

CHINA, EMERGING ECONOMIES, AND THE WORLD TRADE ORDER

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INTRODUCTION

Bangladesh has a per capita income of \$206 and a gross national product (GNP) of \$26 billion; the People's Republic of China has a per capita income of \$1,860 and a GNP of \$2.0 trillion.¹ Despite the obvious disparity between those two countries' economies, China claims equivalence with Bangladesh for the purpose of determining the economic category into which the former should be placed when it joins the World Trade Organization (WTO).²

The Clinton administration argues that China should be placed in the same economic level as Japan and the United States when China joins the WTO.³ This dispute has kept China from joining the WTO because there are far more stringent requirements for those WTO members deemed "developed countries" than for those classified as "developing countries."⁴ Because China possesses the world's third largest economy, it must be integrated into the international marketplace.⁵ Furthermore, China's outsider status prevents its integration into the family of nations, thereby discouraging the rest of the world from investing in and trading with China.⁶

The world trading system has been dominated by the General Agreement on Tariffs and Trade (GATT)⁷ for 50 years.⁸ Since its

1. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 835 (1996) [hereinafter STATISTICAL ABSTRACT]. All monetary figures are in U.S. currency unless otherwise noted.

2. See Jeffrey Parker, *China Vows Not to Beg for Trade-Club Membership*, THE REUTER EUR. BUS. REP., Sept. 21, 1995, available in LEXIS, Nexis Library, Reuters File. China claims to be a "developing" country. Bangladesh, with its very small economy, is also a developing country. See *id.* It seems odd to place the two countries in the same category.

3. See *id.* (stating that the United States blocked China's accession to GATT on the basis that it did not qualify to join as a developing country).

4. See *infra* Part I.C.

5. See RICHARD M. NIXON, BEYOND PEACE 121-29 (1994).

6. See *infra* Part II.B.

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S.

inception in 1947, the GATT has brought about a revolution in the world economy through its promotion of free trade.⁹ Free trade is vital to the world's economic growth because it ensures markets for those countries that produce the best products in certain niches, thereby promoting their continued production.¹⁰ The alternative, a static system of government subsidies and high protective tariffs, would result in outdated and unappealing products.¹¹

Within the GATT framework, the member states participated in a series of negotiating "Rounds," which have led to a series of new liberalizing commitments; these agreements were added to the original GATT agreement.¹² On April 15, 1994, ministers from over 100 member states of the GATT signed the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" (WTO Agreement),¹³ which concluded eight years

1700, 55 U.N.T.S. 194 [hereinafter GATT].

8. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 293-301 (3d ed. 1995).

9. See *id.* at 5-6 (stating that the GATT has caused a "significant increase in the volume of world trade"); World Trade Org., *The Foundations of the World Trading System* (visited Mar. 9, 1997) <http://www.wto.org/wto2_1_0_wpf.html>.

10. See World Trade Org., *Implications for Trade in a Borderless World: Address by Renato Ruggiero, Director-General, World Trade Organization to the World Trade Congress, Singapore, 24 April 1996* (visited Mar. 7, 1997) <<http://www.wto.org/wto/archives/press46.htm>>. Director Ruggiero argued that "[a]chieving a genuine world free trade area would make a tremendous contribution to promoting growth and ensuring a safer world in the century to come." *Id.*

11. See *The Foundations of the World Trading System*, *supra* note 9. The GATT has three guiding principles: "(1) elimination and reduction of tariff and non-tariff barriers to international economic activity; (2) establishment of predictable, equitable and uniform rules that are designed to promote strong market economies; and (3) creation of mechanisms to ensure that basic obligations are met and rights are fully respected." *Prepared Testimony of Michael A. Samuels, [J] President of Samuels International Associates, Inc., [J] on Behalf of the National Foreign Trade Council, Inc., [J] Before the House Comm. on Ways and Means Subcomm. on Trade*, Fed. News Serv., Sept. 19, 1996 [hereinafter *Prepared Testimony of Michael A. Samuels*], available in LEXIS, Nexis Library, Fednew File. Samuels served as Deputy United States Trade Representative and United States Ambassador to the GATT. See *id.*

12. See generally Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123, 126-33 (1995) (describing the evolution of the GATT from its inception to the culmination of the "Uruguay Round").

13. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994 [hereinafter WTO Agreement], reprinted in TRADE NEGOTIATIONS COMM., FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 5 (1994) [hereinafter FINAL ACT]; 33 I.L.M. 1125 (1994).

of negotiations.¹⁴ It set up a new institution, the WTO, and promulgated agreements covering a wide range of trade issues.¹⁵ China is currently one of 29 additional nations that have requested membership in the WTO.¹⁶

The WTO agreement, as successor to the GATT, incorporates the original GATT treaty by reference, and adds a series of additional new agreements designed to further the liberalizing goals initiated by the GATT.¹⁷ The most important aspect of the WTO agreement is its establishment of the WTO institution, the governing body for all aspects of the agreement.¹⁸ In addition to the creation of this new institution, the WTO agreement includes additional measures designed to liberalize trade in numerous sectors previously not covered by the GATT.¹⁹

14. See World Trade Org., *A Summary of the Final Act of the Uruguay Round* (visited Mar. 9, 1997) <http://www.wto.org/wto/ursum_wpf.html>. For a current listing of country membership in the WTO, see World Trade Org., *WTO Membership* (visited Mar. 9, 1997) <<http://www.wto.org/wto/about/organs6.htm>>. The following governments currently are members of the WTO: Angola, Antigua & Barbuda, Argentina, Australia, Austria, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Costa Rica, Cote d'Ivoire, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, European Community, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea Bissau, Guinea, Guyana, Haiti, Honduras, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Korea, Kuwait, Lesotho, Liechtenstein, Luxembourg, Macau, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Rwanda, Saint Lucia, Saint Vincent & the Grenadines, Senegal, Sierra Leone, Singapore, Slovak Republic, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Togo, Trinidad & Tobago, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom, United States, Uruguay, Venezuela, Zaire, Zambia, and Zimbabwe. See *id.*

15. See *A Summary of the Final Act of the Uruguay Round*, *supra* note 14.

16. See *WTO Membership*, *supra* note 14.

17. See *A Summary of the Final Act of the Uruguay Round*, *supra* note 14.

18. See *id.* The WTO is headed by a Ministerial Conference, which meets at least once every two years. See *id.* A General Council oversees the actual operation of the agreement and related decisions on a day-to-day basis. See *id.* The General Council also acts both as a dispute resolution body and as a trade policy review mechanism. See *id.* The WTO framework ensures a "single undertaking approach" to the implementation of all results from the Uruguay Round. *Id.*

19. See *id.* The WTO agreement includes provisions relating to the following areas of trade: agriculture, sanitary and phytosanitary measures, textiles and clothing, technical barriers to trade, trade-related investment measures, dumping, customs valuation, preshipment inspection, rules of origin, import licensing procedures, subsidies and counter-

The GATT, and, subsequently, the WTO agreement, required developed countries to eliminate many domestic regulations imposing barriers to free trade.²⁰ However, in contrast to developed-country member states, developing countries admitted to the WTO are not required to meet most of the trade requirements specified by the two agreements.²¹ Developing countries are allowed to impose barriers to trade because of their perceived need to protect fragile domestic industries from foreign import competition.²² Although developing and developed countries have some different obligations, under the GATT and the WTO, what constitutes either a developing or developed country remains largely undefined.²³ This lack of definition has led to individual, ad hoc responses in bilateral negotiations, rather than the systematized, objective resolution promised by the WTO.²⁴

The abstract problem of defining what constitutes a developing country has led to a serious practical problem. Recently, China's bid to join the WTO has been blocked because of a dispute over whether China will enter the WTO as a developing or a developed country.²⁵ In 1978 China began a process of economic liberalization under the late Deng Xiaoping.²⁶ In addition, China

vailing measures, safeguards, trade in services, and trade-related aspects of intellectual property. *See id.*

20. *See infra* Part I.A.

21. *See infra* Part I.B-C.

22. *See infra* notes 54-55, 64-66 and accompanying text.

23. *See infra* notes 222-37 and accompanying text.

24. *See GATT Director General Decries Protectionism, Says New MTN Round May Not Be the Solution*, 20 Int'l Trade Rep. (BNA) 902, 902-04 (May 2, 1984) [hereinafter *GATT Director General Decries Protectionism*]. In fact, the former Director-General of the GATT, Arthur Dunkel, recognized that a serious structural problem with the GATT was that "the status of developing countries is undefined and the special rules applying to them make no distinction between the different levels of development within the group [of developing countries]." *Id.* at 903.

25. *See infra* Part II.A.

26. *See* Orville Schell, *Deng's Revolution*, NEWSWEEK, Mar. 3, 1997, at 20, 24. In 1978, Deng embarked on the "second revolution" in China, which involved radical economic reform. *See id.* at 25. He reformed agriculture, encouraged the creation of private business and foreign investment, and even allowed the first stock markets into China. *See id.* In Deng's first year in power, 1978, he stated: "I do not care whether a cat is black or white so long as it catches mice." Henry A. Kissinger, *The Philosopher and the Pragmatist*, NEWSWEEK, Mar. 3, 1997, at 42, 46. With this radical statement, Deng began to move China away from rigid communist orthodoxies by slowly beginning a liberalization process and a movement towards a market economy. *See id.* at 46-47; *see also* Jackie Sheehan, *Is There Another Tiananmen Uprising in the Offing?*, JANE'S INTELLIGENCE REV., Dec. 1, 1996, at 554 (examining the growth of independent workers' organizations

has become a central power in Asia both militarily and economically.²⁷ Despite its progress in economic liberalization, however, China continues to impose many barriers to international economic activity, and still does not have a strong top-to-bottom market economy.²⁸ Consequently, the United States has used its political clout in the world to keep China from being admitted to the WTO until China has made more significant concessions toward opening up its market.²⁹

China's situation is not the only instance where this lack of definition has been a problem. During the 1980s, there was a series of disputes over whether certain Newly-Industrializing-Coun-

and the degree of political unrest in China).

27. See Schell, *supra* note 26, at 20-27; see also *Time for U.S. to Focus on China*, STRAITS TIMES (Singapore), Nov. 21, 1996, at 52 (arguing that "China holds the key to stability in the Asia-Pacific theatre in which the Americans indubitably have an anchor role").

28. See Michael Sans et al., *A Fast Drive to Riches*, NEWSWEEK, Mar. 3, 1997, at 32, 33 (noting that much of the infrastructure of a capitalist economy, including rules and transparent laws, is lacking, thereby making China's bid to join the WTO much more difficult).

29. See *Testimony of the Honorable Charlene Barshefsky Before the Subcomm. on Trade of the House Ways and Means Comm., May 23, 1995* (visited Mar. 9, 1997) <http://www.ustr.gov/testimony/barshefsky_2.html> [hereinafter *Barshefsky Testimony*]; see also *Telephone News Conference with Commerce Secretary Mickey Kantor from New York City, New York*, Fed. News Serv., Nov. 20, 1996 [hereinafter *Kantor News Conference*], available in LEXIS, Nexis Library, Fednew File (asserting that progress has been made in economic relations with China). The process of joining the WTO can be accomplished in two ways. Prior GATT members can join the WTO by signing the Final Act of the Uruguay Round, and non-GATT members may only accede to the WTO through "terms agreed with [other] WTO members." World Trade Org., *How the WTO Works* (visited Mar. 9, 1997) <http://www.wto.org/wto/wtoworks_wpf.html>. For non-GATT members, during the initial stage "of the accession procedures the applicant government is required to provide the WTO with a memorandum covering all aspects of its trade and economic policies having a bearing on WTO agreements. This memorandum becomes the basis for a detailed examination of the accession request in a working party." *Id.* After the paperwork is submitted, "the applicant government engages in bilateral negotiations with interested member governments to establish its concessions and commitments on goods and its commitments on services." *Id.* Only after this bilateral process is complete does the applicant's petition go to the General Council or the Ministerial Conference for a vote where two-thirds of the members must agree. See *id.* Within the last year China was still in the bilateral negotiation process. See Office of the U.S. Trade Representative, *1995 Annual Report Annex I, WTO Accession Application and Status (as of 1 Mar. 1996)* (visited Mar. 9, 1997) <<http://www.ustr.gov/reports/tpa/1996/accession.html>>. The United States will keep blocking China's entry into the WTO during the bilateral discussions until China makes "specific commitments to open its market for goods and services." *Testimony Before the Subcomm. on East Asian and Pacific Affairs of the Senate Foreign Relations Comm., June 5, 1996* (Testimony of Ambassador Jennifer Hillman) (visited Mar. 9, 1997) <http://www.ustr.gov/testimony/hillman_1.html>.

tries (NICs), such as South Korea and Singapore, should receive the benefits of the Generalized System of Preferences (GSP), a GATT program for developing countries.³⁰ In addition, a number of other emerging economies who seek membership in the WTO, such as Russia and Vietnam, face the same issues and disputes over definition.³¹

Part I of this Note describes the specific provisions, both in the old GATT and in the current WTO agreement, that offer special protection for developing country members. Part II explores the current dispute with China, indicates the necessity of admitting China to the WTO, and explores the potential inequities in allowing China, and other similarly situated emerging economies, to take advantage of provisions that were designed to help extremely poor and undeveloped countries. Part III offers three suggestions for improving the WTO treaty. First, the WTO should establish a neutral criteria that will define developed and developing countries. Second, the WTO should establish a new middle category for emerging economies such as China; members of this category would meet higher standards than traditional developing countries, but lower standards than truly developed countries. Third, the WTO should establish a system of review and graduation to evaluate every member periodically, thereby determining whether economic conditions have changed such that the member should be moved to a new category.

I. THE DISTINCTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES

A. *GATT Principles*

The GATT agreement reflected principles viewed as critical to the rebuilding of the world economy in the aftermath of World War II. First, free trade was seen as a mechanism to create economic growth and to avoid another depression.³² Second, chang-

30. See *infra* Part III.A.1.

31. See *infra* Part III.A.2.; *WTO Membership*, *supra* note 14. In addition to China, the following nations have applied for WTO membership: Albania, Algeria, Armenia, Belarus, Cambodia, Chinese Taipei, Croatia, Estonia, Georgia, Jordan, Kazakhstan, Kirgыз Republic, Latvia, Lithuania, Former Yugoslav Republic of Macedonia, Moldova, Nepal, Panama, Russian Federation, Saudi Arabia, Seychelles, Sudan, Sultanate of Oman, Tonga, Ukraine, Uzbekistan, Vanuatu, and Vietnam. See *id.*

32. See *The Foundations of the World Trading System*, *supra* note 9.

ing notions of sovereign equality led to a belief that countries at different economic, social and political levels should be given different responsibilities in the world.³³ Third, the ideology of development made the development of the underdeveloped world a top international priority.³⁴

The GATT agreement fosters free trade through specific requirements and programs. The GATT requires that all members apply the principle of most-favored nation (MFN) treatment to all goods imported from other member countries, which means that each member must grant the trade goods of other members treatment no less favorable than that accorded to the trade goods of any other country.³⁵ The MFN clause ensures that no country is given any special trading advantage; similarly, it ensures that no country is discriminated against.³⁶ Related to the MFN clause, the principle of national treatment ensures that once goods have entered a market, they are treated no less favorably than the equivalent domestically produced goods.³⁷ Next, the GATT has fostered free trade through a series of negotiated rounds in which the contracting parties to the GATT have progressively decreased their tariff barriers, helping to fuel an incredible expansion in global trading.³⁸ The progressive lowering of tariffs, and the existence of a series of rules governing their use, has led to more predictability in international trade, and has increased market access

33. See ABDULQAWI YUSUF, *LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE INFLUENCE OF DEVELOPMENT NEEDS ON THE EVOLUTION OF INTERNATIONAL LAW* 26-27 (1982).

34. See U.N. CHARTER art. 55.

35. See *The Foundations of the World Trading System*, *supra* note 9; see also GATT art. I (MFN clause).

36. See *The Foundations of the World Trading System*, *supra* note 9.

37. See *id.*; GATT, *supra* note 7, art. 3.

38. See *The Foundations of the World Trading System*, *supra* note 9. In addition, Former Trade Representative Carla Hills recently argued: "[I]t is absolutely demonstrable that the explosion of trade over the past four decades has lifted more people out of poverty than ever before in world history. . . . Even a little bit of association with foreign markets provides these benefits." *National Press Club Morning Newsmaker with Former U.S. Trade Representative Carla Hills; Topic: World Trade Organization Ministerial Conference in Singapore*, Fed. News Serv., Dec. 6, 1996, available in LEXIS, Nexis Library, Fednew File. Hills concluded that "[w]e have enjoyed four decades of unparalleled growth in this nation's history. And that is in large measure because trade has been open." *Id.*

for many products.³⁹ Finally, the GATT has promoted fair and undistorted competition.⁴⁰

The first principle reflected in the GATT, changing notions of sovereign equality, led to a shift "from abstract and general norms of conduct which apply equally to all in spite of the differences in wealth and development, to purpose-oriented rules which take into account the concrete characteristics of the various members of the international community."⁴¹ The new international institutions created at this time, including the United Nations, the International Monetary Fund, and the GATT, were established to address issues of international peace and security⁴² and took into account the differences among nations.⁴³ The notion of differential rights and responsibilities under the GATT agreement is a product of this change in belief; international legal institutions moved from a notion that all nations were equal to a set of beliefs that focused on the differences between states and the need to take positive action to help those states at the bottom.⁴⁴

39. See *The Foundations of the World Trading System*, *supra* note 9.

40. See *id.*

41. YUSUF, *supra* note 33, at 27; see also Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347, 356-68 (1994) (describing the many departures from a free trade system for developing countries, including non-reciprocal tariff preferences and duty-free treatment).

42. See YUSUF, *supra* note 33, at 24.

43. See *id.* at 26-27.

44. See *id.* at 36; cf. Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 227 (1994) (arguing that the state has a duty to ensure that "vulnerable groups" participate in the efficient economy); Enrique R. Carrasco & Randall Thomas, *Encouraging Relational Investment and Controlling Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis*, 34 COLUM. J. TRANSNAT'L L. 539, 605-10 (1996) (proposing mechanisms that western investors should follow to help, rather than destabilize, developing countries). Developing countries used the United Nations and other international institutions as a forum to call for the adoption of an international legal principle that would recognize "the inappropriateness of the application of equal treatment and reciprocity among unequally developed countries." YUSUF, *supra* note 33, at 36. This led to the belief that there is a "right to differential treatment based, not on the market equivalence of transactions, but on the capability of the underdeveloped partner." *Id.* The Charter of Economic Rights and Duties of States, in Article 19, states:

With a view to accelerating the economic growth of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalized preferential, non-reciprocal and non-discriminatory treatment to developing countries in those fields of international economic co-operation where it may be feasible.

G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 54, U.N. Doc. A/9631 (1974).

In addition to changing notions of equality, international law was affected by the ideology of development, a belief that developing the underdeveloped world was the key to peace and justice throughout the world.⁴⁵ The most important role of international institutions, other than avoiding war, was to foster a "more rapid industrial and agricultural development of the economically underdeveloped three-quarters of the globe."⁴⁶ With these new international institutions, economic isolationism declined as a phenomenon, as international law began to focus on the economic integration of states.⁴⁷ This new ideology was best exemplified by the United Nations Charter, which called for "the promotion of higher standards of living, full employment and conditions of economic and social progress and development."⁴⁸

These ideological principles gave the GATT two major, and possibly conflicting, goals: 1) to promote free trade; and 2) to protect and help developing countries. Often, the mechanisms needed to protect developing countries conflicted with the goal of free trade because developing countries were exempt from many of the GATT requirements designed to foster free trade. With this ideological background, and with these principles in mind, a pressing issue is how to strike the balance between promoting free trade and protecting and helping developing countries.

B. *The GATT and Developing Countries*

When the original GATT was enacted, developing countries sought exemptions from the commitments made by the major developed countries.⁴⁹ During the 1950s and 1960s, developing countries lobbied to gain preferential access to developed countries' markets by paying lower tariffs on their export goods.⁵⁰

45. See YUSUF, *supra* note 33, at xvi-xvii.

46. Stanley D. Metzger, *Panel: Tariff Preferences and Developing Countries*, 60 PROC. AM. SOC'Y INT'L L. 84, 84 (1966) (introductory remarks).

47. See YUSUF, *supra* note 33, at 26.

48. U.N. CHARTER art. 55. As noted in Article 9 of the U.N. Declaration on Social Progress and Development: "Social progress and development are the common concerns of the international community, which shall supplement, by concerted international action, national efforts to raise the living standards of peoples" G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, at 50, U.N. Doc. A/7630 (1969).

49. DIANA TUSSIE, *THE LESS DEVELOPED COUNTRIES AND THE WORLD TRADING SYSTEM: A CHALLENGE TO THE GATT* 137 (1987).

50. See *id.*

Developing countries also sought the ability to protect their own internal market by levying higher tariffs on imports, by subsidizing their own industries, and by employing other emergency measures as necessary to protect their own infant industries.⁵¹ The GATT agreement ultimately embodied the objectives of the developing countries.⁵² It reflected the notion that developing countries should be afforded more protection than developed countries.⁵³ For example, developing countries were allowed to take protective action to "raise the general standard of living of their people."⁵⁴ In addition, developing countries were allowed to grant tariff protection to protect specific domestic industries from competition, or to limit outright the amount of imports that could come into the country.⁵⁵

In 1971, negotiations sponsored under the GATT set up the Generalized System of Preferences (GSP), which allows developed countries to set tariffs on the importation of certain products from developing countries at a tariff rate of zero.⁵⁶ The GATT GSP provision allowed "developed contracting parties . . . to accord preferential tariff treatment to products originating in developing countries . . . with a view to extending to such countries . . . generally the preferential tariff . . . without according such treatment to like products of other contracting parties."⁵⁷ Thus, developed countries are allowed to give a better tariff rate to developing

51. *See id.*

52. *See id.* at 137-38.

53. *See* GATT, *supra* note 7, art. 36. The GATT agreement states the general principle that less-developed contracting parties have special needs and that developmental goals must be recognized. *See id.* In fact, there is an explicit understanding that developing countries may "use special measures to promote their trade and development." *Id.*; *see also* GATT, *supra* note 7, art. 37 (stating the general notion that developed contracting parties have certain obligations to less-developed contracting parties to ensure that their economies are not hurt by developed countries' trading practices). Article 37 also sets up obligations to affirmatively act to help improve the economic situation of the developing contracting parties' economies. *See id.*; *see also* GATT, *supra* note 7, art. 38 (calling on developed countries to "collaborate in seeking feasible methods to expand trade for the purpose of economic development"). Developed countries are supposed to "keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less-developed contracting parties." *Id.*

54. GATT, *supra* note 7, art. 18.

55. *See id.*

56. *See* GATT Decision Establishing the Generalized System of Preferences, June 25, 1971, GATT B.I.S.D. (18th Supp.) at 24 (1972) [hereinafter GATT Decision].

57. *Id.*

countries than their MFN tariff, which normally should be the lowest tariff given.⁵⁸

Zero tariff treatment under the GATT is extremely valuable. The GATT gives discretion to individual developed countries to determine how they will administer their GSP program so long as they notify the other contracting parties of their rules.⁵⁹ This discretion allows the developed countries to determine which countries are eligible, and what specific products can gain the preferential zero tariff rate.⁶⁰

C. *The WTO and Developing Countries*⁶¹

Today, the original GATT agreement has been incorporated into the WTO agreement.⁶² In addition, the WTO agreement incorporated a number of agreements designed to further liberalize trade among its members.⁶³

The various WTO agreements use several methods to provide special benefits to developing countries.⁶⁴ Some provisions, which

58. See JACKSON ET AL., *supra* note 8, at 443-54. Under GATT, and now under the WTO, member countries negotiate a series of multilateral commitments in setting the tariff schedule on numerous products from all members. *See id.* As a requirement of the GATT/WTO, member countries must promise that the lowest tariff that they give to any one country is given to all members. *See id.* Thus, the United States, for example, gives its MFN tariff rate to all members of the WTO, and to other countries, such as China, by separate agreement. The United States only uses its non-MFN tariff for such outlaw states as Libya and North Korea.

59. See GATT Decision, *supra* note 56, at 25.

60. *See id.*

61. Part I.C describes the six most important parts of the WTO agreement that offer special advantages to developing country members. However, numerous other provisions in the WTO Agreement give special benefits to developing countries. *See, e.g.,* Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1A, *reprinted in FINAL ACT, supra* note 13, at 43; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1A, *reprinted in FINAL ACT, supra* note 13, at 69; Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1A, *reprinted in FINAL ACT, supra* note 13, at 117; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1A, *reprinted in FINAL ACT, supra* note 13, at 145 (governing the ability to apply anti-dumping duties against other members); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1A, *reprinted in FINAL ACT, supra* note 13, at 171 (dealing with issues of determining customs valuation).

62. See *A Summary of the Final Act of the Uruguay Round, supra* note 14.

63. *See id.*

64. See Committee on Trade and Dev., *A Description of the Provisions Relating to*

are aspirational in nature, recognize the interests of developing countries, but do not create any concrete legal responsibilities.⁶⁵ Others provide important legal norms, such as requiring developing countries to meet fewer obligations than developed countries, thus allowing developing countries to protect their local industries far more than developed countries are allowed to do.⁶⁶ Similarly, some WTO provisions allow developing countries longer time periods to implement certain obligations.⁶⁷ Finally, still other provisions, which again are more aspirational and do not create enforceable legal obligations, provide for formal technical assistance from developed countries to developing countries.⁶⁸ The following discussion illustrates the substantive impact of applying the above methods to specific agreements within the WTO that grant various forms of preferences to developing countries.

1. *Agreement on Trade-Related Investment Measures.*⁶⁹ The purpose of the Agreement on Trade-Related Investment Measures (TRIMs) within the WTO treaty is to prevent non-tariff related barriers to trade.⁷⁰ Countries use non-tariff barriers, or TRIMs, to protect their markets by limiting the freedom of foreigners to negotiate with willing parties in the country.⁷¹ For example, laws known as domestic local content requirement laws require enterprises located within the country to purchase certain amounts of locally produced goods.⁷² Under the WTO's TRIMs agreement, such local content requirements are impermissible TRIMs because they restrict and distort trade by limiting the freedom of the foreign party to find the best and cheapest products.⁷³

Developing and developed countries are treated differently under the TRIMs agreement, which takes into account "the partic-

Developing Countries in the Uruguay Round Agreements, Legal Instruments and Ministerial Decisions, COM.TD/W/510 (Nov. 2, 1994), at 5.

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1A, *reprinted in* FINAL ACT, *supra* note 13, at 139 [hereinafter TRIMs Agreement].

70. *See A Summary of the Final Act of the Uruguay Round*, *supra* note 14.

71. *See id.*

72. *See id.*

73. *See id.* Other impermissible TRIMs include trade balancing requirements that restrict the volume or value of imports foreign enterprises may purchase or use. *See id.*

ular trade, development and financial needs of developing country Members."⁷⁴ The real benefit to developing countries is that while developed countries must eliminate all TRIMs within 2 years after the WTO goes into force, developing country members have five years to come into compliance.⁷⁵ Even after five years, when developing country members technically must be in compliance with the agreement, they are given the power to "deviate temporarily from the provisions."⁷⁶

2. *Agreement on Subsidies and Countervailing Measures.*⁷⁷

The WTO's Agreement on Subsidies and Countervailing Measures requires members to eliminate most government subsidies to industry.⁷⁸ Subsidies have a protective and anti-competitive effect that is antithetical to the promotion of free trade. At the same time, the WTO agreement recognizes "that subsidies may play an important role in economic development programmes of developing country Members."⁷⁹ It allows developing countries to continue subsidies for up to eight years, and, even after the end of the phase-in period, to have subsidies, albeit those that have a smaller impact than before.⁸⁰

3. *Agreement on Safeguards.*⁸¹ The purpose of the Agreement on Safeguards is to allow all member states to use temporary and limited safeguards to protect a specific domestic industry from "an unforeseen increase of imports" of any product likely to

74. TRIMs Agreement, *supra* note 69 (preamble). This is an example of a provision that recognizes the interests of developing countries.

75. *See id.* art. 5(2). This is an example of a provision that grants a longer time-frame for implementation.

76. *See id.* art. 4. This is an example of a provision that allows developing countries to meet fewer obligations than developed countries because developed countries have no right to ever deviate from those provisions.

77. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1A, *reprinted in* FINAL ACT, *supra* note 13, at 229 [hereinafter Subsidies Agreement].

78. *See id.* art. 3; *A Summary of the Final Act of the Uruguay Round*, *supra* note 14.

79. Subsidies Agreement, *supra* note 77, art. 27(1). This is a provision that recognizes the interests of developing country members.

80. *See id.* art. 27(3)-(4); *A Summary of the Final Act of the Uruguay Round*, *supra* note 14.

81. Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1A, *reprinted in* FINAL ACT, *supra* note 13, at 273 [hereinafter Safeguards Agreement].

cause "serious injury to the industry."⁸² Safeguards refer to a number of mechanisms a country may use to protect local industries from destructive foreign competition.⁸³ The agreement tightens the requirements for when safeguards are appropriate, and limits their duration.⁸⁴ Again, members deemed "developing countries" get special advantages. For example, developing countries may impose a safeguard for up to two years to protect their own industries,⁸⁵ whereas developed countries may not impose a safeguard measure against products that originate in developing countries unless very stringent requirements are met, and even then the developed country may only impose the safeguard for a maximum of 200 days.⁸⁶

4. *General Agreement on Trade-Related Aspects of Intellectual Property Rights.*⁸⁷ The General Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) has increased the international protection of intellectual property.⁸⁸ The agreement requires WTO members to treat foreign holders of intellectual property rights no less favorably than they treat domestic holders of intellectual property rights.⁸⁹ In addition, members agree to comply with many of the substantive provisions of the Berne Convention for the protection of literary and artistic works, and of the Paris Convention on patents.⁹⁰ As with other parts of the WTO agreement, this agreement confers a significant benefit on developing countries: Developing countries have four years before they must implement the agreement.⁹¹

82. *A Summary of the Final Act of the Uruguay Round*, *supra* note 14.

83. *See* JACKSON ET AL., *supra* note 8, at 609-12.

84. *See id.*; *A Summary of the Final Act of the Uruguay Round*, *supra* note 14.

85. *See* Safeguards Agreement, *supra* note 81, art. 9(1). This is a provision that allows developing countries to meet fewer obligations.

86. *See id.* arts. 6, 9(2).

87. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1C, *reprinted in* FINAL ACT, *supra* note 13, at 319 [hereinafter TRIPs Agreement].

88. *See A Summary of the Final Act of the Uruguay Round*, *supra* note 14.

89. *See id.*

90. *See id.*

91. *See* TRIPs Agreement, *supra* note 87, art. 65(2). This provision provides developing countries with a longer time-frame for implementation of the agreement. Developing countries also have an additional five years before they must implement the rules on patents. *See id.* art. 65(4).

5. *Agreement on Import Licensing Procedures*.⁹² The Agreement on Import Licensing Procedures increases transparency and predictability⁹³ by requiring countries to publish sufficient information so that foreign traders will be able to know the basis on which import licenses are granted. It also requires that traders be notified about any changes in a country's import licensing procedures.⁹⁴ Transparency is important because if the rules are not clearly stated and available, foreign traders would be at a serious disadvantage because they would not know how to comply with local rules, and therefore might not be able to secure a license.

Again, developing countries receive special treatment. The agreement takes "into account the particular trade, development and financial needs of developing country Members."⁹⁵ Developing countries are not required to incur additional "administrative and financial burdens" to comply with the enhanced disclosure requirements.⁹⁶ At the same time, developed countries are expected to give special attention to developing countries when issuing scarce licenses for entry of goods into their countries.⁹⁷

6. *General Agreement on Trade in Services*.⁹⁸ The General Agreement on Trade in Services attempts to remove or reduce barriers to the introduction of services from one country into another country.⁹⁹ The agreement essentially requires a most-favored nation approach, and requires transparency through the publication of all relevant laws and regulations.¹⁰⁰ The agreement

92. Agreement on Import Licensing Procedures, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1A, *reprinted in* FINAL ACT, *supra* note 13, at 221 [hereinafter Licensing Agreement].

93. *See id.* (preamble).

94. *See A Summary of the Final Act of the Uruguay Round*, *supra* note 14.

95. Licensing Agreement, *supra* note 92 (preamble). This provision recognizes the interests of developing countries.

96. *Id.* art. 3(5)(a)(iv). This provision allows developing countries to meet fewer obligations than developed countries if it is too expensive for them to comply.

97. *See id.* art. 3(5)(J). This provision recognizes the special needs of developing countries.

98. General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, *supra* note 13, Annex 1B, *reprinted in* FINAL ACT, *supra* note 13, at 283 [hereinafter Services Agreement].

99. *See A Summary of the Final Act of the Uruguay Round*, *supra* note 14.

100. *See id.*

attempts to open up as many service sectors as possible to competition from foreign service providers.¹⁰¹

As with other agreements, the General Agreement on Trade in Services has specific special provisions designed to help developing countries.¹⁰² Developed countries are urged to recognize the "needs of . . . developing country Members, for flexibility in this area."¹⁰³ Developing countries are also not required to open as many service sectors to competition as developed countries must open.¹⁰⁴

II. CHINA AND THE PROBLEM OF LACK OF DEFINITION

A. *The Current Dispute 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.¹⁰⁵ China submitted an application to become a founding member of the WTO on January 1, 1995, but only as a developing country.¹⁰⁶ The United States and other western industrialized countries prevented China from becoming a member at that time,¹⁰⁷ chiefly because these countries disputed the claim that China qualified as a developing country.¹⁰⁸ The United States

101. *See id.*

102. *See id.*

103. Services Agreement, *supra* note 98, art. XV(1). This provision recognizes the special needs of developing countries.

104. *See id.* art. XIX(2). This provision requires developing countries to meet fewer obligations than developed countries. The Services Agreement also calls on developed countries to provide technical assistance to developing countries. *See id.* art. XXV(2).

105. *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, Curmws File (reporting text of Senior Minister Lee Kuan Yew of Singapore's speech at the Create 21 Asahi Symposium in Osaka, Japan) (noting that China "resents and resists [the U.S.'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.

106. *See Parker, supra* note 2.

107. *See id.*

108. *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, available in 1996 WL 10831126. The United States, through the GATT Working

has been adamant that China enter the WTO as a developed country because if China were to enter the WTO as 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.¹⁰⁹

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 on the issues regarding the alignment of China's economy with international trade standards, but China will not compromise on its demand to come into the WTO as a developing nation.¹¹⁰ 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."¹¹¹ 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 raised by a few countries which exceed the level of China's economic development."¹¹²

Party on China's accession, has isolated five major issues that China must address before it can be admitted to the GATT: 1) The scope and nature of China's non-tariff import protection; 2) the role of foreign trade corporations and other large state trading entities; 3) China's claim that agriculture should be exempt because China is a developing nation; 4) the scope and direction of China's price planning; and 5) foreign exchange restrictions that might be used to frustrate GATT requirements. *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 numerous obstacles to China's admission, including the lack of transparency of China's market, the role of state-trading enterprises and the uniform administration of their trade regime. *See id.* Sutherland focused on China's need to "take these concerns seriously." *Id.*

109. *See 1996 National Trade Estimate: China, People's Republic of* (visited Mar. 7, 1997) <<http://www.ustr.gov/reports/nte/1996/china.html>>; *see also supra* Part I.B. (describing permissive treatment of developing countries under the GATT).

110. *See Parker, supra* note 2. 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." *Id.*

111. *China Researchers Dispute US Denial of Containment Policy, supra* note 105.

112. *Taiwan, USA, Trade Issues*, New China News Agency Domestic Serv., July 31,

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.¹¹³ Mickey Kantor, former U.S. Trade Representative, argues that, "we all agree that for certain purposes, China, of course, is a developed country."¹¹⁴ One American trade official noted that, "overall, as a trade regime, we are dealing with an enormously important, enormously large, powerful player."¹¹⁵ The United States does not want to give China

1995, available in LEXIS, Nexis Library, BCSWB File; see also *WTO Admission*, Zhongguo Tongxun She News Agency, July 28, 1995, available in LEXIS, Nexis Library, BCSWB File (reporting on China's active and realistic attitude towards re-entering GATT despite its unwillingness to accept unreasonable conditions); *Talks Resumed in Geneva on China Rejoining GATT*, New China News Agency, May 11, 1995, available in LEXIS, Nexis Library, BCSWB 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, BCSWB file (noting that President Jiang Zemin recently referred to China as "the world's largest developing country"); Ruth Youngblood, *China Issues Warning Over WTO Admission*, UPI, May 13, 1995, available in LEXIS, Nexis Library, UPI File (Vice Premier Li Lingqing warned that "China will not jeopardize its national interest to enter the WTO"); *Talks Resumed on China's Rejoining GATT*, Xinhua News Agency, May 9, 1995, available in LEXIS, Nexis Library, Non-US File ("China has been calling for a realistic stand by major contracting parties on its admission into GATT/WTO as a developing country, with full consideration of its still weak economic basis despite its strong economic growth over past years."); *China Maintains Hard-Line on WTO Status*, Agence France Presse, May 3, 1995, available in LEXIS, Nexis Library, Curmws File (Zhu Qizhen, Vice-Chairman of the Chinese Parliament's Foreign Affairs Committee, stated that China could "only embrace the obligations of membership as a developing nation").

The United States is quite adamant that China come into the WTO as a developed country which has been highly criticized by China as being "hard." See *Beijing Praises EU's China Policy, Slams "Hard" US Stance*, Agence France Presse, July 16, 1995, available in LEXIS, Nexis Library, Curmws File. The United States is continuing to hold up China's admission to the WTO on the demand that China enter as a developed country. See Youngblood, *supra*.

113. See *Gattsmacked*, *ECONOMIST*, Mar. 18, 1995, at 16.

114. Rone Tempest, *U.S. Will Back China's Bid to Join WTO*, *L.A. TIMES*, Mar. 14, 1995, at D2.

115. *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. 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 U.S. TRADE REPRESENTATIVE, FOREIGN TRADE BARRIERS 43 (1997) [hereinafter FOREIGN TRADE BARRIERS].

an economic advantage by allowing it to enter the WTO as a developing country.¹¹⁶ 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.¹¹⁷

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.¹¹⁸ This softened rhetoric includes a less harsh stance in the United States' position against China's admission to the WTO.¹¹⁹ It is not clear, however, how far the United States will go.¹²⁰ 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.¹²¹ Opening

Li Tieying, CCP Central Committee Political Bureau Member, responded to U.S. 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; Li Tieying Addresses "The World Economy and China" Conference, China News Agency Domestic Serv., Apr. 13, 1995, available in LEXIS, Nexis Library, BBCSWB File.

116. See *infra* Part II.B.

117. See *id.*

118. See *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, regional concerns and nuclear proliferation. See *id.*; see also *Pragmatic and Proper Line in U.S. Relations with China; Clinton Gives Trade and Long-Term Influence Priority*, L.A. TIMES, Nov. 26, 1996, at B6 (noting that human rights issues are now behind trade and security issues on the United States' agenda with China).

119. See Edward Luce & Guy de Jonquie'res, *Confusion Greets Clinton's Big Deal*, FIN. TIMES, Nov. 26, 1996, at 6. President Clinton told President 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 U.S. Needs China—and Vice Versa*, NEWSDAY, Nov. 26, 1996, at A33.

120. See *infra* notes 128–29 and accompanying text.

121. See *supra* note 108. U.S. Trade Representative Charlene Barshefsky has also not-

markets, however, does not necessarily mean that China must meet the same standards as would be required of a fully developed country.¹²²

In response to changes in the United States's position, China has been sending mixed signals as to how willing it will be to open its market to foreign trade.¹²³ At the recent APEC summit, President Jiang Zemin expressed a desire to be flexible in addressing China's admission to the WTO.¹²⁴ He highlighted China's re-

ed that China must improve its "open market policy" before it could join the WTO. *U.S., China at Odds Over WTO Membership*, Japan Econ. Newswire, Nov. 21, 1996, available in LEXIS, Nexis Library, Curnws File.

122. See Michael Richardson, *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 *U.S. 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 U.S. 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. See *id.* Former Trade Representative and Commerce Secretary Mickey Kantor conceded that for some purposes, China is "a developing country." Tempest, *supra* note 114, at D2. United States trade officials have agreed that a compromise could be reached where "China will be granted extra time . . . before it will be required to phase out certain tariffs and protective trade restrictions." *Id.*; see also Jurek Martin, *Differences Treated with Respect*, FIN. TIMES, Nov. 22, 1996, at 18 (stating that developing China into a fully fledged market economy could necessitate important social, political and economic change).

123. See *China Stresses Cooperation over Liberalisation in Asia-Pacific*, Agence France Presse, Nov. 26, 1996, available in LEXIS, Nexis Library, Curnws File. The Chinese Communist Party's mouthpiece, *The People's Daily*, argued that China would not make concessions in trade liberalization without "deeper technological cooperation." *Id.*

124. See *US and Chinese Presidents To Continue "Strategic" Dialogues, Look to Future*, *supra* note 112; see also *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-Premier Qian Qichen regarding U.S. 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 *Japan, Australia Agree to Back China's WTO Bid*, Japan Econ. Newswire, Nov. 21, 1996, available in LEXIS, Nexis Library, Curnws File. This leaves the United States as the principle roadblock in the path toward China's admission to the WTO. See *id.* There also seems to be a growing international consensus in favor of China's admission to the WTO, which was recently expressed at the 1996 APEC Ministers meeting in Manila. See Stanislav Bychkov, *APEC Favors China's, Taiwan's Admission to WTO*, The Russian Info. Agency ITAR-TASS, Nov. 21, 1996, available in LEXIS, Nexis Library, Curnws File. Senior officials of all 18 members of APEC "unanimously agreed to support the applications of Beijing and Taipei for WTO membership." *Id.* Major European nations also support China's admis-

cent reduction in import 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 2000.¹²⁵ He indicated a desire to accelerate the negotiation process.¹²⁶ 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.¹²⁷

sion to the WTO, and the Foreign Trade Association, which represents the importing retail trade in Europe, has been lobbying for such support. See *FTA Welcomes Brittan's Statement on China's Accession to WTO*, reprinted in REUTER EUR. COMMUNITY REP., Nov. 20, 1996, available in LEXIS, Nexis Library, Curnws File.

125. See *Chinese President's APEC Address*, Xinhua News Agency, Nov. 25, 1996, available in LEXIS, Nexis Library, BBCSWB File. China has also proposed to cut tariffs further to an average of 15% by the year 2000. See Ray Heath, *Steady Convergence to Free Trade*, SOUTH CHINA MORNING POST, Nov. 17, 1996, at 5, available in LEXIS, Nexis Library, Curnws File. Of course, tariff reduction may not mean that China's market will be any more open to foreign trade because of other state interventions inherent in a planned economy. See *infra* Part II.B. The current reduction to 24% only applies to 4000 items. See Heath, *supra*. In addition, the lower tariffs were not in key sectors, such as the automobile industry, where there is great interest in exports by Europe and the U.S.; instead the lower tariffs were in sectors such as raw materials which are of less interest to western exporters. See Sophie Roell, *China Offers to Cut Tariffs to 15%*, FIN. TIMES, Nov. 26, 1996, at 6. Myriad other restrictions, such as quotas and licensing requirements, also hurt western exports. See *id.*

126. 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." *President Jiang Zemin, Premier Li Peng in Talks with U.S. Secretary of State*, Xinhua News Agency, Nov. 20, 1996, available in LEXIS, Nexis Library, BBCSWB File. However, there is still disagreement between China and the U.S. over China's WTO bid. See *U.S., China at Odds Over WTO Membership*, *supra* note 121.

127. 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 whether the United States would accept such a compromise. See *id.* C. Fred Bergsten, director of the Institute for International Economics, argues that "there is still a big debate about this in Beijing, which is why I'm not very optimistic about an agreement anytime soon." Steven Pearlstein, *Both Sides Lack Consensus: Beijing Says US to Speed Talks on Bid to Join WTO*, INT'L HERALD TRIB., Nov. 26, 1996, available in LEXIS, Nexis Library, Curnws File. Nicholas Lardy, an Asia expert at the Brookings Institute, argues that the best the United States can hope for is that China

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."¹²⁸ China continues to resist any limit on its ability to use extra safeguards to secure sufficient protection for its domestic industries.¹²⁹ Reading between the lines, there does seem an ability to craft a compromise based upon the above 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 the 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 approximately one billion potential consumers.¹³⁰ On the other hand, U.S. industries that sell in the domestic market fear that Chinese companies will use increased access to flood the U.S. market, resulting in higher trade surpluses.¹³¹ 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.¹³²

will agree to make a small down payment toward opening its markets and reducing state control of its economy, with a promise to complete its readjustment over 10-15 years. *See id.* However, others argue that such a promise would be useless based upon China's reluctance to abide by previous bilateral trade agreements on textiles and copyright laws. *See id.*

128. Foo Choy Peng, *U.S. Holds to Line on WTO: Applause for Beijing as Christopher Offers Intensive Talks*, SOUTH CHINA MORNING POST, Nov. 22, 1996, at 4, available in LEXIS, Nexis Library, Curnws File (quoting former Secretary of State Warren Christopher). Christopher also noted that there must be an agreement that calls for "effective market access commitments and adherence to WTO rules." *Id.* However, he emphasized that "[w]e can both profit by joining to establish and uphold the rules that open markets and make trade more fair." *Id.*

129. *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. 46, 51-53 (1994).

130. *See* Pearlstein, *supra* note 127.

131. *See id.*

132. *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. *See* Steven Mufson, *China Sends Mixed Signals as Christopher Arrives*, WASH. POST, Nov. 20, 1996, at A21. The newspaper of the ruling Communist Party in China,

It also, however, might provide China with a stable economic position well into the next century.¹³³ 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.¹³⁴ Many commentators believe that 1997 is the critical year for these difficult issues to be resolved because of President Clinton's reelection.¹³⁵

B. *Problems if China is Admitted as a Developing Country*

Absent requirements that China meet tougher standards than those set for developing countries, China would not have to make significant improvements in its trade policies even if it were in the WTO.¹³⁶ Thus, while it is extremely important that China ulti-

The People's Daily, recently attacked the United States for its "xenophobia" and its "wild arrogance and haughtiness." *Id.* To further cement its position as a world power, China would like to join the WTO, but many within China worry that such a move would limit China's ability to act in its self-interest. *See id.* Opponents of membership within China point to the rapid growth China is experiencing as a non-member, and the incredible demand of foreigners to do business in China. *See id.* China seeks prestige by joining the WTO, but worries about the constraints of the multilateral arbitration procedures. *See Phasing Mainland Entry to WTO May Be the Key*, SOUTH CHINA MORNING POST, Nov. 18, 1996, at 3, available in LEXIS, Nexis Library, Curnws File.

133. *See* Mure Dickie, *China Says WTO Exclusion Unjust, Warns U.S. on MFN*, REUTERS EUR. BUS. REP., Nov. 13, 1996, available in LEXIS, Nexis Library, Curnws File.

134. *See Timetable Set on Talks for China Joining WTO*, INVESTOR'S BUS. DAILY, Nov. 26, 1996, available in LEXIS, Nexis Library, Curnws File.

135. *See* Lorien Holland, *Sino-US Relations Have "Window of Opportunity"*, Agence France Presse, Nov. 15, 1996, available in LEXIS, Nexis Library, Curnws File. David Shambaugh, a political science and international relations professor at George Washington University, argues that "[t]here is a real window of opportunity to establish good relations between China and the United States, because the anti-China lobby in the U.S. has been effectively sidelined." *Id.* In a recent speech, Sir Leon Brittan argued that this is the critical time to restart negotiations with China on its membership to the WTO. *See Extracts of a Speech Given by Sir Leon Brittan—Trade, Economic Development and Sino-European Relations—International Herald Tribune Conference*, reprinted in COMM'N OF THE EUR. COMMUNITIES RAPID, Nov. 14, 1996, available in LEXIS, Nexis Library, Curnws File. Brittan argued that the U.S. is ready to heed Europe's call for "decisive engagement" on this issue. *Id.* Brittan also called for a flexible approach that would allow China time before full implementation of WTO rules. *See id.*

136. *See Kantor News Conference*, *supra* note 29. Secretary Kantor noted that America's trade deficit with China rose 14% from 1995-1996. *See id.* In September 1996, the deficit with China was \$4.7 billion, compared with a deficit of \$3.8 billion with Japan. *See id.* Secretary Kantor noted that the rate of increase in the deficit with China was decreasing at a fairly impressive rate. That's due to a number of factors, not the least of which is we've made some progress . . . in opening up markets in China. But we have a long way to go. We need to make sure the Chinese government lives up to their obligations under our bilateral and trade agree-

mately be admitted to the WTO, it must not be admitted as a developing country. China is a textbook example of a state that has enabled its companies to do well in the global market while limiting reciprocal access to its domestic market.¹³⁷ China's economic system is incompatible with the goals and policies of the WTO.¹³⁸ China has policies that are inconsistent with the six agreements discussed in Part I.C. It employs a wide range of formal trade barriers that include tariffs, import licenses, and subsidies.¹³⁹ In less obvious ways, China acts inconsistently with the principles behind the WTO by promulgating state plans that "control decisions on issues such as plant location, foreign exchange and application of regulations."¹⁴⁰ There is a lack of transparency in nearly all aspects of Chinese regulations, hindering market access.¹⁴¹ China is currently violating the standards set by the WTO in six of the most important agreements as described in Part I.C.: TRIMs, subsidies and countervailing measures, the Agreement on Safeguards, TRIPs, Import Licensing, and Trade in Services.

First, China currently employs certain Trade Related Investment Measures that limit foreign access to its domestic market.¹⁴² For example, China currently limits access to foreign exchange, effectively preventing investors from removing profits from China in their own currency.¹⁴³ Foreign investors are left with

ments, that they respond in a way that would be helpful in terms of the specific plans we're going to put on the table in the Philippines as a member of APEC, and of course, that they . . . advance a commercially reasonable program to accede to the World Trade Organization.

Id.

137. See Greg Mastel, *Earning WTO Admission*, J. COM., Nov. 19, 1996, at 6A [hereinafter Mastel, *Earning WTO Admission*], available in LEXIS, Nexis Library, Curmws File.

138. *Id.*

139. See Greg Mastel, *Beijing at Bay; China and International Trade*, FOREIGN POL'Y, Sept. 1996, at 26 [hereinafter Mastel, *Beijing at Bay*].

140. *Id.*

141. See 1996 *National Trade Estimate: China, People's Republic of*, supra note 109.

142. See Mastel, *Earning WTO Admission*, supra note 137, at 6A.

143. See Parsons, supra note 129, at 52. A panoply of regulations restrict the ability of foreign investors in China to take profits out of the country in hard currency. Article 3 of the Provisional Regulation for Foreign Exchange Control of the People's Republic of China states that China "pursues the policy of centralized control and unified management of foreign exchange by the state." Provision Regulations for Foreign Exchange Control of the People's Republic of China, art. 3 (adopted Dec. 5, 1980, promulgated Dec. 18, 1980), translated in 1 China L. for Foreign Bus. Reg. (CCH) ¶ 8-550. In 1983, China set up detailed rules to implement the 1980 regulation. Article 16 requires foreigners to get "the approval of competent authorities" before exchanging local for foreign

profits in local Chinese currency, which is relatively worthless because it is not freely convertible.¹⁴⁴ 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).¹⁴⁵ This administrative regime hinders foreign investment; further, it does not meet the strict requirements against TRIMs set by the WTO. If admitted as a developing country member, however, China would be permitted to continue these practices.¹⁴⁶

In addition, as a planned economy, it is very difficult to see where the state ends, and private enterprise begins.¹⁴⁷ The Chinese government engages in extensive amounts of state planning regarding economic decisions.¹⁴⁸ 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.¹⁴⁹ Such quotas restrict imports, in viola-

currency. See Detailed Rules for the Implementation of Foreign Exchange Control Regulation Governing Enterprises with Overseas Chinese Investment, Foreign Enterprises with Foreign Capital and Sino-Foreign Joint Ventures, art. 16, (approved July 19, 1983, promulgated Aug. 1, 1983), translated in 1 China L. for Foreign Bus. Reg. (CCH) ¶ 8-610.

144. See Parsons, *supra* note 129, at 52.

145. See *Foreign Exchange Balancing*, in CHINA INVESTMENT MANUAL 170, 180 (Donald Lewis ed., 1994); see also Lucile A. Barole & Thomas E. Jones, *Getting Strict with Foreign Exchange*, CHINA BUS. REV., Sept.-Oct. 1994, at 52-53 (noting complicated procedures for foreign companies to convert Chinese currency into hard currency).

146. See *supra* Part I.C.1.

147. See *Government Structures*, in CHINA TRADE AND MARKETING MANUAL 181, 182 (Donald Lewis ed., 1994).

148. 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 182-85. 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 185-87.

149. See 1996 National Trade Estimate: China, People's Republic of, *supra* note 109.

tion of WTO norms.¹⁵⁰ 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.¹⁵¹ Prices will have little effect on which goods are purchased because supply and demand are determined by government agencies, and not by market forces.¹⁵² Central planning, then, allows countries like China to circumvent the market liberalization objectives of the WTO.¹⁵³

A final impermissible TRIM is the restriction imposed by the government on "the types and numbers of entities within China which have the legal right to engage in international trade."¹⁵⁴ The government restricts most foreign trade in China to that carried out by Foreign Trade Corporations (FTCs).¹⁵⁵ 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.¹⁵⁶ Foreign transactions can be consummated only through approved FTCs.¹⁵⁷

150. *See id.*

151. *See* Parsons, *supra* note 129, 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 little influence over the quantity, source and composition of imports. The economy runs according to the state plan.

Id. Thus, this state involvement is merely one subsidy that distorts the outcome of the GATT.

152. *See id.*

153. *See id.*

154. *Id.*

155. *See Foreign Trade Corporations, in CHINA TRADE AND MARKETING MANUAL, supra* note 147, at 178.

156. *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. *See id.* Examples of FTCs include: China National Native Produce and Animal By-products Import and Export Corporation, China National Light Industrial Products Import and Export Corporation, China National Chemicals Import and Export Corporation, China National Machinery Import and Export Corporation, China National Silk Import and Export Corporation, and China National Tobacco Import and Export Corporation. *See* Hong Kong Trade Dev. Council, *Major National Import and Export Corporations, in CHINA'S FOREIGN TRADE SYSTEM* app. 3 (1991). Thus, each of these FTCs can trade in the products that are represented by their name.

157. *See Foreign Trade Corporations, supra* note 155, at 179-80.

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.¹⁵⁸ For example, risk is shifted to the foreign party,¹⁵⁹ Chinese companies' liability is severely limited, and a change in economic policy by the Chinese government does not constitute a force majeure.¹⁶⁰ 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.¹⁶¹

A second WTO agreement that China violates is the limit on government subsidies because the Chinese government gives direct and indirect subsidies to industry.¹⁶² Direct subsidies include payments to exporters to make up for the lower world market price for various goods,¹⁶³ allowing Chinese companies to export goods at lower prices than they actually receive 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.¹⁶⁴ 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.

158. See *id.* at 180.

159. See *Standard Contract of Sales*, in CHINA TRADE AND MARKETING MANUAL, *supra* note 147, at 91, 91-94. One of the most unfair provisions in these standard sales contracts, Section 7, regards the arbitration of trade disputes. See *id.* 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 U.S. 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.

160. See *Contracts-Foreign Related*, in CHINA TRADE AND MARKETING MANUAL, *supra* note 147, 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 (6th ed. 1990). They are also referred to as "act of God" clauses. *Id.*

161. See *Contracts-Foreign Related*, *supra* note 160, at 70.

162. See *1996 National Trade Estimate: China, People's Republic of*, *supra* note 109.

163. See *id.*

164. See *id.*

Third, China is in violation of WTO norms on safeguards because its current tariff rates are especially high in certain key industries.¹⁶⁵ The government uses these high tariffs as part of a national policy to protect certain sectors of the economy from competition.¹⁶⁶ In particularly important sectors, tariff rates on goods are often 150%.¹⁶⁷ Although average tariff rates are declining, certain tariffs are significantly higher than that average.¹⁶⁸ Further, the lack of transparency in China's tariff system¹⁶⁹ means that the same product may be assessed different tariff rates.¹⁷⁰ Frequently, special exemptions from the published tariff rates are available, but unknown to exporters.

Fourth, China is not in compliance with basic protection for intellectual property required by the WTO.¹⁷¹ Even after signing the 1992 memorandum of understanding with the United States, China has failed to enforce international intellectual property standards.¹⁷²

Fifth, China is in violation of WTO norms regarding the need for transparency and predictability in licenses.¹⁷³ The myriad import licensing requirements have created "an effective import barrier to the Chinese market."¹⁷⁴ No products may be imported into China without a license, which must be issued by the government.¹⁷⁵ Government officials at the Ministry of Foreign Trade

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.*

171. *See id.*

172. *See* Geoffrey Crothall, *Close All Pirate CD Factories, U.S. 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 U.S. Trade Act's Special 301 provision. *See id.* In 1992, the U.S. 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. *See id.*; *see also* FOREIGN TRADE BARRIERS, *supra* note 115, at 43-44 (discussing Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Republic of China on the Protection of Intellectual Property).

173. *See* 1996 National Trade Estimate: China, People's Republic of, *supra* note 109.

174. *Id.*

175. *See* *Import and Export Controls*, China Bus. L. Guide (CCH Int'l) ¶ 80-252, at 82,201-82,501 (Sally A. Harpole ed., 1991).

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.¹⁷⁶ 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.¹⁷⁷

Sixth, China's closed market violates the requirements imposed by the General Agreement on Trade in Services.¹⁷⁸ At present, foreign service providers may only operate "under selective 'experimental' licenses and are restricted to specific geographic areas."¹⁷⁹ The rules regulating these experimental licenses are not transparent, which leads to even more limits on market access by foreigners.¹⁸⁰ Foreign service 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.¹⁸¹ Restrictions on foreign service providers have the effect of closing off most of China's market to foreign competition.¹⁸²

Current Chinese practices, as outlined above, do not conform to the WTO requirements for developed countries. If China were admitted to the WTO as a developing country member, however, it could continue its current practices.¹⁸³ China has indicated through long years of practice that it will rise only to the minimum level of economic reform mandated by outside pressure.¹⁸⁴ Because developing countries are subject to less stringent requirements, China will have no incentive to ever liberalize its practices.¹⁸⁵ Once China is a member of the WTO, the United States will have lost the most significant leverage that it has had—continued blocking of China's admittance to the WTO and

176. See *1996 National Trade Estimate: China, People's Republic of*, *supra* note 109.

177. See *id.*

178. See *Import and Export Controls*, *supra* note 175, ¶ 80-252, at 82,204 (stating that China has restricted the importation of consumer and luxury goods in order to protect domestic industry).

179. *1996 National Trade Estimate: China, People's Republic of*, *supra* note 109.

180. See *id.*

181. See *FOREIGN TRADE BARRIERS*, *supra* note 115, at 53-55.

182. See *id.*

183. See *supra* Part I.C.

184. See *supra* notes 136-41 and accompanying text.

185. See *Mastel, Beijing at Bay*, *supra* note 139, at 26.

the uncertainty of bilateral negotiations.¹⁸⁶ This leverage seems to be effective: "China has suggested it would make no additional, immediate reforms" once it joins the WTO.¹⁸⁷ Thus, it is imperative that China's status be worked out prior to its admission.

C. Importance of China's Membership in the WTO

Despite China's non-compliance with 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.

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.¹⁸⁸ China is the eleventh largest exporter and importer in the world, exporting \$122 billion worth of products each year, and importing \$115.7 billion a year.¹⁸⁹ 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."¹⁹⁰

186. See *id.*

187. *Id.*

188. See Youngblood, *supra* note 112; see also Kwan Weng Kin, *China in WTO Will Play by Rules*, STRAITS TIMES (Singapore), Nov. 20, 1996, at 16, available in LEXIS, Nexis Library, Cumws 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." *Id.*

189. See WORLD TRADE ORG., INTERNATIONAL TRADE TRENDS AND STATISTICS 75 (1995) [hereinafter INTERNATIONAL TRADE TRENDS AND STATISTICS]. The 1994 figures for Chinese exports showed a 32% increase from the prior year, and there was an 18% increase between 1990-1994. See *id.* Imports increased 11% from the previous year, and 21% from 1990-1994. See *id.* For comparison, Japan exported \$397 billion in 1994 and imported \$275 billion in 1994. See *id.* Only the United States, Germany, Japan, France, the United Kingdom, Italy, Canada, the Netherlands, Hong Kong, and Belgium ranked ahead of China in the world. See *id.* at 13.

190. Ruggiero: *Global Trading System Incomplete Without China*, Xinhua News Agency, July 20, 1995, available in LEXIS, Nexis Library, Cumws File.

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.¹⁹¹ The European Commissioner for External Economic Affairs and Commercial Policy, Leon Brittan, has said that "China's membership [is] essential for the world economy."¹⁹²

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 U.S.-China trade regime.¹⁹³

Finally, China's admission to the WTO will help bring China into the family of nations, 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.¹⁹⁴ Minister Lee Kuan Yew of Singapore argues that, "[a]s China's economy becomes more externally orientated, it will become interdependent with the major trading countries of the world."¹⁹⁵ Such interdependence, Yew believes, will make it "costly for China to risk rupture of economic ties by violating accepted rules and conventions. This can be a powerful factor to keep it engaged in the international community."¹⁹⁶ Future economic cooperation be-

191. See Youngblood, *supra* note 112. Thus, 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." *Id.*

192. *Beijing Resumes Talks on Joining World Trade Organisation*, Agence France Presse, May 9, 1995, available in LEXIS, Nexis Library, Cumwvs File.

193. See *Prepared Testimony of Michael A. Samuels*, *supra* note 11.

194. In fact, once China is in the WTO, Yew 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, Cumwvs File.

195. *How US, Japan Can Help Integrate China into the World Community*, *supra* note 105.

196. *Id.*; see also Kassim, *supra* note 194 (stating that membership in the WTO will induce China to abide international rules on trade and investment). Yew 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." *Id.* (quoting Senior Minister Lee Kuan Yew of Singa-

tween the United States and other major trading nations with China might lead to greater cooperation in other areas as well.¹⁹⁷

III. NEED TO RESOLVE PROBLEM OF DEFINITION

A. *Problems Related to the Current WTO Structure*

The current dispute over China's entry to the WTO is one particularly significant situation where the lack of definition of developing countries has been a problem. Nonetheless, it is not the only situation in which the lack of definition has been a significant problem. Similar disputes have occurred in the past, and will recur in the future.

1. *Conflict over the Generalized System of Preferences.* Prior conflict between the United States and Europe, and certain advanced developing countries, over the GATT's Generalized System of Preferences illustrates the problems inherent in a WTO system that lacks a formal procedure for determining when countries cease to be considered developing countries. GSP is an important program for developing countries, as it covers over \$60 billion worth of exports each year—over 50% of the most-favored-nation dutiable exports from developing countries into the member countries of the Organization for Economic Cooperation and Development.¹⁹⁸ Under the GATT, member countries may exempt developing countries from some tariff obligations. In other words, these developing countries may be permitted to maintain high tariffs on imports to protect local businesses, while at the same time taking advantage of developed countries' zero tariffs for exports. All that is required is a bilateral agreement with another country.

Conflict over these exceptions escalated in the late 1980s. In 1988, the United States stripped Singapore, South Korea, Hong Kong and Taiwan of their preferential trade treatment under the GSP.¹⁹⁹ Applying the domestic law implementing the GSP pro-

pore). WTO membership will help lock in China's current economic reforms and provide the incentive for future reforms, and will thus help further integrate China into the world economy. See *Prepared Testimony of Michael A. Samuels*, *supra* note 11.

197. See *id.*

198. See *UNCTAD Countries Reaffirm GSP Benefits but US Warns GSP Is Not Aid Program*, 9 Int'l Trade Rep. (BNA) No. 22, at 938 (May 27, 1992) [hereinafter *UNCTAD Countries Reaffirm GSP*].

199. See *US Mixes Signals*, JAPAN ECON. J., Feb. 27, 1988, at 26, available in LEXIS,

gram, the United States determined that these "Four Tigers" no longer should qualify for preferential treatment as developing countries.²⁰⁰ For some time, members of the U.S. government had believed that these newly industrialized countries (NICs) were "mature competitors in some sectors, and no longer merit some trade concessions granted when their industries were in their infancy."²⁰¹ There had been pressure in Congress for some time to ensure that "GSP benefits should be redirected from fast growing economies to more of the slower growing economies."²⁰² Because the GSP is so valuable, the United States had become concerned that the advanced developing countries were not "assuming responsibility for the world trading system by adhering fully and promptly to the Uruguay Round and other trade agreements."²⁰³

The European Community followed the United States. In 1991, when implementing the Uruguay Round GATT talks, it decided to stop recognizing Hong Kong, Singapore and South Korea as developing countries.²⁰⁴ In 1994, the European Community continued to reform its GSP program in order to "increase the export opportunities for the least-developed countries by withdrawing GSP entitlement from countries that no longer need the boost' of reduced tariffs in order to compete in the European market."²⁰⁵ The European Commission determined that the most

Nexis Library, Non-U.S. File; Gary Hufbauer, *Business Forum: On the Eve of GATT*, N.Y. TIMES, Sept. 14, 1986, at F3. The United States also graduated Bahrain, Bermuda, Brunei Darussalam, and Nauru from GSP benefits because they all exceeded the per capita income limit established by the United States. See *Four Countries to be Graduated from GSP for Exceeding Per Capita Limits*, USTR Says, 5 Int'l Trade Rep. (BNA) No. 18, at 660 (May 4, 1988).

200. See *US Mixes Signals*, *supra* note 199. The GATT decision setting up the GSP left it to individual member states to determine what countries would be eligible for the benefits as developing countries. See GATT Decision, *supra* note 56. The United States law implementing the GSP, created by GATT, sets a ceiling at countries who have a per capita GNP exceeding \$8,500. See *US Mixes Signals*, *supra* note 199. Singapore vigorously protested the United States' move to drop them from GSP, and pointed out that in 1988 Singapore's per capita GNP was only \$7,200. See *id.* South Korea also protested, arguing that dropping them from GSP violated the GATT agreement. See *id.*

201. Tom Heneghan, REUTERS N. EUR. SERV., Oct. 18, 1982, Business News, available in LEXIS, Nexis Library, Reuters File.

202. *Administration Will Look at GSP Countries' Adherence to Trade Pacts*, 12 Int'l Trade Rep. (BNA) No. 31, at 1307 (Aug. 2, 1995).

203. *Barshefsky Testimony*, *supra* note 29.

204. See William Dullforce, *EC Stance Discriminates Among Developing Countries*, FIN. TIMES, Dec. 19, 1991, at 4. The United States and the EU graduated different countries from the GSP. See *supra* note 200 and accompanying text.

205. *European Commission Plans Major GSP Reform Next Year*, 11 Int'l Trade Rep.

advanced developing countries were reaping most of the benefits of the GSP program because they were better able to export products to the European Community.²⁰⁶ In fact, 40 of the least-developed countries reaped only 1% of the total GSP benefits given.²⁰⁷

Without clear WTO graduation criteria, such disputes will continue into the future. As more developing countries advance, a new round of fights over which nations should be excluded from the program will ensue.²⁰⁸ For example, the Clinton administration has recently responded to Congressional pressure by targeting Malaysia as a potential target for future graduation from the GSP program.²⁰⁹

2. *Future Members of the WTO.* The WTO will soon have to review applications for admission submitted by Russia, Taiwan and Vietnam.²¹⁰ These nations pose classification problems similar to that posed by China, and there is already disagreement over which criteria to use in assessing each of their applications.²¹¹ All three

(BNA) No. 23, at 917 (June 8, 1994) (quoting Pierre Defraigne, a senior European Commission official in charge of North-South relations).

206. *See id.*

207. *See id.* "Graduation should correct this imbalance by excluding the products of many advanced countries. It will take into account a country's level of development defined as gross domestic product per capita and level of exports to the EU as well as its share of the total EU imports for a specific sector." *Id.*

208. *See, e.g.,* Frances Williams, *US May Face South Korean Challenge on Uruguay Round*, FIN. TIMES, Dec. 1, 1994, at 7 (detailing a dispute over the exclusion of South Korea, Hong Kong, and Singapore). The United States gave the U.S. Trade Representative the right to designate which countries count as developing countries in applying the subsidies accord. *See id.* This classification indicates the potential for escalation of tensions with the NICs in areas other than over GSP. Hong Kong claims that the agreement allows for "self-selection" to determine the status of a country, and challenges the notion that the GATT or any developed nation has the right to classify its economy. *See id.* South Korea announced that it voluntarily was liberalizing its policies for the period of 1995-97 for imports that were currently restricted under protection that developing countries could use under Article XVIII B of the GATT Agreement. *See South Korea Tells GATT Council of Plans to Lift Import Restrictions*, 11 Int'l Trade Rep. (BNA) No. 19, at 740 (May 11, 1994). Of course, such action is not completely "voluntary." The United States, Japan and Australia had been pressuring South Korea to take such an action, and even after South Korea acted, those three countries argued that South Korea did not go far enough in terms of liberalization. *See id.* This is another example of the problem of the ad-hoc nature of the GATT on graduation.

209. *See Administration Will Look at GSP Countries' Adherence to Trade Pacts*, *supra* note 202, at 1307.

210. *See* Sandra Sugawara, *WTO Trade Ministers Making Scant Progress; First General Meeting Underway in Singapore*, WASH. POST, Dec. 12, 1996, at D1.

211. *See WTO's North-South Dialogue*, J. COM., Dec. 9, 1996, at 8A. There will be

countries share aspects of highly developed countries in terms of their economic power or potential, yet their standards of living are more similar to countries in the developing world.²¹²

The conflict over China's accession to the WTO, and the potential for the same issue to arise when other nations such as Russia, Vietnam and Taiwan attempt to join the WTO, means that the issue of what constitutes a developing country cannot be dismissed as just another "problem with China." Instead, the problem is endemic to the WTO system and needs to be corrected. The current negotiations with China offer an opportunity to resolve this problem formally, as opposed to continually dealing with it on an ad-hoc basis.

B. Solutions

Once it was enshrined in the GATT that developing countries and developed countries were to be treated differently, developing countries had no incentive to move themselves voluntarily into the developed category, no matter how far their economies had grown.²¹³ In the past, nations only made the move from developing to developed status in response to pressure from other GATT members.²¹⁴ Thus, in 1964, under pressure from other EU members, Greece, Portugal and Spain renounced their status as developing countries under the GATT.²¹⁵

At various times, some developed countries have attempted to address the disincentives for developing countries to move voluntarily by setting specific graduation criteria.²¹⁶ However, developing countries bitterly opposed such a plan; they did not want to jump immediately from the more relaxed obligations imposed on

similar problems with the other former Soviet Republics and Saudi Arabia. *See id.*; *see also* Alex Dacanay, *Summit Leaves APEC Facing Action Test*, NIKKEI WKLY., Dec. 2, 1996, at 21, available in LEXIS, Nexis Library, Curnws File (describing the Asia-Pacific Economic Cooperation forum's issuance of a moratorium on the admission of new members in order to develop criteria for the evaluation of applicants).

212. *See* INTERNATIONAL TRADE TRENDS AND STATISTICS, *supra* note 189, at 13. For example, Russia is 20th in the world in exports and 25th in imports. *See id.* Taiwan is 14th in exports and 15th in imports. *See id.*

213. *See infra* notes 216-17 and accompanying text.

214. *See* Kele Onyejekwe, *International Law of Trade Preferences: Emanations from the European Union and the United States*, 26 ST. MARY'S L.J. 425, 455 (1995).

215. *See id.*

216. *See* ANWARUL HODA, *DEVELOPING COUNTRIES IN THE INTERNATIONAL TRADE SYSTEM* 56 (1987).

developing countries to the much more stringent requirements set for developed countries.²¹⁷ The developing countries were wary of allowing developed countries to unilaterally decide which countries would be required to advance to the developed level.²¹⁸ The more advanced developing countries wanted to maintain the relaxed developing country standards for themselves so they could protect their own industries, while taking advantage of the developed countries' open markets which had been brought about by the stringent obligations imposed on them.²¹⁹ In addition, if the more advanced developing countries must lose their status as developing countries, they do not want to be required to immediately jump to the level of the United States, Japan and the European Community.²²⁰

The opposition to a plan setting graduation criteria was successful; the efforts of developed countries to incorporate a provision in the original GATT agreement allowing the application of the graduation principle failed.²²¹ Since these earlier efforts, there has not been a formal codification of graduation criteria in any international trade agreement.²²²

Instead of a formal graduation process, major economic players, such as the United States and the European Union, have made their own ad hoc graduation decisions, especially in the area of the GSP.²²³ These individual, ad hoc decisions about GSP renewal have caused the developing world to refer to them as "arbitrary and restrictive results."²²⁴ The bulk of developing countries do not believe the United States and the European Community's claim that they are graduating countries to ensure that the needier countries get the bulk of the benefits.²²⁵ C.S. Nagaratnam of Sri Lanka, speaking for the "Group of 77" (developing countries within the UN), argued that the "U.S. system of accelerated GSP graduation now prevailing in Washington has resulted in 'a drastic

217. *See id.*

218. *See id.*

219. *See* Hufbauer, *supra* note 199, at F3.

220. *See id.*

221. *See* HODA, *supra* note 216, at 56.

222. *See id.*

223. *See supra* Part III.A.1.

224. *UNCTAD Countries Reaffirm GSP*, *supra* note 198, at 938 (quoting Ernst August Hoerig, Chairman of 1992 UNCTAD meeting).

225. *See Developing Countries Charge Program Fails to Live Up to Promise, Blame United States*, 5 Int'l Trade Rep. (BNA) No. 23, at 851, 852 (June 8, 1988).

loss of benefits' . . . challenging the U.S. claim that the new system is aimed at achieving a better distribution of GSP benefits."²²⁶

The perception of unfairness may have arisen because the powerful developed countries do not seem to have neutral criteria defining developing countries and graduation requirements and because there is no international consensus on those issues. In fact, international attempts to devise a workable compromise between developed and developing countries have failed.²²⁷ Developing countries accused the industrialized countries of attempting to turn GSP into "'an instrument to make developing countries more pliable."²²⁸

The past fight over graduation indicates two lessons: developing countries do not want a system imposed on them by developed nations without their participation, and if developing countries must accept some form of graduation, they do not want a system where they must fit into one of two categories. From these two lessons emerges a possible solution. First, the WTO should develop a set of economic criteria to assess the development level of each nation in the WTO. Second, the WTO should create a middle category between developing and developed in which to place emerging economies. Countries in this category will have more requirements than developing countries, but fewer than developed countries. Third, a regular review process should occur within the WTO to assess each member and determine whether or not they should be moved up or down, based upon their recent economic performance.

1. *Set up a Clear Criterion.* Under the auspices of the WTO, representatives from a wide range of economic development 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

226. *Id.* at 852.

227. See *UNCTAD Group Criticizes U.S. Extension Bill But Fails to Agree on Recommended Revisions*, 1 Int'l Trade Rep. (BNA) No. 31, at 971 (May 9, 1984).

228. *Id.* (quoting Syrian delegate Ahmed Saker speaking on behalf of developing nations).

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.”²²⁹ There is at least the awareness among most countries “of the need to convene and establish a common set of rules of behavior,”²³⁰ 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 of a country’s per capita GNP; and 3) an increase in the importance of manufacturing and service industries, coupled with a decrease in the percent of the population working in agriculture.²³¹ 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 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.

229. *UNCTAD Countries Reaffirm GSP*, *supra* note 198, at 938.

230. *Id.*

231. See MICHAEL P. TODARO, *ECONOMIC DEVELOPMENT IN THE THIRD WORLD* 68, 83–84 (1981); see also Amy Chua, *Ethno-Economics, Ethno-Politics: The Underside of Markets, Democracy, and Law in the Developing World* 8 (Jan. 8, 1996) (unpublished manuscript, on file with author) (using low per capita income, low rates of labor productivity, and a high proportion of population engaged in agriculture to identify underdeveloped countries). One suggestion has been made to divide the GATT into a tiered system with four categories: developed, newly developing, developing, and less developed. See Roshani M. Gunewardene, *GATT and the Developing World: Is a New Principle of Trade Liberalization Needed?*, 15 *MO. J. INT’L L. & TRADE* 45, 67 (1991). However, Mr. Gunewardene does not define what criteria would be used to place countries in such categories. Sustained increases in GNP and growth in per capita GNP are important because they measure the strength of a country’s economy, both overall and at an individual level. See Onyejekwe, *supra* note 214, at 455–56. The Organization for Economic Counsel and Development (OECD) uses \$1300 per capita GNP as the dividing line between low income and middle income nations. See *id.* The World Bank uses \$2000 per capita GNP as the line between low income and upper middle income countries. See *id.* The change from agriculture to manufacturing and services is important because it measures the sophistication of a country’s economy. It also may be a proxy for how many products a country will have to export.

The academic literature has also suggested other factors to define levels of development.²³² Those factors include income distribution, unemployment level, and existence of social safety nets to help the poor.²³³ 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.²³⁴ However, per capita income alone may not indicate the sophistication of the overall economy; it does not adequately measure international competitiveness in specific products.²³⁵ 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.²³⁶ 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 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.²³⁷ 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.

232. See TODARO, *supra* note 231, at 69.

233. See *id.* at 68-72, 83-91.

234. 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) [hereinafter UNCTAD *Head Issues Plea*]; see also Barshefsky *Testimony*, *supra* note 29 (noting that a recently introduced bill would reduce the per capita GNP limit for the GSP program from about \$11,800 to about \$8600).

235. See UNCTAD *Head Issues Plea*, *supra* note 234, at 932.

236. See HODA, *supra* note 216, at 62.

237. 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.

The above discussion indicates the factors that are important in assessing a nation's economic development level in the context of international trade. This Note 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 smaller country, such as Canada, 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 Canada has far 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 advanced country that had greater success in international trade. Such an advanced country would not need as much protection for its local industries.

2. *Set up a Middle Category for Emerging Economies.* It was once easy to divide the countries of the world into two camps: North and South.²³⁸ Any such attempt to do that today would result in a "vast oversimplification" because using economic criteria, the old "South" is now made up of various "distinct economic categories."²³⁹ Ethiopia and Singapore illustrate the stark changes that have occurred in the "South."²⁴⁰

For 1994, the growth rate in the developing world was twice that of the developed world.²⁴¹ 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.²⁴² This increase in GNP in the developing world was also followed by a significant increase in world merchandise trade.²⁴³ Taiwan, Hong Kong, Korea, Malaysia, Singapore and Thailand had a combined \$420 billion worth of exports in 1994.²⁴⁴ Latin America added \$185 billion in exports, and Central and Eastern Europe combined for \$120 billion in exports.²⁴⁵ Hong Kong, China, Singapore, Korea, Taiwan, Mexico, Malaysia, Russia, Thailand, Indonesia, and Saudi Arabia are all among the top 30 exporters in the world.²⁴⁶ 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 devel-

238. See Brown, *supra* note 41, at 356-57 n.33.

239. *Id.*

240. See *id.*

241. See INTERNATIONAL TRADE TRENDS AND STATISTICS, *supra* note 189, at 75.

242. See *id.*

243. See *id.*

244. See *id.*

245. See *id.*

246. See *id.*

oping countries."²⁴⁷ Under this classification, the 48 poorest countries, as defined by the United Nations, are lower-income developing countries, but only 29 are WTO members.²⁴⁸ 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.²⁴⁹ 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; they would "pay tariffs somewhere between the GSP level and the rate paid by industrialised countries."²⁵⁰ 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."²⁵¹ 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. Countries in the middle would accept more responsibilities of being GATT members, but would also gain more privileges.²⁵² 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.²⁵³

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 advanced developing countries not be treated the same as those that are less advanced. 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

247. *Lower-income Developing Countries and the WTO* (visited Mar. 9, 1997) <http://www.wto.org/wto/Whats_new/qadev.htm>.

248. *See id.*

249. *See id.*

250. Heneghan, *supra* note 201.

251. *Id.*

252. *See GATT Director Decries Protectionism, supra* note 24, at 942.

253. *See id.*

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.

3. *Set up Formal Mechanism Within GATT to Review Members.* The WTO treaty should be amended to create a formal committee to analyze member countries' economies. This committee would reassess every member's standing every five years, to determine whether they are candidates for graduation, either from developing country to the new middle category or from the new middle category to developed country. All member states should be represented on this committee. Setting up a formal mechanism within the WTO is preferable to a regime in which the United States and European Union make unilateral decisions that affect the developing world, and including members of developing countries will lessen tensions. This committee would analyze each member state based on the four factors discussed above. It would then determine if the state should remain in its present category for the next five years, or if it should be moved up or down. As with most decisions made by the WTO, it would take a two-thirds vote of all members of the committee to change a country from its present status.

C. *Analysis of China Under Proposed Four Economic Factors*

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 economies category. First, China's GNP is \$2 trillion.²⁵⁴ Based on overall GNP, it recently surpassed Germany to become the third-largest economy in the world.²⁵⁵ Furthermore, its GNP has been growing at a rate of approximately 10% per

254. See STATISTICAL ABSTRACT, *supra* note 1, at 835. 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). See *id.*

255. See *id.*

year since the early 1980s, giving it one of the highest growth rates in the world.²⁵⁶ 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 \$1860.²⁵⁷ This is higher than many developing countries, including Bangladesh and Algeria, but not as high as some of the more advanced developing countries, including Chile and Mexico.²⁵⁸ This factor suggests 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.²⁵⁹ 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.²⁶⁰ China is also the eleventh largest exporter in the world.²⁶¹

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

256. See NIXON, *supra* note 5, at 121.

257. See STATISTICAL ABSTRACT, *supra* note 1, at 835.

258. 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 (\$17,670); and the United States (\$25,810). See *id.* It is also lower than that in some developing countries: Argentina (\$8205), Chile (\$3609); and Mexico (\$3940). See *id.*

259. See *Global Multilateral Trading Systems: The Role of the PRC*, *supra* note 108.

260. See STATISTICAL ABSTRACT, *supra* note 1, 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. See *id.*

261. See INTERNATIONAL TRADE TRENDS AND STATISTICS, *supra* note 189, at 75. China exported \$121 billion in 1994. See *id.*; see also *Global Multilateral Trading Systems: The Role of the PRC*, *supra* note 108, at 4 (stating that China counts for 3% of total world merchandise trade and therefore is the 11th largest trading nation in the world).

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 countries. For example, South Korea has a \$356 billion GNP and \$7896 per capita GNP. Thus, the Asian Tigers or NICs would be part of the new middle group as well, based on the size of their economies.

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 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 Note offers a more complete picture of a nation's economy.

CONCLUSION

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 in 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.²⁶²

262. See R. Thomas Berner, *Let China Into the WTO, Then Work to Reform It*, CHRISTIAN SCI. MONITOR, Oct. 7, 1996, at 19.