1-1-1999

CHINA'S BID TO THE WTO—HISTORY TASK NEEDS JOINT EFFORTS

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B.A., University of International Business and Economics, P. R. China, 1994

A Dissertation Submitted to the Graduate Faculty
Of The University of Georgia in Partial Fulfillment
Of the
Requirements for the Degree
MASTER OF LAW

ATHENS, GEORGIA
1999
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I. Introduction

As one of the three international institutions\(^1\) formed in the aftermath of the Second World War constituting the postwar world economic order, the GATT was an international treaty with its central mission promoting free trade among the contracting parties. During the forty-seven years of its existence (1947-1994), the GATT provided a legal framework within which most international trade was conducted.\(^2\) On January 1, 1995, the WTO was established in accordance with the results of the Uruguay Round of Multilateral Negotiations under the auspices of the GATT. The replacement of the GATT by an institutional body, the WTO, ushered in a new era in the international trade system.

Based on Geneva, Switzerland, the WTO is an inter-governmental organization. Its main decision-making bodies are councils and committees consisting of the WTO’s entire membership. Administrative and technical support comes from the WTO Secretariat in Geneva. The organization has 132 members, 34 observer governments and 7 international organization observers to General Council (as of September 1997).

People’s Republic of China is a newly leading power in an ever more interdependent global economy. In two decades, the value of China’s merchandise exports has expanded more than twenty-fold, reaching US$182.7 billion in 1997, ranking

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\(^1\) The IMF, founded at the Bretton Woods Conference in 1944, was designed to deal with the cooperation and regulation of the monetary aspects of international economic exchange. The International Bank for Reconstruction and Development (World Bank), also founded at the Bretton Woods Conference, was originally devised to provide funds for the rebuilding of Western Europe and has since evolved into the primary world economic organization under the auspices of the United Nations.

10th, and US$142.4 billion in import in 1997, ranking 12th, if including Hong Kong, then China would be the top five exporters and importers in world merchandise trade. And china is also the second largest recipient of foreign investment around the world. Today the Chinese economy represents between 5 to 10 percent of global output, depending on the method used to calculate national production.3

But up to now, China is still not a member country of the WTO. In this thesis, I like to analyze China’s bid to the WTO, and make it clear why it’s the history task which needs joint efforts. Part II will reiterate the importance of China’s accession to WTO. Part III will review the major events in China’s bid to the GATT and the WTO since the establishment of the GATT. Part IV will analyze the major obstacles to China’s admission to the WTO. Part V and Part VI will state what China should do and what the WTO should do separately.

3 See World Trade Organization, International Trade Trends and Statistics (1997) Only United States, Germany, Japan, France, United Kingdom, Italy, Canada, Netherlands, Hong Kong rank ahead of China in exporting,; And United States, Germany, Japan, United Kingdom, France, Hong Kong, Italy, Canada, Netherlands, Belgium-Luxembourg, South Korea ranked ahead of China in importing.
II. Importance of China's membership in the WTO

Despite China's non-compliance with the WTO standards, it is important for both economic and strategic reasons that China ultimately be admitted and become integrated into the world economy. China's admission to the WTO will make the WTO a more effective international economic institution, increase economic activity and the peaceful resolution of trade disputes, and help bring China more firmly into the family of nations, which may in turn help to resolve other world problems.

A. Making the WTO a more effective international economic institution

China's admission will make the WTO a more effective international economic institution. China is an important economic figure in the world, the WTO is incomplete without it as a member.\(^4\) China is one of the largest exporter and importer in the world, and the second largest recipient of foreign investment. Renato Ruggiero, Director General of the WTO, has said that "the global multilateral trading system would be incomplete should China continue to be kept out of WTO...China, with its rapid economic growth and particularly its great potential, would become one of the major forces supporting [the] world's new trading order."\(^5\)

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\(^4\) See Kwan Weng Kin, *China in WTO Will Play by Rules*, STRAITS TIMES (Singapore), Nov. 20, 1996, at 16, available in Lexis-Nexis Library, Curnws File (claiming that the United States is the country most capable of integrating China into the world economy). Dr. Joseph Nye, Dean of the John F. Kennedy School of Government at Harvard University, argues that casting China as the enemy would create a "self-fulfilling prophecy."

B. Increasing economic activity in the world

Besides making the WTO a more effective economic institution, China's admission to the WTO will increase economic activity in the world. If China further opened its economy, it would be a huge export market for the rest of the world. The European Commissioner for External Economic Affairs and Commercial Policy, Leon Brittan, has said that "China's membership [is] essential for the world economy." It is estimated that China's modernization will require imports of equipment and technology of about US$100 billion annually, and infrastructure expenditures during the latter half of this decade could amount to about US$250 billion. This is not to mention rising demand for energy, mineral resources, food and farming imports, which, despite the size and resources of the Chinese economy, cannot be satisfied by domestic output alone.

The basic fact is that China is moving to the very center of the globalization process, and both China and other nations are benefiting from it. We live in a world where technology, capital, and trade move increasingly more freely; where the old economic tools have lost their edge; and where economic strength and security increasingly depend on economic openness and integration. China's path to growth and modernization is also a path to interdependence.

This process of globalization will not be reversed--it will accelerate. Throughout the world, economic and technological forces are breaking down walls, reaching across borders, and weaving together a single world economy. In the late twentieth century our

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6 See Ruth Youngblood, China Issues Warning Over WTO Admission. UPI, May 13, 1995, available in Lexis-Nexis Library, UPI File. Vice Premier Lanqing Li of China has said that China's admission to the WTO will lead to "[a] more open China [that] will provide the world economy with a huge market, more employment and better chances for international allocation of resources."
new opportunities, as well as our challenges—in trade, in economics, in every facet of international politics—arise from our worlds moving closer together, not further apart. Deepening interdependence is the central reality for China and for the world.

C. Making the WTO a better mechanism to resolve international trade disputes

If China is admitted to the WTO, the WTO will become a better mechanism to resolve international trade disputes. A multilateral forum can better address trade disputes with China than the present ad-hoc bilateral negotiations that currently dominate the US-China trade regime.8

For China, a key step towards completing its interdependence is bringing China into the multilateral trading system. China’s economic relations with the world are simply too large and too pervasive to manage effectively through a maze of arbitrary, shifting and unstable bilateral deals. China’s best guarantee of coherent and consistent international trade policies is to be found inside the rules-based multilateral system.

By the same token, China, like all other countries, can best manage its growing economic relations with the world on the basis of rights and obligations agreed by consensus and reflected in enforceable rules and disciplines. This is the only way to resist bilateral pressures or threats of unilateral actions. It is also the only way to sustain and promote domestic economic reform knowing that China’s efforts in this direction are being matched by its trading partners, members of the WTO, who share the same obligations under the WTO Agreements.

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D. Helping China to fulfill its huge potential for development and bringing China into the family of nations, which may in turn help to resolve world problems.

As China’s economy expands into the future, so too will its ties to the global economy. Dependence on export markets will continue to grow rapidly, and not only for Labor Intensive products like footwear and toys, but for the higher technology goods and services that are an increasing proportion of China’s output as it climbs up the production ladder. Imports will also rise, in part to fuel further industrialization and modernization, but also in response to consumer demand. And an ever expanding web of inward and outward investment will draw China deeper into the global financial system.

Joining the WTO means assuming binding obligations in respect of import polices—obligations which will necessitate an adjustment in China’s trade polices and, in most cases, economic restructuring. But, in turn, China will benefit from the extension to it of all the advantages that have been negotiated among the more than 130 members of the WTO. China will be entitled to export its products and services to the markets of other WTO members at the rates of duty and levels of commitment negotiated in the Uruguay Round—this includes tariff bindings benefiting nearly 100 percent of China’s exports of industrial products to developed countries, with almost one-half of these products being subject to duty-free treatment. These tremendous market access opportunities will be underpinned and reinforced by the two cardinal principles of most-favoured-nation and non-discrimination.

Equally importantly, China will have recourse to a multilateral forum for discussing trade problems with its WTO partners and, if necessary, to a binding dispute
settlement procedure if its rights are impaired. This greater level of security will benefit China immensely – encouraging even greater business confidence, and attracting even greater levels of investment.

An outward-looking China cannot afford to stand on the sidelines while others write the rules of the game. A country like China with growing export interests cannot afford to be left without secure and expanding access to global markets—security which only the multilateral system provides. And perhaps most important, a China dependent upon technology and modernization cannot afford to fall behind the fast-moving pace of globalization—particularly in sectors like information technologies, telecommunication, or financial services which will be the key building blocks of the new economy.

So, China’s admission to the WTO will help bring China into the family of globe, thus decreasing tensions in many areas around the globe. The United States and other nations should enter a dialogue with China to ensure that its economy becomes even more externally oriented and interdependent. This should help to ensure future political stability in Asia. Minister Lee Kuanyew of Singapore argues that, “[a]s China’s economy becomes more externally orientated, it will become interdependent with the major trading counties of the world.” Such interdependence, Lee believes, will make it “costly for China to risk rupture of economic ties by violating accepted rules and

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9 In fact, once China is in the WTO, Minister Lee Kuanyew fo Singapore believes that there is a greater likelihood that “[t]he United States...can get China to commit to international rules on trade and investment.” Yang Razali Kassim, Commit China with WTO Entry, BUS. TIMES, Nov. 20, 1996, at 9, available in Lexis-Nexis Library, Curnws File.

10 See How US, Japan Can Help Integrate China into the World Community, STRAITS TIMES (Singapore), Nov. 20, 1996, at 34, available in Lexis-Nexis Library, Curnws File (reporting text of Senior Minister Lee Kuanyew of Singapore’s speech at the Create 21 Asahi Symposium in Osaka, Japan).
conventions. This can be a powerful factor to keep it engaged in the international community.”

Future economic cooperation between the United States and other major trading nations with China might lead to greater cooperation in other areas as well.

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11 See supra note 9, Lee argues that “China’s membership of [sic] the WTO, with a reasonable period of transition as a developing country, will commit China, first to observe, and second to enforce international rules on trade and investments.”

12 See id.
III. Mission unaccomplished: China's application to join the WTO

China was among the original twenty-three signatories in the GATT in 1947. In October, 1949, the government changed in China as a result of the founding of the People's Republic of China ("PRC"). Political circumstances prevented the new government from assuming its seat in the United Nations and other international organizations, including the GATT. The Republic of China ("ROC"), under the Kuo Min Tang ("KMT"), which fled to Taiwan after being defeated by the Communists in 1949, occupied China's seat in the GATT until 1950 when it notified the UN Secretary General of its decision to withdraw from the GATT.13 The ROC's withdrawal from the GATT coincided with its withdrawal from a number of other international organizations including the UN.14 Mainland China has never recognized the legitimacy of the ROC government and therefore regards the ROC's withdrawal invalid.15

In 1971, the UN restored the right of the PRC to hold seat in the UN assembly and ousted Taiwan's representative. Additionally, the PRC won a permanent seat on the UN Security Council, it means from that time, the PRC represent China in the world officially. In 1980, the PRC got admission to the International Monetary Fund (IMF) and the World Bank, this signified the beginning of China's return to the world economic

15 There is no indication that the PRC contested the legality of the withdrawal at the valid time. Nor did it attempt to assume the "Chines seats" in the GATT or to observe the legal obligations of the international agreements associated with the organization. Id. at 21-22.
community.\textsuperscript{16} Since then, China has joined many international and regional economic organizations.\textsuperscript{17} One conspicuous exception, however, is China's hitherto unsuccessful effort to gain admission to the GATT and its newly-born successor, the WTO.

In 1982, China was granted observer status in the GATT. Four years later, in July 1986, China officially notified the GATT Director-General of its intention to resume its membership in the treaty. Since then, China has made continuous efforts to obtain approval of its application from the contracting parties. Although China, as a non-contracting party, participated fully in the Uruguay Round negotiations and signed the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act) and the Agreement Establishing the Multilateral Trade Organization (MTO Agreement) in Morocco on April 16, 1994,\textsuperscript{18} it failed to gain admission to the GATT during the Uruguay Round as it had expected. China's subsequent efforts to rejoin GATT during the remainder of 1994, and thus to become a founding member of the WTO, also proved ineffective. When the WTO came into existence on January 1, 1995, China was not included in its membership.\textsuperscript{19}

\textsuperscript{17} For a list of international organizations in which China has participated, see Wang Guiguo, China's Participation in International Organizations, in CHINA FOREIGN ECONOMIC LAW: ANALYSIS AND COMMENTARY (Rui Mu & Wang Guiguo eds., 1990)
\textsuperscript{18} When the Uruguay Round was formally launched at Punta del Este, Uruguay, in September 1986, the Ministers of CONTRACTING PARTIES gave special permission to allow China to take part in the negotiations by adopting a provision in the Ministerial Declaration which states that the "[n]egotiations will be open t ...countries that have already informed the CONTRACTING PARTIES, at a regular meeting of the Council of Representatives, of their intention to negotiate the terms of their membership as a regular meeting of the Council of Representatives, of their intention to negotiate the terms of their membership as a contracting party." Ministerial Declaration on the Uruguay Round. Declaration of 20 September 1986, Part I, para. F(a)(iv), GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 33\textsuperscript{rd} Supp. 1985-86, at 27
\textsuperscript{19} For a list of WTO Members (January 1,1995), see WTO, FOCUS, No. 1, Jan-Feb., 1995, at 5.
WTO granted China observer status on July 11, 1995, the eleventh largest trading nation in today's world is still excluded from the principal international trade organization.

As a major event in the restructuring of the post-Cold War international trade framework, China's application to join GATT/WTO presents a number of difficult problems in international law, world politics, and the global economic order. It has generated a great deal of not only multilateral and bilateral negotiations between concerned nations but also scholarly attention around the world.

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20 WTO, FOCUS, No. 4, July 1995, at 1-2
21 In 1994, China ranked eleventh both as exporter and importer in world merchandise trade. See WTO, FOCUS, No. 2, March-April 1995, at 8.
22 For a general analysis of this process, see JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990).
23 The following articles, selected from a vast literature, deal with important aspects of China's application to GATT/WTO: Wengou Cai, China's GATT Membership: Selected Legal and Political Issues, J. WORLD TRADE, Feb, 1992, at 35; Susanna Chan, Taiwan's Application to the GATT: A New Urgency with the
IV. Major obstacles to China’s admission to the WTO

China’s economic system is incompatible with principles and practices of the WTO.

A. Trade-related investment measure

1. China currently employs certain trade-related investment measures that limit foreign access to its domestic market.

For example, China currently limits access to foreign exchange, effectively preventing investors from removing profits from China in their own currency.\(^{24}\) Foreign investors are left with profits in local Chinese currency, which is relatively worthless because it is not freely convertible.\(^{25}\) In order for profits to be remitted abroad, foreign investors need to obtain permission from the State Administration of Exchange Controls (SAEC) and the Bank of China (BOC).\(^ {26}\) This administrative regime hinders foreign investment; further, it does not meet the strict requirements against TRIMs set by the WTO.

First, we need to review China’s currency mechanism and foreign exchange measure in the last twenty years.


\(^{25}\) See John D. Parsons, China’s Re-Accession to the GATT and the Impact of the Uruguay Round Agreement 1 Hong Kong L. Sch. Rev. 52. (1994).

Before the economic reform started in 1979, control of Chinese foreign exchange was wholly concentrated in the hands of the central government. In accordance with a structure that employed planned directives for managing the economy and a State monopoly of foreign trade, the central government used administrative instrumentalities to manage foreign exchange.\textsuperscript{27} With the coming of the economic reform, an increasing number of foreign enterprises and businessmen came to China to make investment or conduct business operations. To meet the demand of this new development, it soon became necessary to reform the foreign exchange system. Thus, when China’s foreign trade experienced rapid growth in the 1980s, the central government also relaxed State control over foreign exchange by decentralizing the management of foreign exchange.

Following same pattern of reform in the foreign trade management area, the responsibilities for the administration of and the business operation of foreign exchange were separated. Under the direction of the People’s Bank of China, which exercises the function of the central bank, the State Administration of Exchange Control performs the administration of foreign exchange, and the Bank of China, China’s specialized bank for foreign exchange, manages the business side of foreign exchange.\textsuperscript{28}

Beginning in the mid-1980s, China carefully constructed a dual-rate currency mechanism, administering foreign exchange rates through a loose network of exchange centers or swap centers. By 1989, about eighty swap centers existed throughout China; they become the only channel through which foreign enterprises, enterprises with foreign investment, foreign businessmen, and foreign tourists could make currency conversion in

\textsuperscript{28} Id, at 18-19.
China. The enterprise with foreign investment relied on these centers to acquire RMB (the Chinese currency) in order to pay local costs, and to exchange their domestic earnings into hard currency for repatriation. All enterprises, domestic as well as foreign, acquired their hard currency from these centers to pay for imported goods. By 1993, the swap centers handled about 80 percent of all current account transactions within China.

Under this dual-rate system, the People's Bank of China administered two exchange rates. First, it set an official rate for RMB, which was used by tourists and for priority imports under the State plan. Second, the bank allowed the swap center administrators to peg a daily swap center rate, which was allowed to float within a limited range. This rate was allowed to depreciate relative to the official rate, and thus accurately reflect supply and demand.

Although it was first introduced as a reform measure to decentralize China's foreign currency management, this dual-rate system soon became a target of international criticism as being inconsistent with international practice under the GATT. The United States' Department of Treasury first cited China for "manipulating" its currency in November 1992, and continued to make this claim throughout 1993. Within the GATT Working Party, the representatives from the European Community and other developed countries echoed the US complaints.

These criticisms focused on two aspects of the dual-rate exchange system. Both cast the system as erecting a prohibitive Non Trade Barrier (NTB) for China's foreign trade. First, it was alleged that the dual-rate worked as a device of government subsidy to a

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31 See supra note 29, at 62.
selected number of Chinese enterprises conducting imports. While the GATT charter and the GATT ruling do not specifically outlaw dual-rate currency regimes, they do limit a nation's ability to restrict imports for the purpose of protecting its balance of payment.\(^{33}\) By maintaining the artificially imposed difference between the official exchange rate and the floating swap center rate, it was alleged that the central government was able to protect certain industries by allowing them to pay for imported commodities at the overvalued official rate. The military and some selected State-owned enterprises reaped benefit from this system by paying less than the actual price to purchase imported goods at a currency loss to be absorbed by the central bank.\(^{34}\)

Second, the dual-rate system was described as a hidden tax on currency trades. The central bank could target foreigners by forcing them to register their earnings in China at official rate, which was artificially kept at a much lower ratio than the swap center rate, but repatriate profits at the swap center rate. Tourists also had to use the official rate to buy local currency. Foreign investors made their earnings in local currency and had little or no foreign currency earnings to help pay for needed imports, and thus had no way to acquire hard currency for repatriation.\(^{35}\)

So, during the last three years of continuous talks between China and the GATT Working Party on China's application before the conclusion of the Uruguay Round,
currency controls became a conspicuous point of contention.\textsuperscript{36} In direct response to these criticisms, China's delegates promised in the summer of 1993 that China would achieve a single exchange rate within five years, and convertibility shortly thereafter.\textsuperscript{37}

But the action turned out to be swifter than the promise. Reflecting the sense of urgency that mounted as the Uruguay Round drew to close, China moved quickly at the end of 1993. Only days after the conclusion of the Uruguay Round in December 1993, China made the surprising announcement that it was abolishing the dual-rate exchange system and implementing a unified foreign exchange rate, to come into effect on January 1, 1994.\textsuperscript{38} The new unified exchange rate adopted the former swap center rate of RMB 8.7 yuan (Chinese dollar) per US dollar, thus in effect eliminating the former official rate of exchange. In the meantime, China abandoned the retention system that allowed certain enterprises to keep up to 50 percent of their foreign exchange earnings and established an interbank foreign exchange market, in which domestic enterprises are allowed to acquire hard currency as long as they have the proper import license.\textsuperscript{39} Several months later, China opened a national foreign exchange center in Shanghai which, as the hub of China's interbank market, is linked to trading centers in other major cities.\textsuperscript{40}

The unification of foreign exchange rates effectively eliminated the government subsidy to selected industries in buying imported commodities.\textsuperscript{41} Despite lingering concerns about performance of the newly erected interbank exchange mechanism, China

\textsuperscript{36} Talks on China's GATT Membership End; Questions Raised on Currency Proposal, 10 INT'L TRADE REP. (BNA) 490 (Mar. 24, 1993).
\textsuperscript{37} See supra note32, at 95.
\textsuperscript{38} China to Unify RMB Exchange Rate on January, XINHUA GENERAL OVERSEAS NEWS SERVICE, December 29, 1993, available in Lexis-Nexis Library, ALLWLD File.
\textsuperscript{40} See National Foreign Exchange Trading Center Opens in Shanghai, BBC SUMMARY OF WORLD BROADCASTS, Apr. 9, 1994, available in Lexis-Nexis Library, ALLWLD File.
clearly made a major move toward conforming its foreign exchange structure with international norms. But for the sense of urgency to enter the GATT before the WTO was officially formed, it is hard to imagine that China would have given up its dual-rate exchange system in such a dramatic fashion and as early as 1994. In fact, the unification of the foreign exchange rates came as a surprise to most observers and commentators of the Chinese economy,\(^42\) for in April 1993 China had just institutionalized its dual-rate system by promulgating comprehensive administrative regulations on the swap market.\(^43\)

2. In addition, as a planned economy, it is very difficult to see where the state ends, and private enterprise begins.\(^44\)

The Chinese government engages in extensive amounts of state planning regarding economic decisions.\(^45\) The state plan determines the amount of goods that China will purchase from abroad. For example, China imposes outright import quotas on certain products that are set by the state plan.\(^46\) Such quotas restrict imports, in violation

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\(^{41}\) See supra note 32, at 95.

\(^{42}\) For instance, a commentator wrote in May 1993 that the promulgation of the Regulations on the Foreign Exchange Swap Market indicates that "within a number of years China will not open up its foreign currency free [exchange] market." Bi Kexi, Waihui, Fengxian, & Baozhi (Foreign Currency, Risk, And Hedge)\(^49\) (1993).

\(^{43}\) Waihui Tiaoji Shichang Guanli Tiaoli [Regulations on Foreign Currency Swap Market], Fagui Huibian {April 15, 1993} (P.R.C.)


\(^{45}\) See id. At the head of the government is the State council, which is China's highest executive and administrative organ. Under the State Council, the key governmental body that regulates trade is the Ministry of Foreign Trade and Economic Cooperation (MOFTEC). MOFTEC works with the State Planning Commission (SPC), the Bank of China (BOC), the State Administration of Exchange Control (SAEC), the Ministry of Finance (MOF), the State Administration for Industry and Commerce (SAIC), and other institutions to create the formal plans at the national level to set import and export requirements. See id, the discussion in this section only deals with the myriad rules and plans emanating from the central government. This, however, represents only a small part of the story. At the local level, the local Commission on Foreign Trade and Economic Cooperation (COFTEC) replicates MOFTEC at the national level. See id, at 182-185. Each province and some large cities have their own COFTECs. In addition, there are Provincial Planning Commissions (PPC), local Administration of Exchange Controls (AEC), and local Administration for Industry and Commerce (AIC). These institutions create an often overlapping and confusing set of regulations and state planning that all foreigners must confront in order to do business in or with China. See id, at 185-187.

of WTO norms. Central planning means that, even if the WTO requires China to lower tariff rates, the market will not be the factor that determines what goods China will purchase. Prices will have little effect on which goods are purchased because supply and demand are determined by government agencies, and not by market forces. Central planning, then, allows countries like China to circumvent the market liberalization objectives of the WTO.

3. A final impermissible TRIM is the restriction imposed by the government on “the types and number of entities within China, which has the legal right to engage in international trade.”

The government restricts most foreign trade in China to that carried out by Foreign Trade Corporations (FTCs). FTCs are state-owned commercial entities that have the status of legal persons under the law; each FTC deals within a narrowly-defined business scope. Foreign transactions can be consummated only through approved FTCs.

Before 1979, all foreign trade transactions were carried out by a dozen national FTCs. Take examples: China National Native Product and Animal By-products Import and Export Corporation; China National Light Industrial Products Import and Export Corporation; China National Chemicals Import and Export Corporations; China National

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47 See Parsons, supra note 25, at 51. Parsons explains that in market economies the reduction of import tariffs leads to lower prices and increased competitiveness of the import goods. However, in a NME [non-market economy] the reduction of tariffs will not have such a cause and effect relationship. In market economies, relative prices guide export and import decisions of private enterprises. In NMEs, price has little influence since supply and demand are administratively determined. Tariffs which influence prices, likewise have influence over the quantity, source and composition of imports. The economy runs according to the state plan.

48 See id.

49 See id.

50 Id.


52 See id. at 179. In fact, if FTCs deal in a commodity that is outside their business scope, that is considered an ultra vires transaction and the contract is void.
Machinery Import and Export Corporation; China National Silk Import and Export Corporation; and China National Tobacco Import and Export Corporation. At that time, this system served China well because it enabled China to amass the foreign currency, which was then scarce in China, needed to import materials and equipment for China's industrialization. However, once China opened up trade to the outside world, China's leadership realized that this highly centralized foreign trade system was too rigid to meet the demands of dealing with western countries whose economy and trade regimes were quite different from its own.

So beginning in the early 1980s, China gradually relinquished the monopoly that it exercised over foreign trade through a dozen FTCs under its control. Some industrial ministries under the central government were allowed to set up their own FTCs to directly conduct foreign trade in goods produced by a network of factories under the ministries' jurisdictions. Meanwhile, provinces and municipalities were authorized to establish FTCs to handle foreign trade in their respective regions. In addition, some large and medium production enterprises were given not only the right to export products they manufactured, but also to import materials and equipment needed for the production.

But all the improvements can not change the monopolization of State-owned FTCs, The FTCs' monopoly on foreign trade transactions allows them to exert a strong and wide-ranging influence. The FTCs have created a standard form contract that cannot be modified by a foreign party and is quite one-sided. For example, risk is shifted to the

53 Wang Linsheng, China's Foreign Economic Relations, in China's Socialist Modernization 710, 710-11 (Beijing, Foreign Language Press 1984)
54 See supra note 51, at 180.
foreign party. Chinese companies’ liability is severely limited, and a change economic Policy by the Chinese government does not constitute a force majeure. The Chinese government controls the FTCs, controls the dispute resolution process, and has the ability to change economic plans to the detriment of the foreign party.

B. Subsidies

The Chinese government gives direct and indirect subsidies to industry. Direct subsidies include payments to exporters to make up for the lower world market price for various goods, allowing Chinese companies to export goods at lower prices than they actually received for them. The government also gives many indirect subsidies to industry. Chinese entities receive low-priced energy and other raw materials; they also receive bank loans on preferential terms. The above subsidies violate the WTO because the Chinese government bears significant aspects of the exporters’ costs, making it easier for them to export goods at a below-market price, and thus to underprice goods from countries without similar subsidies.

The subsidies have a protective and anti-competitive effect that is antithetical to the promotion of free trade. It also violates the principle of nondiscrimination of all

55 See Standard Contract of Sales, in CHINA TRADE AND MARKETING MANUAL, at 91, 91-94. One of the most unfair provisions in these standard sales contracts, Section 7, regards the arbitration of trade disputes, at 93, this section calls for arbitration of trade disputes in “the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade,” a governmental entity directly responsible to the State Council. Id. This would be analogous to the following situation: suppose Sony sells TVs to Circuit City and a trade dispute arises. If the Sony-Circuit City sales contract contained a provision analogous to section seven of the standard Chinese sales contract, the dispute must be heard, not in a neutral court, but by the US Trade Representative, who is responsible to the President. To complete the analogy, one must also consider that Circuit City would be a government enterprise, under the control of the Executive Branch.

56 See Contracts-Foreign Related, in CHINA TRADE AND MARKETING MANUAL, supra note 51, at 70. Force majeure clauses state that there are specific “problems beyond the reasonable control of the lessee that will excuse performance.” Black’s Law Dictionary 645 (1990). They are also referred to as “act of God”.

57 See supra note 51, at 70.


59 See id.
GATT agreements. Although no clause in the GATT text specifies this principle, nondiscrimination is embodied in the principles of reciprocity, MFN, and national treatment.\footnote{See id.} It ensures that all benefits conferred upon any contracting party through multinational or bilateral negotiations should be automatically available to other contracting parties. What China has done about subsidies has violated the equal treatment principle.

C. Safeguard measures

China is incompatible with the WTO norms on safeguards because its current tariff rates are high.\footnote{The General Agreement on Tariffs and Trade 1947, The Text of The General Agreement, Articles I and III, at 2-3, 6-7 (1990).} The government uses these high tariffs as part of a national policy to protect certain sectors of the economy from competition. In some particularly important sectors, like electronic products, cosmetic, and automobile, tariff rates on goods are often higher than 150\%.\footnote{See supra note 58.} Although average tariff rates has been declining to about 44\%, it is still higher than international level. Further, the lack of transparency in China’s tariff system\footnote{See supra note 58.} means that the same product may be assessed different tariff rates. Frequently, special exemptions from the published tariff rates are available, but unknown to exporters.

When we talk about tariff, let’s first review the history of the role of tariffs in China’s economy. Before the mid-1980s, tariffs played only a marginal, if not entirely negligible, role in China’s foreign trade regime. Under the highly centralized foreign trade system based on central planning and controlled by administrative directives, tariffs were simply regarded as one of several sources of government revenues.
For over thirty years, they were collected by the Ministry of Foreign Trade (MOFT) based on tariff rates that were almost never adjusted. By virtue of the heavy use of government subsidies for imports and exports in accordance with the arbitrary national plan, tariff rates were totally divorced from the actual value of the goods in the world market. Under the national plan, government subsidies for imports and exports were pervasive. Tariff rates did not reflect the actual value of the goods in the world market because prices paid by domestic end users of imported goods were not tied to the international price adjusted for tariffs but to the price of domestic substitute goods.65

Therefore, just as in other centrally planned economies, the role of tariffs was redundant and had virtually no impact on either the volume of trade or the import and export decisions. Based on the policy of self-sufficiency and protection of national industries, the tariff rates were prohibitively high, which in effect stifled the growth of Chinese foreign trade. Between 1956 and 1977, China’s foreign trade amounted to less than 4 percent of national product, a trade-national product ratio well below those of not only developed counties but also other large developing countries such as Brazil and India.66

Under this central planning system, various related ministries and administrative commissions directly under the central government managed China’s foreign trade. These ministries and commissions combined business and administrative

63 See id.
64 See id.
66 In 1970, the trade-national-product ration for Brazil and India were 13.6 percent ad 8.7 percent respectively. IMF, International Financial Statistics, August 1975. See John C. Hsu, China’s Foreign Trade Reform: Impact on Growth and Stability (1989).
functions. They had full discretion to translate any administrative objectives directly into business decisions. Therefore, there was practically no need to enact laws and regulations to legalize the foreign trade management.  

One of the central promises of China’s economic reform was to reduce the role of the centralized economic plan and to introduce market mechanisms into the Chinese economy. As part of this undertaking, the scope of foreign trade planning was diminished in an effort to decentralize the foreign trade management.  

In the early 1980s, the State began to make more active use of tariffs and taxes as trade policy instruments. Reflecting the heightened status of tariffs in the foreign trade system, China streamlined the bureaucratic structure of the foreign trade management in the central government. As early as 1980, the former Customs Bureau of the Ministry of Foreign Trade was elevated to a ministerial level entity, the General Administration of Customs. The new agency, directly under the State Council, became responsible for formulation and administration of policies, laws, and regulations concerning tariffs. In 1987, the Customs Tariff Rate Commission, an organ under the Ministry of Finance, was abolished and replaced with a new Customs Tariff Commission. Chaired by the Ministry of Finance, the Commission operated as a highly-powered body directly under the State Council. The membership considered of the chief of the General Administration of Customs and a vice-minister of the Ministry of Foreign Economic Relations and Trade.

At the same time, China stepped up its effort to promulgate laws and tariff schedules in order to make the foreign trade administration more transparent. In 1987, the

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68 Id. At 37.
69 See supra note 65, at 47.
National People's Congress enacted a comprehensive customs law to replace the interim law that had governed customs since 1951. The new Customs Law stipulated that all "customs schedules shall be published." In 1985 the various import and export tariffs that had been announced in the previous five years were published in the first comprehensive tariff schedule released since 1951. Since then, any then, any changes in tariff rates have been announced in the monthly publication of the General Customs Administration, Zhongguo Haiguan (Chinese Customs) and in the IMF's annual reports.

China also tried to make its tariff system congruent with the standard international practice by reducing tariffs and assuming more and more obligations embodied in various international organizations and conventions. In 1983, China joined the Customs Cooperation Council. But its efforts to reduce tariffs have not been as successful as its efforts to reform the foreign trade management system. The concern of protecting its national industries, especially those technology intensive industries such as automobile, machinery, and electronics, from being destroyed by the sudden influx of imported goods underscored the cautious course taken by China to reduce the general level of its tariff rates.

By 1987, the weighted average tariff rate was reduced to 39 percent. Five years later, however, the unweighted average tariff rate was increased to 42.8 percent. When weighted by the value of trade in each category (at world price), the average tariff rate was 31.9 percent. Compared with other large developing countries, this rate was compatible with those of Brazil (31.9 percent) and Pakistan (35.9 percent), higher than

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71 Id. at 1332.
72 See supra note 65, at 47.
those of Argentina (17.1 percent) and Colombia (15.1 percent), but much lower than that of India (54.8 percent). It was not until the end of 1995 that China decided to reduce its general tariff rate to 23 percent, effective April 1, 1996. This drastic reduction makes China’s average tariff rate one of the lowest among major developing countries.

D. Import licensing procedure

China is incompatible with the WTO standards regarding the need for transparency and predictability in licenses. The myriad import licensing requirements have created “an effective import barrier to the Chinese market.” No products may be imported into China without a license, which must be issued by the government. Government officials at the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) have the power to issue licenses for nearly 50% of all products that are imported into China, giving the state tremendous power over which products reach the Chinese marketplace. The worst abuses occur when a government ministry in charge of a Chinese manufacturer of a particular product also oversees the import regulations imposed on similar products produced abroad.

It’s interesting to note that China restored the use of licensing in foreign trade in the early 1980s as a measure to reduce the scope of the mandatory import and export plan. When the People’s Republic of China was founded in 1949, it adopted the policy of using-licensing to control all imports and exports. But this policy was abandoned in the

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74 World Bank, China: Foreign Trade Reform 1994 at 56 (1994).
77 Id.
79 See supra note 76.
mid-1950s when the centralized foreign trade system based upon the mandatory national plan was firmly established.\textsuperscript{81} After the economic reform began, the licensing system was reinstituted as a means to displace the function of the mandatory plan as well as to serve the purpose of balance of payments and protecting domestic industries.\textsuperscript{82}

As of 1992, 53 goods were subject to import licensing.\textsuperscript{83} Since then, China has reduced the number of goods subject to import licensing on several occasions.\textsuperscript{84} As a result, the effective application of licensing in China has been limited to a scope essentially compatible with most countries which have GATT/WTO membership.\textsuperscript{85}

E. Protection for intellectual property

China is not in compliance with basic protection for intellectual property required by the WTO.\textsuperscript{86} Even after signing the 1992 memorandum of understanding with the United States, China has failed to enforce international intellectual property standards.\textsuperscript{87}

\textsuperscript{81} See id.
\textsuperscript{82} See supra note 67, at 97-99.
\textsuperscript{83} Guoijia Jinchukou Guanliueryuanhui He Duiwai Maoyibu Chukouxudezheng Zhidu Zanying Banfa [The Interim Measures for the Export Licensing System by the State Import and Export Control commission and the Ministry of Foreign Trade], Zhongguo Shewai Jingji Fa Huibian (1949-1985) [A Collection of China’s Foreign Economic Laws and Regulations], at 467-469.
\textsuperscript{84} See supra note 67, at 100, 183-186.

\textsuperscript{86} Despite the continuous efforts by GATT members to eliminate the use of quotas and licensing in their respective foreign trade regimes, these efforts have yet to achieve the proclaimed goal of eradicating licensing and quotas in the world trade system. See Jackson, The World Trading System, at 129 (1989).
\textsuperscript{87} See supra note 58.

\textsuperscript{88} See Geoffreycrothall, Close All Pirate CD Factories, US insists, SOUTH CHINA MORNING POST, July 22, 1994, Business Section, at 1. For instance, in 1994, there were 26 CD plants in China which produced a total output of 75 million counterfeit compact discs each year. See id. This has led to an investigation of China’s intellectual property practices pursuant to the US Trade Act’s Special 301 provision. See id. In 1992, the US Customs Service seized over $120 million in counterfeit goods coming from China. See id. Further, China has not improved access to its market for foreign audiovisual, sound recording and software companies.
1. China’s current intellectual property protection laws

Since 1982, China has enacted several intellectual property protection laws and joined various international intellectual property conventions.\(^88\) Growing pressure from Western nations, and a desire on the part of the Chinese to improve protection of their own intellectual property, led to the enactment of such laws.\(^89\) Accordingly, China enacted Trademark, Patent, and Copyright laws, as well as Computer Software regulations. China also enacted International Copyright Treaty Implementing Rules that modified portions of the Copyright Law and Computer Software Regulations, harmonizing these laws with the Berne Convention.\(^90\) A separate Unfair Competition Law, enacted in 1993, provides additional protection for well-known or unique brand names.\(^91\)

2. The 1995 Accord

Despite China's enactment of intellectual property protection laws, piracy continued unabated into 1995. Piracy of items such as CDs and computer software was widespread.\(^92\) Consequently, the United States threatened to retaliate by imposing tariffs on Chinese exports.\(^93\) Further, China wanted to be a founding member of the GATT's successor organization, the World Trade Organization. The goal of the 1995 Accord was to open China's market to certain U.S. products, and to create a mechanism guaranteeing

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\(^89\) See id. at 120.


the vigorous enforcement of China's intellectual property laws. The Accord contains an Agreement Letter enumerating certain mutual responsibilities and an Action Plan enumerating the steps China is to take to enforce its intellectual property laws.

a. History of the 1995 Accord

On February 4, 1995, the United States imposed the largest trade sanctions in US history when it levied one hundred percent punitive tariffs on US$1.08 billion of Chinese exports. The action was prompted by China’s refusal to crack down on the extensive piracy of American computer software, movies and music, and by China’s inability or unwillingness to enforce laws protecting intellectual property. China responded to the sanctions by announcing retaliatory tariffs against American exports, such as compact discs and cigarettes. China further announced that it would suspend talks with US companies regarding automobile joint ventures, and that it would withhold approval for US manufactures of audio-visual products to open branch offices in China. Three weeks later, however, on February 26, 1995, the day both governments’ sanction were to take effect, a trade war was averted when the United States and China signed an accord on the protection of intellectual property rights and market access. This Accord has been described as the most comprehensive copyright enforcement agreement the United States has ever negotiated, and was hailed as a victory for the Clinton Administration’s strategy with China. The Accord promised a six-month crackdown by China on copyright

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95 See id.

96 See *supra* note 93 at A1, The US trade sanctions imposed on China consisted of 100% punitive tariffs on $1.08 billion of Chinese exports, which included items such as: plastic articles, cellular telephones and answering machines, sporting goods, bicycles, and other goods such as footwear, and winter apparel.

97 Id.

98 Id.

violators, starting two days after the signing of the Accord. The Accord also includes China’s pledge to open its market to United States' movies, music, and computer software by immediately removing all import quotas on these American products.\(^{100}\)

American business leaders responded to the Accord with a combination of praise and caution.\(^{101}\) While many welcomed the Accord and predicted that it would lead to increased US media company investment in China, others warned that China’s resolve to enforce the new anti-piracy laws would be crucial.\(^{102}\)

In broad terms, five industry groups are most likely to directly benefit from the Accord: the US computer software industry,\(^{103}\) the US audio-visual industry, the US publishing industry, US patent-based industries, and US manufacturers of well-known products. The Accord contains three Chinese government commitments: to take immediate steps to address piracy throughout China, to make long-term changes to ensure effective enforcement of intellectual property rights, and to provide US rights-holders with enhanced access to the Chinese market.\(^{104}\)


\(^{100}\) Id.


\(^{102}\) See id. at D6.
b. The Agreement Letter

The Agreement Letter summarizes the intent and details of the Action Plan, addresses several additional issues not contained in the Plan, and makes a number of assurances.\textsuperscript{105} For example, China pledges to increase cooperation and trade in products protected by intellectual property rights, and to approve the establishment of a representative office of the International Federation of Phonogram Industries ("IFPI").\textsuperscript{106} Furthermore, China pledges not to impose quotas, import license requirements, or other formal or informal restrictions on the importation of audio-visual and published products and promised to permit US entities to establish joint ventures with Chinese entities in China for the production and reproduction of audio-video products. These joint ventures will be permitted to enter into contracts with Chinese publishing enterprises for distributing, selling, displaying, and performing throughout China.\textsuperscript{107} Joint ventures will be permitted immediately in Shanghai, Guangzhou, and other major cities, with the number of cities expanding to thirteen by the year 2000. Joint ventures will also be permitted in the computer software sector for the production and sale of computer software and computer software products. The Agreement Letter also permits revenue sharing arrangements.\textsuperscript{108}

\textsuperscript{104} See id. at 3.
\textsuperscript{106} See id. at 884.
\textsuperscript{107} Id.
\textsuperscript{108} Id. “China will continue to permit US individuals and entities to enter into revenue sharing arrangements with Chinese entities. Permissible arrangements will include, for example, licensing agreements under which the US entity receives a negotiated percentage of revenues generated by film products.”
c. The Action Plan

The Action Plan is annexed to the Agreement Letter, and was developed to provide effective enforcement of intellectual property rights in China. The plan requires all levels of the Chinese Government to participate in its implementation. Additionally, the Action Plan articulates immediate short-term and long-term effects. The Action Plan is divided into two main sections, an intellectual property rights enforcement structure ("Enforcement Structure"), and provisions for intellectual property rights' information dissemination and training.

3. Impediments to effective intellectual property rights enforcement in China

China's laws governing intellectual property protection contain impediments to their effective implementation. These impediments include: inherent ambiguities and "loopholes" in China's laws, procedural impediments, lax enforcement, and market barriers. China's Patent Law, Copyright Law, and Computer Software Regulations, are all vulnerable to these impediments.

a. Ambiguities and Loopholes in Intellectual Property Protection

China's intellectual property laws contain ambiguities and loopholes that may impede effective intellectual property rights enforcement. Such impediments hinder enforcement and erode protection, these ambiguities and loopholes exist in China's Patent Law, Copyright Law, and Computer Software Regulations.

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110 Id.
(1) The Patent Laws

Commentators have criticized China's Patent Law for containing ambiguities and loopholes.\textsuperscript{112} First, infringement is not specifically defined in the Patent Law.\textsuperscript{113} Additionally, the Patent Law contains ambiguous and broad language.\textsuperscript{114} For example, if someone uses or sells a patented product not knowing that it was made and sold without the authorization of the patentee, that person is not liable for patent infringement.\textsuperscript{115} Under this exception, only actual notice is sufficient to protect a patent, because such a showing frequently requires an extremely high, if not impossible, burden of proof, this exception seriously erodes patent protection.\textsuperscript{116} The Patent Law's ambiguous definition of the scope of use under the exception for non-authorized use of a patent in scientific research also hinders enforcement.\textsuperscript{117} The scarcity of lawyers in China, both in the profession and in the patent field, exacerbates these problems.\textsuperscript{118}

(2) The Copyright Laws

As with the Patent Law, the Copyright Law's ambiguous and overly broad language has been criticized for a long time.\textsuperscript{119} For example, while the Copyright Law provides protection for works by non-Chinese authors, it is uncertain whether the definition of a non-Chinese person includes non-Chinese corporations. Furthermore, many terms in the

\textsuperscript{112} See id., at 86.
\textsuperscript{114} See supra note 96 at 86.
\textsuperscript{117} See supra note 96 at 86.
\textsuperscript{118} See supra note 101, at 356. This scarcity of trained lawyers creates problems in using the Chinese courts to enforce patent rights.
Law are not defined. The Copyright Law is also silent regarding the status of citizens in Taiwan, Hong Kong, and Macao. Additional criticisms address the Copyrights Law’s lack of the right of assignment. This silence led to the accepted view that assignments of copyrights are prohibited in China. Critics also point out that while the Copyright Law provides that disputes may be settled by mediation, there are no guidelines as to who may qualify as a mediator.

(3). Computer Software Regulations

Critics argue that China’s Software Regulations show many of the same shortcomings as the Patent and Copyright Laws. Additionally, it is uncertain whether specific provisions of the Copyright Law apply to software. Similarly, as with the Patent and Copyright Laws, many criticize the Regulations’ ambiguous language and lack of definitions.

The Regulations’ numerous fair use exceptions are also criticized. This criticism stems from the combination of ambiguous language and the fact the government institutions purchase large quantities of software. Many fear that these large government purchases will result in future struggles surrounding the fair use exceptions.

119 See Li Xiang Sheng, Trade Mark Infringement in China, 12 EUR. INTELL. PROP. REV. 171 (1990). Regarding the Copyright Law, "[s]ome of its language is ambiguous, some fundamental questions are not answered and the commercial viability of exploiting copyright works is uncertain."


121 See Li Xiang Sheng, Trade Mark Infringement in China, 12 EUR. INTELL. PROP. REV. 448 (1990) (stating that first trademark may have appeared in China 3000 years ago).

122 Id.

123 Copyright Law, China Laws for Foreign Business, 2 business Regulation (CCH), art. 48, at 14,591.


125 See id. at 22,23 Ambiguous language and undefined terms found in the Software Regulations include: "small number of copies" and "non-commercial purposes."

126 Id. at 26.

127 Id.
Similarly, many fear that the fair use exception covering "similar software" could be used as a defense in software infringement actions. Critics also deride the Regulations' lack of retroactivity, and the inability of software developers to register software published prior to the enactment of the Regulations. Indeed, the practice of software infringement is so widespread that a loophole was created in the Regulations, exempting software published prior to the Regulations' enactment from the registration requirement.

b. Procedural Impediments to Intellectual Property Protection

Procedural impediments pose a hinderance to effective intellectual property rights protection, separate and distinct from that of the aforementioned criticisms. The inadequacy of the procedures through which intellectual property disputes are handled may constitute a major impediment to effective protection. For example, a conflict of interest may exist in the patent administrative agency's defined roles as both administrator and adjudicator. The Administrative Authority for Patent Affairs ("AAPA") must act as an administrative court for adjudicating patent disputes for those pursuing the AAPA route, and as a government agency for day to day patent administration. If a patentee decides, therefore, to turn first to the AAPA to resolve a patent dispute, the patentee may be before a biased judiciary. Furthermore, the AAPA

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128 See Software Regulations, China Laws for Foreign Business, 2 BUSINESS REGULATION (CCH), art. 31, at 14,707 (providing fair use exceptions).
129 See supra note 109, at 27, 30.
130 Id. at 27.
131 See supra note 98, at 304-07 (discussing procedural impediments to effective intellectual property protection in China).
132 Id.
133 Id. at 302: see Patent Law, China Laws for Foreign Business, 2 BUSINESS REGULATION (CCH), art. 60, at 14,227.
134 See supra note 98, at 304. The AAPA’s involvement in patent administration may conflict with its role as an administrative court, and its impartial handling of patent infringement disputes may be “compromised due to its dual functions and its position in the administrative structure.”
is subordinate to the executive authority of the region and is, therefore, subject to local protectionist pressure, compromising its impartiality.\textsuperscript{135}

Administrative agencies also lack the procedural authority to handle patent infringement cases.\textsuperscript{136} Thus, the AAPA lacks the power to investigate and collect patent infringement evidence and cannot issue preliminary injunctions. Additionally, administrative agencies are not empowered to enforce their own decisions.\textsuperscript{137}

Litigation proceedings in Chinese courts are also problematic. For example, under China’s Civil Procedure Law\textsuperscript{138} ("Civil Procedure Law") the responsibility for discovering and collecting evidence rests primarily with the court.\textsuperscript{139} The Civil Procedure Law, however, requires a party to present evidence to support its claims.\textsuperscript{140} Consequently, a party may need to rely on the court to order the opposing party to provide required evidence.\textsuperscript{141} Since neither the party nor its lawyers are granted enforceable rights to collect evidence, the party’s lawyer is limited to reviewing the court’s records.\textsuperscript{142} Critics also argue that procedural problems emerged as a result of the

\textsuperscript{135} See Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. If an AAPA decision is appealed and error on the part of the AAPA is proven, the Court will refuse to enforce the order unless the AAPA rectifies the alleged error. When the AAPA insists that its order was correct despite the Court’s holding to the contrary, therefore, the AAPA order remains unenforced. Further compounding this problem is that no procedure governs the resolution of such a disagreement between the AAPA and the court.
\textsuperscript{139} Civil Procedure Law, China Laws for Foreign Business, 3 Business Regulation (CCH), art. 64, at 23,919. This article reads in pertinent part: "if a people’s court considers certain evidence to be of relevance to a case, the people’s court shall itself collect and examine evidence”
\textsuperscript{140} Civil Procedure Law, China Laws for Foreign Business, 3 Business Regulation, art. 64, at 23,919.
\textsuperscript{141} See supra note 98, at 10.
\textsuperscript{142} Id. at 10-11.
promulgation of China’s Administrative Litigation Law ("Administrative Law").\footnote{Law of Administrative Litigation of the People’s Republic of China (1989), translated in China Laws for Foreign Business, 3 Business Regulation, P 19-558, 24,551 (CCH Int’l 1989)\footnote{See Jianyang Yu, Review of Patent Infringement Litigation in the People’s Republic of China, 5 J. CHINESE L. 297, 304-07 (1991). This ambiguity is significant because the applicable law determines the parties on appeal. For example, under the Civil Procedure Law, the patentee and the alleged infringer are the parties to both the patent infringement action and the appellate action. Under the Administrative Law, however, the parties would be the party dissatisfied with the prior decision and the AAPA. Therefore, the party prevailing in the first instance must rely on the AAPA to defend its interests.\footnote{See United States Trade Representative, 1994 National Trade Estimate Report on Foreign Trade Barriers 51 (1994) (discussing China’s lax enforcement of intellectual property protection).\footnote{Id.} Id. In fact, pirated goods are “omnipresent in China’s major commercial centers.”\footnote{See id.}}\footnote{Letter from James L. Bikoff, Esq., Arter & Hadden, to Irving A. Williamson, Chairman, Section 301 Committee, Office of the US Trade Representative 2 (Aug. 9, 1994) (commenting on video game piracy in China, in response to the Special 301 investigation). Infringing Nintendo video games in China have caused losses to the video game industry estimated between US$200 million and US$1.2 billion. It has also been estimated that over 20,000,000 counterfeit Nintendo video game 8-bit hardware and at least 60,000,000 counterfeit Nintendo 8-bit video games were sold in China before July 18, 1994. Letter from James L.}} Specifically, when an AAPA decision is appealed to a court, neither the Administrative Litigation Law nor the Civil Procedure Law indicates which law applies.\footnote{Id.}\footnote{Id.}

c. Lax Enforcement of Intellectual Property Protection Laws

Lax enforcement is evident in the widespread piracy of copyrighted works.\footnote{Id.} Despite the new copyright regulations, piracy in China remains rampant.\footnote{Id.} Critics of China’s lax enforcement point to the existence of twenty-six CD and LD factories in Central and South China.\footnote{Id.} The production capacity of these factories is seventy-five million units per year, although the domestic demand is only five million units per year.\footnote{Id.} Critics, therefore, believe that these factories export over fifty million pirated CDs and LDs annually. Efforts to close these factories have failed. Critics further speculate that many of these plants are closely connected to senior Chinese Government officials.

Commentators also note that Chinese factories and State-Owned Enterprises ("SOEs") play a prominent role in producing and distributing pirated video games.\footnote{Id.}
These SOEs openly advertise their infringing products throughout China, and like the CD factories, are believed to export large quantities of infringing video games to the rest of the world.\textsuperscript{150} Furthermore, the titles of many of the infringing games are based on US movie or character titles, thereby infringing the trademarks and copyrights of many US companies.\textsuperscript{151}

Critics further argue that piracy is wide spread in China’s television industry.\textsuperscript{152} There are over five hundred television stations in China that broadcast US motion pictures without the authorization of the Motion Picture Association (“MPA”).\textsuperscript{153} Furthermore, pirated and/or unauthorized MPA products,\textsuperscript{154} are openly used for programming by hundreds of cable systems and are routinely shown on the in-house movie systems of major Chinese hotels. Infringing products are also shown in Chinese mini-theaters throughout China.\textsuperscript{155}

According to the US Trade Representative’s office, the impotence of China’s designated copyright enforcement agency, the NCA, compounds this lax enforcement.\textsuperscript{156} The NCA is under-staffed and poorly funded, and has no clearly designated function.\textsuperscript{157} Moreover, the NCA can only enforce laws and regulations with the assistance of local ministries, many of which often have a financial stake in the pirating activities. Conflicts of interest exist throughout the entire enforcement structure, and, consequently, powerful

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Bikoff, Esq. and David I. Wilson, Esq., Arter & Hadden, to Carolyn Frank, Secretary, Trade Policy Staff Committee, office of the United States Trade Representative 1 (July 18, 1994) (concerning market access problems regarding video games in China).

\textsuperscript{150} Id.

\textsuperscript{151} Id.

\textsuperscript{152} Motion Picture Association, Trade Barriers to Exports of US Filmed Entertainment: 1995 Report to the United States Trade Representative 153 (1995)

\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Motion Picture Association member company titles can often be found in China within a few weeks of their theatrical release in the United States.

\textsuperscript{156} See supra note 130, at 51.
local interests are able to rebuff Central Government investigations into piracy.\textsuperscript{158} Even when local authorities are not directly involved in the pirating activities, enforcement is often hampered by local authorities who are not more interested in encouraging investment and economic development than enforcing intellectual property laws.\textsuperscript{159}

Similar problems persist in the enforcement trademark protection despite the revised laws and new criminal penalties.\textsuperscript{160} Direct access to administrative remedies and the courts is denied to non-Chinese persons, with non-Chinese petitioners forced to work through five designated agents,\textsuperscript{161} who often appear to have direct ties to the infringers.\textsuperscript{162} Critics deplore both the prolonged duration of investigations, during which US companies are denied information on the status of the investigations, and the practice of arriving at solutions through “back door” processes that ignore due process and principles of transparent justice. As with copyright protection, the courts are often influenced by local interests, thus further eroding the courts’ impartiality.\textsuperscript{163}

d. Market Barriers Undermine Intellectual Property Protection

China maintains a shadowy and unwritten system of quotas for films, video, and television.\textsuperscript{164} There are de facto bans on non-Chinese ownership in joint ventures for producing and distributing recorded music,\textsuperscript{165} and also on establishing joint ventures for

\textsuperscript{157} Id.
\textsuperscript{158} See id at 52.
\textsuperscript{159} Id.
\textsuperscript{160} See supra note 130, at 52.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} See supra note 140, at 152.
\textsuperscript{165} See Letter from Eric H. Smith, Executive Director and General Counsel, International Intellectual Property Alliance, to Frederick Montgomery, Chairman, TPSC, Office of the US Trade Representative 3-6 (July 13, 1994). (regarding public comments on market access issues related to China’s participation in GATT and WTO).
publishing.\textsuperscript{166} There is also an informal quota on the number of non-Chinese recordings that can be released annually in China.\textsuperscript{167} Additionally, while an import license is required to import books into China, these licenses are not available to non-Chinese publishers. Non-Chinese publishers are not permitted to prepare translations of their books: instead, they must have their books translated and published locally. China also imposes export performance requirements\textsuperscript{168} on US products manufactured in China, and imposes prohibitive tariff rates for many imported US products.\textsuperscript{169}

Commentators argue that these market access barriers facilitate intellectual property piracy and impede enforcement.\textsuperscript{170} The prohibitive tariff rates discourage the importation into China of authentic goods, leading to the saturation of the Chinese market with infringing products.\textsuperscript{171} Consequently, foreign licenses are unable to compete in China due to the presence of large quantities of these infringing products.\textsuperscript{172} Preventing full market access thus limits supply in the face of a rising demand that can only be satisfied by pirated copies of the product.\textsuperscript{173}

\textsuperscript{166} Id. at 5.
\textsuperscript{167} Id. at 4. As of July, 1994, the quota was 120 foreign record releases per year.
\textsuperscript{168} See supra note 134, at 2. The export performance requirements reduce the numbers of genuine products manufactured in China which are retained for sale in China. For example, only about thirty percent of the production of one of Nintendo’s two manufacturing partners in China can be retained for sale in China.
\textsuperscript{169} Pharmaceutical Research and Manufacturers of America, Submission of the Pharmaceutical Research and Manufacturers of America for the “Special 301” Report on Intellectual Property Protection 3 (Feb. 13, 1995). As of February, 1995, China’s tariff rates for pharmaceutical products was approximately fifteen to twenty percent. Similarly, as of July, 1994, there was a fifty percent tariff on video games and video game equipment.
\textsuperscript{170} See supra note 134, at 2.
\textsuperscript{171} Id.
\textsuperscript{172} See id. at 3. “US licenses are unable to compete in China because of the presence of vast quantities of infringing [products]...and the prohibitive tariffs on [products]..imported into China”
4. The 1995 Accord should be modified because it fails to address many of the impediments to effective intellectual property protection in China. China's laws and the enforcement of these laws do not meet the international standards in TRIPs.\textsuperscript{174} Furthermore, the 1995 Accord is silent regarding impediments other than enforcement, such as ambiguities in the laws and fair use exceptions. The 1995 Accord, however, does provide procedural reforms and expanded enforcement measures. There is little prospect, however, that the 1995 Accord will immediately bring China's intellectual property protection up to international standards.

a. China's Intellectual Property Protection Laws Fail to Meet the International Standards Embodied in TRIPs

China's intellectual property protection does not include many of the elements required in TRIPs: China does not expressly extend Berne Convention protection to computer software, China's laws are silent on trade secrets, and the Patent Law probably will not provide for the protection of layout-designs of integrated circuits as required by TRIPs. There are also several gaps between the enforcement standards articulated in TRIPs and China's enforcement provisions, particularly, procedures for remedying acts of infringement, written decisions and evidence, injunctive relief, and damages.

(1) Berne Convention Protection of Computer Software

TRIPs requires parties to extend Berne Convention protection of literary works to computer software.\textsuperscript{175} China does not, however, expressly extend Berne Convention

\textsuperscript{173} Id. at 2.

\textsuperscript{174} Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1197, in General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994, 33 I.L.M. 1125, Annex 1C.

\textsuperscript{175} See id. Art 1091), 33, I.L.M., at 1201.
protection to computer software. While China’s Copyright Law provides copyright protection for computer software, such protection has been ineffective and impartial, and contains no reference to the Berne Convention. While the Software Regulations aim to fill the loopholes left by the Copyright Law, again, no references are made to providing Berne Convention protection to computer software. Although China acceded to the Berne Convention in June, 1993, the Berne Convention does not require that China, as a party to the Convention, extend such protection to computer software. In light of China’s failure to include references to the Berne Convention in either of its two principles software copyright protection laws, one may conclude that China does not extend Berne Convention protection.

(2) Protection of Layout-Designs of Integrated Circuits

TRIPs requires intellectual property protection of layout-designs of integrated circuits. China’s laws, however, provide no such protection. Because topographies are considered unique and distinct from patentable subject matters, they require a sui generis form of protection. It is unlikely, therefore, that the Patent Law’s protection of “inventions-creations,” meaning inventions, utility models, and designs, covers this sui generis subject-matter. Furthermore, unlike China’s supplementary provisions for protecting computer software protection, no supplementary provisions have been enacted

176 See Software Regulations, China Laws for Foreign Business, 2 Business Regulation (CCH), arts. 9-29, at 14,685-705 (outlining protection given to computer software).
177 Copyright Law, China Laws for Foreign Business, 2 Business Regulation (CCH), art.3(8), at 14,563.
to protect layout-designs. Consequently, topographies of integrated circuits continue to go unprotected in China.

(3) Protection of Trade Secrets

TRIPs require parties to provide protection for trade secrets. China’s intellectual property laws are silent on this issue, and no existing Chinese laws currently exist for protecting trade secrets. The seriousness of this omission is underscored by the fact that a majority of working technologies are based on trade secrets, and that it has been reported that trade secrets were of great importance for nearly seventy percent of the affected sales, second in importance only to trademarks.


China’s intellectual property laws do not fulfill all of the enforcement measures required by TRIPs. China’s laws are deficient with respect to procedures for remedying acts of infringement, written decisions and evidence, injunctive relief, and damages. Although China’s laws are less deficient with respect to damages, they still are not fully consistent with TRIPs.

First, procedures to remedy acts of infringement. TRIPs requires that remedies for acts of infringement be decided on the merits of the case, preferably in writing, and based only on evidence that the parties had the opportunity to present. TRIPs also requires that defendants be given timely, detailed, written notice of enforcement proceedings, with all parties allowed to present all relevant evidence. China’s intellectual property protection laws do not provide detailed procedures, and it is unclear whether such

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183 See supra note 174, at 1212.
procedures are provided by China’s Civil procedure or Administrative Litigation Laws. For example, both the Civil procedure and Administrative Litigation Laws include provisions for serving notice of claims, but such notice is only minimal, and it is unclear whether it would satisfy the TRIPs mandate. The Civil Procedure Law requires only that a procedural document be served directly on the person to be served, and the Administrative Law similarly states that the People’s Court shall send a copy of the complaint to the defendant within five days of the date on which the case is accepted. It is not clear whether these procedures fulfill the TRIPs requirements of timely and detailed written notice.\(^{186}\)

Second, TRIPs prefers written decisions and the opportunity to offer evidence.\(^{187}\) Again, China’s intellectual property protection laws make no reference to these procedural matters, so one must turn to the Civil Procedure and Administrative Litigation laws. With regards to provisions requiring written decisions, the Administrative Law makes no mention of how decisions are to be made, the Civil Procedure Law states only that judgements and rulings made in writing should contain the cause of the action, the facts and reasons ascertained in the judgement, including the applicable law, and the result of the judgement.\(^{188}\) The Civil Procedure Law, however, does not require written decisions; in fact, it provides for nonwritten decisions by allowing verbal rulings to be entered in the written record.\(^{189}\)

\(^{184}\) See supra note 180, at 32.
\(^{185}\) See supra note 174, art 41.
\(^{186}\) See Administrative Litigation law, China Laws for Foreign Business, 3 Business Regulation (CCH), art. 43, at 24,573.
\(^{187}\) See supra note 174, art 41.
\(^{188}\) Civil Procedure Law, China Laws for Foreign Business, 3 Business Regulation (CCH), art. 138, at 23,951.
\(^{189}\) Id. art 140, at 23,951-53.
With respect to the opportunity to present all relevant evidence in a dispute, China’s laws are inconsistent with the TRIPs standards. As discussed above, the power to collect evidence in Chinese cases resides with the court. While the Civil Procedure Law provides that a party is responsible for providing evidence in support of its allegations, he means of obtaining this evidence is greatly limited, if not nonexistent.\textsuperscript{190} Usually, only the court has the right to investigate and collect evidence.\textsuperscript{191} The Administrative Litigation Law contains similar provisions, plus one that bars the defendant from collecting evidence from the plaintiff or witness on its own during the proceedings.\textsuperscript{192}

Third, injunctive relief. TRIPs requires that courts be authorized to order preliminary injunctive relief.\textsuperscript{193} Such relief would require an infringer to cease all infringing activities during the course of the proceedings. China’s intellectual property laws do not provide for injunctive relief. Instead, Chinese courts may only order an infringer to cease the infringing activity after a judgement of infringement is entered.\textsuperscript{194} Additionally, neither the Civil Procedure Law nor the Administrative Litigation Laws expressly authorize preliminary injunctions. It has been suggested that injunctive relief could be made available pursuant to Articles 92 and 94 of the Civil Procedure Law, which provide that courts may grant provisional property remedies using other forms

\begin{footnotesize}
\begin{itemize}
\item[190] Civil Procedure Law, China Laws for Foreign Business, 3 Business Regulation (CCH), art. 64, at 23,919.
\item[191] See id.
\item[192] Administrative Litigation Law, China Laws for Foreign Business, 3 Business Regulation (CCH), art. 33, at 24,561.
\item[193] See supra note 174, art 44, 33.
\end{itemize}
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permitted by law for reasons other than ensuring the execution of a court judgement. The fact, however, is that clear and unambiguous provisions for injunctive relief are not provided by Chinese laws.

Fourth, damages. TRIPs provides that authorities should have the right to order infringers to pay the right-holder damages to adequately compensate for injuries suffered, including attorneys fees, as well as the right to recover the profits from the infringing act and the right to dispose of the infringing goods. TRIPs also provides that these remedies should be severe, to deter further infringements. TRIPs further require criminal penalties in cases of trademark counterfeiting or copyright piracy on a commercial scale. China’s intellectual property laws do provide for remedies as prescribed by TRIPs such as, destroying the infringing goods and ordering the infringer to compensate the right-holder. While criminal penalties exist for commercial copyright piracy and trademark counterfeiting, there is reason to doubt that the remedies proposed by Chinese officials are actually meant to serve as deterrents. In one recent case involving Microsoft, an infringer illegally copied and exported over 220,000 copies for a computer operating system, resulting in US$22 million in lost revenues for the right-holder. The Chinese court, however, fined the infringer US$260. Such penalties are unlikely to deter further infringements.

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195 See supra note 190, arts. 93, 94, at 23,929.
196 See supra note 174.
197 See Id.
198 See supra note 194.
199 See Microsoft Seeks $22 Million in Chinese Pirating Case, NEWSBYTES NEWS NETWORK, April 14, 1994. Available in WESTLAW (reporting that infringer responsible for counterfeiting 220,000 units of computer software, costing US manufacture US$22 million in lost revenues, was fined just US$260 by Chinese court).
b. Impediments Remain Unaddressed by the 1995 Accord

The 1995 Accord does not address all of the impediments to effectively implementing China’s intellectual property laws. Unfortunately, the Accord is silent with respect to the many ambiguities and loopholes in China’s intellectual property laws, as well as the problem of China’s market barriers. The Accord, however, does provide for procedural reforms and significantly expands enforcement measures.

(1) Ambiguities in the Laws and Market Barriers Persist

The Accord is silent with respect to the ambiguities, lack of definition, loopholes, fair use exceptions, and related weaknesses inherent in China’s current intellectual property laws. For example, patent infringement remains undefined,\textsuperscript{202} "lack of knowledge" may still be used as a defense to an infringement charge, and the Accord does not clarify whether a non-Chinese person includes a non-Chinese corporation. Terms such as “create” and “plagiarize” remain undefined, and the status of Hong Kong and Taiwanese nationals remains in doubt.

Furthermore, it is still not clear whether the Copyright Law applies to software,\textsuperscript{203} and if it does, the terms “small number of copies” and “non-commercial purposes” remain undefined and ambiguous. Additionally, the Software Regulations still do not cover items published prior to the law’s enactment.\textsuperscript{204} Similarly, market barriers to intellectual property rights protection, such as the “shadowy” quotas for films, or

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\textsuperscript{201} See supra note 174, art.41,33 I.L.M. at 1213. “Members shall ensure that enforcement procedures...[include] remedies to prevent further infringements and remedies which constitute a deterrent to future infringements.”

\textsuperscript{202} See supra note 144.

\textsuperscript{203} See supra note 124.

\textsuperscript{204} Id.
prohibitive tariffs that impede the import of legitimate merchandise and thus indirectly encourage the growth of pirated products, are only touched on in the Agreement Letter itself.\textsuperscript{205}


The Accord should materially reduce several major procedural impediments to intellectual property rights protection in China. The most significant procedural change is found in the subsection expanding the administrative agencies’ enforcement powers. Specifically, prior to the Accord, administrative agencies, like the AAPA, often had the dual role of administrator and adjudicator in intellectual property matters without any enforcement powers. The question of whether the Civil Procedure Law or Administrative Litigation Laws apply when an agency decision is appealed is not answered directly by the Accord, but non-Chinese right-holders are now permitted to legally collect information, thereby removing a glaring procedural impediment.\textsuperscript{206}

If the 1995 Accord is faithfully implemented by China’s authorities, it should have its greatest impact in the area of enforcement.\textsuperscript{207} The Accord’s requirement of manufacturing licensing and provision for title verification systems, may well reduce the activities of even state-related pirate CD and other factories. This is particularly lightly in light of the Accord’s broader mandates that the administrative agencies, task forces, and government levels work closely together to end piracy.\textsuperscript{208} The fact that agencies like the National Copyright Agency were previously “impotent” and required local ministers to enforce their decisions should no longer be an impediment. This is due to the Accord’s

\textsuperscript{205} See supra note 105, 34 I.L.M. at 884. The Agreement Letter states that China will not impose quotas, import license requirements, or other restrictions on the importation of audio-visual and published products.

\textsuperscript{206} See supra note 109, art I(E)(6), 34 I.L.M. at 898-99.

\textsuperscript{207} Id.
organizing of multi-agency task forces, its requirement that governments “at each level” aid in the enforcement process, its empowerment of the task forces to impose fines and end production of violators, and its empowerment of the agencies themselves. Similarly, customs officers are now authorized to detain and destroy infringing products. Enforcement, historically, suffered due to the lack of criminal sanctions; the 1995 Accord improves this situation but only indirectly: it empowers the task forces and customs agents to impose fines hold and detain infringing products. Since the Accord mandates various copyright and verification systems, it should become easier to prove that infringers had “knowledge” of the infringement. Furthermore, this should facilitate the enforcement of both civil and criminal sanctions for the commercial sale of pirated products. The Accord also, in a notable improvement for non-Chinese firms, for the first time gives non-Chinese firm direct access to administrative remedies that were formerly denied to them.

Beyond these specific and immediate changes, the Accord may improve the long-term status of intellectual property rights protection in China. For example, the State Council Working Conference may have a broad, long-term impact by coordinating policies and monitoring the implementation of the existing laws. Similarly, the Accord’s educational programs may create improved awareness for intellectual property

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208 *Id.*
209 *Id.*
210 *Id.*
211 See Supplementary Trademark Provisions, Chna Pat. & Trademarks, Apr. 1993, at 91 (outlining criminal penalties for counterfeiting trademarks on a commercial scale); Decision fo the Standing Committee of the National People’s Congress Concerning Punishment of the Crime of Copyright Infringement, China Laws for Foreign Business, 2 Business Regulation (CCH), P 1-701, at 14,597 (presenting criminal liabilities for copyright pirating).
212 See supra note 109.
rights protection and enhanced customs enforcement may eliminated a major incentive for intellectual property pirates.

Yet, three issues remain: first, in the past China has entered into intellectual property protection agreements, but fail to enforce them; second, the 1995 Accord is basically silent regarding the ambiguities, lack of definition, fair use exceptions, loopholes, and similar inadequacies in the laws themselves, so that enforcement, even if pursued, might well prove slow or futile; third, even six months after the Accord was signed, and therefore well into its special enforcement period, serous concerns were being raised by US officials about China’s commitment to implementing the Accord.

c. A number of Modifications to the 1995 Accord Are Required

The 1995 Accord will have to be modified if it is to address the remaining impediments to effective intellectual property protection in China. Since many of these impediments are rooted in China’s laws, the Accord should be modified to require amending a number of these laws in such a way as to bolster intellectual property rights protection in China. China’s Software Regulations must be amended to provide Berne Convention protection to computer software.\textsuperscript{213} Topographies and trade secrets must receive protection. China’s laws must be amended to provide detailed provisions of serving notice of claims and for opportunities to review and present all relevant evidence in a dispute. Ambiguities, loopholes, and inadequate definitions in the laws must be addressed. Specifically, terms such as “patent infringement,” “number of copies,” and “non-commercial purposes,” must be clarified. The ability of the courts and agencies to assign criminal sanctions must be strengthened. Sanctions should be added to the 1995 Accord to ensure that the Accord’s enforcement provisions, particularly as they apply to
the manufacturers’ level, will be applied more aggressively, as well as the Agreement Letter’s pledge to improve market access. Without such modifications, the 1995 Accord will remain, if not toothless, surely incapable of eliminating some of the most pernicious impediments to intellectual property protection in China.

F. Service Trade

China’s closed market in commercial service is inconsistent with the General Agreement on Trade in Services. At present, foreign service trade providers may only operate “under selective ‘experimental’ licenses and are restricted to specific geographic areas.” The rules regulating these experimental licenses are not transparent, which lead to even more limits on market access by foreigners. Foreign service trade providers also are not offered the same treatment as are Chinese nationals in that they have less freedom to contract with customers than do Chinese entities. Restrictions on foreign service trade providers have the effect of closing off most of China’s market to foreign competition, at the same time, it is detrimental to the interest of domestic consumers.

Service trade involves many broad areas including finance, insurance, transportation, tourism, telecommunications, consulting services, and projects under contracts. The developing nature of China’s service trade, combined with China’s lack of experience in international service trade, makes China more cautious in its approach toward service trade in drafting the Foreign Trade Law of China (FTL) in 1994. Unlike

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the trade in goods and technologies, in which China sets the principle of free trade, the FTL commits China to encouraging the development of service trade but falls short of establishing free trade principles. Under the FTL, China will grant market access and national treatment only to those parties who have signed or entered into the international service trade treaties or agreements with China. Beyond those areas, China has adopted an approach to opening the service sector on a selective and gradual basis.

China’s protective approach toward service trade is generally attributed to the developing and sensitive nature of China’s service trade. For a long time, China regarded the service industry as non-productive. As a result, the Chinese government carried out an economic policy that stressed the development of the manufacturing industry to the neglect of the service industry. Not until the 1980s did China begin to implement an overall reform policy. Despite the service sector’s impressive growth and diversification during the 1980s, China’s share of international service trade is still insignificant. As of 1987, China’s total share in world export and import of private services was only 0.9% and 0.5%, respectively. According to statistics collected by GATT in 1989, of the forty leading service import and export countries, China ranked twenty-seventh in service export and thirty-second in service import.

Another factor contributing to China’s cautious approach to service trade is a lack of comprehensive evaluation of China’s service industry. While each department commands a decent knowledge of the service industries within its jurisdiction, there is no agency that is responsible for collecting the statistics of each service industry and

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221 The Top Twenty Exporters and Importers, Focus (GATT Newsletter), Apr. 1990, at 4.
conducting general research to identify the weaknesses and strengths of those service industries. The lack of such concrete research not only makes it premature for China to swing open the doors of its service industry, but renders it difficult for China to conduct efficient service negotiations with other countries.\textsuperscript{223}

Furthermore, because the service industry includes such sensitive industries as banking, insurance, transportation and telecommunications, China shares the concern of other developing countries that foreign control over these industries might pose a threat to China’s sovereignty and security. For China, control over these industries represents not only the socialist nature of its economy, but also its economic and political sovereignty. Although foreign service providers may provide more efficient and inexpensive service, China will proceed very cautiously because political considerations are bound to outweigh economic considerations where sovereignty and security are at stake.

The FTL’s protective approach toward service trade does not provide a long-term solution to the growth of China’s service industries, a fact of which China’s policy makers are aware. On the one hand, the reciprocity principle of international trade requires China to open its service market further if China hopes to enjoy broader access to other countries’ markets. On the other hand, a certain degree of controlled competition is helpful to stimulate the development of domestic service industries. The FTL addresses this issue by providing that China shall encourage the development of international service trade in steps.\textsuperscript{224}

\textsuperscript{222} Wang Jun, \textit{Zhong Guo He Ghan Mao Zhang Xie Ding—Cha Ju He Ji Yu (China and GATT—Gap and Opportunities).} FIN. \& TRADE ECON., 1993, at 49.

\textsuperscript{224} See supra note 94.
In accordance with this principle, China has selectively opened its service sector to foreign service trade providers in finance, insurance, law, commerce trade and other fields. Foreign service trade providers in finance, insurance, law, commerce trade and other fields. In the financial sector, China has opened thirteen cities to foreign financial institutions to handle their foreign currency business. Foreign insurance companies are allowed to set up offices to conduct liaison activities in China. Through the end of September 1994, 108 foreign financial institutions, including 100 banks, 4 finance companies, and 4 insurers, have been approved to operate in China. Currently, four drafted financial laws have been submitted to the State Council for discussion and examination and are expected to come into effect soon. As China's domestic banks become more competitive, China will open its financial industry further to allow foreign banks to handle Renminbi business and to allow foreign insurance companies to sell insurance to Chinese enterprises and customers. For example, following the Chinese Ministry of Communications' 1992 decision permitting foreign shipping companies to set up wholly foreign-owned or Sino-foreign joint ventures to ship import and export goods, one foreign company established a subsidiary, and two foreign companies set up offices. Foreign firms are also permitted, with some restrictions, to invest in airport facilities. In professional service, accounting and law are partly open to foreigners, and

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225 For a detailed introduction to the opening of trade, see He Ning, Hong Xiaodong Fu Wu Mao Yi-Wu La Gui Hu He De Xin Yi Tie (Service Trade- A New Topic in the Uruguay Round), INT'L TRADE (Guo Ji Mao Yi), Nov. 5, 1994, at 29.
226 Id.
230 Id.
231 See supra note 101.
232 Id.
foreign law firms can set up offices in Beijing, Shanghai, Guangzhou, Shenzhen and Haikou.

More significantly, China has been actively involved international service trade negotiation. As a participant of the Uruguay Round talks, China submitted, in accordance with the procedures of the talks, an opening price list of initial commitments regarding service trade and an exchange-reduction opening price list for agricultural and non-agricultural products.\textsuperscript{233} China signed the General Agreement on Trade in Services (GATS) and the Agreement on Agriculture, and proclaimed that, once it is admitted into GATT, it will accept the obligations formulated at the Uruguay Round.\textsuperscript{234} It is safe to predict that with the restoration of China's GATT seat, the pace of opening China's service trade will be greatly accelerated.\textsuperscript{235}

\textsuperscript{233} Foreign Trade Spokesman Stress Urgency of China's Re-entry into GATT, BBC Summary of World Broadcasts, May 11, 1994.
\textsuperscript{235} Since 1982, China's service trade has grown at annual rate of 15.5%, which is 15/1% higher than the growth of commodity trade. China's Service Sector Opens Wider, see supra note 101.
V. What China should do: Reform efforts in trading system in accordance with international principles and practices

A. Reforming economic system

From a long-term point of view, the more important solution to making China's trade regime consistent with international practice is to continue to reform China's foreign trade regime pursuant to the trade liberalization principle.

1. The government should avoid falling into the pattern of involving itself in the micro-control of foreign trade.

While China should continue to pursue an export development strategy and to support foreign trade growth by adopting various trade promotion policies, the immediate attention should be devoted to reducing and eventually phasing out centralized economic plan, like the mandatory import plan and foreign exchange plan to dismantle the country's foreign service trade planning apparatus. China should abandon the foreign service trade contract system, which calls for negotiation of a contract between the central government and local government, and local government and FTCs; the foreign trade contract system duplicates many features of the system used to negotiate economic plan, and it directs FTCs to seek foreign exchange earnings instead of maximizing profits.\(^{236}\)

When China switch from micro-management of the economy to macro-management economy, one important task is that China should lift government price controls on all products.

\(^{236}\) Cheng Hangshen, Guan Yu Zhong Guo Wai Mao Ti Zhi Gai Ge De Jian Yi (Some Proposals to China's Foreign Trade Reform), SYSTEM REFORM, May, 1992, at 20.
In light of the restraint price distortion imposes on China’s foreign trade reform, price liberalization should be the top priority of future reforms. Price distortion is responsible for the mandatory import plan, which, in turn, has led to the retention of the commodity licensing system, quotas, and monopolization of National FTCs; therefore, removing price controls on all products will create the conditions necessary to eliminate all the major administrative controls mentioned above.\textsuperscript{237} Currently, prices of industrial and capital-intensive products are higher than prices of the same products in the international market. Further, prices of primary and labor-intensive products are lower than prices of the same products in the international market. To correct this distortion, China will have to take steps to remove price controls on grains, some raw materials, and services, so as to eliminate the root cause of the price distortions.\textsuperscript{238} In addition to removing price controls, the price-setting mechanism should be improved to let enterprises become the true price setters.

Another point of changing from micro-control to macro-management is to reform China’s enterprise system to create a modern enterprise system. The focal point of enterprise reform is to transform the operational mechanism and to raise efficiency. Since government interference operates as a major obstacle for transforming the enterprise operational mechanism, the first step of enterprise reform should separate the government at various levels from the operational functions of the enterprise to allow the enterprises to make all important business decisions. On the other hand, the government must guarantee the enterprises the power to make decisions on such issues as capital construction, important technological improvement, and appointment of general

\textsuperscript{237} China: Foreign Trade Reform 1994, at 102.
managers to the enterprises. When conditions permit, more medium and large State-owned enterprises should be transformed into limited-liability companies and limited-liability stock companies pursuant to the Company Law.

To facilitate the creation of the modern enterprise system, reforms to establish social protection systems, such as welfare, unemployment insurance, and social security, should be accelerated so as to relieve the enterprises of all the undue burdens they now shoulder. In addition, the residence system should be reformed on a large scale to allow the free flow of the population to provide the labor forces needed. If the enterprises are still not able to compete, they should be sent to bankruptcy without any hesitation.

To ensure the success of the enterprises and price reforms, a more rounded system for macro-control will have to be established in the near future. This will allow the government to carry out economic management primarily through economic and legal measures instead of through administrative controls, such as the national economic plan, State price-setting on important commodities, and State subsidies. What are most urgently needed are structural reforms in finance, taxation, banking, investment, materials supply, and foreign exchange to strengthen the overall coordination in the operation and the management of the economy. Under the macro-control mechanism, the government will direct the activities of the enterprises mainly through regulating the market.

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241 China has long maintained a rigid residence registration system which restricts the people to move form rural areas to cities. In the past few years, reforms have been undertaken to allow the rural peoples to acquire the residency registration of some small cities.
2. Despite playing a positive role in bringing about the foreign trade growth, relying primarily on FTCs to handle Chinese foreign trade insulates domestic producers and end-users from buyers and sellers in the international market. Thus, the practice operates as an obstacle to normal commercial relations between Chinese companies and foreign companies.

Restricting FTCs from engaging in production and restricting production enterprises from handling foreign trade does not adequately prepare them to respond to international market changes. China should relax its approval standards for foreign trade rights so that more production enterprises and scientific research institutions can enter into foreign trade; this would allow these entities to combine their technological sophistication with an expertise in international trade.\textsuperscript{242} As more enterprises enter the foreign trade arena, bankruptcy will play its role in eliminating inefficient foreign trade operators.\textsuperscript{243}

While industry protection remains necessary considering China’s industrial development level, it is important to protect those industries that urgently need to be protected and to use internationally accepted means to provide protection. The overlapping of the administrative controls on some products seems to be redundant and too complicated; therefore, it is possible to remove some products from multiple administrative controls.

Furthermore, the current distinction between Category I and Category II (national FTC and regional FTC) should be abolished and steps should be taken to discontinue the

\textsuperscript{242} As of the end of 1993, China had authorized approximately 2,000 industrial enterprises to handle foreign trade. Wu Yi, Lu He Mian Du Yi Chang Mei You Xiao Yan De Shi Jie Shang Zhan (How to face a Smokeless Commercial War), China Reform, July 1994, at 7.
practice of assigning import and export rights to one or a few NFTCs, such as timber, cement, and fertilizers, as this represents the most effective method of administrative control over imports. As China’s industries become more competitive, and as the need for protection declines, tariffs and taxes should replace licensing and quotas as the main means for protection.244

3. Improving transparency and reducing arbitrariness in trade management.

An important goal of reforming China’s foreign trade regime is to make the trade regime more transparent and less arbitrary through comprehensive legislation. By establishing only general principles governing foreign trade activities, the FTL has left open several issues for further legislation. The immediate solution is to step up legislation on the major systems of the trade regime in accordance with the general principles embodied in the FTL. Without further legislation, a general FTL will be of little help in reducing arbitrariness in China’s foreign trade management.245

Because the contracting parties have more concerns over lack of transparency and arbitrariness in the process of foreign trade enterprise approval, commodity licensing, and quota allocation, the license issuance and quota allocation processes must be more open, fair, simplified, and efficient.246 Formulating concrete and definitive standards and providing an appeals process would effectively reduce arbitrariness and mitigate the

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243 Both Chinese scholars and foreign scholars have advocated introducing a bankruptcy mechanism to foreign trade enterprises. Their arguments are that because most FTCs are small or medium-size enterprises, their bankruptcies will not result in large-scale social unrest. Hangshen, supra note 110, at 30
244 For a discussion of China’s commitment to lift control over import licenses, see China to Lift Control over Import Licenses Within 5 to 6 Years, China Econ. News, May 17, 1993, at 2.
245 It is China’s plan to use three years to build up a fairly complete system of foreign economic and trade laws and regulations. See Jin Man, Commerce Laws to be Ready Within Three Years, BUS. WK. (China Daily Supp.) Aug. 1, 1994, at 1.
246 Several laws and regulations have been published in the past few years to regulate licensing and quotas administration. Among them are: Detailed Rules of the Ministry of Foreign Trade and Economic Cooperation for Export Commodities Quota Control (MOFTEC, Apr. 10, 1993), reprinted in China Econ. News, May 17, 1993, at 7.
contracting parties' concerns. Revising some of the regulations governing licensing and quota allocation, and publishing the regulations governing the examination and approval of foreign trade enterprises, will help to alleviate those concerns.\textsuperscript{247}

China must restore uniformity in foreign trade policy and policy enforcement to reduce the uncertainty in trading with the Chinese foreign trade companies located in different provinces and subject to different ministries. The National People's Congress should enhance legislative supervision to invalidate local legislation that is inconsistent with the foreign trade legislation of the country. In addition, MOFTEC should uniformly enforce China's trade laws and policies. Provinces and ministries should be prohibited from applying different standards in administering licenses because of local considerations.

Moreover, efforts should be made to adopt internationally accepted foreign trade practices. China should publish anti-dumping regulations, anti-subsidy regulations, and regulations on safeguard measures in the near future to shield domestic industries from unfair competition form foreign competitors. At the same time, China should publish regulations governing the behavior of import and export enterprise and competition between Chinese foreign trade enterprises.\textsuperscript{248}

B. Reducing tariffs and phasing out non-tariff barriers

1. Improving laws and tariff schedules in order to make the international trade administration more transparent.

\textsuperscript{247} In addition to a lack of concrete standards governing licensing approval, another defect in licensing regulations is that it does not provide an appeal process to those applicants who have failed to acquire the license.

\textsuperscript{248} MOFTEC Spokesman on Foreign Trade Restructuring, Xinhua News Agency, July 27, 1994.
Transparency in trade regulations is a bedrock principle of the GATT, articulated in Article X; furthermore, centrally planned economies must report state trading activities. The Uruguay Round negotiations that created the WTO sought to expand the reporting of tariff and nontariff duties and charges. Aware of these requirements, China has been touting its trade reforms as attempts to comply with GATT’s mandate. Its new foreign trade law, geared to GATT/WTO provisions but still far from complete compliance, has been in force only a few years. Formerly neibu (internal) documents describing China’s foreign trade regime were made public to the GATT/WTO Secretariat in the early 1990s; English and other foreign language translations have been promised.

2. Reducing general level of tariffs rates in a progressive course.

China has made firm commitments to lower tariffs within a reasonable period of time. In March 1994, China submitted to the GATT a proposal for tariff reduction, which committed it to maintain a ceiling of a forty percent tariff rate on industrial products. This rate would be reduced further to 35 percent by 1999 and to 30 percent within five years of China’s entry of WTO. In fact, these objectives have been substantially achieved through the reduction of average tariff to 23 percent on April 1st, 1996.

3. Government should make the best effort possible under current circumstances to reduce non-tariff barriers.

As for the use of one of the non-tariff barriers, import and export quotas, except for reducing the import quotas, China should publish the rules for export quota bidding and conducted public bidding for all agricultural products subject to export quotas.

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China has committed to the gradual elimination of import quotas and licenses and to the reduction of quantitative restrictions on imports form the current 1,247 tariff categories to 240 by the year 2000.²⁵⁰

4. China should reduce the number of goods subject to import licensing and simplifying the procedure for applying licenses, now, it’s impossible to eradicate all the licenses, but China should be committed to eliminate licensing step by step.

C. Strengthening legalization for the trading system.

1. Improving the current foreign trade law of 1994 (FTL 1994).

First, let’s review the Foreign Trade Law of 1994, so that we would know how to improve it.

Before 1994, no national legislation on foreign trade was ever made in China which was applicable throughout the country. The Chinese government relied solely on administrative regulations and directives to exert total control over foreign trade. Most of these administrative regulations and directives were never openly published and made known to the outside world. For one and a half decades after the beginning of foreign trade reform in 1979, the legal framework was based on half a dozen administrative regulations.²⁵¹ This practice directly conflicted with international norms and GATT practices that favor published laws over discrete administrative regulations. Before long, the void of national legislation which created lack of unity and transparency in China’s foreign trade legal framework caused widespread concerns in China’s trading partners and become a major obstacle to China’s accession to the GATT. To dispel this concern,

²⁵⁰ Id.
²⁵¹ See Introduction to China’s Foreign Economic and Trade Policies, at 108, (Liu Xiangdong et al. eds., 1992). These administrative regulations include the following: the Provisional Measures for the Management of Imports in Foreign Trade; the Interim Regulations of the People’s Republic of China on the
the Chinese government accelerated the pace to enact a foreign trade law with the advent of the 1990s.

May 12, 1994 marked a watershed occasion in China’s foreign trade law reform. That day, the Standing Committee of the 8th National People’s Congress passed the first comprehensive foreign legislation in modern Chinese history, the Foreign Trade Law of the People’s Republic of China (FTL). With the FTL coming into effect the following July 1, China’s foreign trade legal regime finally took shape, after more than fifteen years of continuous reform and the promulgation of hundreds of laws and regulations governing various aspects of foreign economic relations. More than anything else, the FTL symbolizes the legalization of China’s foreign trade legal regime.

The drafters of the FTL followed three proclaimed principles in drafting this legislation. All of them bear clear indications of the molding influence of GATT principles and practices:

First, China’s foreign trade policies and regulations must conform to the basic principles laid out in the FTL and must be openly published and freely available. Second, bans or restrictions on imports and exports must conform to GATT rules and must be transparent. Third, domestic industries must be protected through legal proceeding against unfair imports and not by administrative measures.

253 Bing Wang, China’s New Foreign Trade Law: Analysis and Implications for China’s GATT Bid, 28 J. MARSHALL L. REV. 495, at 521. This article is a thorough and penetrating analysis of the 1994 Foreign Trade Law, which I have relied heavily upon with respect to this legislation.
For the first time in China’s foreign trade legal history, the FTL established comprehensive and legally defined principles for China’s foreign trade policies and practice. At the outset, it underscores the fundamental principle established in the 1993 amendment to the Constitution\textsuperscript{254} and declares that the promotion of a “socialist market economy” is the ultimate goal for China’s foreign trade.\textsuperscript{255} Next, it defines the term “foreign trade” as including “import and export of goods, import and export of technology, and international service trade.”\textsuperscript{256} Confirming China’s readiness to assume all obligations under such international treaties and organizations as GATT and WTO, Article 6 states.

With respect to foreign trade, the People’s Republic of China shall, in accordance with international treaties or agreements, which it has concluded or is a participant in, or based on the principles of reciprocity and equity, grant other signatories or participants the most favored nation status and national treatment.\textsuperscript{257}

Based on these general principles, the FTL emphatically addresses the issues of unified national trade policy, transparency, and conformity with GATT principles and international practices with respect to NTBs, market access, anti-dumping, subsidies, and safeguard measures.

China’s foreign trade reform started with the decentralization of foreign trade management. Prior to 1979, all major trade decisions were made by the Ministry of Foreign Trade (MOFT) under the central government, and all foreign trade transactions

\textsuperscript{254} See The Laws of the People’s Republic of China Annotated at 5, 54 (Beijing: Law Publishing House, 1994).
\textsuperscript{255} The Foreign Trade Law of the People’s Republic of China, art. 1 in ZUIXIN CHANGYONG JINGJI FALUFAGUI SHOUCE [Handbook of Most Recent Economic Laws and Regulations] 349 (1994).
\textsuperscript{256} Id, at art. 2.
\textsuperscript{257} Id, at art. 6.
were carried out by a dozen Foreign Trade Companies under MOFT’s direct control.\textsuperscript{258}

Between 1979 and 1987, China decentralized its foreign trade management by granting foreign trade rights to other ministries of the central government besides MOFT,\textsuperscript{259} provinces and municipalities, and a growing number of production enterprises.

By the mid-1980s, several hundred foreign trade companies were established as production enterprises under the auspices of various ministries of the central government, provinces, and municipalities. In 1987, their number reached 1,500 and increased to 5,000 by 1990.\textsuperscript{260} As of 1994, China’s foreign trade was run by 9,000 foreign trade companies, manufacturing enterprises, scientific research institutes, and industrial trade companies, as well as 190,000 foreign-funded enterprises engaged in foreign trade operation.\textsuperscript{261} These newly created NFTCs and other organizations with foreign trade authorization acquired the right to handle all export commodities, except for sixteen kinds of important exports commodities which are still centralized under the National Foreign Trade Company.\textsuperscript{262}

Decentralization injected energy and economic incentives into China’s foreign trade system. It served as the major driving force responsible for the phenomenal growth of China’s foreign trade in recent years. However, the benefits of decentralization had not been achieved without accompanying problems, of which the most prominent was the lack of unity and consistency in trade policy implementation throughout the country and

\textsuperscript{258} See \textit{supra} note 121.

\textsuperscript{259} In 1982, MOFT was combined with the Ministry of Foreign Economic Relations, the Foreign Investment Control Commission, and the Import-Export Commission into the Ministry of Foreign Economic Relations and Trade (MOFERT). Eleven years later, MOFERT acquired the present name the Ministry of Foreign Trade and Economic Cooperations (MOFTEC).


loss of supervisory control by the central government. Local authorities and various ministries under the central government often made regulations and rules that were inconsistent with the national policies. They gave different, sometimes conflicting, interpretations to the national laws and regulations. As a result, national foreign trade policies and regulations were not uniformly enforced, which not only caused confusion among China’s trading partners but also concern of the GATT contracting parties.\textsuperscript{263}

To remedy this problem of lack of unity, the FTL specifically affirms that “The state shall implement a unified foreign trade system in order to safeguard according to law a fair and free trade order.”\textsuperscript{264} It vests “the department in charge of foreign trade and economic cooperations under the State Council” (presently MOFTEC) with the sole power to direct “foreign trade matters throughout China in accordance with this Law.”\textsuperscript{265} While the FTL brings back unity into China’s foreign trade management, it does not restore the highly centralized structure, which characterized the pre-reform foreign trade system. Instead, it strikes a balance between unity of policy and decentralization of operation in foreign trade by defining the role of MOFTEC as one of macro-management in setting up broad policies, developing general goals, and supervising the implementation of laws and regulations. Under the FTL, this macro-management is to be exercised through the promulgation and implementation of laws and regulations, and increasingly, through economic means such as tariffs, interest rates, exchange rates, and loans.\textsuperscript{266}

\textsuperscript{262} See Measures on the Control of Export Commodities, Art. 3 § 2, Act of Dec. 30, 1992, 1 China Laws for Foreign Bus. (CCH) P 50,708, at 66,663.
\textsuperscript{263} See supra note 121, at 522.
\textsuperscript{264} See supra note 123, art.4.
\textsuperscript{265} Id. at art. 3.
\textsuperscript{266} See supra note 121,at 502.
As a distinctive feature of a planned economy, lack of transparency was preeminent in China’s pre-reform foreign trade regime, which naturally aroused concern by the GATT contracting parties over the incompatibility of China’s trade regime with the international practice of transparency in foreign trade policies.\textsuperscript{267} In particular, the contracting parties voiced displeasure over China’s pervasive use of internal directives, commonly referred to as “internal documents,” which were available only to a very limited number of government officials involved in foreign trade. Under this practice, “the annual imports and exports plan was classified as top ‘business secrets’ of the state.”\textsuperscript{268}

Since the early 1980s, China has taken steps to improve the transparency of its foreign trade regime. The promulgation of laws and regulations, especially the FTL itself, has gradually yet decisively moved its foreign trade regime away from total administrative control. In response to the GATT contracting parties’ requests to halt the use of “internal documents,” China published a significant number of previously unavailable decrees, rules, and regulations. It also made further commitments not to enforce any law, rule, regulation, administrative guidance, or policy measure governing trade unless it was published.\textsuperscript{269}

The FTL’s enactment represents a major step toward greater transparency. It sets up a uniform legal framework for foreign trade that can be followed by foreign trade partners. It clearly defines MOFTEC’s jurisdiction, authority, and relation to other governmental agencies involved in foreign trade activities, and thus makes it much easier


\textsuperscript{268} See supra note 121, at 523.
for foreign trade partners to conduct their business within the jurisdiction of these agencies.\footnote{See supra note 121, at 524.}

With respect to those major issues in international trade such as NTBs, market access, government subsidies, anti-dumping, and safeguards, the FTL closely follows the practices prescribed in the GATT charter and other documents. Without entirely eliminating all kinds of NTBs in China’s foreign trade system, the FTL nevertheless has made the best effort possible under current circumstances to reduce NTBs. The most striking progress occurred with regard to the foreign trade planning practice.

For more than thirty years, foreign trade planning had been the most effective non-tariff device employed by the central government to exert total control on foreign trade. It sets the figures for the import and export of each product, the source of import and export, and the allocation of foreign exchange. Once the plan is in place, the State will allocate foreign exchange responsibilities to NFTCs to enable them to import the products covered under the import plan and to cover the losses suffered by NFTCs in carrying out the export plan. The trade-restrictive effect of foreign trade planning is that it prevents the market forces from playing a role in directing imports and exports.\footnote{See supra note 74, at 24-26.}

During the 1980s, China gradually reduced the role of foreign trade planning. In addition to the outright abandonment of the mandatory export plan, the mandatory import plan, which constituted 40 percent of China’s imports in 1986, was reduced to cover only 18.5 percent of all imports in 1992.\footnote{See supra note 74, at 24-26.} Reflecting its drafters’ determination to eventually abolish all mandatory foreign trade plans, the FTL is conspicuously silent on foreign

\footnote{Edward Balls, Survey of China, FIN. TIMES, November 18, 1993, at 7; China to Make Trade Regulations Transparent, US Official Says, ASIAN WALL ST.J., July 20, 1992, at 3.}
trade planning in its text—a clear indication that it perceives no place for foreign trade planning within the new foreign trade regime.\textsuperscript{273}

In dealing with another NTB, the licensing system, the FTL adopts a pragmatic approach. On the one hand, the drafters of the FTL realize the impossibility at this time of eradicating this practice. Thus, the FTL retains the licensing system for the import and export of selected commodities and technologies.\textsuperscript{274} On the other hand, China treats licensing as a temporary necessity to maintain continuity in its foreign trade practice, not as a central piece of administrative control, and indicates its determination to eliminate licensing in phases.\textsuperscript{275}

Although the FTL falls shy of abolishing the use of quotas in foreign trade, it requires the publication of the list of commodities under quotas and the identification of the government department in charge of making the list,\textsuperscript{276} thus introducing transparency and market mechanism into the administration of quotas distribution. It is significant that, following the enactment of the FTL, China published the rule for export quota bidding and conducted public bidding for four agricultural products subject to export quotas.\textsuperscript{277}

In prescribing the measures dealing with trade surge, dumping, and subsidies, the FTL directly borrows the solutions provided by GATT. Articles 29 (on safeguards), 30 (on dumping), and 31 (on subsides) of the FTL parallel the language used in Articles XIX (escape clause), VI (anti-dumping), and XVI (subsides) of GATT.\textsuperscript{278} This shows that the

\textsuperscript{272} \textit{Id.} at 28.
\textsuperscript{273} See supra note 121, at 525.
\textsuperscript{274} See supra note 123, art. 19.
\textsuperscript{275} See supra note 121, at 525.
\textsuperscript{276} See supra note 123, art. 20.
\textsuperscript{278} See supra note 74, at 252.
FTL resembles the GATT charter almost verbatim and draws China’s foreign trade legal regime even closer to the international practice.

2. Chinese domestic industries must be protected through legal proceeding against unfair imports and not by administrative measures.

From a long-term point of view, the more important solution to making China’s trade regime consistent with international practice is to continue to reform China’s foreign trade regime pursuant to the trade liberalization principle. Foremost, while the State will continue to pursue an export development strategy and to support foreign trade growth by adopting various trade promotion policies, the government should avoid falling into the pattern of involving itself in the administrative management of foreign trade. The immediate attention should be devoted to reducing and eventually phasing out the mandatory import plan and foreign exchange plan to dismantle the country’s foreign trade planning apparatus. China should abandon the foreign trade contract system, which calls for negotiation of a contract between the central government and local government, and local government and foreign trade companies; the foreign trade contract system duplicates many features of the system used to negotiate economic plans, and it directs foreign trade companies to seek foreign exchange earnings instead of maximizing profits.279

D. Strengthening the protection for intellectual property

China has taken substantial steps since signing the 1995 Accord. It has closed factories, seized counterfeit goods, and provided more market access to foreign companies. Restrictions on the import of materials and equipment required in the

279 Cheng Hangshen, Guan Yu Zhong Guo Wai Mao Ti Zhi Gai Ge De Jian Yi (Some Proposals to China’s Foreign Trade Reform), SYSTEM REFORM, May, 1992, at 20.
manufacture of CDs may help to ensure that new factories do not spring up to replace the ones the government has closed down. The steps taken prior to the 1996 Agreement are promising, but China’s intellectual property right enforcement system must become self-sufficient before it deserves praise. Only if China continues to protect intellectual property without the threat of sanctions may it be said that China affords internationally acceptable protection of intellectual property rights.

1. China should stiffen legislation actions and improve enforcement measures.

China has pledged to carry out its obligations under the 1995 Intellectual Property Accord. China has promised to revise the title verification system used to ensure that Chinese CD factories and publishing houses have properly licensed the titles they wish to produce. Two other important monitoring programs involve SID codes ad on-site inspections.

Additionally, a group of Chinese officials responsible for the effective enforcement for Intellectual Property Right in China visited the Seattle area and Silicon Valley this summer to meet with officials form Microsoft and other high-technology businesses. The Chinese officials came to the United States to observe how it enforces copyright law. Plans were made for US officials to provide on-site assistance in China at some date.

Market access has improved greatly for US producers of intellectual property. In the summer of 1996, Warner Home Video and MGM/UA Home Entertainment announced that they had “entered into a licensing agreement with Shenzhen Advanced Science Enterprise Group..., one of China’s largest manufacturers and distributors of
VCD and LD hardware and software. Software giant Microsoft stated that it expects sales in China to double in 1996 as a result of increase purchases of legal software.

2. China should bring its laws in line with international standards.

The 1995 Accord fails to address many of the impediments that continue to hamper intellectual property protection in China. Consequently, while the Accord is a significant step forward for intellectual property protection in China, it will not, in its current form, move China into compliance with the international standards embodied in China, it will not, in its current form, move China into compliance with the international standards embodied in TRIPs. The Accord, therefore, should be revisited and modified to address the impediments to China’s effective intellectual property protection. Without such modifications, and without China’s faithful implementation of its agreements, China will not be able to bring its intellectual property protection up to international standards.

3. China should liberalize the regulations for foreign lawyer to practice and provide legal service in China and allow foreign impeded owner of intellectual property to appeal alleged domestic infringers in Chinese court.

a. The demand for foreign lawyer’s service to China’s development, especially for the development of intellectual property rights law.

The continued expansion of world trade has created a growing need for international legal services. Lawyers from all nations are increasingly traveling and settling in foreign countries to meet this need. Foreign lawyers facilitate international transactions, expand the flow of goods and increase trade in other types of services,

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281 Peter Hannam, Microsoft’s China Sales Expected to Double (last modified Sept. 16, 1996).
“particularly in such sectors as financial services and intellectual property rights which are especially law-intensive.” More concretely, foreign lawyers’ practice usually consists of advising clients on international commercial matters. This includes advising on international finance, intellectual property rights, tax planning, corporate and securities law, franchising, licensing, distribution and commercial agency, joint ventures, competition law, arbitration and general international law. In most cases, foreign lawyers have at least the same amount of specialized training as local lawyers. In fact, foreign lawyers, especially those from advanced developed countries, are more likely to be qualified than local lawyers to advise clients on China and international law because of their experience and international contacts.

Foreign lawyers usually provide their services in one of two contexts in China. First, Chinese law firms hire and “import” foreign lawyers to their home office to advise domestic clients on the law of the foreign lawyers’ home country. More commonly, foreign law firms send their own lawyers to China to establish or staff a Chinese branch office.

b. Three major reasons that China restricts foreign lawyers’ practice in China and proposals to solve these concerns.

(1). Proof of Qualifications

The reason cited to disallow a scope of practice to foreign attorneys in China is that foreign lawyers lack qualification to practice in China, because there are often inherent cultural and philosophical difference between legal systems, for example, the

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282 In New York, for example, there are layers from at least 45 different countries, “from Argentina to Uruguay.” Hope B. Engel, New York’s Rules on Licensing of Foreign Legal Consultants, 66 N.Y. St. B.J. 36 (Mar/Apr 1994).
common and civil law systems, that make the foreign lawyer’s credentials incompatible with the local legal system regardless of the quality of standards in the home nation.284

These concerns, however, need not lead to the extreme conclusion that foreign lawyers should be required to obtain the same legal training and certification in China as any local Chinese lawyers. Limiting the foreign lawyer to practice only in matters related to the law of his home jurisdiction, where he or she is already qualified, minimizes the risk of harm to the public caused by defects in the training or competency of the foreign lawyer. Underlying this suggestion is the premise that some reliance on the home jurisdiction’s certification process is warranted. When the foreign lawyer is delivering services based only on his own law, especially about protection of the intellectual property rights of his own country’s products, a rule requiring him to be reeducated in the schools of China is both overly severe and pointless.

Hong Kong, the former British colony and now a Special Administrative Zone of China, offers a unique and more rational approach for insuring that the foreign lawyer is qualified and provides a model for the rest of China to follow. Hong Kong licenses not by inducidual attorney, but by law firm. The primary requirement is that the firm present satisfactory evidence that it is a “long established partnership with a substantial reputation in the country of origin.”285 The Hong Kong approach rests on the reasonable

284 For example, it is often said that the Japanese system favors conciliation, while the American system is adversarial. See Kawashima, Dispute Resolution in Contemporary Japan, LAW IN JAPAN 41-73 (A. Von Mehrened. 1963).
285 Law Society of Hong Kong, Foreign Law Firms Establishing Themselves in Hong Kong-Guidelines to Applicants (Sept. 1, 1975) The provision states, in this context: (i) Long established would mean that the firm can satisfy the committee that it has an established and continuous practice in the country for origin for a substantial period. (ii) A substantial reputation means that the applicant firm can produce references from its local Law Society or local Bar or equivalent, from Judges and other firms of attorneys in its country of origin that it is a partnership of reputable lawyers who have conducted themselves in accordance with the
presumption that inherent in the practice of the modern foreign legal adviser are qualities that lessen the danger of incompetent counsel. For example, although there are exceptions, most clients of American law firms abroad are local law firms and corporations, many of which have their own staff counsel. Presumptively, this type of client is legally sophisticated and not likely to consult or be deceived by a foreign attorney who is merely feigning knowledge of the law. In addition, established law firms abroad, which account for the vast majority of American lawyer’s foreign presence, generally attract and hire only the most capable American law school graduates.Given these factors, Hong Kong’s approach, which allows only reputable law firms to practice, is an acceptable model to China.

Right now, China has allow foreign law firm to open and register in some big and open cities of China, such as Beijing, Shanghai, Guangzhou, Shenzhen, Xiamen, more and more foreign firms would come to China in the near future.

(2). The fear of encroachment

China government has expressed fear of encroachment on and disruption of the domestic legal profession by foreigners. Chinese lawyers have claimed that once the floodgates are opened, the country will be deluged with foreign law firms and lawyers who will in turn disrupt the development of the legal system and take business away from local lawyers and other professionals.

Actually, restrictions designed only to protect local lawyers adversely affect the client. In a restricted market, legal services are harder to obtain, the cost of services goes

 moral and ehical requirements of the profession in that area and against whom no disciplinary or disbarment proceedings are outstanding.

 286 Since only well-established US firms can afford to set up a foreign law office, presumably they will strive to uphold their reputation of quality services in order to compete favorably in the marketplace. Cf.
up, and business opportunities may be lost, especially to today's China, who's economic development majorly depends on foreign investment and exportation. The experience of England and other countries, as well as a recent empirical study conducted in the United States, strongly indicates that fears of foreign lawyers doing harm to the bar and the public are not well founded. Most importantly, examination of the experience of nations that have allowed foreign lawyers to practice suggests strongly that the presence of foreign lawyers not only poses no risk of harm, but actually benefits local lawyers. Experiences has shown in England that when foreign lawyers are organized to give an efficient business service to their clients, they present not a threat to the profession but the best form of competition, and, in fact, they introduce new international business for English lawyers.

At this respect, Hong Kong can be the model of China, too. Hong Kong has adopted approach for regulating the number and activities of foreign firms, but by allowing at least two firms from every nation to establish a local practice it appears to have adopted a presumption that the presence of foreign attorneys benefits the public and the bar. All firms applying for approval bear a burden of showing that there is a demand in Hong Kong for the "particular field of specialization" that the firm offers and that the services of the firm will be available not only to the public, but to Hong Kong solicitors. The Law Society's guidelines further state that, "unless there is evidence of a very substantial demand for such advice form the public, the Law Society will not grant


288 Id. The results of the study show that the complaints do not come form the public, but from lawyers, id. At 44, that there is in fact a very low incidence of harm to the public, id. At 34, and that there is no actual economic threat to lawyers.
permission for additional law firms above the two allotted. Significantly, the Hong Kong Law Society recently approved three additional American law firms, a fact that strongly suggests the existence of “substantial demand” and benefit to the local clients and solicitors.

Another reason to overcome the fear of encroachment is reliance on market forces. Since controls limiting foreign lawyers’ scope of activity and insuring that foreign lawyers are properly qualified and disciplined protect the most vital aspects of the local lawyers’ monopoly and put foreign lawyers on the same competitive footing as the local bar, economic forces underlying the legal services marketplace provide adequate assurances against disruption of the local legal profession. Setting up an office abroad is an expensive proposition which only a few well-established law firms can undertake. Moreover, individual lawyers will likely find few opportunities outside of corporations, in which practice is already widely allowed, or local law firms, in which the decision to hire will be made by local lawyers. Finally, if any such arrangement proves unproductive, means are available to procure the foreigners’ withdrawal.

(3) Safeguard for the Client.

Like other countries, China has an interest in protecting the public from actual losses caused by malpractice. Misconduct by lawyers and unredressed injury to clients affect not only the individual client, but also the credibility of the nation’s system of

289 See supra note 278.
290 The privilege of corporations abroad to have their own in-house counsel is grounded in part in the treaties of Friendship, Commerce, and Navigation, which were signed between the United States and its allies in the 1950’s.
291 These local firms also have, of course, the power to lay-off or refuse to hire American attorneys if there is no client demand for their services or if the arrangement does not prove to be beneficial to the firm.
292 It is standard procedure for host nations to obtain assurances, in the form of proof of cash reserves, return airline tickets or the like, that all visitors have the monetary means and the obligation to return to their respective countries.
justice. When foreign lawyers are involved, China’s concern is that the sanctions, which control the local lawyers are not effective against the foreign practitioner. The foreign lawyer may leave the country and thus remove himself from the jurisdiction of the local courts. He may have no attachable property with which to assure a judgment. In addition, the foreign lawyer cooperating “outside” the system is also outside the ambit of the local code of disciplinary and administrative sanctions that compel adherence to local standards of conduct.

These concerns, all of which are valid, justify a high degree of restriction on foreign lawyers. However, it is possible to develop an approach that mitigates these concerns without putting unnecessarily broad restrictions on the practice of law by foreigners.

For example, the breadth of the restrictions should reflect two countervailing factors. First, many foreign firms have long-term interests and property in the host country. Once a foreign firm is established, it can be expected to protect its interests by maintaining high standards of conduct, like Hong Kong, which institutionalizes this factor by requiring law firm applicants to demonstrate their reputation, and then requiring the firm to undertake responsibility for the individuals in the firm. The undertaking given by the firms to the Law Society will include a specific provision that where any breach of the undertaking or codes of professional conduct is alleged the foreign firm and/or its local partner or assistant as may be appropriate will submit to the jurisdiction of a disciplinary committee in the same was [sic], as if they were a firm of solicitors, admitted to practise in Hong Kong. Such disciplinary committee will have power to require the firm to discontinue it practice or to discontinue the employment in Hong Kong of any
partner or assistant for any serious breach of the undertakings given to the Law Society. Second, in the case of an individual lawyer who is employed by a local firm or a lawyer who is only in the country on a temporary basis, there are means available to compel responsible behavior and protect clients’ interests.

Various security devices provide an effective safeguard to alleviate risk of harm to client. For example, Chinese jurisdictions should require an agent to be named to accept service of process. In addition, the foreign lawyer might be required to provide malpractice insurance coverage. Similarly, when the foreign lawyer handles clients’ assets, the state could require him to file a security bond. Finally, requiring the foreign lawyer to demonstrate his “good moral character” might also serve to reduce risks of client injury. Another possible approach is to weigh the relevant considerations on a case-by-case basis. Suppose, for example, that the client or other local citizens have had successful prior dealings with the foreign lawyer or his firm. The nation might choose to require proof, procured in his home jurisdiction, that his firm is reputable; or it might require the foreign lawyer to produce letters of recommendation or procure a surety from highly respected members of the local community in addition to or in lieu of other security.

E. Facilitating the development of services in trade.

1. Opening the service market is helpful to stimulate the development of domestic service industries. Such as post and telecommunications, banking and insurance.


294 Id.

295 Most nations have a requirement of “good moral character.” There is no general formulation, however, for example, Denmark requires merely that two non-family members write a letter to the effect that the applicant is of good moral character. France requires a council juridique to ‘not have committed acts
China already has plans to further open its service trade sector to foreign companies, including financial and insurance services, the retail sector, foreign trade, travel services, and telecommunications, but the opening will be on a gradual basis.

US officials in Beijing said that China’s Assistant Minister of Foreign Trade and Economic Cooperation Liu Xiangdong announced the opening in a recent speech at an investment and trade fair, but that he provided no timetables. They said it’s believed some sectors will be opened sooner and wider, while it will take longer in others.


So far, 173 foreign financial institutions and insurance companies have been licensed to operate in China. Most of them are confined to Shanghai and Guangdong Province. Liu said that further market access for foreign financial institutions will depend on development of necessary legislation and improvements in supervision and management.

b. Retail Sector

Liu said that China has gained experience in the retail sector from its experiments with China-foreign retailing joint ventures in over a dozen cities during the past several years. Now the government is ready to allow foreign retailers to form joint ventures with local retailers in major cities in all provinces, autonomous regions and cities that have provincial status.

c. Foreign Trade

arbitrary to honor, honesty or good morals leading either to a penal conviction or to disciplinary or administrative sanctions or disbarment.
China will allow foreign companies to set up foreign trade joint ventures with local firms in major cities of economically developed inland provinces, following the success of experiments in Shanghai's Pudong Area and Shenzhen Special Economic Zone.

d. Travel Services

China-foreign joint travel agencies will be allowed in major tourist cities on an experimental basis.

e. Telecommunications

China will open its telecommunications service market to international companies after legislation on this sector is improved. Once access is allowed, it will, as usual, be on an experimental basis at first.

In negotiations on its accession to the World Trade Organization, China has come under increasing pressure from the leading industrial countries to open its service sector. US officials said that the message of Mr. Liu's speech is that China is willing to make the commitment to open its service sector to foreign service providers, but they will have to be patient.

2. A certain degree of foreign control over these industries would not pose a threat to China's sovereignty and security.

3. Information technologies, telecommunication and financial services would be the key industries in the next century.
VI. What the WTO should do: establishing a new middle category for emerging economies such as China

A. The current disputes between China and the United States

Although China faces many hurdles in its effort to gain admission to the WTO, one of the most important is the continuing controversy over China’s status as a developed or developing country. China submitted an application to become a founding member of the WTO on January 1, 1995, but only as a developing country. The United States and other western industrialized countries prevented China from becoming a member at that time, chiefly because these countries disputed the claim that China qualified as a developing country. The United States has been adamant that China enter the WTO as a developed country because if China were to enter the WTO as

296 See China Researchers Dispute US Denial of Containment Policy (China Radio International broadcast, Aug. 5, 1995), available in Lexis-Nexis Library, BBCSWB File. Another major stumbling block is human rights. See id. While the United States has attempted to use trade negotiations as a lever to improve the human rights situation in China, China claims that such pressure constitutes unjustifiable meddling in its internal affairs. See How US, Japan Can Help Integrate China into the World Community, STRAITS TIMES (Singapore), Nov. 20, 1996, at 34, available in Lexis-Nexis Library, Curnse File (reporting text of Senior Minister Lee Kuanyew of Singapore’s speech at the Create 21 Asahi Symposium in Osaka, Japan) (noting that China “resists and resists [the US’s attempts to make China more democratic] as an interference in its domestic matters”). However, a discussion of human rights issues is outside the scope of this Note.


298 See id.; Testimony of Ambassador Charlene Barshefsky Before the Subcomm. On Trade of the House Ways and Means Comm., Fed. Document Clearing House, Sept. 19, 1996 WL 10831126. The United States, through the GATT Working Party on China’s accession, has isolated five major issues that China must address before it can be admitted to the GATT. See id. In arguing against the categorization of China as a “developing country,” Peter D. Sutherland, Director-General of the GATT, put special emphasis on the fact that China moved from 31st in the world in merchandise trade, in 1980, to 11th place in the space of thirteen years, accounting for 3% of all world merchandise trade. See Global Multilateral Trading System: The Role of the PRC, GATT Doc. 1633, at 4 (May 11, 1994). Sutherland also pointed out that there are still
a developing country, it would be allowed to maintain most of the market-restricting and protectionist barriers that currently limit the ability of foreign companies to export their goods to China.\textsuperscript{300}

While leaders in the United States have called China a developed country, numerous important political leaders and institutions within China have stated unequivocally that China will not join the WTO unless it is admitted as a developing country. Chinese Foreign Trade Minister Wu Yi has said that China is willing to negotiate and compromise in the issues regarding the alignment of China’s economy with international standards, but China will not compromise on its demand to come into the WTO as a developing nation.\textsuperscript{301} Chinese state radio has commented that the United States’ position places “excessive and unrealistic demands, which have led to the failure of China’s GATT membership negotiations at the end of last year.”\textsuperscript{302} The Chinese Ministry of Foreign Trade and Economic Cooperation has claimed that “the main obstacle to China’s reentry into GATT is the excessive demands raise by a few countries which exceed the level of China’s economic development.”\textsuperscript{303}


\textsuperscript{301} See supra note 148. Wu stated that “[w]e must adhere to our principle and will not beg anybody and will never sell out our principles.” Id. Wu blames the failure of negotiations thus far on the United States’ placing “excessive demands...on China.”

\textsuperscript{302} See supra note 147.

\textsuperscript{303} Taiwan, USA, Trade Issues, New China News Agency Domestic Survey, July 31, 1995, available in Lexis-Nexis Library, BBCSWB File; see also WTO Admission, Zhongguo Tongxun She News Agency, July 28, 1995; Talks Resumed in Geneva on China Rejoining GATT, New China News Agency, May 11, 1995, available in Lexis-Nexis Library, BBC SWB File (stating that China is taking a strong stance on its re-entry to GATT, and is requesting a realistic approach by major contracting parties). Other Chinese officials have also emphasized the importance of China’s status as a developing country and criticized the American stance. See e.g., US and Chinese Presidents to Continue “Strategic” Dialogues, Look to Future, Xinhua News Agency, Nov. 25, 1996, available in Lexis-Nexis library, BBCSWB File (noting that President Jiang Zemin recently referred to China as “the world’s largest developing country”).
The United States continues to use its power in the WTO to block China’s admission to the WTO; its position is that because China is one of the world’s biggest trading nations, it should be considered a developed economy.\textsuperscript{304} Mickey Kantor, former US Trade Representative, argues that, “we all agree that for certain purposes, China, of course, is a developed country.”\textsuperscript{305} One American trade official noted that, “overall, as a trade regime, we are dealing with an enormously important, enormously large, powerful player.”\textsuperscript{306} The United States does not want to give China an economic advantage by allowing it to enter the WTO as a developing country.\textsuperscript{307} To do so would allow Chinese companies to conform to less rigorous standards than American companies in similar areas, making it far more difficult for American businesses to succeed in China.\textsuperscript{308}

Both the United States and China seemed inflexible in their demands until recently, when relations between China and the United States generally have improved. President Clinton has softened the rhetoric of his first campaign and early years in the White House about China.\textsuperscript{309} This softened rhetoric includes a less harsh stance in the

\textsuperscript{304} See Gattsmacked, Economist, Mar. 18, 1995, at 16.
\textsuperscript{306} \textit{id.} The United States’ trade deficit with China is the primary evidence American officials use to justify their claims that China needs to make further concessions before admission to the WTO. \textit{See} Special Report: Trade Outlook for 1995, 12 Int’l Trade Rep. (BNA) 129, 143 (Jan. 18, 1995). In 1996, the trade deficit with China was $39.5 billion, an increase of $5.7 billion from 1995. See Office of US Trade Representative, Foreign Trade Barriers 43 (1997). Li Tieying, CCP Central Committee Political Bureau Member, responded to US economic statistics by pointing out that China is a developing country with an average per capita GNP of only about 400 US dollars and more than 80 million people who are still living in poverty... It is unfair and unacceptable to treat China as if it were a developed or semi-developed country and require it to shoulder international obligations which do not conform with its development level and its national rights. China and the World; \textit{Li Tieying Addresses “The World Economy and China” Conference, China News Agency Domestic Serv., Apr. 13, 1995, available in Lexis-Nexis Library, BBCSWB File.}
\textsuperscript{307} See \textit{id.}
\textsuperscript{308} See \textit{id.}
\textsuperscript{309} See \textit{Chinese Foreign Minister Holds News Conference on APEC, XINHUA NEWS AGENCY, Nov. 25, 1996, available in Lexis-Nexis Library, BBCSWB File.} As a result of a meeting between President Clinton and President Jiang Zemin at the APEC Summit, the two countries agreed to the following: 1) to have two official state visits by both heads of state in 1997 and 1998; 2) to speed up negotiations on China’s accession to the WTO; and 3) to discuss a number of critical international issues such as global security,
United States’ position against China’s admission to the WTO.\textsuperscript{310} It is not clear, however, how far the United States will go. At a minimum, President Clinton has stated that the United States will not support China’s bid to join the WTO until it does more to open its markets.\textsuperscript{311} Opening markets, however, does not necessarily mean that China must meet the same standards as would be required of a fully developed country.\textsuperscript{312}

In response to changes in the United States’ position, China has been sending mixed signals as to how willing it will be to open its market to foreign trade.\textsuperscript{313} At the APEC summit, President Jiang Zemin expressed a desire to be flexible in addressing China’s admission to the WTO.\textsuperscript{314} He highlighted China’s recent reduction in import

\textsuperscript{310} See Edward Luce & Guy de Jonquie’res, \textit{Confusion Greets Clinton’s Big Deal}, FIN. TIMES, Nov. 26, 1996, at 6. President Clinton told President Jiang Zemin that the US would be “flexible and pragmatic” in the WTO negotiations provided that China pledged to open its markets further and embrace WTO rules. See id. Senator Sam Nunn has argued that “[t]he United States should seek to work constructively with China to facilitate its entry... into the international regimes that regulate and order world affairs.” Sam Nunn & Michael Oksenberg, The US Needs China—and Vice Versa, Newsday, Nov. 26, 1996, at A33.

\textsuperscript{311} See supra note 108. US Trade Representative Charlene Barshefsky has also noted that China must improve its “open market policy” before it could join the WTO; \textit{US China at Odds Over WTO Membership}, JAPAN ECON. NEWSWIRE, Nov. 21, 1996, available in Lexis-Nexis Library, Curnws File.

\textsuperscript{312} See Michael Richardson, \textit{Pacific Talks End in Push for Free Trade in Technology}, INT’L HERALD TRIB., Nov. 26, 1996, available in Lexis-Nexis Library, Curnws File; see also US Offers ‘Road map’ to China’s Entry into WTO, Asian Econ. News, Nov. 13, 1995, available in Lexis-Nexis Library, Curnws File (discussing the flexible road map offered by the US for China’s transition into the WTO). The United States promised to be more “flexible” about the developing country issue, but remained firm in its demand that China at some point accept strict requirements, and not the general requirements for developing countries. See id. The United States has signalled a willingness to compromise as to whether China should be allowed some transition period before the most stringent obligations are required.


\textsuperscript{314} See \textit{US and Chinese Presidents to Continue “Strategic” Dialogues, Look to Future}, supra note 154; see also \textit{Chinese Foreign Minister Praises Jiang-Clinton Talks at APEC}, XINHUA NEWS AGENCY, Nov. 25, 1996, available in Lexis-Nexis Library, BBCSWB File (reporting a statement by Chinese Vice-Premire Qian Qichen regarding US and Chinese disagreement concerning the requirements for China’s accession to the WTO, in which he said that he felt that “[w]e have differences. However, we can solve these differences through negotiations and consultations”). Prior to the APEC meeting, Japan and Australia announced support for China’s WTO membership. See \textit{Japan, Australia Agree to Back China’s WTO Bid}, JAPAN
tariff rates from an average of 35.9% to an average of 23%, and committed China to a reduction to an average of 15% by year 2000.\textsuperscript{315} He indicated a desire to accelerate the negotiation process.\textsuperscript{316} Other sources indicate that China also may be willing to agree to make a "down payment" on its WTO application by accepting some of the stricter commitments required for developed countries by the WTO immediately, and phasing in others over time.\textsuperscript{317}

The net result of these latest developments is that the United States still will not allow China to join the WTO unless an agreement regarding its admission contains "commercially meaningful terms."\textsuperscript{318} China continues to resist any limit on its ability to use extra safeguards to secure sufficient protection for its domestic industries.\textsuperscript{319} Reading between the lines, there does seem an ability to craft a compromise based upon the above

\textsuperscript{315} See Chinese President's APEC Address, XINHUA NEWS AGENCY, Nov. 25, 1996, available in Lexis-Nexis Library, BBCSWB File.

\textsuperscript{316} US President Clinton is also in a strong position to make unpopular decisions domestically, such as accelerating China's entry into the WTO, because of his reelection victory, and the fact that he cannot run again for office. See Leon Hadar, American Trade Leadership Needed, Bus. Times, Nov. 25, 1996, at 4. Former Secretary of State Warren Christopher stated that "[a]dmitting China to the World Trade Organization conforms to the interests of the United States, which is willing to speed up negotiations with China."

\textsuperscript{317} See China Warms to WTO Down-Payment Deal, SOUTH CHINA MORNING POST, Nov. 16, 1996, at 3, available in Lexis-Nexis Library, Curnws File (statement of European Commission Vice President, Sir Leon Brittan). Brittan believes that China may be moving toward accepting the compromise supported by the EU to allow for China's admission to the WTO. See EU Announces Breakthrough in Talks on China's WTO Bid, AGENCE FRANCE PRESSE, Nov. 15, 1996, available in Lexis-Nexis Library, Curnws File. The question now becomes entry into the WTO, because of his reelection victory, and the fact that he cannot run again for office. See Leon Hadar, American Trade Leadership Needed, Bus. Times, Nov. 25, 1996, at 4. Former Secretary of State Warren Christopher stated that "[a]dmitting China to the World Trade Organization conforms to the interests of the United States, which is willing to speed up negotiations with China."

\textsuperscript{318} See China Warms to WTO Down-Payment Deal, SOUTH CHINA MORNING POST, Nov. 16, 1996, at 3, available in Lexis-Nexis Library, Curnws File (statement of European Commission Vice President, Sir Leon Brittan). Brittan believes that China may be moving toward accepting the compromise supported by the EU to allow for China's admission to the WTO. See EU Announces Breakthrough in Talks on China's WTO Bid, AGENCE FRANCE PRESSE, Nov. 15, 1996, available in Lexis-Nexis Library, Curnws File. The question now becomes entry into the WTO, because of his reelection victory, and the fact that he cannot run again for office. See Leon Hadar, American Trade Leadership Needed, Bus. Times, Nov. 25, 1996, at 4. Former Secretary of State Warren Christopher stated that "[a]dmitting China to the World Trade Organization conforms to the interests of the United States, which is willing to speed up negotiations with China."

terms, one that does not involve the prior rigid formulation of both parties: that is, one that does not require China to be treated as either an entirely developed or entirely developing country.

Part of the difficulty in predicting the future of these negotiations is the fact that China and United States face divergent domestic pressures. In the United States, businesses involved in exporting products would like greater access to the Chinese market and its more than one billion potential consumers.320 On the other hand, US industries that sell in the domestic market fear that Chinese companies will use increased access to flood the US market, resulting in higher trade surpluses.321 For China, meeting the requirements for joining the WTO might cause short-term dislocations, especially unemployment, as the inefficient state-run enterprises are forced to compete without state subsidies.322 It also, however, might provide China with a stable economic position well into the next century.323 Because both sides see value in China’s ultimate admission to the WTO, the countries have agreed publicly to hold definitive talks in 1997 on China’s accession to the WTO.324 Many commentators believe that 1997 is the critical year for these difficult issues to be resolved because of President Clinton’s reelection.325 But up to now, there are still no apparent signs that they would reach the deal quickly.

321 See id.
322 See id. After the recent APEC summit, Foreign Minister Qian Qichen stated that China hoped to finish talks to join the WTO by mid-1997. See China Hoping to Wind Up WTO Talks with US by Mid-97, Agence France Presse, Nov. 25, 1996, available in Lexis-Nexis Library, Curnws File. However, there are mixed signals coming from Beijing, as it appears that there is division within the Chinese government over how to proceed with its accession to the WTO and with its relationship with the United States in general.
B. The standards to determine a member’s position in the WTO.

Under the auspices of the WTO, representatives from a wide range of economic developments levels should meet to seek a consensus on a criterion to measure a nation’s economic development level. There can only be a solution if the process of coming up with this criterion involves members from all levels of economic development. Ernst August Hoerig, Chairman of United Nations Conference on Trade and Development (UNCTAD), argues that “[o]bjective and rational criteria for such treatment would be the best way to avoid such unwanted and often discriminatory results.”326 There is at least the awareness among most countries “of the need to convene and establish a common set of rules of behavior,”327 and the WTO framework could be used to expand this awareness into some consensus of a fair criterion.

Economic development literature suggests three factors that could be used to determine a country’s level of development: 1) sustained increases in a country’s GNP; 2) rate of growth a country’s per capita GNP; 3) an increase in the importance of manufacturing and service industries, coupled with a decrease in the percent of the population working in agriculture.328

Although significant, these three factors alone do not predict a country’s ability to compete in international trade. Merely looking at the percent of the population engaged in

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327 See id.
manufacturing and service does not indicate whether a nation will be able to compete successfully. It seems logical that a world trading organization would also examine factors that would show a country’s promise in international trade when determining a measurement for that country’s economic development level.

The academic literature has also suggested other factors to define levels of development.\(^{329}\) Those factors include income distribution, unemployment level, and existence of social safety nets to help the poor.\(^{330}\) Although these factors may be important in assessing the overall success of a nation, they seem irrelevant to a nation’s ability to compete internationally in exports.

Outside the academic world, various criteria have been used to measure levels of development. The United States government uses a country’s per capita income as the critical factor in determining whether that country should be considered developing or developed.\(^{331}\) However, per capita income alone may not indicate the sophistication of the overall economy; it does not adequately measure international competitiveness in specific products.\(^{332}\) An alternative approach is employed by the Dutch Ministry of Development Cooperation. It looks at three factors to determine whether a country is developing: 1) GNP per capita; 2) percentage share of manufacturing in GNP; and 3) export performance by product group of each developing country relative to all developing country exports.\(^{333}\) The additional criteria used by the Dutch are more accurate, but still incomplete because the criteria ignore overall GNP and thus fail to illustrate the overall magnitude of a nation’s economy. A former Mexican government

\(^{329}\) See id.

\(^{330}\) Id.

\(^{331}\) See UNCTAD Head Issues Plea to Tie New GATT MTN to Broader Review of Third World Concerns, 2 INT’L TRADE REP. (BNA) No. 29, at 932 (July 17, 1985).
official has suggested that, at a minimum, a country should be considered to have advanced beyond developing country status when it has industrialized to the point where it can offer competitive manufactured goods for export, and has a per capita income of more than $1,000 per year.\textsuperscript{334} Although useful, this criteria is also incomplete because it ignores the raw size of a nation’s economy, and fails to look at that nation’s actual success in international trade.

The above discussion indicates that factors that are important in assessing a nation’s economic development level in the context of international trade. The article proposes the following criteria to be used as a basis for determining how to measure development: 1) GNP; 2) per capita GNP; 3) percent of economy involved in manufacturing and service industries; and 4) export success, as measured by value of prior years’ exports, variety of exports, and existence of a trade deficit or surplus. These four factors measure a nation’s ability to successfully compete in international trade.

GNP is an important measure because it offers a benchmark to analyze the economy as a whole. Per capita GNP, or income, is important because it gives more context to the overall GNP, as it reflects the population of an economy. Both measures are important because if only GNP were used, a very large country, such as China, would appear to be more developed than a much small country, such as Sweden, merely because China has a higher GNP. However, when per capita GNP is factored in, the analysis changes dramatically because that measurement reflects the fact that Sweden has far

\textsuperscript{332} See id.
\textsuperscript{333} See Anwarul Hoda, Developing Countries in the International Trading System 56 (1987).
\textsuperscript{334} See David Ibarra & Salvador Arriola, NICs Are New International Powerhouses; But the Question is : Is the Change Permanent in World Economic Stability? AM. BANKER, Sept. 7, 1982, at 33.
fewer people, and equalizes the measurement. This does not mean that GNP is a faulty measure, because there is significance in the overall size of an economy, but it must be tempered with the per capita GNP.

Percentage of population involved in industry and service is important because it looks to whether the country has moved away from an agricultural-based economy to a more sophisticated economy. A country with a large industrial and service base might be expected to compete well in the international economy. But, alone, this factor can also be misleading because it may treat a country that is highly dependent on one product as being sophisticated in all aspects of trade, which might not be the case. Thus, a country that only exports one raw material might have a high percentage of the population involved in service or industry, but still not have a sophisticated economy such that it can compete successfully in all aspects of international trade. Thus, it is also important to look at value of exports, variety of exports, and the existence of a trade deficit or surplus. Those factors provide more evidence of the overall sophistication of a country's economy.

The WTO should use its criteria to measure the ability of a nation to successfully compete in international trade without the need for significant protection, as is commonly given to developing countries. These four criteria offer a mechanism by which the WTO could evaluate a country's development level, with an eye toward that country's ability to engage in international trade without the need for much help. Thus, a nation that had low ranks on the four criteria would not be as successful in international trade, so would be in
need of more protection for its local industries, than a more advance country that had greater success in international trade. Such an advanced country would not need as much protection for its local industries.

C. Introducing the criteria to analyze China.

China shares characteristics of both developed and developing countries. An analysis of the Chinese economy in light of the four factors outlined above, however, suggests that China is neither a developed nor a developing country, but should be placed in the new emerging economy category. First, China’s GNP is $2 trillion. Based on overall GNP, it recently surpassed Germany to become the third-largest economy in the world. Furthermore, its GNP has been growing at a rate of approximately 10% per year since the early 1980s, giving it one of the highest growth rates in the world. While growth is not explicitly a factor, it is relevant to the size of GNP and provides a very strong indication of the overall strength of China’s economy and suggests that China is like many developed countries.

Second, China’s per capita GNP is about $1600. This is higher than many developing countries, including Bangladesh and Algeria, but not as high as some of the most advanced developing countries, including Chile and Mexico. This factor suggests

335 See Bureau of the Census, US Department of Commerce, Statistical Abstract of the United States at 835 (1996). (All money figures are in US currency unless otherwise noted.) China’s GNP is larger than that of many countries widely acknowledged as developing countries: Algeria ($41 billion), Argentina ($278 billion), Bangladesh ($26 billion), India ($287 billion), Mexico ($363 billion) and Zaire ($6 billion). See id. China’s overall GNP is also larger than that of many developed countries: Austria ($196 billion), Canada ($523 billion), the United Kingdom ($1 trillion), and France ($1.3 trillion). See id. It is, however, smaller than that of some developed countries, including Japan ($4.6 trillion) and the United States ($6.7 trillion).

336 See id.

337 See Richard M. Nixon, Beyond Peace at 121 (1994).

338 See supra note 186.

339 China’s per capita GNP is higher than that in many developing countries: Algeria ($1452); Bangladesh ($206); Ethiopia ($91); India ($312); and Zaire ($133). See id. It is, however, lower than other developed countries: Austria ($24,600); Canada ($18,600); France ($22,760); Japan ($37,000); The United Kingdom
that China is also like many developing countries. Third, although China has a fairly large industrial capacity, it still has a very significant percentage of the population leading an absolute subsistence existence as farmers.\(^{340}\) Again, by itself, this factor suggests that China might fit within the developing country category. The fourth factor, success in international trade, indicates that China is more like a developed country, as it has been quite successful. It has a trade surplus of $5 billion with the rest of the world.\(^{341}\) China is also the tenth largest exporter in the world.\(^{342}\)

Thus, China shows great strength in overall GNP and international success, but less strength in per capita GNP and economic maturity. Because of these mixed results China should not be a developed country. However, the size of China’s economy cannot be ignored; this necessitates the creation of a new middle category. This category would recognize the overall size of China’s economy, yet also recognize that the economic growth has not yet pervaded all of society yet. The Asian Tigers present the reverse situation. They have lower overall GNP levels than developed countries, although higher than most all developing countries, but their GNP per capita is much higher than other developing counties. For example, South Korea has a $356 billion GNP and $7896 per capita GNP.

This simple exercise of applying the four factors to China underscores the problems the other proposed criteria had. It demonstrates how the choice of factors can skew the picture. For instance, under the United States’ criteria of looking only at per

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\(^{341}\) See supra note 186, at 853. China has a $60 million trade surplus with the United States. See id. Most developing countries have huge trade deficits: Mexico ($18.9 billion); India ($5.1 billion). See id. Even most developed countries have trade deficits, as do the United States and the United Kingdom.

\(^{342}\) See supra note 3.
capita GNP, China appears to be a classic example of a developing country because of its relatively low per capita GNP. By applying the criteria from the academic literature, the per capita GNP and percentage of population in manufacturing criteria also would strongly suggest that China was a developing country, with only its GNP to counterbalance that conclusion. The four-factor analysis utilized by this article offers a more complete picture of a nation’s economy.

D. At the time being, the WTO should not demand the same high standard to China as to developed countries, there should be a Middle Category for Emerging Economies.

It was once easy to divide the countries of the world into two camps: North and South—Developed and Developing.343 Any such attempt to do that today would result in a “vast over-simplification” because using economic criteria, the old “South” is now made up of various “distinct economic categories.”344 Ethiopia and Singapore illustrate the stark changes that have occurred in the “South.”345

For 1994, the growth rate in the developing world was twice that of the developed world.346 This can be explained by the high growth rates in the transition economies in Eastern and Central Europe, and the developing countries in Asia and Latin America.347 This increase in GNP in the developing world was also followed by a significant increase in world merchandise trade. Taiwan, Hong Kong, South Korea, Malaysia, Singapore and Thailand had a combined $420 billion worth of exports in 1994.348 Latin America added

344 See id.
345 Id.
347 See id.
348 See id.
$185 billion in exports, and Central and Eastern Europe combined for $120 billion in exports. Hong Kong, China, Singapore, Korea, Taiwan, Mexico, Malaysia, Russia, Thailand, Indonesia, and Saudi Arabia are all among the top 30 exporters in the world.\textsuperscript{349} This indicates that we can no longer speak of one monolithic developing world.

The WTO, in some cases, has already divided the "South" into two categories" developing countries and "lower-income developing countries."\textsuperscript{350} Under this classification, the 48 poorest countries, as defined by the United Nations, are lower-income developing countries, but only 29 are the WTO members.\textsuperscript{351} This bottom category makes sense for the limited number of countries it covers, but it still leaves every other non-developed country within the broad "developing country" category.\textsuperscript{352} Because developing country is an overly broad category, it remains necessary to create an intermediate category between developing country and developed country.

The idea of an intermediate category has been discussed for many years. In 1982, there was some sentiment favoring creation of a middle category for the NICs (Newly Industrialized Countries); they would "pay tariffs somewhere between the GSP level and the rate paid by industrialized countries."\textsuperscript{353} Thus the "rapidly developing third world states... have become mature competitors in certain sectors and no longer deserve some of the trade concessions granted them when their industries were in their infancy."\textsuperscript{354} At that time, the Director-General of GATT, Arthur Dunkel, suggested the institution of a new middle category for those countries that had achieved a higher level of development.

\textsuperscript{349} Id.
\textsuperscript{350} Lower-income Developing Countries and the WTO (visited Mar. 9. 1997).
\textsuperscript{351} See id.
\textsuperscript{352} Id.
\textsuperscript{354} Id.
Countries in the middle would accept more responsibilities of being GATT members, but would also gain more privileges. These privileges might include promises that the NICs will not be pressured to pay higher wages as a result of their success in labor-intensive production or to submit to “voluntary” export limits to developed countries.

The creation of a middle category seems to be a reasonable compromise for all sides. It would ease many of the concerns held by the United States that advance developing countries not be treated the same as those that are less advance. This could be accomplished by setting higher requirements for trade liberalization for the emerging economies than for other developing countries, but still keeping the requirements lower than those borne by true developed countries such as the United States. This new category also would ease the frustration felt by emerging economies at being told that they must immediately take on all of the requirements of a developed country.

356 See id.
VII. Conclusion

So, creating a new middle category within the WTO recognizes the reality that developing countries are not a monolithic block. There are huge variations within the developing world, and those differences must be taken into account when the international community assigns economic responsibilities. Unless the world community recognizes those differences, some countries will be getting bonuses that they do not deserve at the expense of countries who truly need the help. In addition to these issues of fairness, public support for free trade developed countries is eroded when the public sees powerful economies taking advantage of preferences they no longer need. Thus, to preserve an international system of free trade, it is important to ensure that every nation participates to the extent that it is able, which means that countries like South Korea, and ultimately China, will have to do more than their third world counterparts who are not yet as advanced.

The stakes are very high. If the world community does not resolve the issue, China will either be kept out of the WTO, or will use the developing country preferences to reap an unfair advantage over its competitors. In the final analysis, China must be pressured to further liberalize its economy, but that goal can best be served by including China at the table as a member of the WTO.

In fact, no one now contends that China should be kept outside of the WTO for too long, particularly in light of China’s drastic tariff reductions implemented in April 1996. The only question that remains is timing. Moreover, no matter at what time China’s
accession to the WTO eventually materializes, the fundamental changes brought about by the application process have had, and will continue to have, lasting impact not only on China’s foreign trade system but on the world economic order as well.
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Others:


25. Letter from James L. Bikoff, Esq., Arter & Hadden, to Irving A. Williamson, Chairman, Section 301 Committee, Office of the US Trade Representative 2 (Aug. 9, 1994).

26. Letter from Eric H. Smith, Executive Director and General Counsel, International Intellectual Property Alliance, to Frederick Montgomery, Chairman, TPSC, Office of the US Trade Representative 3-6 (July 13, 1994).


