China Accession Protocol' (2003) 37 (3) *Journal of World Trade* 509.

¹⁴⁰ *Ibid*, 518.

accession. Moreover, under the transitional review mechanism, the General Council may make recommendations to China, a function which is not included in the TPRM. Consequently, China was made subject to a much more stringent discipline of transitional review than any other Member of the WTO. No explanation could be found in the Protocol regarding the difference between the TPRM and the transitional review mechanism of China.

4.5.1.3 Market economy commitments

The multilateral trading system is constructed with market economy assumptions. Hence, it has been historically a major challenge for the system to integrate centrally planned economies, also known as non-market economies (NME). Though China tried hard,¹⁴¹ China was denied market economy status when she acceded to the WTO. Interestingly, China was required to undertake specific market economy commitments in the Protocol that were not consistent with her accession NME status. For example, pursuant to Section 9 of the Protocol, China should “allow prices for traded goods and services in *every sector* to be determined by market forces” except for those specified in Annex 4 of the Protocol, which contains a list of goods and services that may be subject to price controls consistent with WTO

¹⁴¹ In light of the market orientation of its economy after years of reform since 1978, China has long argued that it should not be treated as a NME in particular.

rules.¹⁴² Unless there are exceptional circumstances, and subject to notification to the WTO, China may not extend price controls to goods and services beyond those listed in Annex 4.

To let market forces determine all prices is one of the crucial characteristics of the market economy, which should not be imposed on China given the denial of the market economy status. This obligation, in a sense, is by far the most significant of all WTO obligations that China has undertaken, as its fulfilment will ultimately ensure the compatibility between the Chinese economic regime and the WTO system.

4.5.2 WTO-minus rights

4.5.2.1 NME treatment in antidumping cases

Though China has undertaken market economy commitments as stated above, Section 15(a) of the Protocol allows WTO Members to treat China as a NME in anti-dumping investigations. According to GATT Art VI and the WTO Anti-Dumping Agreement, where a product that is subject to an anti-dumping investigation is exported from a NME, the authorities could

¹⁴² The list includes: (i) four categories of goods (tobacco, edible salt, natural gas and pharmaceuticals) and four categories of service sectors (public utilities, postal and telecommunication services, entrance fee for tour sites, and education services) that may remain subject to government pricing; and (ii) six categories of goods (grain, vegetable oil, processed oil, fertilizer, silkworm cocoons and cotton) and six service sectors (transport services, professional services, commission agents' services, banking services, prices of residential apartments, and health-related services) that may remain subject to government guidance pricing.

determine the dumping margin by "constructing" the value of the product in the home market. Under U.S. anti-dumping practice, authorities follow the controversial approach of utilising the input costs of a "surrogate" third country for purposes of determining the constructed value.¹⁴³ The problem of this approach is that it provides space for WTO Members to disregard the domestic sales price in China. In addition, the use of a proxy price from some surrogate country or a constructed price also deprives Chinese manufacturers' comparative advantage of their labour costs,¹⁴⁴ and thus makes it easier for the imported countries to reach a determination of the existence of dumping. Notwithstanding China's disadvantaged position on this issue, as agreed in the US-China bilateral agreement, China agreed in its Protocol of accession to be treated as a NME for fifteen years after accession for purposes of conducting anti-dumping investigations against Chinese companies.¹⁴⁵

4.5.2.2 Denial of Art 29 benefit of Subsidies and Countervailing Measures (SCM)

Acceding as a NME, however, China was denied the rights to take advantage

¹⁴³ John H. Jackson, 'State Trading and Nonmarket Economies', (1989) 23 *International Lawyer* 905.

¹⁴⁴ Andrew L. Stoler, 'Treatment of China as a Non-Market Economy: Implications for Antidumping and Countervailing Measures and Impact on Chinese Company Operations in the WTO Framework' (Paper presented at the Forum on WTO System & Protectionism: Challenges China Faces after WTO Accession, Shanghai WTO Affairs Consultation Centre, 1-2 December 2003).

¹⁴⁵ Protocol, Section 15.

of the special provisions in the SCM Agreement that are applicable to developing countries. According to Art 29 of SCM, subsidies used for purpose of economic reform of the NME are exempted from WTO challenges for a 7-year period upon the accession of the WTO membership, provided certain conditions are met. This recognises the special role subsidies may play in a transition economy. However, instead of being granted this special treatment benefits, Section 10 of the Protocol sets the subsidies provided to state-owned enterprises as “specific” to subject to SCM Agreement, given they are the predominant recipients of such subsidies, or receive disproportionately large amounts of it. In addition, China was also required to eliminate all prohibited subsidies falling within the scope of SCM agreement Art 3 upon accession,¹⁴⁶ regardless of the purpose of using it.

4.5.2.3 Discriminatory safeguard rule

Even though GATT Art XIX and the *Agreement on Subsidies and Countervailing Measures* provide for the possibility of the application of safeguard measures to deal with sudden increases of imports, the latter severely restricts the ability of members to impose "safeguards" or otherwise WTO-inconsistent quotas and tariffs temporarily imposed in exceptional circumstances.¹⁴⁷ Under China's accession package, however, a special transitional product-specific safeguard mechanism was allowed to be used

¹⁴⁶ Protocol, Section 10 (3).

¹⁴⁷ *Agreement Establishing the World Trade Organization*, Annex IA, Legal Instruments – Result of the Uruguay Round, 33 I.L.M.1125 (1994).

under Section 16 of the Protocol, which allows the WTO members to apply a special safeguard rule to China, which will remain in effect for twelve years after accession. The premise for this mechanism is “market disruption”, which is deemed to exist so long as the increasing imports of an item is “a significant cause of material injury” or “threat of material injury to the domestic industry”,¹⁴⁸ rather than causing “serious injury” as required under the Safeguard Agreement of the WTO. In addition, under the normal WTO rule, if a safeguard measure is taken for a relative increase in imports, the affected export member is allowed to retaliate immediately. Under the transitional product-specific safeguard mechanism, however, China would have the rights to retaliate only if such measure remains in effect for more than two years.¹⁴⁹

In summary, these China specific provisions are unique in WTO accession clauses, and apply to China only. Some scholars have already raised concerns regarding the legal status and practicability of these provisions.¹⁵⁰ But what distinguishes China from other countries that have so far acceded to the WTO with the creation of the China-specific rules? It seems the existing WTO rules were perceived to be insufficient to regulate the Chinese trade as a new WTO member, because of which the extra obligations were imposed. The answer perhaps could be summarised from the Protocol and the WPR, though in a large document, there is no rationale or stated objective for such different

¹⁴⁸ Protocol, Section 16 (4).

¹⁴⁹ Ibid, Section 16 (6).

¹⁵⁰ Henry Gao, ‘China’s Participation in the WTO: A Lawyer’s Perspective’ (2007) *Singapore Year Book of International Law and Contributors*; also see, Julia Ya Qin, ‘WTO-Plus Obligations and Their Implications for the World Trade Organization Legal System - An Appraisal of the China Accession Protocol’ (2003) 37 (3) *Journal of World Trade*.

treatment of China. In the context of discussing whether China should have the right to enjoy all the special treatment provisions in the WTO Agreement available to developing country WTO members, Paragraph 9 of the WPR states that:

“Some members of the Working Party indicated that because of the significant size, rapid growth and transitional nature of the Chinese economy, a pragmatic approach should be taken in determining China’s need for recourse to transitional periods and other special provisions...”; “...it was stressed that this pragmatic approach would be tailored to fit the specific cases of China’s accession in a few areas...”.

Thus, it seems extra obligations were imposed on China primarily because of the sheer size of her economy, and her importance in world trade and investment. Though theoretically, China could apply to have the WTO amend these terms, or waive some of its obligations,¹⁵¹ none of these options seem feasible in reality given the potential political and economic costs. Consequently, China has no choice but to undertake these burdensome terms and conditions as a strategic decision.

¹⁵¹ The Marrakech Agreement Establishing the WTO (1994) Articles X and IX.

4.6 Evaluation

China's WTO accession represents a desirable outcome for the worldwide market, and has had wide ramifications for China, WTO and the world as a whole. It is a goal achieved after nearly 15 years of exhausting negotiations carrying many legal, political and social implications for all parties,¹⁵² especially for the relations between China and the US and the EU. By providing the support to China's WTO accession, the US and the EU were able to achieve their goals in relation to China, i.e., political and economic reform in the direction of democracy and free-markets.¹⁵³ But it also meant having China as a potential competitor. On China's side, the WTO membership committed her to comply with the principles and rules of the international trading system, and accelerate her own process to promoting transparency, fairness and openness more generally throughout her trade regime, all of which are essential for her to integrate with the multilateral trade. Having thought through the exacting undertakings in the Protocol, especially the China-specific provisions discussed above, China probably should not have agreed with that. As for China, the multinational mechanisms and institutions were perceived as more or less extensions of American foreign economic policy, or as essentially serving broader Western interests. Nevertheless, a more positive view towards multilateralism prevailed finally, mainly because China saw the WTO, International Monetary Fund (IMF), World Bank and so on as the ultimate

¹⁵² Keren Halverson, 'China's WTO Accession: Economic, Legal and Political Implications' (2004) 319 *International and Comparative Law Review* 27.

¹⁵³ Groombridge, above n 112.

custodians of the international economic system over which China wished to have a role to play. It was thus in China's own interests to support the development of the WTO and work with it to avert future systemic disturbances to the global economic on which China increasingly depends. More importantly, the external pressure the WTO membership was expected to bring to China rightly matched the then domestic reform agenda to overcome the domestic obstacles in furthering the reform. The WTO membership was mostly seen as a first step in the tough reform process. Interestingly, it seems that to provide the concessions in the Protocol was also a means of calming the complaints raised by China's major trading partners, e.g. human rights protection, and the rule of law status in China.¹⁵⁴ Consequently, China's WTO membership can be seen as an outcome of compromise between herself and the other WTO members. It was a negotiation of the interests-balancing process in which every party got its piece of the cake. The following Chapter turns to examine the changes to China's laws brought about by WTO accession.

¹⁵⁴ Dent, above n 115.

CHAPTER V

WTO ACCESSION RELATED CHANGES TO CHINA'S FOREIGN

TRADE-RELATED LAWS

CHAPTER V

WTO ACCESSION RELATED CHANGES TO CHINA'S FOREIGN TRADE-RELATED LAWS

5.1 Introduction

As noted the WTO accession is much more than economic integration. It also presupposes profound domestic law reform for legal integration. China's WTO membership required her to apply and administer all of her laws, regulations as well as central and local government measures, which affect trade in goods, services and trade-related aspects of intellectual property rights, in a manner consistent with WTO rules and principles. Such a requirement brings headon: the relationship between domestic law and international law; the process of formulating the national laws to accommodate foreign laws; the acceptance of international economic law; and the implementing and enforcing them at the national level. This Chapter examines these matters in the context of China's WTO accession commitments.

The application of international laws in a domestic legal system is influenced by their different political systems, constitutions, and legal cultures. While the US acknowledges the force and effect of international treaties in Art 6 of its

Constitution,¹⁵⁵ in practice, it distinguishes international treaties as self-executing and non-self-executing treaties. The former can be adopted in US courts as soon as it enters into force, while the latter requires complementary legislation for their application. In the UK, though international law is recognised as a part of common law, its application also needs some kind of transformation into the laws at the relevant domestic level. In China, there are no general rules regulating the relationship between international laws and national laws. The Constitution of China is silent about the status of international treaties under Chinese law and whether they can be applied directly in China without enabling domestic legislation. However, some simple rules exist in a few domestic laws, such as the General Principles of Civil Law of the PRC.¹⁵⁶ After much debate, a consensus has emerged recently, that WTO agreements will not be applied in China directly; instead they must be implemented through domestic legislation. In its accession agreement China has promised to fully perform her international obligations in an effective and uniform manner by “revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement.”¹⁵⁷

¹⁵⁵ “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.”

¹⁵⁶ Article 142 of the *General Principles of Civil Law of the PRC* reads, “If any international treaty concluded or acceded to by the People’s Republic of China contains provisions differing from those in the civil laws of the People’s Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People’s Republic of China has announced reservations. International practice may be applied to matters for which neither the law of the People’s Republic of China nor any international treaty concluded or acceded to by the People’s Republic of China has any provisions.”

¹⁵⁷ WPR, Para. 67.

Close comparison of the concessions required of China with those of other WTO members shows China's commitments to be in many respects more onerous.¹⁵⁸ Nonetheless, these external pressures on China to reform and implement the WTO commitments have been the catalyst for the creation of a modern legal framework to support her new market oriented, rule based trading system. Along with her decision to rejoin the WTO, China had already commenced to systematically overhaul her existing laws, administrative regulations and departmental rules to comply with WTO rules and her WTO accession commitments as well as to accommodate the Annexes under the WPR. Most of this work took place at the central government level, with more than 2,500 trade-related laws and regulations reported to be reviewed for WTO consistency in the first year of her membership. As a result, more than 800 laws and regulations were repealed and 450 either revised or newly issued.¹⁵⁹ By the end of 2005, the Central Government had enacted, adopted, revised, or repealed more than 2,000 pieces of legislation, administrative regulations and department rules¹⁶⁰ covering trade in goods, services, intellectual property rights, and transparency and uniformity in the application of trade measures. The WTO principles which China was required to follow upon her admission centered around GATT, GATS and TRIPS. These three agreements are discussed below in two parts with a view to examining how China proceeded to

¹⁵⁸ Halverson, above n 152, 326. For example, the average statutory tariffs on industrial products in Argentina, Brazil, India and Indonesia are respectively 30.9%, 27%, 32.4% and 36.9%, as compared with 8.9% set by China.

¹⁵⁹ *Report to Congress on China's WTO Compliance* (2008) United States Trade Representative <
http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/asset_upload_file192_15258.pdf> at 8 March 2009.

¹⁶⁰ WTO Doc WT/TPR/G/161, 9.

implement the principles, rules and requirements embodied in the WTO Agreement and the Accession Protocol into its domestic laws with the view to fulfilling its WTO commitments. Examined in this context are (1) the core provisions of each agreement; and (2) how the changes China made to its domestic laws affecting foreign trade accommodate these core provisions.

5.2 Changes to China's domestic laws to accommodate the WTO Agreements of GATT

5.2.1 Core provisions of GATT

As discussed in Chapter I, the basic purpose of GATT is to constrain governments from imposing or continue having a variety of measures that restrain or distort international trade,¹⁶¹ such as tariffs, internal taxes and some other non-tariff measures that discourage international business activities. The core provisions of GATT link closely with Part IV of the WPR - the Policies Affecting Trade in Goods, as well as the Accession Protocol. These require, first, the granting of MFN and NT status by China to the WTO members.¹⁶² Secondly, to promote international trade liberalisation, various GATT articles provide for tariff reduction and Customs rules, and the removal of quotas and non-tariff barriers with a view to opening up domestic markets to WTO members. Consequently, specific reference is made to Articles, such Art VII

¹⁶¹ Jackson, Davey and Sykes, above n 4, 209.

¹⁶² Concerns raised by the WTO members referred to the discriminatory treatment in China's trade regulation regime can be found in Paragraphs 80 and 104 of the WPR, as well as Section 5 of the Protocol.

(Valuation for Customs Purpose), Art XI (General elimination of quantitative restrictions), and Art XXIII (Nullification or Impairment).¹⁶³ Thirdly, Paragraph 147 of the WPR requires the incorporation of provisions giving effect to GATT Articles promoting fair trading and competition, such as Art VI (Anti-dumping and Countervailing Duties) and Art XXVIII (Withholding or Withdrawal of Concessions). Fourthly, the WPR, e.g. in Paragraph 209 expresses concern on the active participation of China's state trading enterprises engaging in purchasing and selling, and importing and exporting and their impact on competition and fair trade and their relationship to GATT Art XVII (State Trading Enterprises). The discussion following examines how China accommodated GATT requirements by amending her domestic trade-related laws to implement the commitments she made in the WPR and the Protocol.

5.2.2 Revision of China's foreign trade-related laws to comply with GATT

5.2.2.1 Liberalisation of foreign trade

Before China's WTO accession, trading rights for foreign trade companies operating in China were regulated by a licensing system. Following accession, this was replaced by *Foreign Trade Law of the PRC* (FTL) (2004), which provided for the expansion of foreign trade operators (FTO), and a registration system.

¹⁶³ See discussions in Paragraphs 139 to 160 of the WPR.

Under the old *Foreign Trade Law of the PRC* (1994), trade enterprises could not freely engage in foreign trade within the territory of China, unless authorised or otherwise exempted by the law. A FTO was needed as a prerequisite for conducting business. This requirement was criticised for its negative influence on market access of foreign goods. The foreign exporters could not deal directly with the end-users unless they channelled their goods through a FTO. Under the Protocol, China committed that:

“Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalise the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol.”¹⁶⁴

The revised *FTL (2004)* extended FTO to include

“any legal person, other organization, or individual, that has handled industrial and commercial registration or other formalities for business operation and is engaged in the foreign trade business activities according to the provisions of the present law and other relevant laws and administrative regulations”.¹⁶⁵

This enabled all enterprises, natural persons and associations to operate foreign businesses now at a lower cost without reliance on local intermediaries.

¹⁶⁴ Protocol, Section 5 “Right to Trade”.

¹⁶⁵ *Foreign Trade Law of the PRC* (2004), Article 8.

More important was the change under the revised *FTL (2004)* - from a licensing system to a registration system. In Paragraph 84 (a) of the WPR, China had promised to “eliminate its system of examination and approval of trading rights within three years after accession”. In response to it, Art IX of the *FTL (2004)* provides that a foreign trade operator may engage in the import and export of goods and technologies “upon registration”. Under the new scheme, any entity or individual wishing to engage in imports and exports of goods or technologies may do so upon completing certain registration procedures with the Ministry of Commerce (MOFCOM) of the PRC.¹⁶⁶ This replaced the previous licensing system, which required some conditions to be met before the foreign trade operators could operate the import and export of goods or technologies, e.g. having their own names and organisational structures, and obtain the permission from the competent department in charge of foreign economic relations and trade under the State Council.¹⁶⁷ This change demonstrates that the Chinese government’s shift from direct control over foreign trade operations, to functioning as a regulator in the marketplace.

¹⁶⁶ Julia Ya Qin, “Trade, Investment and Beyond: The Impact of WTO Accession on China’s Legal System” (2007) *191China Quarterly* 726.

¹⁶⁷ Above n 165, Article 9.

Figure 3. Evolution of China's Trading Rights

Unit: 100 million RMB (¥)

Measure	Foreign Invested Enterprises	Domestic Enterprises
<i>2001 Provision on Administration of Qualification for Import and Export Business</i>	Licensing system: minimum capital ¥ 5million (m)	
2001 WPR	Full rights to trade for joint-venture enterprises with minority share foreign-investment by Nov 2002; Full rights to trade for majority share foreign-invested joint-ventures by Nov 2003.	Minimum registered capital requirement reduced to ¥5m for the first year, ¥ 3m for the second year, ¥1m for the third year.
<i>2003 Circular in Adjusting the Qualification for Import and Export Business and Procedures for Verification</i>	Licensing system: minimum capital ¥ 1m	

2004 FTL	Registration system: trading rights for all FTO (enterprises, natural persons and other associations)	Trading rights for all FTO (enterprises, natural persons and other associations) upon registration
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5.2.2.2 Reform of non-tariff barriers

Most of the goods subject to non-tariff barriers had been previously covered by the licensing and quota system before China's WTO admission. To comply with the stipulations of GATT Art XI (General elimination of quantitative restrictions) and the WTO Agreement on Import Licensing Procedures, a new article on import and export automatic licensing administration was added to FTL (2004) whereby "in view of the need to monitor the import and export, the relevant authority may exercise automatic licensing over certain commodities imported and exported freely and publish a catalogue of such commodities."¹⁶⁸ This was to ensure that the new Chinese automatic licensing system would not be used for purposes of quantitative control of the imports of restricted goods, but be used only for monitoring the imports of such goods for administrative purposes. In this spirit, the Ministry of Commerce and Customs in December 2004

¹⁶⁸ Ibid, Article 15.

promulgated the *Administrative rules on Automatic Import Licensing of Goods* to help regulate goods subject to automatic import licensing. It provides detailed application procedures for the obtaining of automatic import licensing, a catalogue of goods subject to automatic import licensing, and the name of authorities responsible for licensing approval.¹⁶⁹ In addition, Art 19 of this Act stipulates the import licence's duration of validity to be six months in keeping with the accession commitment.¹⁷⁰ All of these provisions fall within Paragraph 136 of the WPR and Section 8 of the Protocol.¹⁷¹

To examine to what extent China's licensing and quota system complies with the WTO agreement after the amendment of the FTL (2004), two matters require attention. First, more than one regulator under this system shares the power of quota application determination based on the type of imported goods. This may lead to unpredictable delays. Secondly, the lack of detailed guidelines for exercising the regulatory power regarding approval or refusal of the quota application creates an area of discretion, especially when the application exceeds the fixed amount of quota. The transparency problem this leads to also causes delay during the application process, especially when the application has to go through more than one relevant authority. Hence, while

¹⁶⁹ *Administrative rules on Automatic Import Licensing of Goods of the PRC* (2004), Appendixes I and II.

¹⁷⁰ Para 8-1 (c) stipulates "China shall issue import licenses for a minimum duration of validity of six months, except where exceptional circumstances make this impossible."

¹⁷¹ The WPR Paragraph 136 reads, 'China committed to bring her automatic licensing system into conformity with Article II of the *Agreement on Import Licensing Procedures upon accession*, the chief requirement of which is that the approval application of automatic import licensing should be granted in all cases.' Section 8 of the Protocol requires China to undertake relevant measures to facilitate compliance with GATT and the WTO agreement and the provisions of the *Agreement on Import Licensing Procedures*.

the implementing measures may comply with the WTO rule, problems may arise with the regulatory process applying these measures in keeping with the spirit of the WTO rules. Moreover, there is also concern over the lack of corresponding implementation in domestic law in the licensing and quotas system of China. As the implementing measures do not fully address the quantitative commitments for allocation of import quotas, the government may leave it to the policy discretion of the various ministries.

5.2.2.3 Liberalisation of Customs regulation

I. Customs valuation

Under the PRC law, the “dutiable value” of imported and exported goods is the amount which Customs use to impose tariffs on goods. Before China’s WTO accession, two alternative methods had been used when the valuation of imported goods could not be objectively determined. One was to use the international price of identical or similar goods that was available to the public; the other was the price of identical or similar goods in the domestic market, after deducting 20% of the price as an amount equivalent to import fees, costs and profits. Obviously, the rule of 20% deduction rate was inconsistent with the WTO Agreement on Customs Valuation, which forbids the use of the selling price of the competing domestic products.¹⁷²

¹⁷² ShangHai Customs, China <<http://shanghai.customs.gov.cn/tabid/30597/Default.aspx>> at 20 July /2008.

To comply with the requirements of GATT Art VII (Valuation for Customs Purpose) and the *WTO Agreement on Customs Valuation*, Chinese Customs law has been modified as follows:

- (i) The *Customs Law of the PRC* passed by the standing committee of the National People's Congress in 2000,¹⁷³ was amended in line with Art 55 of the *WTO Agreement on Customs Valuation*, to provide that the method of Customs valuation shall be based on transaction values, i.e. "the dutiable values of imported or exported goods shall be determined by the Customs on the basis of transaction values". If the transaction values cannot be determined, the dutiable values shall be determined by Customs. This created a legal connection between the revised *Customs Law of the PRC* and the *WTO Agreement on Customs Valuation*.
- (ii) *The Regulations of the People's Republic of China on Import and Export Duties* promulgated by the State Council of China in 2004,¹⁷⁴ defines dutiable and transaction values in Art 18, similar to the relevant provisions of the *WTO Agreement on Customs Valuation*.¹⁷⁵
As a result, such concepts of the WTO as "selling", "actually paid",

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ "The customs value of import goods shall be determined by the Customs on the basis of the transaction value which complies with the conditions specified in Para 3 of this Article, as well as the costs of transport, charges associated with transport, and the cost of insurance incurred prior to unloading of such goods at the port or place of entry within the Customs territory of the People's Republic of China. The transaction value of import goods is the price actually paid or payable for the import goods by the buyer when sold by the seller for export to the Customs territory of the People's Republic of China, adjusted in accordance with the provisions of Article 19 and 20 of these regulations, including the price paid directly and indirectly."

“payable”, “adjusted prices”, “paid directly and indirectly” have been embodied in the definition of the transaction values for the first time in the Chinese law.

- (iii) *The Measures of the People’s Republic of China on Customs Dutiable Valuation of Imported and Exported Goods* issued by the General Administration of Customs of PRC in 2006,¹⁷⁶ now provides the legal basis for Customs valuation by elaborating the rules of entities and procedures. It incorporates the narration in the WTO Agreement of Customs Valuation and provides for international valuation rules with respect to transaction value conditions, valuation methods, adjustment of actually paid or payable prices. For example, with reference to the uncertainty in the determination of transaction value, Art 8 sets out four standards to examine the transaction value of the import goods. As a result, it wholly adopts the basic principles and main contents of the WTO Agreement on Customs Valuation, and ensures conformity between domestic legislation and international valuation rules. Importers, therefore, now have more right to contest Customs valuation decisions in light of the increased transparency of the valuation process.

¹⁷⁶ Ibid.

II. Rules of origin

Prior to 2001, China's regulation of rules of origin was divided into two categories, import and export. Import rules of origin were used for the application of MFN rates, compiling of trade statistics, marking of origin, import control, anti-dumping duties, countervailing duties, safeguard measures, and tariff quotas. Export rules of origin were used for export control, compiling of trade statistics, and marking of origin. After her WTO membership, a single set of rules applying to both import and export was adopted to comply with the WTO Agreement on Rules Origin, thus ending discrepancies between the two sets of rules.

The Regulation of the Origin of Imported and Exported Goods of the PRC came into effect in 2005 and replaced the former two laws.¹⁷⁷ The new rule applies widely to various areas such as most favored nation treatment, anti-dumping and anti-subsidies safeguard measures, origin marking requirement, country-based quantitative restrictions, tariff quota, government procurement, and trade statistics.¹⁷⁸ Its basic principle of origin is consistent with the WTO Agreement on Rules of Origin, that is, the origin of a particular good is either the country (or region) where the good has been wholly obtained or, when more than one country is concerned in the production of the good, the county

¹⁷⁷ *The Rules of Origin of Export Goods of the People's Republic of China* released by the State Council on 8 March, 1992 and *the Provisional Regulations of the People's Republic of China on the Place of Origin of Import Goods* promulgated by the Customs General Administration on 6 December, 1986. See Article 27 of *the Regulation of the Origin for Imported and Exported Goods of the PRC (2005)*.

¹⁷⁸ *The Regulation of the Origin for Imported and Exported Goods of the PRC (2005)*, Article 2.

(or region) where the last substantial transformation has been carried out.¹⁷⁹ While the certainty of a particular good wholly obtained from one country or one region is not difficult to examine,¹⁸⁰ the focus has shifted to how to interpret the standard of the “last substantial transformation”. To address this issue, Art 6 provides three criteria for the determination of the “last substantial transformation”, namely, change in tariff heading, value-added content, and manufacturing or processing operations. However, it does not provide enough instruction as to what extent it is the threshold for the change of origin of the goods in the value-added chain relating to content criteria, or as to what constitutes essential characteristics applicable to manufacturing or processing operations – a task which the present regulations leave to the Customs Department.¹⁸¹ This gives regulators, to some extent, a great deal of discretion when exercising their powers.

III. Commodity inspection

The *Agreement on Technical Barriers to Trade* (TBT) seeks to standardise all certification and technical requirements for goods across all member countries. It promotes the removal of arbitrary requirements in separate jurisdictions and creates transparency. An example of how this agreement aids in the international trade of goods is Art 2.8, which states that all products must meet

¹⁷⁹ Ibid, Article 3.

¹⁸⁰ Article 4 of *the Regulation of the Origin for Imported and Exported Goods of the PRC (2005)* sets forth the detailed provisions regarding the situations of the wholly obtained goods.

¹⁸¹ The Customs Department is required to consult with Ministry of Commerce (MOC) and General Administration for Quality Supervision and Inspection and Quarantine (AQSIQ) to figure out the specific rules on the application of these criteria. *The Regulation of the Origin for Imported and Exported Goods of the PRC (2005)*, Article 6.

performance requirements rather than design or descriptive characteristics. This levels the playing field for all entities wanting to export goods as they do not need to fit changing criteria across different countries. To comply with the TBT, *the Law of Import and Export Commodity Inspection of PRC (1989)* was amended in 2002, replacing the two different commodity inspection systems for the quality certification for import and export commodities and the compulsory certification system for products sold only on the domestic market. The new rule sets out a uniform national certification system for both import and export products, which reads that,

“The import and export commodities should be inspected in accordance with the compulsory requirements of the technical regulation of the State. With regard to those commodities for which compulsory requirements of the technical regulations of the State have not yet been formulated, such requirements shall be formulated in time according to law. Before their formulation, those commodities may be inspected with reference to the relevant foreign standards designated by the State administration for commodity inspection.”¹⁸²

Additionally, it also points out the legislative purpose as “protection of the health and safety of human, animal or plant life, of the environment, or for the prevention of deceptive practices and preserving of national security”¹⁸³ to replace the “needs in the development of foreign trade”.

¹⁸² *The Law of Import and Export Commodity Inspection of the PRC (2002)*, Article 7.

¹⁸³ *Ibid*, Article 4.

However, *the Law of Import and Export Commodity Inspection of PRC (2002)* does not specify the compulsory requirement of the “technical regulation” which the inspection commodities are required to meet. In accordance with the TBT Agreement, “technical regulation” means a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provision, with which compliance is mandatory.¹⁸⁴ Furthermore, in the EC Asbestos case,¹⁸⁵ the Appellate Body clarified that a technical regulation must regulate the “characteristic” of products, such as the means of identification, the presentation and appearance, in a binding or compulsory fashion. None of these concepts are included in the revised law.

5.2.2.4 State Trading Enterprises

Pursuant to Art XVII (4) of GATT, contracting parties could establish, authorise or maintain an import monopoly of a product as state trading, i.e. the state authorises special import and export companies, which may be state-owned or non-state-owned, to deal in trade in goods in some areas. On this basis, the revised FTL (2004) added in provisions that the state may exercise state trading administration over the import and export of some goods; more importantly, it also added an exceptional provision to give permission to non-state trading enterprises to import and export a certain amount of goods under the state trading list, “the import and export of goods subject to the administration of state-run trade can be managed by the authorised enterprises

¹⁸⁴ The WTO Agreement on Technical Barriers to Trade, Paragraph 6 of Preface.

¹⁸⁵ Appellate Body Report on European Communities – Measures Affecting Asbestos and Products Containing Asbestos, WT/DS135/AB/R (Adopted 12 March 2001, paras 67-9).

only, with the exception, however, of goods allowed by the state to be partially imported or exported by unauthorised enterprises”.¹⁸⁶ This provides the legal basis in domestic law for allowing private trading to share state trading rights with authorised enterprises. Although it is limited in scope and timetable, it marks a great stride for the liberalisation of state trading.

The Administration Regulations on Import and Export of Goods of the PRC enacted in 2002 is the first piece of Chinese law that specifically regulates state trading. It sets out the basic regulatory principle for state trading, such as the items subjected to state trading and authorised enterprises. Of most significance, it requires state trading enterprises to carry out their business in accordance with “normal commercial conditions”. They cannot choose suppliers or refuse the entrustment for import an export by other enterprises or organisations “on the basis of non-commercial elements”.¹⁸⁷ These modifications, on the one hand, are fully within the provision of Art XVII (State Trading Enterprises) of GATT, which requires state trading enterprises to make purchases and sales solely based on commercial considerations; on the other hand, however, it has been criticised for its ambiguity regarding the definition of “condition” and “terms”, which did not set out any criteria or interpretation. Their meaning primarily depends on the specific cases, as well as the objective test of reasonableness under each case, leaving scope for the exercise of discretion in decision-making process.

¹⁸⁶ Above n 165, Article 11.

¹⁸⁷ *Administration Regulations on Import and Export of Goods of the PRC (2002)*, Article 52.

5.2.2.5 Fair trading measures

Fair trading measures are of particular significance in the WTO agreements. These generally include three kinds of trade remedies against injury from imports: anti-dumping measures, countervailing duties for subsidised imports, and safeguard measures regulated by the *Agreement on Anti-dumping*, and the *Agreement on Subsidies and Countervailing Measures* and the *Agreement on Safeguards* respectively. The success of GATT/WTO in achieving negotiated reductions in tariff rates impels these sorts of measures to become increasingly popular tools of trade protectionism. Due to China's large volume of exports, China has been a primary target for other countries to initiate trade remedies mechanisms, especially antidumping measures. For example, from 1995 to 2005, WTO members initiated a total of 2,840 antidumping investigations, of which 469 involved Chinese products; of the 1,804 final measures taken by the members during this period, 338 were against Chinese products.¹⁸⁸ Among these complaints, the US was foremost. China has the largest number of anti-dumping investigations initiated against her of any of the US' trading partners. During 2002-2004, over 26% of all US antidumping investigation targeted China, up from 13% in 1995-2001.¹⁸⁹ Although the WTO has reported an overall decrease in anti-dumping investigations and measures, China remains the most frequent subject of new investigations.¹⁹⁰

¹⁸⁸ WTO Antidumping Statistics.

¹⁸⁹ Robert Feenstra and Shang-Jin Wei (eds), *China's Growing Role in World Trade (2008)* University of Chicago Press 10.

¹⁹⁰ WTO Secretariat Reports Renewed Declines in New Anti-dumping Investigations and New Final Anti-dumping Measures, WTO Press/497 (2007)
<http://www.wto.org/english/news_e/pres07_e/pr497_e.htm> at 18 November 2008.

On this basis, to have systematic legislation regarding fair trading, it is crucial to ensure fair competition and to protect the domestic industry from unfair international trade practices. On 26 November 2001, just a few days before China acceded to the WTO, the State Council issued *Regulations of the PRC on Anti-dumping*, *Regulations of the PRC on Anti-subsidy*, and *Regulations of the PRC on Safeguard Measures* respectively, replacing all of the old 1997 legislation¹⁹¹ in respect of trade remedies procedures. In order to comply with the WTO commitments, the 2001 legislation was revised in 2004, broadly in line with the WTO Agreement on Anti-dumping, the Agreement on Subsidies and countervailing Measures, and the Agreement on Safeguards.¹⁹²

Despite her recent membership status, China has learned rapidly from these WTO disputes as a respondent and quickly turned out to be one of the top users of antidumping measures in the world. During the first four years of its WTO membership, China initiated 103 WTO antidumping investigations and took final measures in 68 cases, which made it the third largest antidumping user after the US and India.¹⁹³ Japan, Korea, the US and the EU are among the most frequent targets of China's antidumping investigations. In addition, China also recently initiated two cases¹⁹⁴ in the WTO, complaining of the anti-

¹⁹¹ *The Anti-dumping and Anti-subsidy Regulations of the People's Republic of China* (1997). It is the first anti-dumping law of China.

¹⁹² Xin Zhang, *International Trade Regulation in China: Law and Policy* (2006) Hart Publishing 179.

¹⁹³ WTO Antidumping Statistics.

¹⁹⁴ WTO Doc WT/DS 368 (*Preliminary Antidumping and Countervailing Duty Determination on Coated Free Sheet Paper from China*) and WT/DS 379 (*Definitive Antidumping and Countervailing Duties on Certain Products from China*). To date, the former has not had any panel established nor settlement notified; but the latter is under the process of achieving panel report.

dumping and countervailing duties imposed by the US Department of Commerce on certain Chinese products as being inconsistent with GATT, SCM, and Antidumping Agreement. This shows the progress China has made in the countervailing measure to deal with the disputes with her trading partners.

5.3 Changes to China's domestic laws to accommodate the WTO Agreements of GATS

5.3.1 Core provisions of GATS

GATS is one of the most significant results of the Uruguay Round negotiations in 1995. It was created to extend the multilateral trading system to services. The word "service" in GATS embraces more than a hundred different service sectors, such as banking, tourism, communications, medical, legal, insurance, brokerage, transport, etc.¹⁹⁵ However, the main service sectors discussed in the WPR are insurance, banking and telecommunication. Like GATT, the MFN and national treatment are the core clauses of GATS as well. These are stipulated in Art II and Art XVII respectively. More importantly, its market access provision in Art XVI requires details to be provided in the national schedule of undertakings on specific market-access commitments to member countries, with a view to progressively eliminating the practice of limiting impositions on the following: limitations on numbers of service providers, on the total value of service transactions, or on the total number of service operations

¹⁹⁵ Jackson, Davey and Sykes, above n 4, 210.

or people employed; and also equally, restrictions on the kind of legal entity or joint venture through which a service is provided, or any foreign capital limitations relating to maximum levels of foreign participation to be progressively eliminated.¹⁹⁶ The lifting up of these market access limitations in China's foreign service regulation regime according to GATS was discussed explicitly in the WPR (mainly Paragraphs 306-321) and a final decision about China's specific commitments on services was made in Annex 9 of the Protocol. The following part highlights the effort China has made to make its GATS relevant laws accord with the WTO requirements.

5.3.2 Revision of China's foreign trade-related laws to comply with GATS

China has abolished obsolete laws and regulations, and gradually revised those that are incompatible with the GATS provisions since her WTO membership. The main measure she fulfilled in her market access commitments in the field of trade in services was to revise and adopt of sector-specific laws, administrative regulations, and departmental rules.¹⁹⁷

5.3.2.1 National treatment principle

China's accession Protocol enlarged the traditional scope of the non-discrimination principle by requiring that foreign enterprises and individuals be given national treatment with respect to China's market access in services, the

¹⁹⁶ GATS Article XVI (2).

¹⁹⁷ WTO Doc WT/TPR/G/161, 10.

right to engage in the import-export business, and the conditions affecting foreign invested enterprises' production and sales in China, such as the prices and availability of public utilities and other factors of production. Nonetheless, China's efforts to comply with the non-discrimination principle of GATS started even before her official admission to the WTO. For example, *The Law of Wholly Foreign-Owned Enterprises* amended in October, 2000, made a progressive revision regarding the non-discrimination treatment of the individuals and enterprises with the foreign-related factors. It removed the restriction of domestic market preference in the procurement of raw materials by foreign enterprises. As Art 15 of the revised *Wholly Foreign-Owned Enterprise Law* reads,

"On the basis of fairness and reasonableness, the raw materials, fuel and other materials required by a wholly foreign-owned enterprise which come within its authorized business scope may be purchased within China or on the international market."

Furthermore, the provisions concerning the control of production and operational plans by relevant administrations and that regarding the balance in foreign currency have been deleted.

The accession commitment of China relating to the non-discrimination treatment is stated in Section 3 of the Protocol: "foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other (domestic) individual and enterprise". To ensure compliance with this provision, there have been numerous

modifications. One of the most significant is the promulgation of *the People's Republic of China Enterprise Income Tax Law*, which came into force on January 2008. It repealed the *Law of the People's Republic of China on the Enterprise Income Tax of Enterprises with Foreign Investment and Foreign Enterprises* adopted in 1991, and the *Interim Regulations of the People's Republic of China on Enterprise Income Tax* promulgated in 1993,¹⁹⁸ and ended the coexistence of two tax systems applicable to foreign-invested enterprises and Chinese domestic enterprises separately. Under the new rule, a uniform enterprise's income tax rate applies to both domestic firms and foreign investment enterprises. The statutory income tax rate was reduced from 33% to 25% and the methods and standards of pre-tax deductions were unified as well.¹⁹⁹ In addition, the recent *Insurance Law of the PRC* (2009) has removed the previous Art 103, which had provided that "An insurance company that needs to cede reinsurance business shall give priority to insurance companies established within China". Under the new law, the insurance companies are free to reinsure either at home or abroad.

5.3.2.2 Easing market access limitation

As required under GATT Art XVI, a number of steps have been taken to revise China's GATS relevant laws with a view to ease market access restrictions. Key among these are: Art XI of the revised *Constitution of the*

¹⁹⁸ *The People's Republic of China Enterprise Income Tax Law* (2008), Article 60.

¹⁹⁹ WTO Doc, WT/TPR/G/199, 11. See also, Article 4 of *Enterprise Income Tax Law of the PRC*, which provides that, "The enterprises income tax rate shall be 25%."

PRC (2004), which provides for the legal protection of the non-public sector, including foreign invested enterprises. In February 2005, the State Council issued *Opinions on Encouraging, Supporting and Guiding the Development of the Non-public Sectors of the Economy*, which stated explicitly that all market access barriers affecting non-public sectors should be removed,²⁰⁰ including barriers to trade in service. More importantly, the *Provision on Guiding Foreign Investment Direction* was substantially revised in 2002. The number of encouraged foreign investment industries increased from 186 to 262, while restricted industries decreased from 112 to 75.²⁰¹

Market access barriers have also been relaxed in the sectoral industries. *The Administrative Regulations on Foreign Invested Insurance Companies*, which came into force in 2002, lowered the capital requirements for national licenses from RMB 500 million (US \$67.5 million) to RMB 200 million (US \$27 million), and for branch offices from RMB 50 million (US \$6.75 million) to RMB 20 million (US \$2.7 million). In the banking services sector, remarkable progress was made in December 2003 and July 2004 when the People's Bank of China reduced working capital requirements for various categories of foreign banks.²⁰² With the issuance of the *Implementation Rules for the Administrative Regulation on Foreign-Invested Financial Institutions* in 2004, the China Banking Regulatory Commission (CBRC) also removed the restriction that had limited foreign-funded banks to opening only one branch

²⁰⁰ WTO Doc WT/TPR/G/161.

²⁰¹ Qin, above n 166, 729.

²⁰² *The Detailed Rules on the Regulations for the Administration of Foreign-Invested Insurance Companies* of the PRC (2004).

every 12 months.²⁰³ Additional regulations were promulgated by the State Council to comply with the final stage of the GATS schedule of commitment in the banking sector.²⁰⁴ As a result, geographic and customer restrictions on RMB business, as well as other non-prudential restrictions on foreign bank operations were lifted on 11 December 2006, fulfilling the commitment to “removing all the geographic restrictions and eliminating any existing non-prudential restriction measures within five years of accession.”²⁰⁵

5.4 Changes to China’s domestic laws to accommodate the WTO Agreements of TRIPS

5.4.1 Core provisions of TRIPS

The TRIPS agreement introduces intellectual property law into the international trading system and provides rules requiring governments to ensure a minimum level of protection for patents, copyrights, industrial designs, trademarks, business secrets and similar matters.²⁰⁶ As for GATT and GATS, MFN and National Treatment clauses are also of central importance to TRIPS, and are set out in Articles IV and III respectively. More importantly, TRIPS added a measure of enforceability to IPR through the Dispute Settlement Understanding system of the WTO to ensure that intellectual property rights can be effectively

²⁰³ *Report to Congress on China’s WTO Compliance* (2007) United States Trade Representative.
<http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/asset_upload_file625_13692.pdf> at 11 August 2008.

²⁰⁴ See, the *Regulation on the Administration of Foreign-funded Banks of the PRC* in November 2006, followed by the *Rules for Implementing the Regulations on the Administration of Foreign-funded Banks*.

²⁰⁵ WT/MIN (01)/3/Add.2, 34.

²⁰⁶ Jackson, Davey and Sykes, above n 4, 210. Standards concerning the availability, scope and use of intellectual property rights are found, e.g. with respect to Copyright (Article 9-14), Trademarks (Article 15-21) and Patents (Articles 27-34).

enforced, as demonstrated by its core provisions in respect of requiring the government to provide civil and administrative procedures and remedies for rights holders.²⁰⁷ WTO concerns on the need for the improvement of China's intellectual property regulations to comply with TRIPS are found in WPR paragraphs 257-263, 267-278. In addition, enforcement concerns of intellectual property protection are found in WPR Paragraphs 289-299. Following her acceptance of TRIPS, China modified her full range of intellectual property rights laws, regulations and judicial interpretations to ensure consistency with TRIPS and other international rules on protection of intellectual property rights. The discussion in this section will focus on China's basic intellectual property laws, namely, *Copyright Law; Trademark Law and Patent Law*. Moreover, in keeping with her commitments under the Protocol on IPR protection several new administrative regulations have also been promulgated.²⁰⁸ According to Chong Quan, Assistant Minister of the Ministry of Commerce, China has implemented 717 specific measures in 10 areas of the IPR protection, including legislation, law enforcement services and publicity and education just in three years from 2006 to 2008.²⁰⁹ All of these efforts seek to comply with China's commitments on IPR protection as required by the Protocol of China's WTO accession. As a result, a new legal structure of IPR protection has been formed and the IPR protection level has been greatly enhanced, though problems remain, which will be discussed in Chapter VII.

²⁰⁷ See e.g. TRIPS Articles 42-49, and the provisional measures in Article 50.

²⁰⁸ *Regulations on the Protection of Layout Designs of Integrated Circuits and Regulations on the Protection of Computer Software of the PRC*. WT/ACC/CHN/49, Para 252, table B.

²⁰⁹ *EU, China Hold High-Level Forum on IPR Protection* (2009) Intellectual Property Protection
<http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=270369&col_no=1083&dir=200903>
at 29 March 2009.

5.4.2 Revision to China's foreign-trade related laws to cope with TRIPS

China's progress regarding IPR protection improvement had commenced even before her WTO membership. These efforts were two fold: (1) improvement of IPR regulation and, (2) improvement of its enforcement, as evidenced in three basic Chinese intellectual property laws and their implementation regulations, and more importantly, in the revised *FTL (2004)*. Furthermore, several new administrative regulations covering specific subject areas were also promulgated to strengthen IPR protection, such as *Regulations on the Protection of Layout Designs of Integrated Circuits* and *Regulations on the Protection of Computer Software*.²¹⁰

5.4.2.1 Improvement of IPR regulation

I. Amendment of *Patent Law*

Among the three basic intellectual property laws, *the Patent Law of the PRC (1985)* was the first to be revised, with amendments entered into effect on July 1, 2001.²¹¹ According to the WPR,²¹² the revised *Patent Law of the PRC*, has brought China's patent regulations to the requirements of the TRIPS Agreement in most aspects.

²¹⁰ WTO Doc WT/ACC/CHN/49, Para 252, table B.

²¹¹ *The Patent Law of the PRC*, which was first revised in 1992 to add pharmaceutical compositions to the list of patentable items and inaugurate China's membership in the Patent Cooperation Treaty. See <http://www.law-lib.com/law/law_view.asp?id=96710> at 8 May 2008.

²¹² WTO Doc WT/ACC/CHN/49, Paragraphs 267-278.

The core proposed amendment China agreed to in Paragraph 275 of the WPR was the revision of “other use without authorisation of the right holder”, which is the requirement of Art 31 of the TRIPS Agreement. The modification of the *Implementing Rules of the Patent Law (2002)* addressed part of this commitment in Art 72, which reads,

“The decision of the use without authorisation of the right holder would be authorised predominantly for the supply of the domestic market; in the case of semiconductor technology, the scope and duration of such use would only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive.”

However, it did not clarify the payment rights of the right holder or other relevant conditions for the grant of the use without authorisation of the right holder; these are also required by Art 31 of the TRIPS.²¹³ Another significant revision was seen in Art 48, which tightened the standards for obtaining a compulsory license as permissible under Art 31 of TRIPS, while Art 46 allows for judicial review of patent invalidations pursuant to Art 41(4) of TRIPS.

Moreover, with the purpose of improving and strengthening her patent protection in line with the goal of constructing an “innovative country” as outlined in its National IPR Strategy, as well as to bring it fully in line with TRIPS, the *Patent Law* had its third revision in the end of 2008 and will come into force in October 2009.²¹⁴ The newly revised law made several important

²¹³ For details, see WT/ACC/CHN/49, Paragraph 275.

²¹⁴ *New China Patent Law is unveiled* (2009) Intellectual Property Protection <http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=265466&col_no=934&dir=200902> 10 March 2009.

changes to the application process and enforcement of the law and contains more detailed and specific patent protection measures than the old ones. For example, the protection standard of a patent has been enhanced; regulation of design patent has been significantly revised; and the terms of preliminary injunction and compulsory license are harmonised. More importantly, the new Act removed the requirement for all Chinese individuals and entities to first file applications in China for inventions made in China. The revision allows Chinese individuals and entities to file their patents for the first time in other countries, not necessarily in China. In other words, applicants can apply for foreign patents even before obtaining Chinese patents, as long as they go through a security check held by patent authority of the State Council of the PRC.

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II. Amendments to the *Trademark Law*

Trademark Law first came into force on 1 March 1983 and was amended in 1993, followed by the second revision in October 2001. To further ensure the compliance of the trademark system of the TRIPS, the Implementation of Trademark Law came into force in 2002. The core amendments are set out below:

²¹⁵ Ibid.

- (i) Extending the scope of the registrable categories of the former law by adding three-dimensional symbols, combinations of colours, alphabets and figures. In order to conform to Art 15.1 of TRIPS,²¹⁶ as well as the commitment China made in Paragraph 263 of the Report of the Working Party on China's WTO Accession, Art 8 of *Trademark Law of PRC* was revised as "In respect of any visual sign capable of distinguishing the goods or service of one natural person, legal entity or any other organization from that of others, including any word, design, letters of an alphabet, numerals, three-dimensional symbol, combinations of Colours, and their combination, an application may be filed for registration".
- (ii) Extending the range of subjects protected by the Trademark Law by adding new rules on the protection of geographical indications (including appellations of origin), collective trademarks and certification trademarks. The revised Trademark Law made Art 16 a specific provision on the protection of geographical indications. This was to comply with the obligation under the TRIPS Agreement (Articles 22 - 24), and also the commitment China made in Paragraph 264 of the WPR.

²¹⁶ TRIPS Article 15.1 stipulates that "Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks".

- (iii) Extending the scope of the protection system of “Well-Known” trademarks, in order to meet the requirements of Art 16 of TRIPS and the China’s accession commitment.²¹⁷ Art 13 of *Trademark Law* stipulates special protection for well-known trademarks and Art 14 states the general criteria for determining whether a mark constitutes such a mark, protecting the domestic well-known trademarks as well as those from overseas, whether they have registered in China or not.
- (iv) Modifying the former trademark right confirmation system by the introduction of the opportunity for judicial review concerning the confirmation of trademarks. In accordance with Art 62 of TRIPS, any final administrative decisions concerning the acquisition or maintenance of the IPR, administrative revocation and *inter partes* procedures such as opposition, revocation and cancellation shall be subject to review by a judicial or quasi-judicial authority. The revised law made the judicial review possible for all the administrative decisions, replacing the old provisions which made the administrative decisions of the confirmation of trademarks as final and no judicial remedy was offered.

III. Amendment to the *Copyright Law*

The Copyright Law was amended in October 2001, just two weeks before China rejoined the WTO. The promulgation of *The Implementation Rules of the*

²¹⁷ WPR, Paragraph 262.

PRC Copyright Law (2002) further implements her WTO obligations. The main features of the amendments can be summarised as follows:

- (i) In response to “the need to clarify the rights of performers and producers to bring them into conformity with the requirements of Art 14 of the TRIPS Agreement”,²¹⁸ the revised *Copyright Law* added the performers’ right of allowing the broadcasting of their performance by wireless means and the communication to the public.²¹⁹ It also expanded the rights of the producers of phonograms by permitting the others to reproduce, rent or broadcast their phonogram by wireless means.²²⁰ This revision brought into close conformity China’s copyright laws with Art 14 of TRIPS.²²¹ However, Art 14 also addresses rights of performers and producers of phonograms to prevent the unauthorized use of their performance or phonogram, which the revised *Copyright Law of PRC* does not cover.

- (ii) The proposed amendments China made in Paragraph 259 of the WPR about “providing provisional measures, increasing the legitimate compensation amount and strengthening the measures against infringing activities” were carried out by the revision of the

²¹⁸ Ibid, Paragraph 258.

²¹⁹ *Copyright Law of the PRC*, Article 37 (6).

²²⁰ Ibid, Article 41.

²²¹ TRIPS Article 14, “In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization, ...2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.”

Copyright Law. In the new law, provisions on the suspension of related infringement acts and the provisional measures for the preservation of property and evidence against alleged infringements were added.²²² Moreover, the administrative sanctions against infringing activities causing damage to public interests were improved.²²³

- (iii) In order to “ensure MFN and national treatment to foreign right-holders regarding all intellectual property rights across the board in compliance with the TRIPS”,²²⁴ *the Implementation Rules of the PRC Copyright Law*, which entered into force on August 2002, explicitly stipulates the protection of foreigner’s performance, sound or video recordings, and broadcasting in Articles 33 to 35.

IV. Revisions regarding the protection of IPR for foreign trade

In addition to the amendments brought about by the three basic IP laws, there was the addition of a new Chapter (Chapter V) in the *FTL (2004)* to deal with foreign trade-related intellectual property protection. It includes three articles which deal with the preventing of infringement of IPR from imported goods (Art 29), preventing the abuse of IPR by the owners (Art 30), and facilitating overseas protection of IPR of China through application of trade measures

²²² Above n 219, Article 49 & 50.

²²³ Ibid, Article 47.

²²⁴ WPR, Paragraph 256.

(Art 31). It should be noted that the scope of the IPR protection of the FTL (2004) is

set in the background of foreign business, and the IPR abuse by the owner it prevents is the abuse that could bring an adverse effect to China's foreign trade. While the Chinese IP laws, mainly the three basic IP laws, are directed at all issues that arise from the IPR protection, the FTL (2004) deals with the foreign trade-related IPR protection only.

The following part discusses Art 29 of *FTL (2004)* due to its relevance with this thesis. The Article provides a general principle for the foreign trade-related IPR protection, "in accordance with relevant laws and administrative regulations concerning intellectual property". In particular, it also expressly provides that

"where any of the imported goods violates any IP rights and ... endangers the foreign trade order, the foreign trade department of the State Council – MOC, may take such measures as prohibiting the import of the relevant goods that the infringer has produced or sold for a certain period time."

While this provision grants an ambiguous power to MOC with regard to the protection of IP rights against their infringement by the imported goods, their application in practice is far from clear. Two questions arise from this provision. The first one is the regulatory scope of the MOC in protecting IPR; the second is the conditions where the MOC can exercise its regulatory power to protect IPR infringed by imported goods.

(i) The regulatory scope

The literal meaning of this provision restricts the regulatory power of the MOC to “imported goods”. It seems that MOC is only concerned about the infringement of IPR by the goods that are or are not to be imported to the territory of the PRC. Following this understanding, the issue arises whether MOC has the regulatory power to prohibit the export of Chinese goods that infringe either Chinese-protected IP rights, or an international protected IPR. Although under the Chinese IP law regulatory regime, IPR relating to the exported goods are regulated by Customs, it seems anomalous that MOC as the primary foreign trade regulator only has the regulatory right for imported goods, but not for the exported goods that could equally infringe IPR. This point needs to be clarified by the MOC or covered by another law or administrative rule that clearly empowers the MOC to protect export-related IPR as well.

(ii) The regulatory conditions

According to Art 29 of *FTL (2004)*, there are two conditions for the MOC to exercise its regulatory power for IPR protection. First, where the imported goods violate some sort of IP rights; secondly, where such violation caused by the imported goods endangers the foreign trade order. The first condition is an issue of fact which should be proved by the applicants themselves. The second condition, however, is ambiguous and uncertain. The implication could be that if the imported goods do violate IP rights, but do not cause harm to the “foreign trade order”, the MOC will not intervene. Obviously, this does not sound

reasonable. Also, it lacks clear criteria or guidelines to apply to the definition of “foreign trade order”, and what factors “endanger” the foreign trade order. Therefore, the MOC might enjoy too much discretion in deciding whether or not the second condition has been satisfied. Also this uncertainty would cast doubt on the effectiveness of the FTL (2004) in respect of the IP rights protection.

In conclusion, it is a remarkable measure of progress for the FTL (2004) to have set IPR protection in its regulatory ambit. However, the application of this procedure is still ambiguous. More detailed criteria on the implementation procedure would be really helpful in the future revisions of IPR related issues.

5.4.2.2 Improvement of IPR enforcement

For the enforcement of IP protection, currently two routes are employed in China: administrative and judicial. The judicial route is somewhat similar to the American intellectual property protection system in that an IP owner files suit for relief in court. The administrative system enables IP owners to enforce their IPR without going to court. The administrative procedure is the most commonly used method, especially for trademark and copyright matters, as it is comparatively flexible and can provide effective options for adjudicating IPR disputes. However, if the IP owner is not satisfied with the results of the administrative agency, judicial remedies are always available as an alternative.

The following amendments relating to IPR enforcement focus on China's three basic IPR laws, though problems remain with the enforcement difficulties as will be discussed later. The revised laws now allow preliminary injunctions that can be applied before or shortly after initiating the lawsuit,²²⁵ and allow enforcement authorities to confiscate income from infringing products and to impose fines on violators.²²⁶ To help preserve evidence and property, the laws also authorise administrative agencies and courts to confiscate and destroy infringing products and materials, as well as the tools and equipment used in the manufacturing process.²²⁷ More importantly, foreign rights holders may enforce their rights through both local and national authorities.²²⁸ Finally, in order to "crack down on all serious infringement",²²⁹ the sanctions against the IPR infringement have been strengthened. All of the three basic IP laws of China provide criminal liability for IPR infringement.²³⁰ The most significant are in Articles 53 to 59 of the *Trademark Law*, which require enforcement authorities to transfer administrative and customs cases to a judicial body for criminal investigation regarding trademark infringement.

²²⁵ Article 49 of *Copyright Law of the PRC*; Article 66 of *Patent Law of the PRC* and Article 57 of *Trademark Law of the PRC*.

²²⁶ *Copyright Law of the PRC*, Article 47 permits enforcement authorities to confiscate unlawful income and to impose fine on violators. See also, *Trademark Law of the PRC*, Article 53.

²²⁷ *Copyright Law of the PRC*, Articles 47 & 51, which authorize administrative agencies and courts to confiscate and destroy infringing products and materials, as well as the tools and equipment used in the manufacturing process. See also, *Trademark Law of the PRC*, Art 53.

²²⁸ Catherine Sun, *China Intellectual Property for Foreign Business* (2004) LexisNexis 11. (listing the new judicial interpretations that dealt with trademark protection).

²²⁹ WPR, Paragraph 263.

²³⁰ *Copyright Law of the PRC*, Article 20 and *Trademark Law of the PRC*, Article 59.

In addition to the basic laws, the improvement of the IPR enforcement is also shown by the criminal provisions changes found in the *Criminal law of the PRC* and interpretations by the Supreme People's Court and the Supreme People's Procuratorate on handling criminal cases of IPR infringement. For example, the Supreme People's Court and the Supreme People's Procuratorate issued the first *Interpretation of on Several Issues in the Concrete Application of the Law in Handling Criminal Cases of Intellectual Property Infringement* in 2004, and the second one in 2007,²³¹ sharply lowering the threshold for criminal liability and specifying the standard of sentencing on the crimes of IPR infringement. The 2007 *Interpretation* enhanced the IPR enforcement largely by: (1) dramatically lowering the threshold for Prosecution of IPR Violators;²³² (2) clearly defining the amount of the fine for intellectual property crimes pursuant to Art 4;²³³ and (3) specifying the standard of sentencing IPR infringements. It provides that any organisation, which commits the acts of IPR infringement included in Articles 213-219 of the Criminal Law of the PRC, should be

²³¹ See details, <
<http://english.ipr.gov.cn/ipr/en/info/infoSearch.jsp?keyword=sues&Column=&pageno=18>
> at 2 April 2009.

²³² It provides that anyone who, for the purpose of making profits, reproduces and distributes more than 500 illegal copies of written, musical, movie, televised, and video works, computer software and other works without the permission of copyright owners, falls under the definition of "other serious circumstances" as provided in Art 217 of the Criminal Law of the PRC. If the number of illegal copies was more than 2500, the act constitutes "other especially serious circumstances" provided in Art 217 of the Criminal Law of the PRC. See *The Interpretation of on Several Issues in the Concrete Application of the Law in Handling Criminal Cases of Intellectual Property Infringement, 2007, Article 1.*

²³³ "in determining the fine for intellectual property crimes, the People's Courts shall comprehensively take into account the illegal income, the illegal turnover, the damage caused to the rights owner, the harm to society and other circumstances of the crime. The amount of the fine shall generally range from one time up to five times the illegal income or 50 % up to one time the illegal turnover."

convicted and sentenced according to the corresponding criteria for individual offenders set forth in both 2004 and 2007 Interpretations.²³⁴

The latest step towards the IPR enforcement improvement is the National *Intellectual Property Strategy of China*,²³⁵ the purpose of which is to actively respond to international challenges and adjust to demands of economic and social development. It embraces the idea for the government to consider developing specialised courts to handle civil, administrative or criminal cases involving IPR for the first time in China.²³⁶ This could certainly facilitate overcoming difficulties where cases are transferred, e.g. from administrative system to criminal enforcement system. Another recent step is the amendment of *Patent Law of the PRC (2009)*, which increases the penalty for patent infringement from three times to four times the illicit profits and raises the damage payment from RMB 50,000 (about US \$7,000) to RMB 200,000 (about US \$30,000) even if there was no profit from infringement.²³⁷ In addition, Art 65 of the amended law also provides that in situations where the plaintiff's damages or the infringer's profits cannot be determined, the court can choose the damage penalty between RMB 10,000 (about US \$1,500) to RMB 1,000,000 (about US \$150,000).

²³⁴ *The Interpretation of on Several Issues in the Concrete Application of the Law in Handling Criminal Cases of Intellectual Property Infringement, 2007, Article 6.*

²³⁵ *State Council of China, Compendium of China National Intellectual Property Strategy (2008)* HighBeam Research < <http://www.highbeam.com/doc/1G1-184340426.html>> at 11 August 2008. On June 5, 2008 the State Council promulgated the Compendium of China National Intellectual Property Strategy, vowing to build China into a country with a comparatively higher level of intellectual property rights creation, utilization, protection and administration by 2020.

²³⁶ National Intellectual Property Strategy of China (2008) Paragraph 45.

²³⁷ For the comparison of the changes, see Articles 58 & 59 of the previous Patent Law of the PRC (2000) and Article 63 of the Patent Law of the PRC (2009).

5.5 Conclusion

The systemic change investigated above, on the one hand, mirrors China's good faith in carrying out its WTO undertakings, while on the other, modernises China's legal system to support foreign business activities. More importantly, it evidences the ineluctable convergence of China's domestic laws with WTO laws in respect of both her operating principles and general norms. We could say that China has been operating well to "ensure that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreements".²³⁸ The next chapter explores further this continuing convergence, along with the investigation of the legal divergence trend in other WTO countries caused by the 2008 economic meltdown.

²³⁸ WTO Doc WT/ACC/CHN/49, Paragraph 67.

CHAPTER VI

LEGAL CONVERGENCE AND DIVERGENCE IN THE POST-2001

CHINA

CHAPTER VI

LEGAL CONVERGENCE AND DIVERGENCE IN THE POST-2001

CHINA

6.1 Introduction

Post-2001 China evidences a continuing trend of legal convergence between domestic international trade laws and WTO laws. A vast number of laws relating to foreign trade has been enacted. The rudiments of a modernised foreign trade regulation system have been growing steadily in China. More remarkable, however, is that this is despite the 2008 global economic meltdown and talk of domestic protectionism (read WTO divergence) among some EU members and the US. What this highlights is that the obligation attached to WTO membership and its accompanying laws have attached to them significant social and economic costs.

6.2 Continuing legal convergence

The WTO compliance enforcement process and procedures has stimulated China to accept, institutionalise, and utilise WTO and international trading rules and norms generally. In a great many ways, it marks a watershed and the

coming of age of China as an international economic power. It has had the effect of compelling her to accelerate her trade liberalisation program, widen market access, and compel conformance with the rules of trading with the international body. China's structural reforms through legal convergence have resulted in annual real GDP growth rates in excess of 10% over the past four years, rising per-capita income and poverty reduction.²³⁹ According to a WTO Secretariat report in 2008 on the trade policies and practices of China,²⁴⁰ China's trade regime has continued the liberalising trend, which will help sustain her high growth in the face of a number of challenges under the current global economic recession. So it is that the Chinese economy has continued to grow despite the economic meltdown, albeit at a slightly reduced pace.

Although most of the laws and regulations relevant to foreign business have either been repealed or revised, with some newly created, along with the completion of China's WTO commitments by 2006 (according to her Accession Schedule in goods and services), the legal convergence progress in China has not stopped. A great amount of legislation relating to foreign business was promulgated recently, such as *the Enterprises Insolvency Law of the PRC (2007)*, *the Property Law (2007)*, and *the Anti-Monopoly Law (2008)*. With numerous laws and regulations in place, what is needed now is to foster a legal environment that adopts a normative view of the law to enable it to evolve efficiently and integrate fully with the international system. The remarkable

²³⁹ Above n 93.

²⁴⁰ WTO Doc WT/TPR/S/199.

effort at legal revision has already promoted greater understanding of the content and operation of international law standards by the populace, and has led to the better implementation of these international obligations. Though progress with respect to the latter has been slow, it is time to say that it is happening. A good example of this is IPR protection, which will be discussed in the next Chapter.

While government direction at the central level in creating such a legal environment is of the utmost importance, such a top down model alone (which has been dominating China for decades), has been found wanting. For example, the inconsistency between central and local government policies, and for that matter different perspectives on the same policy is not unknown. Thus, it is necessary to progress from mere formal instrumental compliance to the strategic adoption of this objective, as the truly international level legal system integration is not just about the formulation and acceptance of the international law, but also to implement, monitor and enforce WTO legal standards. Given the size of the country and population, as well as her varied local conditions, a bottom up mechanism to accept and acculturate international norms to local circumstance would be necessary for continuing legal convergence.

In summary, the process of legal convergence represents the progress of economic globalization. Despite this, the vast body of changes introduced into the laws and legal system of China, needs time to take firm root and be widely

accepted by the populace at large as part of their national laws and for it to be observed as a matter of routine.²⁴¹ This can prove to be a slow process, as would be the case in any country.

6.3 Divergent trends in the US and the EU, and its impact on legal convergence in China

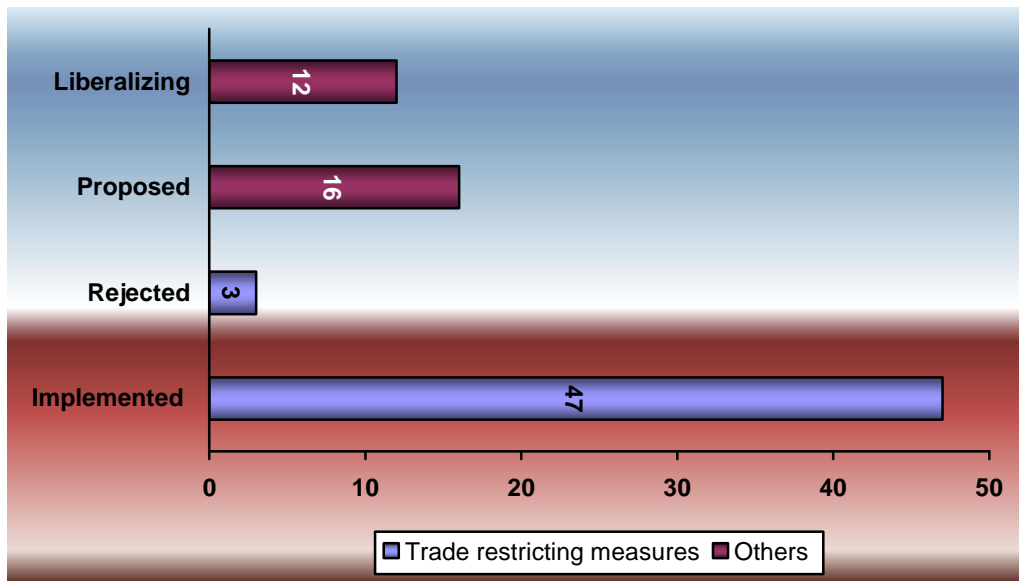
In the face of the 2008 financial crisis, domestic pressures for increased protectionism has been building up in WTO member countries. The history of the Great Depression in the 1930s shows that, as the crisis deepens, there is increasing pressure to raise trade barriers. This would bring significant costs in terms of efficiency.²⁴² Despite signing a pledge in November 2008 to avoid protectionism, 17 of the G20 countries have since introduced 66 trade restriction measures, of which 47 individual measures have taken effect.²⁴³

²⁴¹ Donald C. Clarke, 'China: Creating A Legal System for A Market Economy' (Public Law and Legal Theory Working Paper No. 396, George Washington University Law School, 2007) 24.

²⁴² Blanchard, O., Cottarelli, C ., Spilimbergo, A. and Symansky, S., *Fiscal Policy for the Crisis* (2009) Voxeu Organization <<http://www.voxeu.org>.> at 22 May 2009.

²⁴³ Gamberoni, E. and R. Newfarmer, 'Trade protection: incipient but worrisome trends', in Baldwin and Evenett (eds), *The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20* (2009) Vox EU 49.

Figure 4. Trade Measures Taken from Oct 2008 – Feb 2009



Source: World Bank staff, List of Trade-related Measures, February 2009. Excludes anti-dumping cases.

Key among these is the US “Buy American” clause. The US Congress passed the “Buy American” provision in February 2009. This required the government infrastructure projects to use exclusively US-made steel, iron, and manufactured goods. As part of President Barack Obama's economic stimulus package, it banned the use of most foreign iron and steel from infrastructure projects funded under the \$787 billion stimulus bill.²⁴⁴ The protectionist attitude of this provision is clear and disappointing. However, while previous laws allowed that a US product could usually win a government bid if its price was not more than 6% higher than that of a foreign

²⁴⁴ Andrew Mayeda and Sheldon Alberts, *US Stimulus Plan's Protection Clause Concerns Harper* (2009) National Post <<http://www.nationalpost.com/news/story.html?id=1231096>> at 7 March 2009.

good, the new provision raises it to 25%. That means a US product could be 25% more expensive than a foreign good and still win a bid.²⁴⁵ The final version, which was passed in March 2009, expanded the coverage of the provision to all manufactured goods though added a stipulation that the provision "be applied in a manner consistent with US obligations under international agreements".²⁴⁶ Unlike the EU, Japan and Australia etc, who already have signed the WTO Agreement on Government Procurement and free trade agreement with the US and thus remain unaffected by this provision, countries such as China, India, Russia, Turkey and Brazil would be subject to this provision and thus disadvantaged. While supporters of the "Buy American" clause say it meets Democratic and labor unions' demands that the stimulus package be used to create jobs in America under the global slump, critics claim that it breaches the WTO free-trade principle and would drive other countries to retaliate with their own protectionism, triggering thereby a global trade war. "It's the me-tooism phenomenon", says Gary Clyde Hufbauer, of the pro-free-trade Peterson Institute for International Economics. Given that there are plenty of protectionists in Brazil, Argentina, and other countries who will say, 'Look, the Americans are doing it, so we should do it as well, trade will be the loser.'²⁴⁷ The result of this potential rise of protectionism, of course, will cause fewer jobs anywhere in the world, and hurt everybody. This has assumed significant concerns in the Doha Round, which is struggling to grapple with it.

²⁴⁵ Andres Oppenheimer, *Buy American Law Will Cost More Than We Think* (2009) Philly < http://www.philly.com/inquirer/opinion/20090217__Buy_American__law_will_cost_more_than_we_think.html > at 8 March 2009.

²⁴⁶ Section 1604 (d) of the Buy American Provision.

²⁴⁷ Ibid.

This trend of trade protectionism is also evidenced in the number of regional trade blocs established after the outbreak of the financial crisis. The EU quickened its pace at boosting the process of its integration. By the end of 2008, EU members other than Ireland, the Czech Republic and Poland, ratified the Lisbon Treaty, which was designed to reform EU institutions and streamline decision-making in the ever-enlarging union. In addition, a charter of the Association of Southeast Asian Nations (ASEAN), which was ratified by the Parliaments of 10 members of the regional bloc and formally entered into force in December 2008, clearly set the strategic goal of setting up an ASEAN community.²⁴⁸ Furthermore, the Southern African Development Community (SADC) and two other regional blocs, the East African Community and the Common Market for Eastern and Southern Africa, held a summit in the Ugandan capital of Kampala to discuss Africa's economic integration.²⁴⁹

Given China's close and complex international relations with her trading partners, there is the possibility that market protectionism methods may be resorted to block further economic integration and with the benefits of legal convergence. Though no decisive action has been taken, the achievement of a few cooperation agreements between China and Japan after the outbreak of global crisis was seen as a sign of trading alliance formation in response to the economic recession. This is not surprising since China and Japan have always had a special historical relationship. China in 2007 surpassed the

²⁴⁸ Sun Ruijun and Bao Erwen, *Globalization, Regional Cooperation* (2008) <http://news.xinhuanet.com/english/2008-12/28/content_10571543.htm>at 12 March 2009.

²⁴⁹ Ibid.

United States as Japan's largest trading partner, taking 14% of its exports and supplying 21% of its imports.²⁵⁰ The relative shortage of labor in Japan's ageing society, its superb education system, and the surplus of labor in China provide complementary benefits in the circumstance of global crisis.

In summary, all of these divergences may have the effect of slowing the overall integration process of China with the world economically, as well as legally. On China's part, however, it must be said that since the time of her admission into the WTO, she has made remarkable progress in the internationalisation of her market based laws and trading system as well as substantial increases in her participation in the international legal system and trade regime.²⁵¹

6.4 Conclusion

As with most aspects of China's dynamic modernisation programs, the internationalization of her trade-related laws has been a complex and novel process. By reason of globalization, the last ten years has seen increased internationalization of China's market through her WTO accession as well as substantially increased participation in international legal regime.²⁵² China now has become the world's third largest trader and has continued to be one of the largest recipients of inward FDI and has become a large provider of outward

²⁵⁰ Martin Hutchinson (ed), *Two Ways to Profit as China and Japan Quietly Forgot the Most Powerful Trading Alliance in the World* (2009) Money Morning
<<http://www.moneymorning.com/2008/05/16/two-ways-to-profit-as-china-and-japan-quietly-forge-the-most-powerful-trading-alliance-in-the-world/>> at 10 March 2009.

²⁵¹ Pitman B. Potter, 'China and the International Legal System: Challenges of Participation' (2007) 191 *China Quarterly* 715.

²⁵² *Ibid*, 716.

FDI, reflecting her increasing integration into the global economy.²⁵³ Yet there are uncertainties about the extent to which China's domestic laws have assimilated international norms since 2001. The accommodation of her legal system to comply with GATT, GATS and TRIPS examined in the previous Chapter, already reflect this alignment and convergence. This continuing convergence and benefits need recognition and adoption by her populace to achieve a level of general compliance of international rules and standards. The outcome of this legal convergence, however, will not come easily; nor will this progress be acknowledged readily by the world trading community. It might take years for the world to see the profound effects of these changes on China's economy and her integration with the international trade regime. The next Chapter moves on to consider the areas of continuing contention between China and the WTO members.

²⁵³ Above n 241.

CHAPTER VII

SOME CONTINUING ISSUES OF DISCORD

CHAPTER VII

SOME CONTINUING ISSUES OF DISCORD

7.1 Introduction

Pursuant to Annexes 8 (Schedule in Goods) and 9 (Schedule in Services) of the WPR most of China's WTO commitments were scheduled for implementation within a few years after accession. For example, most of the final bound tariff rates of goods are scheduled to be implemented between 2003-2006, with only 11 items set for 2008²⁵⁴ and one item by 2010.²⁵⁵ Consequently, almost all of China's WTO commitments had to be implemented by 2006. In the absence of a common system for measuring WTO compliance requirements, a Transitional Review Mechanism (TRM)²⁵⁶ was set in place by the US (supported by the EU) as the standard for

²⁵⁴ Annex 8 of the WPR, p52 (29173610 Terephthalic acid); p74 (3901 Polymers of ethylene; 3902 Polymers of propylene or of other olefins; 3903 Polymers of styrene; 3904 Polymers of vinyl chloride or of other halogenated olefins) and p75 (3907 Polyacetals, other polyethers and epoxide resins; polycarbonates, alkyls resins, polyallyl esters and other polyester; 3908 Polyamides and 3909 Amino-resins, phenolic resins and polyurethanes); p76 (3915 Waste, parings and scrap, of plastics; and 3917 Tubes, pipes and hoses, and fittings thereof of plastics) and p77 (3920 Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials).

²⁵⁵ *Ibid*, p15 (0812 Fruit and nuts, provisionally preserved (for example, by sulphur dioxide gas, in brine, in sulphur water or in other preservative solutions), but unsuitable in that state for immediate consumption).

²⁵⁶ Protocol, Section 18. The review under the TRM started to take place after China's WTO accession and will continue each year for eight years with a final review in the tenth year or at an earlier date decided by the General Council of the WTO. It has been criticized as discriminatory because it requires China to provide WTO members with specific information, such as economic data and policies affecting trade in goods, services and IPR protection. Moreover, this special review instrument applies only to China, besides the ordinary WTO Trade Policy Review Mechanism.

monitoring China's compliance with her WTO commitments. The TRM found two issues to be the subject of frequent complaint by China's core trading partners, namely, the subsidisation of China's State Trading Enterprises (STE), and the enforcement issues of IPR protection. These have gathered momentum in the face of China's accumulation of massive reserves of foreign currency arising from her trade surpluses and their employment under the umbrella of Sovereign Wealth Funds to make strategic investments and to acquire strategic investment portfolios. Each of these is considered below. Firstly, the existence of a large number of STE in China has apparently been perceived as fundamentally incompatible with the world trading system. Combined with this are China's non-market economic (NME) status and the subsidies to her State-owned Enterprises (SOE). Secondly, IPR enforcement has become a highly contentious area in recent WTO disputes between the US and China.²⁵⁷ Some view this as a US trade offensive against China.²⁵⁸ As to whether such an offensive will help in China's full compliance of her WTO obligations remains to be seen.

²⁵⁷ WTO Doc WT/DS 358 - *Certain Measures Granting Refunds, Reductions and Exemptions from Taxes as to Domestically Produced Goods* (Feb 2nd, 2007); DS 362 - *Measures Affecting the Protection & Enforcement of Intellectual Property Rights* (April 10th, 2007); WT/DS 363 – *Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products* (April 10th, 2007).

²⁵⁸ Some critics pointed that the US IPR complains against China showed its "active engagement" toward meeting the new challenges of East Asia. See Stuart S. Malawer, 'Global Trade Law' (2007) *International Practice Section, Virginia Lawyer*.

7.2 State-trading Enterprises (STE)

7.2.1 The STE and SOE

GATT Art XVII refers to SOE, while the 1994 Understanding on the Interpretation of Article XVII of GATT provides a working definition of STE, as follows:

"Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

Three features of this definition stand out: (i) governmental and non governmental enterprises including marketing boards, (ii) enjoying exclusive or special rights, privileges and powers, and (iii) which through their purchases and sales influence the "level or direction" of purchases or sales of imports or exports. Given its breadth, it would appear that the working definition includes within it both STE and SOE. The Working Definition seems to suggest that Art XVII is concerned more about the special or exclusive rights and privileges over a market rather than state ownership of the entity itself. In other words, if operating in fully competitive markets, SOE are not subject to the discipline of the requirement of Art XVII.

Though there is no conclusive answer on whether and how the state trading

rules of GATT apply to the SOE of China, commitments made in the WPR by China offer assistance on this. For example, in response to the requests of other members of the WTO, China confirmed that, "all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g., price, quality, marketability and availability, and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to, and purchases from, these enterprises on non-discriminatory terms and conditions."²⁵⁹ This conforms with the substantive requirements of Art XVII:1(a) and (b).²⁶⁰

As discussed above, *the Administration Regulations on Import and Export of Goods of the PRC* enacted in 2002 further confirms this. Nonetheless, there is concern as to the failure of Art XVII to address the issue of transparency of SOE in China, especially as to any subsidies they may receive and consequent trade distorting effect on imports into and exports out of China, and on third countries. This has made the task of distinguishing between "legitimate" government subsidies and trade-distorting subsidies difficult.²⁶¹ Consequently, the trade effect of subsidisation through state trading operations is left to be disciplined by GATT Art XVI (Subsidies) and the SCM Agreement, and where appropriate, to the relevant provisions of the Agreement on Agriculture.²⁶²

²⁵⁹ The WPR, Paragraph 46.

²⁶⁰ Jackson, Davey and Sykes, above n 4, 408.

²⁶¹ Longyue Zhao and Yan Wang, 'Trade Remedies and Non-market Economies: Economic Implications of the First US Countervailing Duty Case on China' (Policy Research Working Paper 4560, World Bank, 2008) 8.

²⁶² WTO Panel Report, *Canada – Wheat*, WT/DS276/R, Paragraphs 6 (104) and (105).

7.2.2 Subsidies to SOE

Two issues of concern in relation to China's SOE have been (1) the imposition of antidumping duties and countervailing measures, and (2) denial of the Art 29 SCM agreement benefit.

7.2.2.1 GATT Art VI and NME

Chinese subsidies in general, and to SOE in particular, have been of special concern to the world trading system as they occur in the context of her NME. GATT Art VI allows discriminatory treatment of, and imposition of anti-dumping duties and countervailing measures on countries that have a complete or substantially complete government monopoly over international trade and where all domestic prices are fixed by the state - a situation which rarely exists in the context of current international trade. China's Fourteenth Congress in October 1992 clearly defined the country's economic reform objective as being the establishment of a "socialist market economy". The amendment of Art 15 of the PRC Constitution in 1993 replaced "planned economy under public ownership", and more importantly, replaced "supplementary role" of the "market" with the straightforward declaration that "the state practices the socialist market economy".²⁶³ The "market" then, was established as the main instrument for resource allocation. However, since there is no accurate definition of "socialist market economy", it is the subject

²⁶³ Chinese Constitutional amended on 29 March 1993 replaced the text "planned economy under public ownership" with the words "socialist market economy".

of continuing debate. What seems to be generally agreed is that a socialist market economy is one which, while allowing market forces to play the major role in market allocation, additionally incorporates two fundamental socialist principles.²⁶⁴ First, public ownership would be the mainstay in that economy, supplemented by private ownership. Second, it would adopt measures to prevent unfair income distribution, and emphasise the elimination of remaining poverty. Based on this, China's socialist market economy is, much more likely, to be a market economy operating under socialist conditions, and balancing a combination of social fairness and market efficiency. For this reason, China's economic status would appear not to match any of the NME standards of GATT Art VI.

The issue of NME status in relation to China came to a head during the Doha Round talks, following the US's imposition of countervailing duties on China in 2007. This imposition marked a departure from the policy of US Department of Commerce of not applying countervailing duties on NME in the last 23 years.²⁶⁵ The approach the US has been using to impose countervailing duties on NME involves the determining of a theoretical price for goods from prices of inputs plus expenses and profit percentages of a *surrogate market economy*. Such an approach disadvantages Chinese exporters, as use of surrogate market data deprives Chinese manufacturers of the comparative advantage of their labour

²⁶⁴ Xiuping Sun, Huayou Zhu and Tiejun Yao, *Theory and Reality of Transition to a Market Economy* (1995) Foreign Languages Press 18.

²⁶⁵ The Commerce Department of the US preliminarily decided to apply CVD to coated free-sheet paper imported from China on March 30 2007. See, Zhao and Wang, above n 258, 1-2.

costs.²⁶⁶ As compared to the US, the EU adopts a somewhat hybrid approach to determine the “normal value” of the product from the NME. Commission Decision No 435/2001/ECSC of 2 March, 2001, amended the EC’s earlier approach to non-market economies by providing that it would be possible in limited circumstances to treat imports from China as coming from a market economy if it is shown that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned.²⁶⁷ This hybrid approach shows that although the investigating authorities are not yet willing to consider that China is – in an overall sense – a market economy, they are willing to be convinced that market economy conditions might prevail in limited industry-specific cases. This approach has been adopted also by India and Korea – an approach while not amounting to the treatment of China as a market economy –yet shows willingness to acknowledge that market economy conditions may prevail in limited industry-specific cases. Moreover, given China’s remarkable progress toward a market economy over the past few decades since her admission into the WTO in 2001, it would be incorrect to view the Chinese economy of today as being entirely state-centric. Nonetheless, it was a condition of the WTO Protocol that China took on market access obligations and be treated as a NME for 15 years after its accession to the WTO.

²⁶⁶ Stoler, above n 144.

²⁶⁷ Ibid, 4.

7.2.2.2 Subsidies and SCM Agreement: Art 29 benefit

The existing WTO subsidy disciplines do not concern themselves with the special circumstances of NME, and instead assume conditions typical of a market economy. SCM Agreement Art 29 (Transformation into a Market Economy), arising from the Uruguay Round, is an exception to this in that it grants an exception to subsidies used for purposes of economic reform. The Article exempts subsidies from WTO challenges for a 7-year period, provided certain conditions are met, and is a *de facto* recognition by WTO members of the special role subsidies may play in a transition economy. Nevertheless, China was denied this Art 29 benefit, and instead required to establish two special rules in the Protocol to protect producers from other member countries from the potential adverse effects of Chinese subsidies. These were, first, the specificity test under which subsidies to SOE in China are automatically subjected to the SCM Agreement;²⁶⁸ and secondly, the importing members were permitted to use the so-called NME methodologies to identify Chinese subsidies for 15 years upon accession.²⁶⁹ Apparently, this has left Chinese subsidies open to countervailing actions by importing member countries despite the existence of the special treatment benefit provided to China under SCM Art 29.

²⁶⁸ Protocol, Section 10 (2).

²⁶⁹ Ibid, Para 15 (d).

Denial of the Art 29 exemption may be explained as follows. First, while least developed country is defined,²⁷⁰ there is no definition of developing country in either GATT or any of the other WTO agreements. This requires countries to self-designate themselves with a view to claiming favourable treatment under this status, which claim other members of the WTO may object to.²⁷¹ This may explain the refusal under the Protocol to recognise the market economy status achieved by China in some areas, such as the treatment of anti-dumping and countervailing duties, while at the same time excluding her from invoking most of the special treatment benefits granted to the NME under the SCM Agreement. Another explanation could be the distrust of state ownership enterprises among major WTO members (the US and EU in particular). Although the WTO system is supposedly economic and ownership neutral, its norms and rules assume the conditions of a market economy that is typically dominated by private ownership.²⁷² Moreover, unlike many transition economies that carried out large-scale privatisation in the early stages of their reforms, China has not done so. Officially, the government remains committed to the idea of “a socialist market economy”,²⁷³ characterised by a market-based pricing system and a mixed ownership structure with the state-owned sector maintaining a dominant position in the core industries. Added to this is the fear of China’s rapidly growing power and changing role in the international economy given her much greater trading capacity. China’s gross

²⁷⁰ The definition of the LDCs can be found in Art XI: 2 of the Marrakesh Agreement Establishing the WTO, Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations, April 15, 1994.

²⁷¹ Marcia Don Harpaz, ‘China and the WTO: New Kid in the Developing Bloc?’ (2007) *International Law Forum of the Hebrew* 5.

²⁷² Julia Ya Qin, ‘WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – a Critical Appraisal of the China Accession Protocol’ (2004) 7 (4) *Journal of International Economic Law* 915.

²⁷³ Article 15 of Constitution of the PRC.

domestic product in the first quarter of 2007 was a twelve-year high at 11.9%, enabling it to overtake Germany as the world's third-largest economy.²⁷⁴ These early successes of its economic reforms has enabled China to become a major exporting power in the world in a relative short period causing much concern to other WTO members that are losing market share to Chinese competition. Although a developing country in per capita income, China's potential as an economic threat was clearly foreseen.²⁷⁵ This fear of the "China threat" combined with the distrust of state ownership, explains perhaps the different treatment of China on this matter.

7.2.3 Conclusion

Subsidisation even of a SOE is not in itself bad for not all subsidies distort international trade patterns and reduce world welfare. As economists have pointed out, many subsidies merely correct for market failures and thus are not necessarily bad.²⁷⁶ Even under circumstances where subsidies distort the optimal allocation of resources, such distortion visits no real economic harm on the importing country.²⁷⁷ The SCM agreement has in mind three categories of subsidies, namely, prohibited subsidies, actionable subsidies, and non-actionable subsidies.²⁷⁸ Subsidies to a SOE are permissible but

²⁷⁴ Malawer, above n 258, 31.

²⁷⁵ Harpaz, above n 271, 11.

²⁷⁶ Ralph H. Folsom, Michael Wallace Gordon and John A. Spanogle Jr, *International Business Transactions: A Problem-Oriented Coursebook* (7th ed, 2004), Thomson West 570.

²⁷⁷ *Ibid*, 571.

²⁷⁸ *WTO Agreement on Subsidies and Countervailing Duties*, Articles 3; 5 and 8.

actionable pursuant to SCM if they cause adverse effects to another member country, including injury in its domestic market; nullification or impairment of GATT benefits, or serious prejudice to enterprises in other member countries.²⁷⁹ Not all subsidies to SOE will be deemed to be trade-distorting and prohibited by the SCM and therefore attract a countervailing duty. Some subsidies, e.g. government loans for the promotion of SOE reform, are permissible under the SCM as they have a positive effect on overall market reform. Only SOE specific subsidies, i.e. where SOE are the predominant recipients of a subsidy or receive disproportionately large amounts of a subsidy may be actionable under SCM Articles II and III, as shown in *US — Softwood Lumber IV*²⁸⁰ and *Indonesia – Autos*.²⁸¹

In other words, China's SOE subsidies in areas where she does not have a comparative advantage and made with a view to effecting overall market reforms should not be seen as falling within the specificity prohibition but as contributing toward overall international trade welfare. The search for a *modus vivendi* which enables China to use subsidies that further her reform of SOE, while at the same time ensuring its observance of other WTO rules and the avoidance of any adverse effects flowing on to her trading partners as a result, is of pressing importance.

²⁷⁹ Ibid, Article 5.

²⁸⁰ WTO Doc WT/DS257. In the view of the panel, "the subsidy will not be specific unless access to this subsidy is limited to a sub-set of this industry, i.e. to certain enterprises within the potential users of the subsidy engaged in the manufacture of similar products". See Paragraph 7. 116.

²⁸¹ WTO Doc WT/DS54, 59. "The European Communities, the United States and Indonesia agree that these subsidies are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b), and that they are therefore deemed to be specific pursuant to Article 2.3 of the Agreement. In light of the views of the parties, and given that nothing in the record would compel a different conclusion, we find that the measures in question are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement." See, Paragraph 14.155.

7.3 IPR protection

7.3.1 Legislation and enforcement problems

While China's performance efforts toward conforming with TRIPS have demonstrated the radical improvement of IPR protection, two issues of concern have surfaced: (1) inconsistencies as between China's domestic laws and TRIPS; and (2) enforcement problems regarding IPR infringement. With respect to the former, for example, the revised *Copyright Law of the PRC* omits to address the rights of performers and producers of phonograms to prevent unauthorised use of their performance or phonogram in compliance with TRIPS Art 14.²⁸² More importantly, pursuant to the WTO Panel Report,²⁸³ the first sentence of *Copyright Law* Art 4²⁸⁴ is deemed to be inconsistent with China's obligation under TRIPS Articles 9 (1) and 41 (1), as it makes the application of the enforcement provisions of *Copyright Law* unavailable to works which are denied copyright protection under it. Concerns also spread to internet copyright protection in relation to internet piracy challenges, including infringement on user-generated content sites. In relation to *Trademark Law*, the following aspects have been the targets of complaint frequently: (i) the

²⁸² TRIPS Article 14, "In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization... Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms."

²⁸³ WTO Doc WT/DS362/R (26 January 2009) 41.

²⁸⁴ "Works the publication or distribution of which is prohibited by law shall not be protected by this law". This has been modified as follows as a result of the settlement of the China-US IPR dispute (WT/DS362), "Works the publication and/or dissemination of which is prohibited by law shall not be protected by this law". See *Ibid*, 9.

exclusion of services, apart from goods, and the protection of Well-Known trademarks, e.g. *IBM*; (ii) inadequate deterrence of infringing activity, such as the “squatting” of foreign company names, designs and trademarks; the registration of other companies’ trademark as design patents and vice versa.²⁸⁵ With respect to the latter, the concerns generally arise from the lack of coordination among government ministries and agencies, lack of resources, and lack of transparency in the enforcement process and its outcomes, as well as local protectionism and official corruption. Concerns also spread to China’s criminal enforcement mechanism, as seen from the recent WTO case initiated by the US regarding China’s IPR enforcement problem in, “*Measures Affecting the Protection and Enforcement of Intellectual Property Rights*”.²⁸⁶ The major issues involved in this case are the high criminal thresholds for criminal investigation, prosecution and conviction which might preclude criminal remedies; the enforceability of copyright during the period before works obtain censorship approval; the profit motive requirement in copyright cases; the requirement of identical trademarks in counterfeiting cases; and the absence of minimum, proportional sentences and clear standards for initiation of police investigations in cases where there is a reasonable suspicion of criminal activities.

²⁸⁵ Above n 159.

²⁸⁶ WTO Doc WT/DS362, April 2007.

7.3.2 The explanation of the complexities regarding China's compliance with strong enforcement standards of IPR protection

7.3.2.1 Regional disparities and domestic barriers

To understand why China has great difficulties in enforcing IPR, one has to appreciate the country's size and heterogeneity. China has been described as being large, complex, diverse and "sometimes internally contradictory"²⁸⁷ with economic conditions varying drastically as between the different parts of the country. Such has also been the enforcement and protection of IPR in China. Consequently, it is neither likely nor possible for China to undertake a uniform and overall policy or strategy to resolve the piracy and counterfeiting problems in a short period of time. Moreover, because of the decentralisation trend begun under Deng Xiaoping's "Open and Reform" policy in 1978 (as mentioned above), the uniform administration power of the central government has been reduced. Local protectionisms arise when central government policy conflicts with the interests of local governments. These differences in protection at the national, provincial and local levels impede the improvement of IPR protection laws. In addition, barriers also arise from corruption, the limited training and resources available to enforcement officials, and the lack of public education in relation to the economic and social impact of piracy and counterfeiting, etc. It is these obstacles that have diluted the power of IPR laws and the strength of their enforcement. Ironically, none of these barriers is regulated by TRIPS or

²⁸⁷ CF Bergsten, B Gill NR Lardy and D Mitchell (eds), *China: The Balance Sheet: What the World Needs to Know Now About the Emerging Superpower* (2006) Public Affairs.

any other international intellectual property treaties or conventions China has ratified,²⁸⁸ which means those barriers could not be removed by legislation.

7.3.2.2 The unique nature of IPR

Given the somewhat abstract nature of IPR, the protection of IPR is not normally a top priority in a country's development strategy. Even in the United States, the protection of IPR is generally considered to be of lower priority than the resolution of such domestic problems as the prevention of murders, burglaries, robberies, thefts, arsons, assaults and distribution of narcotics and Child pornography.²⁸⁹ Moreover, the abstract nature of IPR alongside its importance to economic development makes IPR policing unattractive for the host country. In the face of this, overcoming the conflicts and challenges towards a more developed IPR regime, would involve incurring short-run costs, such as unemployment as labour shifts from infringing activities, as well as higher prices for consumer goods which might discourage economic development. To some extent, the lack of awareness of the close relationship between the protection of IPR and economic development has also postponed the progress for upgrading of IPR protection in China. Thus, it is not hard to understand the present neglect of intellectual property rights protection in countries all over the world.

²⁸⁸ Peter K. Yu, 'Intellectual Property, Economic Development and the China Puzzle', in Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (2007) 215.

²⁸⁹ Peter K., Yu, 'Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate' (2008) 7 *John Marshall Review of Intellectual Property Law* 416.

7.3.2.3 The enforcement provision of TRIPS

The enforcement provision of TRIPS does not “create any obligation with respect to the distribution of resources as between the enforcement of intellectual property rights and the enforcement of law in general.”²⁹⁰ That is to say, a WTO member state is not required to devote more resources to intellectual property enforcement than other areas of law enforcement. With this background China appears to have fulfilled its enforcement obligations as required by TRIPS Art 41(5).²⁹¹ This is made clearer in the consultation process on the dispute filed by the US against China with the WTO Dispute Settlement Body on “*Measures Affecting the Protection and Enforcement of Intellectual Property Rights*”.²⁹² Instead of general enforcement measures charges, the focus of this dispute is on the lack of compliance with specific provisions of the TRIPS, that is, the lack of criminal procedures and penalties for commercial scale counterfeiting and piracy in China. The US claims that China has failed to make the procedures and penalties required by the first and second sentences of TRIPS Art 61 “available” as required by TRIPS Art 41 (1).²⁹³ However, the WTO Panel Report exercised judicial economy with respect to the claims under TRIPS Art 41 (1) and the second sentence of

²⁹⁰ TRIPS Article 41 (5).

²⁹¹ “It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.”

²⁹² Above n 286.

²⁹³ WTO Doc WT/DS362/R, 2.

Art 61, and finally concluded that the United States has not established that the criminal thresholds of *Copyright Law of the PRC* are inconsistent with China's obligation under the first sentence of TRIPS Art 61.²⁹⁴ While the US might have had predicted such a result, it is surmised that the original expectation for filing this complaint was to force negotiation and diplomacy between China and the US, including concessions in areas unrelated such as e.g. reducing the trade deficit and currency valuation.²⁹⁵

7.3.3 The US-China IPR protection debate

IPR enforcement has been a thorn in the US-China relationship as shown by the numerous agreements and contentious negotiations between the two countries demonstrate.²⁹⁶ The US elevated China to its Special 301 "Priority Watch List" in 2005 and developed a comprehensive strategy for addressing China's ineffective IPR enforcement regime. However, as a former US government official pointed out, "the intellectual property protection is always at the top of the second list".²⁹⁷ Compared to the nuclear nonproliferation and currency exchange debates between the US and China (which hold the key to national security and economic development), it is understandable that the protection of IPR has lost its priority at the very top of the US-China development agenda.

²⁹⁴ WTO Doc WT/DS 362/R, 133.

²⁹⁵ WTO Doc WT/DS362, April 2007.

²⁹⁶ 1992 Agreement is the first full bilateral IPR agreement between China and the US; followed by the 1995 Memorandum of Understanding, which was far more detailed than the 1992 agreement.

²⁹⁷ Yu, above n 289, 415.

The complexity of the disputes between the two countries are explainable in terms of the current international economic climate, international political positions of the US and China, and their domestic economic and political environments. These issues have assumed importance prompted by the interests of US businesses which rely heavily on its intellectual property-based goods exported to China, as well as the US government seeing it as an avenue for reducing its trade deficit with China. Tied closely to the trade imbalance is the valuation of China's currency, and the perception that China has intentionally maintained an undervalued Yuan to promote its own exports.²⁹⁸

Prior to 2001, the US relied on her threat of non-renewal of MFN status and opposition to entry into the WTO to force China to strengthen her IPR. The US foreign policy has shifted now to threaten China with economic sanctions and trade wars. Nonetheless, these policies have largely been ineffective. While they helped develop the new IPR laws and accompanying enforcement infrastructure, their effectiveness has been less than desired by the US. Furthermore, piracy and counterfeiting problems become much worse once international attention has been diverted away from the issue.²⁹⁹ Professor Peter K. Yu has termed this as the "cycle of futility"³⁰⁰ – a stalemate that

²⁹⁸ Donald P. Harris, 'The Honeymoon is Over: Evaluating the United States' WTO Intellectual Property Complaint against China' (Legal Study Research Paper Series 76, Beasley School of Law, Temple University, 2008) 74.

²⁹⁹ Peter K. Yu, 'From Piracy to Partners: Protecting Intellectual Property in China in the Twenty-First Century' (2000) *50 American University Law Review* 131.

³⁰⁰ Peter K. Yu, 'Still Dissatisfied after All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility' (2005) *34 Georgia Journal of International and Comparative Law* 149.

advanced the interests of neither China nor the US. In other words, it is said to be unrealistic to expect US trade policy to result in vast improvements in IPR protection in China. What appears to be needed then is a strategy that appeals to the interests of both countries. The present short term gains of US conduct have resulted in very little substantive changes to the overall strategy of IPR enforcement. The breadth of issues impacting the US-China relationship leads to the view that IPR issues would best be resolved diplomatically, rather than through the WTO dispute settlement process.³⁰¹ In this matter, less unilateral and confrontational actions on both sides is preferable.

7.3.4 Further Observations

Some commentators have observed that to upgrade her IPR enforcement, China would need to first, recognise the relationship between IPR and economic development and make the link to these to be made known throughout the country given that IPR protection is in itself not a prerequisite for the economic development of a nation. Thus it is necessary to link IPR protection with the country's legal and social system. Secondly, that educational and training efforts on protection awareness need to be carried out, for it is only when people realise the importance of the benefits of IPR protection as against the disadvantage of not having such protection, that

³⁰¹ Harris, above n 298, 76.

observance of the laws would occur, in other words that Chinese citizens and local business need to be convinced that protection is in the interests of domestic business itself.³⁰² The losses resulting from cheap counterfeit products will in time be counterbalanced by the benefits of IPR protection of increased innovation and invention. More importantly, to put an end to the “cycle of futility” and move toward a form of sustained protection, the role of IPR legislation in China should itself be reconceived and recast. Though a vast number of laws and regulations have been revised and modified to comply with China’s WTO accession commitments relating to IPR protection, their continuing integration to reduce disparities between domestic laws and TRIPS is still of central importance to the protection of IPR.

However, with the expansion of IPR protection and the growing interdependence between different bodies of law, a focus on intellectual property laws alone often does not fully account for the full extent of such protection. In other words, the protection of IPR should be seen not only in legal terms, but also as complementing the political, economic, and judicial environments that enable effective IPR enforcement. As Robert Sherwood pointed out that “some things cannot be legislated...Until judicial systems in developing and transition countries are upgraded, it will matter little what intellectual property laws and treaties provided.”³⁰³

³⁰² Ibid, 61.

³⁰³ Robert Sherwood, ‘Some Things Cannot Be Legislated’ (2002) *Cardozo Journal of International and Comparative Law* 37.

7.3.5 Conclusion

The enforcement of the IPR protection in China is complicated not only by reason of her rapidly-changing and diverse local conditions and the unique nature of the IPR protection, but also because of differences between Chinese and Western legal cultural norms in terms of strong individual property rights and IPR protection. There has been a failure to appreciate that similar to the transition from a NME to a market economy, there is also a transitional phase in IPR protection where a country moves from an economy based on manufacturing to an economy relying on the utilisation and exploitation of information and advanced technology. The strengthening of IPR protection requires the allocation of a relatively larger amount of resources. The recent growth of legitimate intellectual property stakeholders in China, largely with governmental assistance, has allowed the Chinese government to emphasise that IPR protection is good for Chinese business, and not just for foreign business.³⁰⁴ What is needed then is absorption of property rights norms and obedience to them at the grass roots level. In a country where individual ownership of property has not been the norm, this has become a difficult call. Nonetheless this must be so, and the recent move to encourage private ownership of property even in rural areas through the Land Registration Measures Act,³⁰⁵ is a positive step in this direction.

³⁰⁴ Peter K. Yu, 'The Sweet and Sour Story of Chinese Intellectual Property Rights' in Graham Dutfield and Uma Suthersanen (eds), *Technology, Progress and Prosperity: A History of Intellectual Property and Development* (2008).

³⁰⁵ The Land Registration Measures (2008) is the implementation rule of the immovable property registration provisions under the Property Rights Law (2007), which represents the first comprehensive attempt to codify the nation's private property rights. The Act came into effect in February 2008 and aims at simplifying the registration of property

Moreover, history has shown that IPR protection dramatically improves when the overall benefits of such protection begin to outweigh its overall costs. That somewhat similar changes occurred in Japan in the 1970s, and in Hong Kong, Singapore, South Korea and Taiwan in the 1980s, lends support to this view.³⁰⁶ As compared to the well-established IPR protection system of the US which took more than two centuries,³⁰⁷ China has had about thirty years IPR development history. As the Chinese economy grows and with it an increase in the middle class base following her WTO accession, it is expected that the purchasing power of the Chinese people will be improving as well. As predicated in a study by Ernst & Young, the Chinese luxury market ... is expected to grow 10% annually until 2015, when sales are expected to exceed US \$11.5 billion and account for 29% of all global luxury goods purchase.³⁰⁸ The latest National Intellectual Property Strategy of State Council in 2008, which provides a comprehensive plan to improve intellectual property protection and modernise the management of IPR, attempts to construct China into a country with comparatively higher level of IPR creation, utilisation, protection and administration by 2020.³⁰⁹ It seems then, that at

transfers. In the past, the interest in buildings on land were seen as being separate to ownership of the land itself, with registration of these interests required at two separate municipal governmental authorities. The new law enables registration of both interests at a single local governmental authority. Registration is regarded as a civil legal requirement, and the land rights certificate is proof of the owner's possession of the land use right. Those who fail to properly register land use rights will lose their rights and interests in the land.

³⁰⁶ Daniel J Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (2007) Oxford University Press 202.

³⁰⁷ Yu, above n 297, 158.

³⁰⁸ Ernst & Young, *China: The New Lap of Luxury 1* (2005) <[http://www.ey.com/global/download.nsf/China_E/050914_Report_E/\\$file/China-TheNew0Lap0ofLuxury_Eng\(Final\).pdf](http://www.ey.com/global/download.nsf/China_E/050914_Report_E/$file/China-TheNew0Lap0ofLuxury_Eng(Final).pdf)> at 7 August 2008.

³⁰⁹ Above n 235.

some point in the near future, the development of the Chinese economy will reach a crossover point at which the country will gradually abandon its infamous piracy past to become a champion of intellectual property protection.³¹⁰ Thus although piracy and counterfeiting problems remain widespread in China at the moment and needs to be rectified, progress toward this is being steadily made. All this in a country whose intellectual property – from gun powder, to the printing press and tea - was itself the subject of plunder by Western powers.

³¹⁰ FM Abbott, 'Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism' (2005) 77 *Journal of International Economic Law* 81.

CHAPTER VIII

CONCLUDING THOUGHTS AND THE WAY FORWARD

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8.1 Introduction

This concluding chapter ties together the main findings of this thesis. It has shown that WTO accession was, first and foremost, a strategic decision of the Chinese government to further liberalise her economy pursuant to the onslaught of globalisation. It is this strategy that prompted China to accept what appeared to be very exacting commitments as a condition for her accession. Nonetheless, the benefits to China have been great. First, it has forced China to modernise her domestic laws relating to trade, services and intellectual property rights as shown in this thesis. This has led toward a convergence of China's foreign trade-related laws with the WTO laws, especially in the areas governed by GATT, GATS and TRIPS. Secondly, this process of modernisation has contributed and is continuing to increase China's power in the international arena. The end outcome of this legal convergence however, is still unfolding, and its full impact will take years to work out. Thirdly, there still remain areas of discord: these largely include the subsidies to the Chinese SOE and the enforcement problem of IPR protection laws. The research shows that subsidies to a Chinese SOE are not necessarily bad; as not all of them are deemed to be trade-distorting

attracting countervailing duties. Only the SOE specific subsidy has been found to be actionable under SCM Articles II and III in WTO proceedings, as shown in *US — Softwood Lumber IV*³¹¹ and *Indonesia — Autos*.³¹² Therefore, a modus vivendi which enables China to use subsidies that further her reform of SOE, while at the same time ensuring her observance of other WTO rules while not imposing any adverse effects on her trading partners needs to be found. More importantly, this research has also shown that IPR enforcement in China has proved to be intractable not only because of the unique nature of IPR protection based on the notion of western concepts of property rights so alien to China's communitarian traditions, but also because of the rapidly-changing diverse local conditions within China. Similar to the transition from a NME to a market economy, there is likewise a transitional phase of IPR protection when a country moves from an economy based on manufacturing to an economy relying on the utilisation and exploitation of information and advanced technology of advanced economies. Along with the absorption of the property rights norms, it is believed that at some point of time in the near future, the corollary of IPR enforcement in China is expected to soon reach a crossover point when the overall benefits of such protection begins to outweigh its overall costs. Fourthly, the research here has also observed the growth of a new economic vision in China following her WTO admission based on a range of preferential trading agreements, alongside increased attention toward achieving an equitable and sustainable

³¹¹ WTO Doc WT/DS 257.

³¹² WTO Doc WT/DS 54, 59.

development strategy. The preferential trading agreements China has entered into with selected trading partners has further provided the stimulus for her to pursue the benefits that she had previously been excluded from under the WTO framework. Furthermore, the thesis points out the new challenges China now face in the trade agreement arena. Key among these are the actions of China's sovereign wealth funds (SWF), her currency devaluation, and her role in the ongoing Doha round.

8.2 China's emerging ascendancy

According to a survey conducted in eight major Chinese cities, 74% believed that WTO had brought significant and positive changes to China; 61% thought the quality and professionalism in government had since improved, and 57% viewed WTO membership as giving an extra impetus for Chinese businesses to improve their competitiveness.³¹³ Perhaps the most crucial benefit to China has been her rapid economic growth, which has made her the world's fastest-growing economy. Her continuing growth has seen her gross domestic product (GDP) reach 10.7% in 2007 as compared to an average GDP growth rate of the rest of the world economy of about 3.3% during the same period.³¹⁴

³¹³ Sun Liang and Zhang Xiangchen, 'Redefining Development, Reimagining Globalization: The WTO and China's New Economic Vision (2007) 4 (6) *Journal of World Trade*, 1280.

³¹⁴ *China GDP Trends (2007)* Smart International
<http://www.starmass.com/china_review/economy_overview/economy_gdp_trends.htm>
at 12 April 2009.

Extraordinary progress is also being made in foreign trade since 2001. China now has grown from having a negligible role in world trade to being one of the world's largest exporters, as well as a substantial importer of raw materials, intermediate inputs and other goods. Compared with the total value of imports and exports in 2000 of US \$474.3 billion, it reached US \$2,561.6 billion in 2008, up 17.8% over the previous year³¹⁵ - an increase of nearly fivefold since her WTO membership. Of this total, the value of exports was 1,428.5 billion US dollars, up 17.2%, and the value of imports was 1,133.1 billion US dollars, up 18.5%. China had a trade surplus (exports minus imports) of US 295.5 billion dollars, an increase of 32.8 billion US dollars over the previous year.

Figure 5. Total Value of Imports and Exports and the Growth Rates in 2008

Unit: 100 million USD

Item	Value	Increase over 2007 (%)
Total Imports and Exports	25616	17.8
Exports	14285	17.2
Of which: General trade	6626	22.9
Processing trade	6752	9.3
Of which: Mechanical and electronic products	8229	17.3

³¹⁵ China National Bureau of Statistics. <<http://www.stats.gov.cn/enGLISH/>> at 10 May 2009.

High & new-tech products	4156	13.1
Of which: State-owned	2572	14.4
Foreign-funded	7906	13.6
Others	3807	27.9
Imports	11331	18.5
Of which: General trade	5727	33.6
Processing trade	3784	2.7
Of which: Mechanical and electronic products	5387	7.9
High & new-tech products	3419	4.3
Of which: State-owned	3538	31.1
Foreign-funded	6200	10.8
Others	1593	25.7
Trade Surplus	2955	---

Source: China National Bureau of Statistics.

Along with the boost in foreign trade, the rapid growth of China's economy has seen impressive progress in her foreign investment sector. FDI inflows to China reached US\$69.468 billion in 2006 and US\$78.339 billion in 2007, making China the fourth largest destination in the world and the largest destination among developing countries.³¹⁶ FDI attracted by China in 2006 accounted for 6.72% of global foreign direct investment flows, though 1.5%

³¹⁶ WTO Doc WT/TPR/199 (2008) 16.

points lower than that of 2005.³¹⁷ During the same period, China's outward direct investment grew rapidly as well. Its non-financial overseas direct investment amounted to US\$16.13 billion in 2006 and US\$ 18.72 billion in 2007, and US\$40.7 billion in 2008, up by 63.6% over the previous year.³¹⁸

Figure 6. Total Value of Foreign Direct Investment and the Growth Rates in 2008

Unit: 100 million USD

Sector	Enterprises	Increase over 2007 (%)	Actually utilized value(\$)	Increase over 2007 (%)
Total	27514	-27.3	924.0	23.6
Farming, Forestry, Animal Husbandry and Fishery	917	-12.5	11.9	28.9
Mining and Quarrying	149	-36.3	5.7	17.0
Manufacturing	11568	-39.7	498.9	22.1
Production and Supply of Electricity, Gas and Water	320	-9.1	17.0	58.1
Construction	262	-14.9	10.9	151.6
Transport, Storage, Post and Telecommunication Services	523	-20.5	28.5	42.1
Information Transmission,	1286	-7.6	27.7	86.8

³¹⁷ Ibid.

³¹⁸ Above n 315.

Computer Services and Software				
Wholesales & Retail Trade	5854	-7.6	44.3	65.6
Lodging & Catering Services	633	-32.5	9.4	-9.9
Banking	25	-51.0	5.7	122.5
Real Estate	452	-68.7	185.9	8.8
Leasing and Business Services	3138	-11.3	50.6	25.9
Scientific Research, Technical Services and Geological Prospecting	1839	7.2	15.1	64.2
Water Conservancy, Environment Protection and Public Facilities Management	138	-10.4	3.4	24.7
Services to Households and Other Services	205	-24.1	5.7	-21.1
Education	24	60.0	0.4	12.2
Health, Social Security and Social Welfare	10	-23.1	0.2	63.1
Culture, Sports and Entertainment	170	-17.9	2.6	-42.8
Public Management and	1	--	0.0	--

Social Organization				
International Organization	--	--	6.0	--

Source: China National Bureau of Statistics

In the face of the 2008 economic downturn, China's economy experienced the lowest quarterly growth rate (6.1%) in 10 years in the first quarter of 2009. This was 4.5 % lower than the first quarter of 2008 and down 0.7% from the previous quarter.³¹⁹ Despite this, however, its solid economic foundation makes it comparatively stronger than most of the other nations, as shown by the experimental launch of the Chinese “Yuan” instead of the US “Dollar” as an international reserve currency since the beginning of 2009.³²⁰ China’s outstanding growth has offered a way out of the economic downturn not only for China but also for Asian countries, which will enable them to decouple from the US dollar dependency as well as from American financial influence in the region. In order to bypass the US dollar in trade settlements, China has been arranging currency swaps with trading partners. Since mid-December of 2008, it has signed currency swap contracts worth 650 billion Yuan (about 95.6 billion US dollars) with six central banks in Hong Kong, the Republic of Korea, Malaysia, Belarus, Indonesia and Argentina.³²¹ Though these are small steps and it might take years for China to build up a regulatory system to support a convertible currency, they have expanded the use of Yuan in the region and paved the way for its global acceptance. There is speculation that

³¹⁹ Ibid.

³²⁰ Five key cities of China have been nominated to take part, namely, Shanghai, Guangzhou, Shenzhen, Zhuhai and Dongguan.

³²¹ Ministry of Commerce of the PRC, <<http://english.mofcom.gov.cn/aarticle/counselorsreport/americaandocanreport/200904/20090406167952.html>> at 9 April 2009.

the Yuan could soon become part of the basket of currencies on which the special drawing rights (SDR) at the IMF are based, thereby joining the yen, the US dollar, the euro and the pound.³²²

8.3 China's new economic vision

While China recognises the benefits of economic openness, she is also aware of a broad range of social and environmental costs associated with a GDP-oriented and export-driven development strategy, such as the widening income gap in the face of the rapid transformation of its economy as well as the environmental degradation that has followed.³²³ In the face of this, the Chinese government has been paying more attention to rebalancing the sources of economic growth and adjusting her development strategy to pursue an equitable and sustainable growth path. The pursuit of high growth is being rethought with a view to achieving a balance between speed, quality, and efficacy of development; between consumption, investment and export, and population, resources and the environment. Moreover, pursuant to the Sixteenth Party Congress Report delivered by Chinese Secretary Hu Jintao in 2002, China was preparing to reorder its relations with the outside world.³²⁴ The report put developed countries as the first priority with respect to the countries foreign relations, while pointing out that China "will continue to

³²² Colleen Ryan, 'Yuan Gets Some Global Reach', *Australian Financial Review* (Sydney), 14 April 2009, 12.

³²³ Sun and Zhang, above n 310, 1282. Between 1990 and 2005, average salary gap between the highest-earning sectors (monopolist industries plus legal service) and the lowest-income sectors widened from 1.76:1 to 6.88:1.25.

³²⁴ Ren Xiao, 'Between Adapting and Shaping: China's Role in Asian Regional Cooperation' (2009) 18 (59) *Journal of Contemporary China* 306.

cement our friendly ties with our neighbours and continue to enhance our solidarity and cooperation with other Third World countries.”³²⁵ These new

domestic development agendas have been incorporated into China's global position, along with the search of an alternative development model involving a reorientation of its foreign development policy.

China's increasing participation in the preferential trading agreements (PTA)³²⁶ must also be seen as being motivated by the above factors. Since China's official completion of the WTO commitments, she has been actively participating in the negotiations of preferential trading with her trading partners. To date, China has engaged in such negotiations with more than 20 countries and regional associations,³²⁷ a vast majority of which are from Africa and in the Asia-Pacific region. Consequently, preferential trading has become a new direction in China's economic development strategy. The most recent PTA China has established has been with Chile,³²⁸ Pakistan,³²⁹ New Zealand³³⁰ and

³²⁵ The Sixteenth Party Congress Report of People's Republic China, 2002.

³²⁶ It represents the regional trade agreement and free trade agreement in this thesis.

³²⁷ John Ravenhill and Yang Jiang, 'China's Move to Preferential Trading: A New Direction in China's Diplomacy' (2009) 18 (58) *Journal of Contemporary China* 27.

³²⁸ Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Chile, Nov. 18 2005, <http://www.chinadaily.com.cn/english/doc/2005-11/18/content_496004.htm> at 3 April 2009. It is the first FTA between China and a Latin American country.

³²⁹ Free Trade Agreement between the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China, Nov. 24 2006, <<http://www.commerce.gov.pk/PCFTA.asp>> at 3 April 2009.

³³⁰ Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China, Apr. 7 2008, <<http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/China/index.php>> at 3 April 2009. It entered into force on 1st October, 2008 after 15 rounds of negotiation over three years.

Singapore.³³¹ The most impressive of these has of course been her PTA with New Zealand – being the first developed industrialised country to have recognized the market economy status of China.³³²

Along with pursuit of the equitable and sustainable growth path, a primary economic objective in China's negotiation of PTA has been to ensure better treatment than she enjoyed in her WTO accession endeavour, where she was disadvantaged in a number of areas during the accession negotiations. Foremost among these perhaps is the desire to be treated as a market economy by its trading partners, which would stop China suffering from the "surrogate country" methodology in anti-dumping disputes, making Chinese export products less vulnerable to antidumping duties. One of the significant reasons for the delay of the PTA talks between China and India has been India's reluctance to accord market economy status to China.³³³ From this perspective, it seems China takes the PTA as a vehicle to complement the benefits she should have gained from the WTO membership. Another factor that dominates China's preference for PTA negotiation is the desire to enhance her access to raw materials and energy products from abroad, such as petroleum, copper and rubber. Her continuing rapid economic growth after 2001 has dramatically increased her dependence on imported materials. PTA here plays the role of a diplomatic weapon which enables China to not only end any discrimination against its resource investments but also to secure access

³³¹ Free Trade Agreement between the People's Republic of China and the Republic of Singapore, Oct. 23 2008, <http://www.fta.gov.sg/fta_csfta.asp?hl=27> at 3 April 2009.

³³² New Zealand Ministry of Foreign Affairs and Trade. It reads there is no "universally accepted definition of a 'market economy' ", and China now has "enough characteristics of a 'market economy' to be recognized as one".

³³³ Ravenhill and Jiang, above n 327, 32.

to resource materials at reasonable prices.³³⁴ China's increasing presence in Africa mirrors this concern closely. To date China has signed trade agreements with 41 African countries, and has set up bilateral economic and trade mechanisms with 37 more.³³⁵ With respect to energy, Africa is one of the areas with newly-developing oil resources that have not yet been tied up by Western countries. China's imports from Africa are overwhelmingly resource-based with the most important of these trading partners being exporters of oil and minerals. Similarly, one of the major economic motivations for China in negotiating a PTA with Australia has been to secure a stable supply of resources, such as uranium and iron ore. Due to differences in approaches between the two countries in the design of the PTA, negotiations have been continuing, with the last round of talks completed in December 2008.³³⁶ While Australia wishes the application of GATT Art XXIV (Regional Agreement) to cover "substantially all trade" in the FTA, China prefers use of the "enabling clause"³³⁷ to negotiate trade in goods first, and services and investment later, so as to gain more time for her domestic economy to confront the challenges that the FTA with Australia would bring to China. Furthermore, the PTA China

³³⁴ Ibid, 33.

³³⁵ Xu Weizhong, 'Sino-African Relations: New Transformations and Challenges,' in Dorothy-Grace Guerrero & Firoze Manji (eds), *China's New Role and the South: A Search for a New Perspective* (2008) 69.

³³⁶ The latest move in regard to China – Australia FTA occurred in March 2009, when Australia Minister for Trade Simon Crean visited Beijing. The main purpose of this visit was to discuss how to advance the FTA negotiations, including consideration of how the FTA can provide a framework for two-way investment. Agriculture market access and services were reported to be a further focus of discussions.

³³⁷ The "Enabling Clause" was officially called the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", which was adopted under GATT in 1979 and enables developed members to give differential and more favorable treatment to developing countries, e.g. preferential tariff treatment.

participates in also plays a role as an economic instrument for the achievement of political ends. The Closer Economic Partnership Arrangements China signed with Hong Kong and Macau showed the expanded coverage, depth and concessions compared with China's other PTAs.³³⁸ Apparently, there is enticement for Taiwan to enter into a similar agreement with a view to "final national reunion".

These PTA objectives of China are in marked contrast to those of the US and the EU, whose PTA is normally characterised as being designed with the intention of opening foreign markets to their exports and transplant laws to the less powerful countries. To China agreements of this type are unbalanced and one-sided, tending to further heighten inequalities in bargaining power between parties. China, instead, employs a pragmatic approach in PTA negotiation, though it means she has to accept agreements that discriminate against her interests under certain circumstances. For example, compared with Japan's unwillingness to offer any concessions that would adversely affect its domestic interests, the concessions China made on imports of agricultural products through the Early Harvest Program of the Association of South East Asian Nations (ASEAN) agreement have been considerable and have placed it in a particularly favourable light.³³⁹ Obviously, China's pragmatic stance on the PTA with ASEAN has provided a great step for regional cooperation to move

³³⁸ Ross Buckley, Vai Io Lo and Laurence Boulle (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (2008) Kluwer Law International 59.

³³⁹ Ravenhill and Jiang, above n 327, 32. Early Harvest Program is designed to accelerate the implementation of China-ASEAN Economic Cooperation Framework Agreement by reducing the tariffs of some products, agricultural products in particular, including livestock, meat, fish, dairy products, live plants, vegetables, fruits and nuts. It allows the ASEAN countries can attain early access to China's huge domestic market prior to the establishment of the free trade agreement.

forward. The establishment of the China-ASEAN free trade agreement (CAFTA) has not only strengthened these trade relations, but has also helped spread China's goodwill to alleviate concerns of the China threat. Adoption of such a strategy has greatly increased China's soft power in reinforcing its role as the natural and indispensable leader in the Asia Pacific region,³⁴⁰ while enhancing her bargaining power within the WTO.

In summary, PTA rightly matches China's pursuit of equitable and sustainable development strategy in the post-2001 era internally, and the variety of foreign policy interests externally. Although the achievement of the PTA has never been easy, China's increasing economic power and her pragmatic approach towards it have provided significant support. To what extent the PTA provides economic advantage to China is still a matter of ongoing debate. Nonetheless, PTA must be seen as playing an important diplomatic role in China's development strategy to expand her political influence and market access in the Post-2001 period.

8.4 Reshaping the WTO

As noted, prior to China's admission into the WTO, the two had an ambivalent relationship. There were overwhelming suspicions on the part of existing WTO members about China's willingness and capacity to comply with her WTO

³⁴⁰ Peter K. Yu, 'Sino Trade Agreements and China's Global Intellectual Property Strategy' (2009) 8, <<http://ssrn.com.abstract=1333431>> at 3 May 2009.

undertakings for admission. However, this is no longer the case since China has showed the world her successful performance of almost all the WTO

accession commitments within the scheduled time. Now China is attracting the attention of the world by her SWF, her currency devaluation, and her role in the Doha Round – all of which are vitally linked with the future of the WTO.

8.4.1 SWF

SWF, along with currency devaluation, are two of the most critical aspects of global imbalances. The creation of China Investment Corporation (CIC) in September 2007 with US \$200 billion foreign exchange reserves initiated multiple policy responses regarding the regulation and monitoring of the large SWF activities around the world. The concerns of the capital-importing countries mostly lie in the objectives and operations of the Chinese SWF. Its move to equities with higher rates of return instead of the relatively risk-free investment in, for example, government debt, with lower rates of return further complicates this concern. In the absence of an international oversight body, the WTO has by default become the regulatory body to address the issues arising between investor SWF countries, and investee countries. While GATS provides general rules for SWF investment in services by allowing the receiving countries to adopt preventive measures that restrict investments by SWF

(where the required specific conditions have been complied with),³⁴¹ it does not provide any investment rules for countries with SWF. In addition, the GATS regulations apply only to the investment in services, which is obviously not capable of covering various investment activities of the SWF. Consequently, there is a need for the WTO to expand its mandate to designing the investment activities of SWF.

8.4.2 Chinese currency devaluation

On the issue of China's currency manipulation, it has been claimed that China has regularly intervened in international exchange markets to prevent the "ren min bi" (RMB) from appreciating relative to other currencies, and over the same period has developed a very large global and bilateral trade surplus. Consequently, a vast variety of trade measures have been proposed against the alleged RMB devaluation around the world, especially in the US. By linking the connection between exchange rate policy and trade policy,³⁴² the complaints have been sent to the WTO instead of the International Monetary Fund (IMF) for resolution. The WTO has been chosen by reason of its very

³⁴¹ Bart De Meester, 'International Legal Aspects of Sovereign Wealth Funds: Reconciling International Economic Law and the Law of State Immunities with a New Role of the State' (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1308542> at 20 April 2009.

³⁴² Robert W. Staiger and Alan O. Sykes, 'Currency Manipulation and World Trade' (2008) <<http://ssrn.com/abstract=1151942>> at 23 April 2009. It assesses the relationship between exchange rate policies and trade measures and reaches that the real effects of exchange rate intervention and the translation of that intervention into trade-policy equivalents depend critically on how traded goods and services are priced. Consequently, the authors are skeptical about various trade policy responses against the Chinese RMB devaluation under consideration in Washington.

special dispute settlement mechanism. However, the current WTO rules are thought to be inadequate to resolve this issue. The only provision relating to undervalued exchange rate recourse is GATT Art X (Exchange Arrangement), which states that “Contracting parties shall not, by exchange action, frustrate the intent of the provision of the Agreement” – a provision which is thought to be too vague to be effective in the circumstances. While suggesting reform of the WTO rules relating to the exchange rates is not the point of this thesis, the RMB undervaluation issue nevertheless demonstrates the need to have effective WTO regulations in relation to currency exchange aspects of international trade.

8.4.3 China’s role in the Doha Round

China’s increasing economic ascendancy has also improved its role in developing the world trading system. In the face of the current impasse of the Doha Round, the EU trade Commissioner, Peter Mandelson has argued that, “China has reached a stage in its development when it is legitimate to point to China’s growing responsibilities: to maintain an open global trading system, to help deliver a global trade deal in the WTO, and to remove barriers to further trade.”³⁴³ The Doha round has vividly demonstrated the transformation in geographical power relationships taking place in the world today.³⁴⁴ The large

³⁴³ Peter Mandelson, ‘Europe Has to Accept Fierce Competition. China Has to Ensure it is Fair Competition’ (2006) Strasbourg: European Union.

³⁴⁴ Debra P. Steger, ‘The Culture of The WTO: Why It Needs To Change’ (2007) 10 (3) *Journal of International Economic Law* 483.

emerging developing countries led by China, India, and Brazil have challenged the bi-polar trading system once driven by the US and the EU. As a result, the mandate and purpose of the WTO are no longer clear enough to respond effectively to these new political realities and the power relationships in the international economic system. An alternative and feasible option which could achieve trade liberalisation and facilitate growth in trade, investment and services has been called for, especially during the current tough times. Viewed from this perspective, it is not a coincidence that the WTO members have been searching for new venues to pursue their own trade interests with their trading partners, which has resulted in the rapid growth of preferential trading and bilateral negotiation arrangement. By the end of 2008, more than 400 free-trade pacts had been negotiated worldwide,³⁴⁵ in which China is counted as one of the most important members. These bilateral agreements, while contributing to the trade flow of member countries, are also imposing critical challenges to the multinational trade system. One principle it contradicts most is the Most-Favoured-Nation (MFN) of GATT, as it could cause diversion of trade away from non-member countries. In addition, GATT Art XXIV (Regional Agreements) has been criticised as being too loose and flexible for the regulation of bilateral trade agreements.³⁴⁶ To what extent the increasing bilateral negotiations could affect the multilateral system of the WTO system remains to be seen.

³⁴⁵ Petchanet Pratuangkrai, *Crisis May Lead to More Trade Barriers* (2009) Bilateral Organisation <http://www.bilaterals.org/article.php3?id_article=142000> at 20 May 2009.

³⁴⁶ The Honourable Christine Lagarde, 'Multilateralism: The Doha Round and the Hong Kong Declaration' in Ross Buckley, Vai lo Lo and Laurence Boule (eds), *Challenges to Multinational Trade: The Impact of Bilateral, Preferential and Regional Agreements* (2008) Kluwer Law International 9.

8.5 Further reflections

The discussion above has demonstrated the overall success of China's admission to the WTO in relation to both China and the world community. For China, she has spelt both economic and political success. China's expedient method of sacrificing certain economic interests in the short-term to secure long-term gains is reminiscent of the US tolerance of discrimination against its exports by the EU and Northeast Asia in the period after 1945³⁴⁷ before it achieved its predominant status in the world. Now China has begun to explore ways of using her bargaining leverage and emerging world power status to renegotiate some of the China-specific provisions (discussed above), which she thinks was unfairly and discriminately imposed on her in her bid for WTO accession. The establishment of the China-New Zealand FTA has already shown the progress of China in this endeavour, with New Zealand waiving discriminatory anti-dumping and safeguard measures of Section 15 and 16 of the Protocol and Paragraph 242 of the WPR. As Henry Gao points out, China's strategy is quite clear: "As more and more economies recognise China's market economy status, there would be mounting pressures on those who still

³⁴⁷ Ravenhill and Jiang, above n 327, 32-35.

deem China to be a non-market economy to do just the same.”³⁴⁸ Australia became the second industrialised country, to grant the full market economy status to China shortly after New Zealand’s decision,³⁴⁹ forming the prelude to discussions toward a China – Australia FTA.

Along with China’s increasing economic growth and soft power influence in the Asian-Pacific region and around the world, some domestic issues, such as rising income inequality, enormous increase in energy consumption and carbon emissions, imbalance in her sources of economic growth, and the controversy on her exchange rates,³⁵⁰ continue to pose great challenges for China’s further development strategy. Moreover, partly as a result of the slump in the United States and Europe, China, due to her close economic relations with them, is experiencing her own economic slowdown. Nonetheless, China’s growing global influence in international affairs ties her together with the whole world, especially the US. China’s appeal to developing countries challenges the old order of international governance led by the US and the EU, as has been shown in the Doha round negotiations. More importantly, China’s increasing economic, political, and military powers are also seen as undermining the stability of the US and its allies, amongst whom are the East Asian economies whose economic security is being increasingly tied to China. Furthermore, international criticism of US foreign policy in recent years has also presented itself as an opportunity for China to

³⁴⁸ Henry Gao, 'The RTA Strategy of China: A Critical Visit' in Ross Buckley, Vai lo Lo and Laurence Boulle (eds), *Challenges to Multinational Trade: The Impact of Bilateral, Preferential and Regional Agreements* (2008) 61.

³⁴⁹ Australia recognized China’s market economy status in April 2005, <
http://www.asiantribune.com/oldsite/show_news.php?id=14132> at 12 January 2009.

³⁵⁰ C. Fred Bergsten, Charles Freeman, Nicholas R. Lardy & Derek J. Mitchell, *China’s Rise: Challenges and Opportunities* (2008) Peterson Institute for International Economics 105.

focus outward, enhance her global attractiveness, present alternative models of international conduct, and to shape the international system in ways that meet her national interests.³⁵¹ To sum it up, China today has gained herself one of the most critical seats in the WTO, from a country who had shut her doors to foreigners a few generations ago, to one opening her doors to engaging with them on its own terms. This continuing Chinese influence, however, is bound to encounter many roadblocks in her march in the years ahead.

³⁵¹ Ibid, 211.

Appendix I. Figures

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Appendix II Protocol on the Accession of the People's Republic of China

Preamble

The World Trade Organization ("WTO"), pursuant to the approval of the Ministerial Conference of the WTO accorded under Article XII of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"), and the People's Republic of China ("China"),

Recalling that China was an original contracting party to the General Agreement on Tariffs and Trade 1947,

Taking note that China is a signatory to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,

Taking note of the Report of the Working Party on the Accession of China in document WT/ACC/CHN/49 ("Working Party Report"),

Having regard to the results of the negotiations concerning China's membership in the WTO,

Agree as follows:

Part I - General Provisions

1. General

1. Upon accession, China accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO.

2. The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.

3. Except as otherwise provided for in this Protocol, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force.

4. China may maintain a measure inconsistent with paragraph 1 of Article II of the General Agreement on Trade in Services ("GATS") provided that such a measure is recorded in the List of Article II Exemptions annexed to this Protocol and meets the conditions of the Annex to the GATS on Article II Exemptions.

2. Administration of the Trade Regime

(A) Uniform Administration

1. The provisions of the WTO Agreement and this Protocol shall apply to the entire customs territory of China, including border trade regions and minority autonomous areas, Special Economic Zones, open coastal cities, economic and technical development zones and other areas where special regimes for tariffs, taxes and regulations are established (collectively referred to as "special economic areas").

2. China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level (collectively referred to as "laws, regulations and other measures") pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights ("TRIPS") or the control of foreign exchange.

3. China's local regulations, rules and other measures of local governments at the sub-national level shall conform to the obligations undertaken in the WTO Agreement and this Protocol.

4. China shall establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application of the trade regime.

(B) Special Economic Areas

1. China shall notify to the WTO all the relevant laws, regulations and other measures relating to its special economic areas, listing these areas by name and indicating the geographic boundaries that define them. China shall notify the WTO promptly, but in any case within 60 days, of any additions or modifications to its special economic areas, including notification of the laws, regulations and other measures relating thereto.

2. China shall apply to imported products, including physically incorporated components, introduced into the other parts of China's customs territory from the special economic areas, all taxes, charges and measures affecting imports, including import restrictions and customs and tariff charges, that are normally applied to imports into the other parts of China's customs territory.

3. Except as otherwise provided for in this Protocol, in providing preferential arrangements for enterprises within such special economic areas, WTO provisions on non-discrimination and national treatment shall be fully observed.

(C) Transparency

1. China undertakes that only those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange that are published and readily available to other WTO Members, individuals and enterprises, shall be enforced. In addition, China shall make available to WTO Members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange before such measures are implemented or enforced. In emergency situations, laws, regulations and other measures shall be made available at the latest when they are implemented or enforced.

2. China shall establish or designate an official journal dedicated to the publication of all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange and, after publication of its laws, regulations or other measures in such journal, shall provide a reasonable period for comment to the appropriate authorities before such measures are implemented, except for those laws, regulations and other measures involving national security, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement. China shall publish this journal on a regular basis and make copies of all issues of this journal readily available to individuals and enterprises.

3. China shall establish or designate an enquiry point where, upon request of any individual, enterprise or WTO Member all information relating to the measures required to be published under paragraph 2(C)1 of this Protocol may be obtained. Replies to requests for information shall generally be provided within 30 days after receipt of a request. In exceptional cases, replies may be provided within 45 days after receipt of a request. Notice

of the delay and the reasons therefor shall be provided in writing to the interested party. Replies to WTO Members shall be complete and shall represent the authoritative view of the Chinese government. Accurate and reliable information shall be provided to individuals and enterprises.

(D) Judicial Review

1. China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

2. Review procedures shall include the opportunity for appeal, without penalty, by individuals or enterprises affected by any administrative action subject to review. If the initial right of appeal is to an administrative body, there shall in all cases be the opportunity to choose to appeal the decision to a judicial body. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any right to further appeal.

3. Non-discrimination

Except as otherwise provided for in this Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of:

- (a) the procurement of inputs and goods and services necessary for production and the conditions under which their goods are produced, marketed or sold, in the domestic market and for export; and
- (b) the prices and availability of goods and services supplied by national and sub-national authorities and public or state enterprises, in areas including transportation, energy, basic telecommunications, other utilities and factors of production.

4. Special Trade Arrangements

Upon accession, China shall eliminate or bring into conformity with the WTO Agreement all special trade arrangements, including barter trade arrangements, with third countries and separate customs territories, which are not in conformity with the WTO Agreement.

5. Right to Trade

1. Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users. For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period.

2. Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.

6. State Trading

1. China shall ensure that import purchasing procedures of state trading enterprises are fully transparent, and in compliance with the WTO Agreement, and shall refrain from taking any measure to influence or direct state trading enterprises as to the quantity, value, or country of origin of goods purchased or sold, except in accordance with the WTO Agreement.

2. As part of China's notification under the GATT 1994 and the Understanding on the Interpretation of Article XVII of the GATT 1994, China shall also provide full information on the pricing mechanisms of its state trading enterprises for exported goods.

7. Non-Tariff Measures

1. China shall implement the schedule for phased elimination of the measures contained in Annex 3. During the periods specified in Annex 3, the protection afforded by the measures listed in that Annex shall not be increased or expanded in size, scope or duration, nor shall any new measures be applied, unless in conformity with the provisions of the WTO Agreement.

2. In implementing the provisions of Articles III and XI of the GATT 1994 and the Agreement on Agriculture, China shall eliminate and shall not introduce, re-introduce or apply non-tariff measures that cannot be justified under the provisions of the WTO Agreement. For all non-tariff measures, whether or not referred to in Annex 3, that are applied after the date of accession, consistent with the WTO Agreement or this Protocol, China shall allocate and otherwise administer such measures in strict conformity with the provisions of the WTO

Agreement, including GATT 1994 and Article XIII thereof, and the Agreement on Import Licensing Procedures, including notification requirements.

3. China shall, upon accession, comply with the TRIMs Agreement, without recourse to the provisions of Article 5 of the TRIMs Agreement. China shall eliminate and cease to enforce trade and foreign exchange balancing requirements, local content and export or performance requirements made effective through laws, regulations or other measures. Moreover, China will not enforce provisions of contracts imposing such requirements. Without prejudice to the relevant provisions of this Protocol, China shall ensure that the distribution of import licences, quotas, tariff-rate quotas, or any other means of approval for importation, the right of importation or investment by national and sub-national authorities, is not conditioned on: whether competing domestic suppliers of such products exist; or performance requirements of any kind, such as local content, offsets, the transfer of technology, export performance or the conduct of research and development in China.

4. Import and export prohibitions and restrictions, and licensing requirements affecting imports and exports shall only be imposed and enforced by the national authorities or by sub-national authorities with authorization from the national authorities. Such measures which are not imposed by the national authorities or by sub-national authorities with authorization from the national authorities, shall not be implemented or enforced.

8. Import and Export Licensing

1. In implementing the WTO Agreement and provisions of the Agreement on Import Licensing Procedures, China shall undertake the following measures to facilitate compliance with these agreements:

(a) China shall publish on a regular basis the following in the official journal referred to in paragraph 2(C)2 of this Protocol:

- by product, the list of all organizations, including those organizations delegated such authority by the national authorities, that are responsible for authorizing or approving imports or exports, whether through grant of licence or other approval;
- procedures and criteria for obtaining such import or export licences or other approvals, and the conditions for deciding whether they should be granted;
- a list of all products, by tariff number, that are subject to tendering requirements, including information on products subject to such tendering requirements and any changes, pursuant to the Agreement on Import Licensing Procedures;
- a list of all goods and technologies whose import or export are restricted or prohibited; these goods shall also be notified to the Committee on Import Licensing;
- any changes to the list of goods and technologies whose import and export are restricted or prohibited.

Copies of these submissions in one or more official languages of the WTO shall be forwarded to the WTO for circulation to WTO Members and for submission to the Committee on Import Licensing within 75 days of each publication.

- (b) China shall notify the WTO of all licensing and quota requirements remaining in effect after accession, listed separately by HS tariff line and with the quantities associated with the restriction, if any, and the justification for maintaining the restriction or its scheduled date of termination.

- (c) China shall submit the notification of its import licensing procedures to the Committee on Import Licensing. China shall report annually to the Committee on Import Licensing on its automatic import licensing procedures, explaining the circumstances which give rise to these requirements and justifying the need for their continuation. This report shall also provide the information listed in Article 3 of the Agreement on Import Licensing Procedures.
- (d) China shall issue import licences for a minimum duration of validity of six months, except where exceptional circumstances make this impossible. In such cases, China shall promptly notify the Committee on Import Licensing of the exceptional circumstances requiring the shorter period of licence validity.
2. Except as otherwise provided for in this Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of the distribution of import and export licences and quotas.

9. Price Controls

1. China shall, subject to paragraph 2 below, allow prices for traded goods and services in every sector to be determined by market forces, and multi-tier pricing practices for such goods and services shall be eliminated.
2. The goods and services listed in Annex 4 may be subject to price controls, consistent with the WTO Agreement, in particular Article III of the GATT 1994 and Annex 2, paragraphs 3 and 4 of the Agreement on Agriculture. Except in exceptional circumstances, and subject to notification to the WTO, price controls shall not be extended to goods or services beyond those listed in Annex 4, and China shall make best efforts to reduce and eliminate these controls.

3. China shall publish in the official journal the list of goods and services subject to state pricing and changes thereto.

10. Subsidies

1. China shall notify the WTO of any subsidy within the meaning of Article 1 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), granted or maintained in its territory, organized by specific product, including those subsidies defined in Article 3 of the SCM Agreement. The information provided should be as specific as possible, following the requirements of the questionnaire on subsidies as noted in Article 25 of the SCM Agreement.

2. For purposes of applying Articles 1.2 and 2 of the SCM Agreement, subsidies provided to state-owned enterprises will be viewed as specific if, inter alia, state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies.

3. China shall eliminate all subsidy programmes falling within the scope of Article 3 of the SCM Agreement upon accession.

11. Taxes and Charges Levied on Imports and Exports

1. China shall ensure that customs fees or charges applied or administered by national or sub-national authorities, shall be in conformity with the GATT 1994.

2. China shall ensure that internal taxes and charges, including value-added taxes, applied or administered by national or sub-national authorities shall be in conformity with the GATT 1994.

3. China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.

4. Foreign individuals and enterprises and foreign-funded enterprises shall, upon accession, be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of the provision of border tax adjustments.

12. Agriculture

1. China shall implement the provisions contained in China's Schedule of Concessions and Commitments on Goods and, as specifically provided in this Protocol, those of the Agreement on Agriculture. In this context, China shall not maintain or introduce any export subsidies on agricultural products.

2. China shall, under the Transitional Review Mechanism, notify fiscal and other transfers between or among state-owned enterprises in the agricultural sector (whether national or sub-national) and other enterprises that operate as state trading enterprises in the agricultural sector.

13. Technical Barriers to Trade

1. China shall publish in the official journal all criteria, whether formal or informal, that are the basis for a technical regulation, standard or conformity assessment procedure.

2. China shall, upon accession, bring into conformity with the TBT Agreement all technical regulations, standards and conformity assessment procedures.

3. China shall apply conformity assessment procedures to imported products only to determine compliance with technical regulations and standards that are consistent with the

provisions of this Protocol and the WTO Agreement. Conformity assessment bodies will determine the conformity of imported products with commercial terms of contracts only if authorized by the parties to such contract. China shall ensure that such inspection of products for compliance with the commercial terms of contracts does not affect customs clearance or the granting of import licences for such products.

4. (a) Upon accession, China shall ensure that the same technical regulations, standards and conformity assessment procedures are applied to both imported and domestic products. In order to ensure a smooth transition from the current system, China shall ensure that, upon accession, all certification, safety licensing, and quality licensing bodies and agencies are authorized to undertake these activities for both imported and domestic products, and that, one year after accession, all conformity assessment bodies and agencies are authorized to undertake conformity assessment for both imported and domestic products. The choice of body or agency shall be at the discretion of the applicant. For imported and domestic products, all bodies and agencies shall issue the same mark and charge the same fee. They shall also provide the same processing periods and complaint procedures. Imported products shall not be subject to more than one conformity assessment. China shall publish and make readily available to other WTO Members, individuals, and enterprises full information on the respective responsibilities of its conformity assessment bodies and agencies.

(b) No later than 18 months after accession, China shall assign the respective responsibilities of its conformity assessment bodies solely on the basis of the scope of work and type of product without any consideration of the origin of a product. The respective responsibilities that will be assigned to China's conformity assessment bodies will be notified to the TBT Committee 12 months after accession.

14. Sanitary and Phytosanitary Measures

China shall notify to the WTO all laws, regulations and other measures relating to its sanitary and phytosanitary measures, including product coverage and relevant international standards, guidelines and recommendations, within 30 days after accession.

15. Price Comparability in Determining Subsidies and Dumping

Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

- (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
 - (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
 - (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

16. Transitional Product-Specific Safeguard Mechanism

1. In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards.

2. If, in the course of these bilateral consultations, it is agreed that imports of Chinese origin are such a cause and that action is necessary, China shall take such action as to prevent or remedy the market disruption. Any such action shall be notified immediately to the Committee on Safeguards.

3. If consultations do not lead to an agreement between China and the WTO Member concerned within 60 days of the receipt of a request for consultations, the WTO Member affected shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption. Any such action shall be notified immediately to the Committee on Safeguards.

4. Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.

5. Prior to application of a measure pursuant to paragraph 3, the WTO Member taking such action shall provide reasonable public notice to all interested parties and provide adequate opportunity for importers, exporters and other interested parties to submit their views and evidence on the appropriateness of the proposed measure and whether it would be in the public interest. The WTO Member shall provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration.

6. A WTO Member shall apply a measure pursuant to this Section only for such period of time as may be necessary to prevent or remedy the market disruption. If a measure is taken as a result of a relative increase in the level of imports, China has the right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than two years. However, if a measure is taken as a result of an absolute increase in imports, China has a right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than three years. Any such action by China shall be notified immediately to the Committee on Safeguards.

7. In critical circumstances, where delay would cause damage which it would be difficult to repair, the WTO Member so affected may take a provisional safeguard measure pursuant to a preliminary determination that imports have caused or threatened to cause market disruption. In this case, notification of the measures taken to the Committee on Safeguards and a request for bilateral consultations shall be effected immediately thereafter. The duration of the provisional measure shall not exceed 200 days during which the pertinent requirements of paragraphs 1, 2 and 5 shall be met. The duration of any provisional measure shall be counted toward the period provided for under paragraph 6.

8. If a WTO Member considers that an action taken under paragraphs 2, 3 or 7 causes or threatens to cause significant diversions of trade into its market, it may request consultations with China and/or the WTO Member concerned. Such consultations shall be

held within 30 days after the request is notified to the Committee on Safeguards. If such consultations fail to lead to an agreement between China and the WTO Member or Members concerned within 60 days after the notification, the requesting WTO Member shall be free, in respect of such product, to withdraw concessions accorded to or otherwise limit imports from China, to the extent necessary to prevent or remedy such diversions. Such action shall be notified immediately to the Committee on Safeguards.

9. Application of this Section shall be terminated 12 years after the date of accession.

17. Reservations by WTO Members

All prohibitions, quantitative restrictions and other measures maintained by WTO Members against imports from China in a manner inconsistent with the WTO Agreement are listed in Annex 7. All such prohibitions, quantitative restrictions and other measures shall be phased out or dealt with in accordance with mutually agreed terms and timetables as specified in the said Annex.

18. Transitional Review Mechanism

1. Those subsidiary bodies³⁵² of the WTO which have a mandate covering China's commitments under the WTO Agreement or this Protocol shall, within one year after accession and in accordance with paragraph 4 below, review, as appropriate to their mandate, the implementation by China of the WTO Agreement and of the related provisions of this Protocol. China shall provide relevant information, including information specified in Annex 1A, to each subsidiary body in advance of the review. China can also raise issues relating to any reservations under Section 17 or to any other specific commitments made by

³⁵² Council for Trade in Goods, Council for Trade-Related Aspects of Intellectual Property Rights, Council for Trade in Services, Committees on Balance-of-Payments Restrictions, Market Access (covering also ITA), Agriculture, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Rules of Origin, Import Licensing, Trade-Related Investment Measures, Safeguards, Trade in Financial Services.

other Members in this Protocol, in those subsidiary bodies which have a relevant mandate. Each subsidiary body shall report the results of such review promptly to the relevant Council established by paragraph 5 of Article IV of the WTO Agreement, if applicable, which shall in turn report promptly to the General Council.

2. The General Council shall, within one year after accession, and in accordance with paragraph 4 below, review the implementation by China of the WTO Agreement and the provisions of this Protocol. The General Council shall conduct such review in accordance with the framework set out in Annex 1B and in the light of the results of any reviews held pursuant to paragraph 1. China also can raise issues relating to any reservations under Section 17 or to any other specific commitments made by other Members in this Protocol. The General Council may make recommendations to China and to other Members in these respects.

3. Consideration of issues pursuant to this Section shall be without prejudice to the rights and obligations of any Member, including China, under the WTO Agreement or any Plurilateral Trade Agreement, and shall not preclude or be a precondition to recourse to consultation or other provisions of the WTO Agreement or this Protocol.

4. The review provided for in paragraphs 1 and 2 will take place after accession in each year for eight years. Thereafter there will be a final review in year 10 or at an earlier date decided by the General Council.

Appendix III. Summary of US – China Bilateral WTO Agreement

AGRICULTURE

The Agreement provides increased access for U.S. exports across a broad range of commodities and elimination of barriers. Commitments include:

- Significant cuts in tariffs that will be completed by January 2004. Overall average for agricultural products will be 17 percent and for U.S. priority products 14.5 percent.
- Establishment of a tariff-rate quota system for imports of bulk commodities, e.g., wheat, corn, cotton, barley, and rice, that provides a share of the TRQ for private traders. Specific rules on how the TRQ will operate and increased transparency in the process will help ensure that imports occur. Significant and growing quota quantities subject to tariffs that average between 1-3 percent.
- The right to import and distribute products without going through state-trading enterprise or middle-man.
- China has also agreed to the elimination of SPS barriers that are not based on scientific evidence and no export subsidies on agricultural products.

INDUSTRIAL PRODUCTS

China's commitments will eliminate broad systemic barriers to U.S. exports, such as limits on who can import goods and distribute them in China as well as barriers such as quotas and licenses that restrict imports of U.S. products.

TARIFFS

- Tariffs cut to an average of 9.4 percent overall and 7.1 percent on U.S. priority products.
- China will participate in the Information Technology Agreement (ITA) eliminating all tariffs on products such as computers, telecommunications equipment, semiconductors, computer equipment and other high technology products.
- In the auto sector, China will cut tariffs from the current 100% or 80% level to 25% by 2006, with the largest cuts in the first years after accession.
- Auto parts tariffs will be cut to an average of 10% by 2006.
- Significant cuts will also be made in the wood and paper sectors, going from present levels of 12-18% on wood and 15-25% on paper down to levels generally between 5 and 7.5%.
- China will also be implementing the vast majority of the chemical harmonization initiative. Under that initiative, tariffs will be at 0, 5.5 and 6.5 percent for products in each category.

ELIMINATION OF QUOTAS AND LICENSES

WTO rules bar quotas and other quantitative restrictions. China has agreed to eliminate these restrictions with phase-ins limited to five years.

- Quotas: China will eliminate existing quotas upon accession for the top U.S. priorities (e.g. optic fiber cable). It will phase-out remaining quotas, generally by 2002, but no later than 2005.
- Quotas will grow from current trade level at a 15% annual rate in order to ensure that market access increases progressively, and reduces the effect of quantitative restrictions.
- Auto quotas will be phased out by 2005. In the interim, the base level quota will be \$6 billion (the level prior to China's industrial auto policy) and this will grow by 15% annually until elimination.

RIGHT TO IMPORT AND DISTRIBUTE

Trading rights and distribution are the major priority of the manufacturing sector. At present, China severely restricts trading rights (the right to import and export) and distribution (wholesaling, retailing, maintenance and repair, transportation, etc.). Under the Agreement, China will provide, for the first time, trading rights and distribution rights to U.S. firms. Trading rights will be progressively phased in over three years. Distribution rights will be provided even for China's most restricted distribution sectors such as wholesale, transportation, maintenance and repair. China will provide for trading rights and distribution.

SERVICES

China has made commitments in all major service categories with reasonable transitions to eliminate most foreign equity restrictions (especially in sectors where the U.S. has a strong commercial interest), agreeing to accede to the Basic Telecommunications and Financial Services Agreements, and "grandfathering" of current market access for U.S. service providers.

GRANDFATHERING

China will grandfather all existing current market access and activities in all services sectors. This will protect existing American distribution services, financial services, professional and other service providers in China, including those operating under contractual or shareholder agreements or a license, from restrictions as Chinese commitments phase in.

DISTRIBUTION

In China today, foreign firms have no right to distribute products other than those they make in China, or to own or manage distribution networks, wholesaling outlets or warehouses. China also now frequently issues businesses licenses which limit the ability of American firms to conduct marketing, after-sales service, maintenance and repair and customer support. As the section on industrial goods noted, this is a severe barrier to goods exports as well as to service exports.

China's commitments address all these issues. They reflect a comprehensive commitment on distribution - including wholesaling, sales away from a fixed location, retailing, maintenance and repair, and transportation. Thus, Americans will be able to distribute imported products as well as those made in China, offering significant opportunity to expand U.S. exports of goods. As noted above, China will phase out all restrictions on distribution services for most products within three years.

SERVICES AUXILIARY TO DISTRIBUTION

Chinese commitments in services auxiliary to distribution include rental and leasing, air courier, freight forwarding, storage and warehousing, advertising, technical testing and analysis, and packaging services. All restrictions will be phased-out in 3 to 4 years, at which time U.S. service suppliers will be able to establish 100% wholly-owned subsidiaries.

TELECOMMUNICATIONS

China now severely restricts sales of telecommunications services and bars foreign investment. China's commitments mark its first agreement to open its telecommunications sector, both to the scope of services and to direct investment in telecommunications businesses. Through these commitments, China will become a member of the Basic Telecommunications Agreement.

Specific commitments include:

- **Regulatory Principles:** China has agreed to implement the pro-competitive regulatory principles embodied in the Basic Telecommunications Agreement (including cost-based pricing, interconnection rights and independent regulatory authority), and agreed to technology-neutral scheduling, which means foreign suppliers can use any technology they choose to provide telecommunications services.
- **Scope of services:** China will phase out all geographic restrictions for paging and value-added services in 2 years, mobile/cellular in 5 years and domestic wireline services in 6 years. China's key telecommunications services corridor in Beijing,

Shanghai, and Guangzhou, which represents approximately 75% of all domestic traffic, will open immediately on accession in all telecommunications services.

- Investment: Under present circumstances, China allows no foreign investment in telecommunications services. With this agreement, China will allow 49% foreign investment in all services, and will allow 50% foreign ownership for value added paging services in two years, for mobile services, 49 percent in 5 years; and for international and domestic services, 49% in 6 years.

INSURANCE

For insurance, China now restricts foreign companies to operating in Shanghai and Guangzhou. Under the agreement:

- Geographic Limitations: China will permit foreign property and casualty firms to insure large-scale risks nationwide immediately upon accession, and will eliminate all geographic limitations IN 3 YEARS.
- Scope: China will expand the scope of activities for foreign insurers to include group, health and pension lines of insurance, which represent about 85% of total premiums, phased in over 5 years.
- Prudential Criteria: China agrees to award licenses solely on the basis of prudential criteria, with no economic needs test or quantitative limits on the number of licenses issued.
- Investment: China agreed to allow 50 percent ownership for life insurance. life insurers may now choose their own joint venture partners. for non-life, china will allow branching or 51% ownership on accession and form wholly owned subsidiaries in 2 years. reinsurance is completely open upon accession (100 percent, no restrictions).

BANKING

Currently foreign banks are not permitted to do local currency business with Chinese clients (a few can engage in local currency business with their foreign clients). China imposes severe geographic restrictions on the establishment of foreign banks.

- China has committed to full market access in five years for U.S. banks.
- Foreign banks will be able to conduct local currency business with Chinese enterprises starting 2 years after accession.
- Foreign banks will be able to conduct local currency business with Chinese individuals from 5 years after accession.
- Foreign banks will have the same rights (national treatment) as Chinese banks within designated geographic areas.
- Both geographic and customer restrictions will be removed in five years
- Non-bank financial companies can offer auto financing upon accession

SECURITIES

China will permit minority foreign owned joint ventures to engage in fund management on the same terms as Chinese firms. As the scope of business expands for Chinese firms, foreign joint venture securities companies will enjoy the same expansion in scope of business. Minority joint ventures will be allowed to underwrite domestic securities issues and underwrite and trade in foreign currency denominated securities (debt and equity).

PROFESSIONAL SERVICES

In the professional services, China currently tightly restricts operation of foreign law firms and accounting firms. In the Agreement, China has provided a broad range of commitments, including on legal, accountancy, taxation, management consultancy, architecture, engineering, urban planning, medical and dental, and computer and related services. China will permit foreign majority control except for practicing Chinese law (an exception common to many WTO members.) For accountancy, China has agreed to eliminate a mandatory localization requirement and will now allow unrestricted access to its market to professionals licensed and follow transparent procedures.

AUDIOVISUAL

China's commitments cover the right to distribute video and sound recordings and cinema ownership and operation. For video and sound recordings, China will allow 49% foreign participation in joint ventures engaged in the distribution of these products. China has also agreed to import 40 films after accession growing to 50 films in three years, of which 20 films will be revenue sharing in each of the three years.

TRAVEL AND TOURISM

Hotels: China will allow unrestricted access to the Chinese market for hotel operators with the ability to set up 100% foreign owned hotels in 3 years, with majority ownership allowed upon accession.

Travel Services: Foreign travel operators can provide the full range of travel agency services. For travel agency services, China will allow access to government resorts as well as Beijing, Shanghai, Guangzhou and Xian.

PROTOCOL PROVISIONS

Commitments in China's WTO Protocol and Working Party Report establish rights and obligations enforceable through WTO dispute settlement procedures. We have agreed on key provisions relating to antidumping and subsidies, protection against import surges, technology transfer requirements and offsets as well as practices of state-owned and state-invested enterprises. These rules are of special importance to U.S. workers and business.

China had agreed to implement the TRIMs Agreement upon accession, eliminate and cease enforcing trade and foreign exchange balancing requirements, eliminate and cease enforcing local content requirements, refuse to enforce contracts imposing these requirements; and only impose or enforce laws or other provisions relating to the transfer of technology or other know-how, if they are in accordance with the WTO agreements on protection of intellectual property rights and trade-related investment measures.

These provisions will also help protect American firms against forced technology transfers, as China has also agreed that, upon accession, it will not condition investment approvals, import licenses, or any other import approval process on performance requirements of any kind, including: local content requirements, offsets, transfer of technology, or requirements to conduct research and development in China.

ANTIDUMPING AND SUBSIDIES METHODOLOGY

The agreed protocol provisions ensure that American firms and workers will have strong protection against unfair trade practices including dumping and subsidies. The U.S. and China have agreed that we will be able to maintain our current antidumping methodology (treating China as a non-market economy) in future anti-dumping cases. This provision will remain in force for 15 years after China's accession to the WTO. Moreover, when we apply our countervailing duty law to China we will be able to take the special characteristics of China's economy into account when we identify and measure any subsidy benefit that may exist.

PRODUCT SPECIFIC SAFEGUARD

The agreed provisions for the protocol package also ensure that American domestic firms AND WORKERS will have strong protection against rapid increases of imports.

To do this, the Product-Specific Safeguard provision sets up a special mechanism to address increased imports that cause or threaten to cause market disruption to a U.S. industry. China is a major exporting country that enjoys open access to U.S. markets. This mechanism, which is in addition to other WTO Safeguards provisions, differs from traditional safeguards measures. It permits United States to address imports solely from China, rather than from the whole world, that are a significant cause of material injury through measures such as import restrictions. Moreover, the United States will be able to apply restraints unilaterally based on legal standards that differ from those in the WTO Safeguards Agreement and could permit action in more cases. This provision will remain in force for 12 years after China accedes to the WTO.

STATE-OWNED AND STATE-INVESTED ENTERPRISES

The Protocol addresses important issues related to the Chinese government's involvement in the economy. China has agreed that it will ensure that state-owned and state-invested enterprises will make purchases and sales based solely on commercial considerations, such as price, quality, availability and marketability, provide U.S. firms with the opportunity to compete for sales and purchases on non-discriminatory terms and conditions.

China has also agreed that it will not influence these commercial decisions (either directly or indirectly) except in a WTO consistent manner. With respect to applying WTO rules to state-owned and state-invested enterprises, we have clarified in several ways that these firms are subject to WTO disciplines.

-Purchases of goods or services by these state-owned and state-invested enterprises do not constitute "government procurement" and thus are subject to WTO rules.

-We have clarified the status of state-owned and state-invested enterprises under the WTO Agreement on Subsidies and Countervailing Measures. This will help ensure that we can effectively apply our trade law to these enterprises when it is appropriate to do so.

TEXTILES

China's protocol package will include a provision drawn from our 1997 bilateral textiles agreement, which permits U.S. companies and workers to respond to increased imports of textile and apparel products. This textile safeguard will be in effect until December 31, 2008 which is after the WTO Agreement on Textiles and Clothing expires.

Source: The White House Office of Public Liason NOVEMBER 17, 1999

Appendix IV. Highlights of the EU-China Agreement on WTO

Telecommunications

The timetable for market opening in mobile telephony has been accelerated by 2 years.

Foreign

investment will be allowed at 25% on accession, 35% after 1 year and 49% after 3 years. For mobile

and fixed services, traffic between cities as well as within them will be open.

China will open up its leasing market in 3 years, allowing foreign firms to rent capacity from Chinese

operators and resell it domestically and internationally (private leased circuits & closed user groups).

Insurance

Effective management control has been negotiated for foreign participants in life insurance joint

ventures, through choice of partner, and a legal guarantee of freedom from any regulatory interference in private contracts on a 50-50 equity basis.

China will immediately give 7 new licences to European insurers, in both the life and non-life sectors.

And 2 EU firms will be permitted to establish in 2 new cities.

Scope of insurance business will be expanded for foreign companies two years faster than foreseen in

the Sino-US Agreement.

Foreign brokers will be able to operate in China as of accession, on a 50-50 basis, and free of any joint-venture requirement 5 years after accession. Cross border brokerage business will also be allowed.

Monopoly state import/export restrictions

China's state monopoly on importing crude and processed oil, and NPK fertiliser, will be gradually opened to private traders, starting on accession.

The state monopoly on exporting silk - where China accounts for 70% of world production - will be completely removed by 2005.

Tariffs

China has reduced import tariffs on over 150 leading European exports - such as machinery, ceramics and glass, textiles, clothing, footwear and leather goods, cosmetics and spirits. Agreed levels are generally around 8-10%.

Motor vehicles

European carmakers are well established in China, and will have greater flexibility to choose which types of vehicles they build. Approval thresholds of provincial authorities will be raised from \$30m to \$150m.

China has agreed to eliminate the joint-venture restriction for engine production, upon accession.

Distribution

China has agreed to lift the specific joint venture restriction on large department stores (over 20,000m²) and for virtually all chain stores.

Agriculture

Market access will improve for key EU products, such as rape-seed oil, dairy products, pasta, wine and olives.

An EU-China sanitary and phytosanitary agreement will ensure China's application of the WTO SPS Agreement, and resolve a number of bilateral issues.

Horizontal measures

China will cease to apply a number of measures that distort trade and have macroeconomic effects, including export performance and local content requirements, and industrial export subsidies. China's government procurement system will be transparent, and will not discriminate between foreign bidders.

China will abolish preferences to domestic producers in the fields of pharmaceuticals, chemicals, aftersales services, cigarettes and spirits.

Other

Improved market access in the fields of banking, legal services, accountancy, architecture, tourism, construction, dredging and market research.

**Appendix V. China's major trade-related laws and regulations, June
2009**

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
Foreign trade, exchange restrictions and foreign investment			
Foreign Trade Law (G/LIC/N/1/CHN/4)	6 Apr 2004	1 Jul 2004	12 May 1994
Regulations on Origin of Import and Export Goods	18 Aug 2004	1 Jan 2005	
Regulation on the Administration of the Import and Export of Goods (G/LIC/N/1/CHN/4)	31 Oct 2001	1 Jan 2002	
Rules for the Registration of Foreign Trade Operators	19 Jun 2004	1 Jul 2004	
Rules on Investigations of Foreign Trade Barriers (Replaced 2002 Provisional Rules on Investigations of Foreign Trade Barriers)	21 Jan 2005	1 Mar 2005	
Regulations on the Export Control of Arms Products	15 Oct 2002	15 Nov 2002	22 Oct 1997
Regulations on the Export Control of Nuclear Products	1 Nov 2006	1 Nov 2006	1 Aug 1997
Regulations on the Export Control of Dual-purpose Biological Products and Relevant Equipment and Technology	14 Oct 2002	1 Dec 2002	
Regulations on the Export Control of Dual-purpose Nuclear Products and Related Technologies	26 Jan 2007	26 Jan 2007	10 Jun 1998

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
Regulations on the Export Control of Missiles and Related Items and Technologies	22 Aug 2002	22 Aug 2002	
Regulations on the Export Control of Certain Chemicals and Related Equipment and Technologies	19 Oct 2002	19 Oct 2002	
Regulations on Foreign Exchange Control	14 Jan 1997	14 Jan 1997	5 Dec 1980
Decision of the Standing Committee of the NPC on Punishing Crimes of Fraudulently Purchasing, Evading and Illegally Trading in Foreign Exchange	16 Dec 1998	25 Jan 1999	
Law on Chinese-Foreign Equity Joint-Ventures	15 Mar 2001	15 Mar 2001	1 Jul 1979
Regulations for the Implementation of the Law on Chinese-Foreign Equity Joint-Ventures	22 Jul 2001	22 Jul 2001	20 Sep 1983
Law on Chinese-Foreign Contractual Joint-Ventures	31 Oct 2000	31 Oct 2000	13 Apr 1988
Regulations for the Implementation of the Law on Chinese-Foreign Contractual Joint-Ventures	4 Sep 1995	4 Sep 1995	
Law on Foreign-Capital Enterprise	31 Oct 2000	31 Oct 2000	12 Apr 1986
Regulations for the Implementation of the Law on Foreign-Capital Enterprises	12 Apr 2001	12 Apr 2001	28 Oct 1990
Law on the Protection of Investment of Taiwan Compatriots	5 Mar 1994	5 Mar 1994	
Provisions on Guiding Foreign Investment Direction	11 Feb 2002	1 Apr 2002	7 Jun 1995
Measures for the Administration of Partnership Enterprise Registration	9 May 2007	1 Jun 2007	19 Nov 1997
Customs- and tariff-related regulations			
Customs Law	8 Jul 2000	1 Jan 2001	22 Jan 1987
Regulations on Import and Export Tariff (G/VAL/N/1/CHN/4)	29 Oct 2003	1 Jan 2004	18 Mar 1992
Anti-dumping Regulations (G/ADP/N/1/CHN/2/Suppl.3)	31 Mar 2004	1 Jun 2004	26 Nov 1992

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
		2004	2001
Regulations on Countervailing Measures (G/SCM/N/1/CHN/1/Suppl.3)	31 Mar 2004	1 Jun 2004	31 Oct 2001
Safeguard Regulations (G/SG/N/1/CHN/2/Suppl.3)	31 Mar 2004	1 Jun 2004	26 Nov 2001
Regulations on Customs Protection of Intellectual Property (IP/N/1/CHN/2/Add.1)	26 Nov 2003	1 Mar 2004	5 Jul 1995
Regulations on Customs Statistics	25 Dec 2005	1 Mar 2006	
Regulations on Export Products Responding to Antidumping Cases	14 Jul 2006	14 Aug 2006	
Standards and technical regulations			
Law on Import and Export Commodity Inspection	28 Apr 2002	1 Oct 2002	21 Feb 1989
Regulations for Implementation of Import and Export Commodity Inspection	10 Aug 2005	1 Dec 2005	7 Oct 1992
Standardization Law	29 Dec 1988	1 Apr 1989	
Regulations for the Implementation of the Standardization Law	6 Apr 1990	6 Apr 1990	
Law on the Entry and Exit Animal and Plant Quarantine	30 Oct 1991	1 Apr 1992	
Regulations for Implementation of the Law on the Entry and Exit Animal and Plant Quarantine	2 Dec 1996	1 Jan 1997	
Food Safety Law	28 Feb 2009	1 Jun 2009	
Law on Product Quality	8 Jul 2000	1 Sep 2000	22 Feb 1993
Regulations for Compulsory Product Certification	3 Dec 2001	1 May 2002	
Regulations on Inspection and Quarantine of Entry and Exit Aquatic Products	18 Oct 2002	10 Dec 2002	

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
Frontier Health and Quarantine Law	2 Dec 1986	1 May 1987	
Regulations on Authentication and Approval	20 Aug 2003	1 Nov 2003	
Regulations for Safety Control of Dangerous Chemical Products	9 Jan 2002	15 Mar 2002	
Regulations on Imposing Administrative Penalties related to Certification and Accreditation	9 Dec 2003	9 Dec 2003	
Special Regulations of the State Council on Strengthening the Supervision and Administration the Safety of Food and Other Products	26 Jul 2007	26 Jul 2007	
Agricultural Products Quality Safety Law	29 Apr 2006	1 Nov 2006	
Intellectual property rights			
Copyright Law (IP/N/1/CHN/C/1)	27 Oct 2001	27 Oct 2001	7 Sep 1990
Regulations for the Implementation of the Copyright Law (IP/N/1/CHN/C/3)	2 Aug 2002	15 Sep 2002	24 May 1991
Trademark Law (IP/N/1/CHN/T/1)	27 Oct 2001	1 Dec 2001	23 Aug 1982
Regulations for the Implementation of the Trademark Law (IP/N/1/CHN/T/2)	2 Aug 2002	15 Sep 2002	
Patent Law (IP/N/1/CHN/I/1)	25 Aug 2000	1 Jul 2001	12 Mar 1984
Regulations for Implementation of the Patent Law (IP/N/1/CHN/I/3)	28 Dec 2002	1 Feb 2003	
Regulations on Computer Software Protection (IP/N/1/CHN/C/2/Rev.1)	20 Dec 2001	1 Jan 2002	
Regulations on the Protection of Layout-Design of Integrated Circuits (IP/N/1/CHN/L/1/Rev.1)	28 Mar 2001	1 Oct 2001	
Regulations on Protection of New Varieties of Plants (IP/N/1/CHN/P/1)	20 Mar 1997	1 Oct 1997	
Regulations on the Administration of Technology Import	31 Oct 2001	1 Jan	

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
and Export		2002	
Tax regime			
Law on the Administration of Tax Collection	28 Apr 2001	1 May 2001	4 Sep 1992
Decision of the Standing Committee of the NPC Regarding the Application of Provisional Regulations on such Taxes as Value-added Tax, Consumption Tax and Business Tax to Enterprises with Foreign Investment and Foreign Enterprises	29 Dec 1993	29 Dec 1993	
Interim Regulations on Value-added Tax	26 Nov 1993	1 Jan 1994	
Interim Regulations on Consumption Tax	26 Nov 1993	1 Jan 1994	
Interim Regulations on Business Tax	26 Nov 1993	1 Jan 1994	
Interim Regulations on Land Appreciation Tax	26 Nov 1993	1 Jan 1994	
Interim Regulations on Resources Tax	26 Nov 1993	1 Jan 1994	
Law on Income Tax for Enterprises	16 Mar 2007	1 Jan 2008	
Income Tax Law for Individuals	29 Jun 2007	29 Jun 2007	10 Sep 1980
Regulation for the Implementation of the Enterprise Tax Law	28 Nov 2007	1 Jan 2008	
Sectoral laws			
Agriculture			
Agricultural Law	28 Dec 2002	1 Mar 2003	2 Jul 1993
Law on Land Contract in Rural Areas	29 Aug 2002	1 Mar 2003	

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
Land Administration Law	28 Aug 2004	28 Aug 2004	25 Jun 1986
Law on the Popularization of Agricultural Technology	2 July 1993	2 July 1993	
Grassland Law	28 Dec 2002	1 Mar 2003	18 Jun 1985
Seed Law	28 Aug 2004	28 Aug 2004	8 Jul 2000
Fisheries Law	28 Aug 2004	28 Aug 2004	20 Jan 1986
Forestry Law	29 Apr 1998	1 Jul 1998	20 Sep 1984
Law on Prompting Agricultural Mechanization	25 Jun 2004	1 Nov 2004	
Regulations on Management to Grain circulation	19 May 2004	26 May 2004	
Regulations on the Management to Central Grain Reserves	6 Aug 2003	15 Aug 2003	
Manufacturing			
Law on Tobacco Monopoly	29 June 1991	1 Jan 1992	
Pharmaceutical Administration Law	28 Feb 2001	1 Dec 2001	20 Sep 1984
Steel Industry Development Policy	20 Jul 2005	20 Jul 2005	
Industrial Policy for the Automobile Industry	21 May 2004	1 Jun 2004	19 Feb 1994
Automobile Trade Policy	10 Aug 2005	10 Aug 2005	
Administrative Regulations on Recalls of Defective Automobile Products	15 Mar 2004	1 Oct 2004	
Energy, utilities and natural resources			

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
Mineral Resources Law	29 Aug 1996	29 Aug 1996	19 Mar 1986
Water Law	29 Aug 2002	1 Oct 2002	21 Jan 1988
Regulations on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises	23 Sep 2001	23 Sep 2001	30 Jan 1982
Regulations on Exploitation of On-shore Petroleum Resources in Cooperation with Foreign Enterprises	23 Sep 2001	23 Sep 2001	7 Oct 1993
Provisional Measures for Administration of the Market of Processed Oil	1 Jan 2005	1 Jan 2005	
Law on the Administration of the Use of Sea Areas	27 Oct 2001	1 Jan 2002	
Law on Water and Soil Conservation	29 Jun 1991	29 Jun 1991	
Law on Conserving Energy	1 Nov 1997	1 Jan 1998	
Mineral Resources Law	29 Aug 1996	1 Jan 1997	19 Mar 1986
Law on Coal Industry	29 Aug 1996	1 Dec 1996	
Electric Power Law	28 Dec 1995	1 Apr 1996	
Regulations for Administration of Electricity Industry	2 Feb 2005	1 May 2005	
Laws on Conserving Energy	28 Oct 2007	1 Apr 2008	
Regulations on Exploitation of On-shore Petroleum Resources in Cooperation with Foreign Enterprises	18 Sep 2007	18 Sep 2007	7 Oct 1993
Financial services			
Law on the People's Bank of China	27 Dec 2003	1 Feb 2004	18 Mar 1995
Law on Commercial Banks	27 Dec 2003	1 Feb 2004	10 May 1995

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
Law on Regulation of and Supervision over the Banking Industry	31 Oct 2006	1 Jan 2007	27 Dec 2003
Law on Funds for Investment in Securities	28 Oct 2003	1 Jun 2004	
Regulations on Closure of Financial Institutions	23 Nov 2001	15 Dec 2001	
Regulations on Administration of Foreign-funded Financial Institutions	12 Dec 2001	1 Feb 2002	
Insurance Law	28 Oct 2002	1 Jan 2003	30 Jun 1995
Regulations on Administration of Foreign-funded Insurance Companies	5 Dec 2001	1 Feb 2002	
Trust Law	28 Apr 2001	1 Oct 2001	
Securities Law	27 Oct 2005	1 Jan 2006	29 Dec 1998
Rules on the Establishment of Foreign-shared Fund Management Companies	1 Jun 2002	1 Jul 2002	
Rules for the Establishment of Foreign-shared Securities Companies	1 Jun 2002	1 Jul 2002	
Provisions of the State Council on Foreign Capital Stocks Listed in China by Joint Stock Limited Companies	2 Nov 1995	25 Dec 1995	
Auction Law	28 Aug 2004	28 Aug 2004	5 Jul 1996
Guaranty Law	30 Jun 1995	1 Oct 1995	
Regulation on the Administration of Futures Trading	7 Feb 2007	15 Apr 2007	
Decision of the Standing Committee of the NPC on Punishment of Crimes of Disrupting Financial Order (Refer also to the 1997 Criminal Law Appendix II)	30 Jun 1995	30 Jun 1995	
Law on Lawyers	28 Oct 2007	1 Apr 2008	15 May 1996
Other services			

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
Accounting Law	31 Oct 1999	1 Jul 2000	21 Jan 1985
Law on Certified Public Accountants	31 Oct 1993	1 Jan 1994	
Regulations on Telecommunications (Telecommunications Decree)	20 Sep 2000	25 Sep 2000	
Provisions on the Administration of Telecommunications Enterprises with Foreign Investment	5 Dec 2001	1 Jan 2002	
Highway Law	28 Aug 2004	28 Aug 2004	30 Jul 1997
Regulations on Road Transportation	14 Apr 2004	1 Jul 2004	
Provisions on the Administration of Road Transport Services with Foreign Investment	20 Nov 2001	20 Nov 2001	
Railway Law	7 Sep 1990	1 May 1991	
Maritime Code	7 Nov 1992	1 Jul 1993	
Regulations on International Maritime Transportation	5 Dec 2001	1 Jan 2002	
Implementing Rules of Regulations on International Maritime Transportation	25 Dec 2002	1 Mar 2003	
Special Maritime Procedure Law	25 Dec 1999	1 Jul 2000	
Provisions on Administration of Foreign Investment in International Maritime Transportation	2 Mar 2004	1 Jun 2004	
Regulations on Administration of Pilotage	12 Oct 2001	1 Jan 2002	
Port Law	28 Jun 2003	1 Jan 2004	
Regulations on Administration of Port Operation	26 Dec 2003	1 Jun 2004	

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
Regulations on Port Facility Security	14 Nov 2003	14 Nov 2003	
Civil Aviation Law	30 Oct 1995	1 Mar 1996	
Regulations of Restriction for Universal Aviation	10 Jan 2003	1 May 2003	
Postal Law	2 Dec 1986	1 Jan 1987	
Law on Licensed Doctors	26 Jun 1998	1 May 1999	
Higher Education Law	29 Aug 1998	1 Jan 1999	
Education Law	18 Mar 1995	1 Sept 1995	
Compulsory Education Law	12 Apr 1986	1 Jul 1986	
Vocational Education Law	15 May 1996	1 Sep 1996	
Law on Promotion of Privately-run Schools	28 Dec 2002	1 Sep 2003	
Regulations on Sino-Foreign Cooperative Education	19 Feb 2003	1 Sep 2003	
Construction Law	1 Nov 1997	1 Mar 1998	
Regulations on Foreign-invested Construction Design Enterprises	27 Sep 2002	1 Dec 2002	
Law on Urban Real Estate	30 Aug 2007	30 Aug 2007	1 Jan 1995
Regulations on Construction Enterprises with Foreign Investment	27 Sep 2002	1 Dec 2002	
Regulations on Property Management	28 May 2003	1 Sep 2003	
Advertisement Law	27 Oct 1994	1 Feb 1995	

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
Rules on Administration of Foreign-invested Advertising Enterprises	2 Mar 2004	2 Mar 2004	
Regulations on Administration of Travel Agencies	11 Dec 2001	1 Jan 2002	
Regulations on Administration of Tourist Guides	14 May 1999	1 Oct 1999	
Provisional Rules on the Establishment of Travel Agencies with Majority Foreign Equity and Solely Foreign Investment	12 Jun 2003	12 Jul 2003	
Law on Entry and Exit of Aliens	22 Nov 1985	1 Feb 1986	
Regulations on Administration of Foreign Law Firms' Representative Offices in China		1 Jan 2002	22 Dec 2001
Provision of the Ministry of Justice on the implementation of Regulations on Administration of Foreign Law Firms' Representative Offices in China	2 Sep 2004	2 Sep 2004	4 Jul 2002
Others			
Constitution	14 Mar 2004	14 Mar 2004	4 Dec 1982
Organic Law of the State Council	10 Dec 1982	10 Dec 1982	
Organic Law of the Local People's Congress and Local People's Government at Different Levels	27 Oct 2004	27 Oct 2004	
Criminal Procedure Law	17 Mar 1996	1 Jan 1997	1 Jul 1979
Civil Procedure Law	28 Oct 2007	1 Apr 2008	1 Oct 1982
Administrative Procedure Law	4 Apr 1989	1 Oct 1990	
Law on the Procedure of the Conclusion of Treaties	28 Dec 1990	28 Dec 1990	
Legislation Law	15 Mar 2000	1 July	

Legislation	Adoption of latest amendment	Entry into effect	Date of first adoption
		2000	
Regulations on Procedures for the Formulation of Administrative Regulations	16 Nov 2001	1 Jan 2002	
Employment Promotion Law	30 Aug 2007	1 Jan 2008	
Anti-monopoly Law	30 Aug 2007	1 Aug 2008	
Labour Contract Law	29 Jun 2007	1 Jan 2008	
Property Law	16 Mar 2007	1 Oct 2007	
Provisions on the Administrative Punishment of Price-related Violations	9 Jan 2008	9 Jan 2008	10 Jul 1999
Regulation on Disclosure of Government Information	17 Jan 2008	1 May 2008	
Regulations on Procedures for the Formulation of Rules	16 Nov 2001	1 Jan 2002	
Regulations on Submission of Regulations and Rules for the Record	14 Dec 2001	1 Jan 2002	
Decision of the Third Session of the Sixth National People's Congress on Authorizing the State Council to Formulate Interim Provisions or Regulations Concerning the Reform of the Economic Structure and the Open Policy	10 Apr 1985	10 Apr 1985	
Law Countering Unfair Competition	2 Sep 1993	1 Dec 1993	
Provisions of the State Council on Prohibiting of Imposition of Regional Blockage on Market Economic Activities	21 Apr 2001	21 Apr 2001	
Notice on Cleaning up Local Protectionism in Market Economy Activities (issuing authorities: MOFCOM, Ministry of Supervision, LAOSC, MOF, Ministry of Communications, SAT, AQSIQ)	18 Jun 2004	18 Jun 2004	

Administrative Permission Law	27 Aug 2003	1 Jul 2004	
Judges Law	30 Jun 2001	30 Jun 2001	28 Feb 1995
Labour Law	5 Jul 1994	1 Jan 1995	
Law on Administrative Reconsideration	29 Apr 1999	1 Oct 1999	
Company Law	27 Oct 2005	1 Jan 2006	29 Dec 1993
Pricing Law	29 Dec 1997	1 May 1998	
Regulation on Government Pricing	26 Dec 2001	1 Feb 2002	
Interim Provisions on Preventing the Acts of Price Monopoly	18 Jun 2003	1 Nov 2003	
Regulations on the Administration of Company Registration	18 Dec 2005	1 Jan 2006	
Law on the Protection of Consumer Rights and Interests	31 Oct 1993	1 Jan 1994	
Law on Enterprise Bankruptcy (Trial Implementation)	27 Aug 2006	1 Jan 2007	
Law on Industrial Enterprises Owned by the Whole People	13 Apr 1988	1 Aug 1988	
Law on Individual Proprietorship Enterprises	30 Aug 1999	1 Jan 2000	
Administrative Rules Governing the Registration of Individual Proprietorship Enterprises	13 Jan 2000	13 Jan 2000	
Law on Partnership Enterprises	27 Aug 2006	1 Jun 2007	
Administrative Regulations Governing the Registration of Partnership Enterprises	9 May 2007	1 Jun 2007	19 Nov 1997
Law on Promotion of Small and Medium-Sized Enterprises	29 Jun 2002	1 Jan 2003	
Law on Township Enterprises	29 Oct 1996	1 Jan 1997	

Provisions on the Merger and Division of Enterprises with Foreign Investment	22 Nov 2001	22 Nov 2001	23 Sep 1999
Law on Bid Invitation and Bidding	30 Aug 1999	1 Jan 2000	
Rules for the Administration of Employment of Foreigners in China	22 Jan 1996	1 May 1996	
Administrative Regulations Governing The Registration of Legal Corporations	3 Jun 1988	1 Jul 1988	
Code of Corporate Governance for Listed Companies	9 Jan 2002	9 Jan 2002	
Several Opinions on Promoting the Reform, Opening and Steady Development of the Capital Market – State Council	31 Jan 2004	1 Feb 2004	
Contract Law	15 Mar 1999	1 Oct 1999	
Interim Regulations on Supervision and Management of Corporate State-owned Assets	13 May 2003	27 May 2003	
Provisional Measures on Transfer of State-Owned Property Rights in Enterprises	8 Jan 2004	1 Feb 2004	
Government Procurement Law of China	29 Jun 2002	1 Jan 2003	
Environmental Protection Law	26 Dec 1989	26 Dec 1989	
Law on Evaluation of Environmental Effects	28 Oct 2002	1 Sep 2003	
Marine Environment Protection Law	25 Dec 1999	1 Apr 2000	23 Aug 1982
Regulations on Administration of Collection and Utilization of Sewage Discharge Levies	2 Jan 2003	1 Jul 2003	
Trade Union Law	27 Oct 2001	27 Oct 2001	
Civil Procedure Law	28 Oct 2007	1 Apr 2008	1 Oct 1982

Source: Ministry of Commerce, China

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