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China's WTO Accession: Economic, Legal, and Political Implications

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CHINA'S WTO ACCESSION: ECONOMIC, LEGAL, AND POLITICAL IMPLICATIONS

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Abstract: This Article discusses the unparalleled economic, legal, and political change that has confronted China during WTO accession. The Article focuses on the relationship between China's unique WTO accession process and China's reform over the past two decades. The author suggests that WTO accession has acted as a lever for economic and legal reform by locking in reform and making it irrevocable. The Article begins with a historical background of China's long road to accession and the way that this process worked to further the previously instated economic reform program. Next, the Article analyzes the manner in which WTO accession has initiated profound legal reform. The final section of the Article discusses the effects of adhering to WTO-related obligations on the future of political reform and suggests that the resulting weakened control of the Communist Party may ultimately lead either to continued growth and political liberalization or to mass unrest and a backlash of government repression.

INTRODUCTION

As one of the newest members of the World Trade Organization (WTO),[1] China is unique in a number of respects. First, it is by far the largest economic power among developing country members. By traditional measures, China fits well within the definition of a developing country—in most regions of the country, per capita GDP remains be-

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[1] China became a member of the WTO effective December 11, 2001. Taiwan's accession became effective in January 2002. The Former Yugoslav Republic of Macedonia (FYROM) is the newest WTO member; its accession became effective in April 2003. A current list of WTO members is available at http://www.wto.org (last visited Apr. 22, 2004) [hereinafter WTO Website].

low $1000.[2] Indeed, during its negotiations for accession to the WTO, China argued that it should be entitled to the special and differential treatment extended to developing countries in the WTO agreements.[3] At the same time, China stands apart from other developing countries as a producer of, and a magnet for, foreign investment. According to recent WTO data, China was the seventh largest merchandise exporter in the world, with aggregate exports of $249 billion in 2000.[4] In addition, China received an estimated $46.8 billion in foreign direct investment (FDI) in 2001, making it one of the world's largest recipients of foreign investment—second only to the United States if FDI flows to Hong Kong are included.[5] Thus, China is both a developing country and an economic powerhouse.

China is also unique in a second respect; it is the only major WTO member that is still Communist.[6] In 1982, six years after the end of the Cultural Revolution, the Chinese Communist Party (CCP) adopted a new Constitution reflecting Deng Xiaoping's ideas for

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[2] Of China's thirty-one provinces, only ten reported per capita GDP above USD $1000, according to data from 2000. The province with the highest GDP was Guangdong ($11,636) and the lowest was Guizhou ($299). CHINA DEVELOPMENT BRIEF, 250 CHINESE NGOs: CIVIL SOCIETY IN THE MAKING 127, 149 (2001) (based on data drawn from State Statistical Bureau, 2000 China Statistical Yearbook) (on file with author).

[3] *See, e.g.*, WTO Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49 (Oct. 1, 2001), para. 171, http://www.uschina.org/workingpartyreport.doc (addressing China's ability to benefit from certain rules under the WTO Agreement on Subsidies and Countervailing Measures that are available to developing countries) [hereinafter Working Party Report]; *see also* Frederick M. Abbott, *Reflection Paper on China in the World Trading System: Defining the Principles of Engagement, in* CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT 26–28 (Frederick M. Abbott ed., 1998) (describing how, during accession negotiations with the WTO Working Party, China insisted on being considered a "developing country" member of the WTO).

[4] The figure for China's exports does not include exports from Hong Kong, which totaled $202.4 billion in 2000 (of which only $23.7 billion constituted domestic exports and $178.8 billion re-exports). Press Release, World Trade Organization, World Trade Slows Sharply in 2001 Amid the Uncertain International Situation, tbl. 1.5 (Oct. 19, 2001), *at* http://www.wto.org/english/news_e/pres01_e/pr249_e.htm.

[5] According to the 2002 UNCTAD World Investment Report, China and Hong Kong together received an estimated $69.7 billion in FDI in 2001. The United States was the world's largest recipient in 2001, with aggregate FDI of $124.4 billion. The FDI received by China and Hong Kong amounts to over two thirds of FDI inflows to Asia and the Pacific during the same period ($102.3 billion), and well over twice the amount of FDI invested in Central and Eastern Europe ($27.2 billion). U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2002, at 303–06, UNCTAD/WIR/2002 & Corrigendum (2002), http://www.unctad.org/en/docs//wir2002_en.pdf.

[6] The only other Communist member of the WTO is Cuba. *See infra* note 83 (describing Cuba).

modernization and market reform.[7] Since that time, China's reform effort has continued at an extraordinary pace, as the Party has increasingly staked its legitimacy on China's ability to sustain high levels of economic growth. As a result of Deng Xiaoping's reforms, China has largely transformed its economy. However, it remains under the control of a Communist apparatus that struggles to maintain dominance even as it embraces modernization. Jiang Zemin's "three represents" campaign, which emphasizes the CCP's role in representing the interests of capitalists along with the interests of workers and peasants, is part of an ongoing effort by the Party to reform and revive itself.[8] The CCP has opened its membership to entrepreneurs and may soon appoint several prominent businessmen to high positions within the Party.[9] Currently, China is undergoing its first peaceful change of leadership in decades, as Jiang Zemin and other top CCP officials step down and cede control to a new generation of leaders.[10] China is therefore at a turning point, both in terms of the transfer of power within the CCP and its new status as a WTO member.

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[7] China's 1982 Constitution formalized a departure from Soviet-style Communism that began in December 1978 when Deng Xiaoping first announced China's "open door" policy. The 1982 Constitution emphasizes "socialist modernizations," provides a constitutional basis for foreign investment and its protection, and allows for the development of an "individual" economy alongside the socialist economy. *See* JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 67–69 (1999).

[8] The "three represents" campaign was launched several years ago by former CCP General Secretary Jiang Zemin. The basic gist of the campaign is that, in order to prosper in the new millennium, the Communist Party must represent not only the workers' and the peasants' interests but also the development needs of the country's "advanced productive forces." *See, e.g.*, *Full Text of Jiang's Speech at CPC Anniversary Gathering*, XINHUA NEWS AGENCY, July 1, 2001, *available at* LEXIS, News Library, Xinhua File (text of Jiang Zemin's speech, which refers to the "Three Represent's" as the "source of strength" of the Party and the basis on which to build the Party into the new century); *see also* Erik Eckholm, *Likely to Be a Best Seller in China: It's No Mystery*, N.Y. TIMES, at A3, June 1, 2000 (describing the launching of the "Three Represents" campaign).

[9] Entrepreneurs who are thought to be candidates for high government or CCP positions include the chairmen of two of China's most successful companies: the Legend Group (maker of personal computers) and the Haier Group (home appliance manufacturer). *See* Joseph Kahn, *China's Communist Party, 'to Survive,' Opens Its Doors to Capitalists*, N.Y. TIMES, Nov. 4, 2002, at A10.

[10] *See* Elizabeth Rosenthal, *In Ceremony with No Surprises, China Formally Changes Leaders*, N.Y. TIMES, Mar. 15, 2003 (late ed.), at A4 (reporting that Hu Jintao replaced Jiang Zemin as General Secretary of the CCP at the 16th CCP Congress in November 2002). At the annual session of the National People's Congress in March 2003, Wen Jiabao replaced Zhu Rongji as prime minister, Wu Bangguo replaced Li Peng as Chairman of the National People's Congress, and Hu Jintao took over Jiang Zemin's position as state president. Jiang Zemin will retain his title as chairman of the Central Military Commission. *The Survivor Takes Over*, THE ECONOMIST, Mar. 22, 2003, *available at* LEXIS, News Library, Econ File. *See generally Who's in Charge Now?*, THE ECONOMIST, Mar. 22, 2003, at 40.

The trajectory of China's reform process over the past two decades mirrors China's lengthy process of joining the WTO. This Article analyzes the relationship between these two processes. China's experience as a WTO member is unique. Perhaps in no other country has WTO accession had such a profound impact on economic, legal, and political change as in China. Notwithstanding concerns expressed in the past by WTO members regarding China's ability to comply with the obligations of WTO membership,[11] more current developments suggest that the threat to reform in China does not stem so much from any lack of commitment on the part of the CCP,[12] but rather from the possibility that disaffected groups in China will ultimately destabilize the political system. The irony of China's situation is that the process of WTO accession, by accelerating market reform and expanding the private sector, has exacerbated income inequality in the country.

Part I of this Article describes China's accession process, highlights the role the WTO has played in propelling forward China's economic reform program, and contrasts China's experience with that of other Communist countries that joined the General Agreement on Tariffs and Trade (GATT) during the 1960–70s. Part II examines the ways in which WTO accession has provided an impetus to legal reform. Finally, Part III speculates on the extent to which China's WTO-related commitments will lead to political reform in the future.

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[11] *See, e.g.*, 146 CONG. REC. H3036 (daily ed. May 15, 2000) (statement of Rep. Nancy Pelosi) (during the debate over whether to grant China Permanent Normal Trade Relations (PNTR), questioning whether the Chinese would "begin for a change, a drastic change, to start honoring the[ir] commitments"); *see also* NICHOLAS R. LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY 136 (2002) (noting frequent assertions during the PNTR debate that China had systematically failed to live up to its international trade obligations); Public Citizen, Permanent Normal Trading Relations with China (PNTR), *at* http://www.citizen.org/trade/issues/china/index.cfm (last visited Apr. 22, 2004) (statement of Public Citizen against the granting of PNTR to China). Lardy demonstrates how, notwithstanding some delays and lapses in implementing some aspects of its commitments, the assertions of systematic noncompliance by China are not supported by the evidence. LARDY, *supra*, at 137–41.

[12] *See, e.g.*, U.S. TRADE REPRESENTATIVE, 2002 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 3 (2002), http://www.ustr.gov/regions/china-hk-mongolia-taiwan/2002-12-11-China_WTO_compliance_report.PDF [hereinafter COMPLIANCE REPORT] (concluding that, while concerns remain, China's leadership generally made "significant progress" in effecting systemic changes and in implementing its WTO commitments during its first year as a WTO member).

I. China's Accession Process and the WTO's Role in Economic Reform

A. *History*

No country has endured as lengthy an accession process to the GATT/WTO as China, nor has any country acceding to the WTO been asked to take on as many concessions as the price for admission. From the date that China was first granted observer status to the GATT to the date that China finally acceded to the WTO, almost twenty years elapsed.[13] Some of the extraordinary terms to which China agreed to be bound as a WTO member are described below.

Generally speaking, the WTO accession process formally begins when a country informs the WTO Director-General of its desire to join.[14] The WTO General Council then forms a "working party" of members to examine the application.[15] After basic principles and policies have been resolved with the working party, individual WTO members enter into bilateral negotiations with the applicant country over the specific undertakings that the applicant will agree to as a condition of WTO membership.[16] Upon completion of these bilateral negotiations, the working party finalizes the accession terms in three documents: the working party report, the protocol of accession, and the attached schedules containing the new member's specific liberalization

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

[14] Bernard M. Hoekman & Michel M. Kostecki, The Political Economy of the World Trading System: The WTO and Beyond 65 (2001). Typically, by the time a country applies for membership, the applicant has already obtained observer status. *Id.* Observer governments to the WTO must commence accession negotiations within five years of becoming observers. Current observer governments include Russia, Vietnam, and Saudi Arabia, and a current list is available at the WTO Website, *supra* note 1.

[15] The applicant must then submit to the WTO a memorandum describing any aspects of the country's trade and economic policies that would potentially affect obligations contained in the WTO agreements. This memorandum forms the basis for negotiations between the applicant and the working party. *See* World Trade Organization, Membership, Alliances and Bureaucracy, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/rg3_e.tm (last visited Apr. 22, 2004) [hereinafter WTO Membership].

[16] Although the negotiations are bilateral, the commitments apply to all WTO members under the most-favored nation principle. *Id.*

commitments.[17] The final accession terms are then presented to the WTO body for a vote. If two-thirds of the WTO's existing members vote in favor of accession, then the applicant may sign the protocol and join the WTO.[18]

Since China was a founding member of the GATT,[19] its initial application in 1986 was for "resumption" of its membership as a GATT Contracting Party.[20] A number of complications and intervening events prolonged China's accession process. By spring of 1989, China and the United States had almost completed bilateral negotiations on the terms of China's membership to the GATT.[21] However, the Chinese government's crackdown on pro-democracy demonstrators at Tiananmen Square resulted in the imposition of economic sanctions and an abrupt suspension of active negotiations until October 1992.[22] Although China was a signatory to the Uruguay Round agreements, it was unable to conclude its accession negotiations by 1995, when the WTO entered into force. Thus, the GATT working party converted to a working party on China's accession to the WTO. Momentum on China's application was finally provided when the United States and China concluded a bilateral agreement on China's entry into the WTO in November 1999. This led to the conclusion of a bilateral agreement on WTO entry between China and the European Union, the passage of Permanent Normal Trade Relations (PNTR) legislation by the U.S. Congress,[23] and

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[17] China's accession terms are contained in the WTO Report of the Working Party on the Accession of China, *supra* note 3, and in World Trade Organization, *Accession of the People's Republic of China*, WT/L/432 (Nov. 10, 2001), http://www.uschina.org [hereinafter Protocol].

[18] WTO Membership, *supra* note 15; *see also* HOEKMAN & KOSTECKI, *supra* note 14, at 65–66.

[19] China was an original Contracting Party to the GATT. After the 1949 revolution and the split between the Communists and the Kuomingtan (KMT), the KMT leaders withdrew China from the GATT. Jeffrey L. Gertler, *The Process of China's Accession to the World Trade Organization*, *in* CHINA IN THE WORLD TRADING SYSTEM 65–66 (Frederick M. Abbott ed., 1998)

[20] PRC Ministry of Foreign Affairs, *supra* note 13.

[21] Gertler, *supra* note 19, at 6.

[22] According to the Chinese government, the bilateral talks were expected to be concluded by the end of the year but were interrupted when "political disturbances" took place and Western countries, led by the United States, imposed sanctions. PRC Ministry of Foreign Affairs, *supra* note 13.

[23] The Jackson-Vanik Amendment to the 1974 Trade Act, 19 U.S.C. § 2432, prohibits the United States from granting unconditional MFN status to any nonmarket economy country that denies its citizens the freedom to emigrate. Until Congress passed legislation granting PNTR status to China in September 2000, MFN status had to be renewed annually by the President and approved by Congress. *See* HOEKMAN & KOSTECKI, *supra* note 14, at 404. Thus the granting of PNTR status for China cleared the way for the United States to

ultimately the WTO vote on China's accession, which occurred at the Doha Ministerial Meeting in November 2001. The events leading up to China's WTO accession are summarized in Table 1 below.

Table 1: Events Leading Up to China's WTO Accession

Year	Event
1948	GATT goes into effect (China is a Contracting Party)
1950	China withdraws from GATT
1982	China granted observer status in GATT
1986	China notifies GATT of intent to renegotiate terms of membership
	Hong Kong becomes a GATT Contracting Party
1987	Working party on China's membership to GATT established
1989	Discussions of China's membership suspended until 1992 due to government crackdown
1992	Working party on Taiwan's accession established
1994	Uruguay round of trade negotiations completed (China is a signatory)
1995	WTO enters into force; China applies for accession to WTO
1999	United States and China sign bilateral agreement on China's accession
2000	U.S. Congress passes PNTR legislation
	EU and China sign bilateral agreement on China's accession
2001	China's accession to WTO becomes effective (Taiwan joins shortly thereafter)

Sources: HOEKMAN & KOSTECKI, *supra* note 14, at 403–05; Gertler, *supra* note 19, at 66; PRC Ministry of Foreign Affairs, *supra* note 13; WTO Website, *supra* note 1.

There were a number of political events that disrupted relations between the United States and China and slowed progress on WTO accession talks, such as NATO's bombing of the Chinese embassy in Belgrade in May 1999.[24] However, China's application was complicated by other factors as well. First, as mentioned in the Introduction,[25] China's dual status as a developing country and economic power posed a dilemma. While China's negotiators insisted on "special and differential" developing country treatment, WTO members viewed China as a major source of cheap labor imports and thus a threat to domestic industry.[26] Second, WTO members were concerned with the planned na-

extend MFN treatment to China as required under Article I of GATT. For the history of MFN status and the Jackson-Vanik Amendment, see Di Jiang Schuerger, *The Most Favored Nation Trade Status and China: The Debate Should Stop Here*, 31 J. MARSHALL L. REV. 1321, 1324–30 (1998).

[24] Other political obstacles included the Taiwan question, U.S. concern over intellectual property enforcement in China, and the U.S. tendency to link human rights issues with trade. *See generally* Joseph Fewsmith, *China and the WTO: The Politics Behind the Agreement*, NBR ANALYSIS, Dec. 1999, at 23, *available at* http://www.nbr.org.

[25] *See supra* notes 2–5 and accompanying text.

[26] *See* HOEKMAN & KOSTECKI, *supra* note 14, at 403.

ture of China's economy and sought evidence of sufficient market orientation as a condition to membership.[27] Business interests pressed for increased market access and commitments to promote transparency as a price for China's accession.[28] China initially resisted many of these demands but shifted its stance in early 1999.[29] Finally, increased substantive coverage of the Uruguay Round agreements (including intellectual property protection, trade in services, and agriculture) broadened the scope of commitments demanded as a price of admission.[30]

B. *China's Protocol*

China's WTO obligations, in many respects, span further than the obligations of the WTO's existing members.[31] When one takes into account the size of China's economy, its status as a developing country, and the degree to which China (until very recently) operated as a planned economy, the extent of China's commitments are unprecedented.[32] Summarized below are some of the more significant concessions that China agreed to in its protocol:

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[27] *Id.*

[28] *Id.*

[29] *See* Fewsmith, *supra* note 24, at 27–28 (discussing the factors that led the Chinese leadership to offer substantial concessions to the United States in order to conclude a bilateral agreement on WTO accession).

[30] *See* HOEKMAN & KOSTECKI, *supra* note 14, at 67 (discussing reasons why WTO accession has become "considerably more burdensome" than it was during the GATT era).

[31] For a sector-by-sector comparison of China's commitments with those of other WTO members, see LARDY, *supra* note 11, at 69–79. China has not only agreed to comply with the terms of the WTO agreements, but, as discussed below, China has agreed to a number of rules that "go far beyond" the rules that bind other WTO members, including those members that joined the WTO after 1995. *Id.* at 80.

[32] Although the magnitude of China's commitments exceeds that of other formerly Communist countries who have acceded to the WTO, aspects of China's terms of accession, such as the special safeguard rule and China's designation as a "nonmarket economy" for purposes of anti-dumping determinations, have their precedent in earlier rules developed to address the special challenges of trade with Eastern Bloc communist countries. *See infra* notes 82–103.

China is not the first country to face discriminatory treatment in its efforts to join the world economic community. When Japan joined the GATT in 1955, fourteen member countries invoked a special "Japan article" to withhold most-favored nation treatment to Japanese products. *See generally* Philip H. Trezise, *US-Japan Trade: The Bilateral Connection, in* THE POLITICS OF TRADE: US AND JAPANESE POLICYMAKING FOR THE GATT NEGOTIATIONS 1 n.1 (Michael Blaker ed., 1978). During the first years of Japan's membership in the GATT, the U.S. government bypassed GATT procedures and pressured the Japanese government to impose "voluntary" export restraints on Japanese textile producers, which effectively subjected Japanese exports to quotas and price controls. *Id.* at 2–3. In addition, when Poland, Hungary, and Romania acceded to the GATT in the 1960–70s, the Contracting Parties required that the protocols of accession for these countries reserve the right for the

- *Market access in goods.* China agreed to reduce tariffs on industrial goods to an average rate of 8.9% and to sustain this average against future increase. China's average tariff level on industrial goods is thus just a fraction of that prevailing in a number of large, developing countries, including India (32.4%), Brazil (27%), and Indonesia (36.9%).[33]
- *Market access in services.* Under the General Agreement on Trade in Services (GATS), China agreed to liberalize a number of service sectors that were previously closed or severely restricted to foreign investment. China made commitments in all sectors covered by the GATS, including financial, telecommunications, distribution, and legal services.[34]
- *Agriculture.* China agreed to eliminate quotas on all but a few agricultural goods[35] and to eliminate export subsidies on agricultural goods.[36] The Development Research Center (part of the PRC State

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Contracting Parties to take special, country-specific safeguard action in the event that the acceding state's exports would cause "serious injury" to domestic producers. *See* K. Grzybowski, *Socialist Countries in GATT*, 28 AM. J. COMP. L. 539, 549 (1980); *see also* M.M. KOSTECKI, EAST-WEST TRADE AND THE GATT SYSTEM 107 (1978) (describing the safeguard clause). Western European countries maintained discriminatory quantitative restrictions against Polish, Hungarian, and Romanian exports, and the United States refused to extend MFN treatment to Hungary and Romania, even after these countries joined the GATT. *See* KOSTECKI, *supra*, at 98–99.

[33] LARDY, *supra* note 11, at 79.

[34] The extensive and detailed commitments are set forth in a fifty-five-page schedule to China's Working Party Report. WTO Working Party, Report of the Working Party on the Accession of China, Part II—Schedule of Specific Commitments on Services, WT/ACC/HN/49/Add.2 (Oct. 1, 2001), http://www.uschina.org/specificcommitment.doc [hereinafter Schedule of Specific Commitments].

For example, China has agreed to eliminate all "non-prudential" restrictions on the banking sector, including ownership and operation restrictions, by December 2006. If they meet the minimum asset requirements spelled out in the Schedule, foreign banks will be allowed to establish subsidiaries in China and will be able to engage in local currency transactions after three years of profitable business operation in China. *Id.* at 35–36; *see also infra* notes 75–81.

[35] Under the WTO Agreement on Agriculture, members agreed to replace quantitative restrictions on agricultural goods with tariffs. HOEKMAN & KOSTECKI, *supra* note 14, at 217. China agreed to replace all but a few agricultural quotas with tariffs and to utilize tariff-rate quotas (i.e., a low tariff in effect until a specified quota of imports has been reached, after which time a much higher tariff becomes effective, thus functioning like a quota with fewer trade-distorting effects) for a list of ten commodities. *See* Frederick W. Crook, *Betting the Farm: The WTO's Impact on the Agricultural Sector*, CHINA BUS. REV., Mar.–Apr. 2002, tbl. 1, http://www.chinabusinessreview.com.

[36] China's commitment to reduce subsidies on agricultural exports to zero can be contrasted with comparable commitments of the EU (reduced export subsidies by 36%, to $8.496 billion), the United States (same, to $594 million), and Mexico (reduced by 26%,

Council) estimates that, due to the adjustments brought by phasing out quotas and subsidies on agricultural goods pursuant to its WTO commitments, China will lose 11.3 million jobs in the agricultural sector.[37]

- *Subsidies.* By signing on to the Agreement on Subsidies and Countervailing Measures (SCM Agreement),[38] China in effect agreed to make subsidies to state-owned enterprises subject to countervailing duty actions. With limited exceptions, China agreed not to take advantage of the special provisions in the SCM Agreement that are applicable to developing countries.[39] China also expressly agreed to eliminate export subsidies on industrial goods upon accession.[40]
- *Transparency-related commitments.* China specifically agreed to translate into one of the WTO languages and make publicly available[41] all WTO-related law, to apply such law in a uniform and neutral manner, and to allow judicial review of administrative decisions relating to such implementation.[42] China also agreed to be subject to annual, "transitional" reviews of its compliance with WTO-related obligations for eight years following accession.[43]

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to $553 million). INTERNATIONAL TRADE CENTRE/COMMONWEALTH SECRETARIAT, BUSINESS GUIDE TO THE WORLD TRADING SYSTEM 180 (2d ed. 1999).

[37] Lardy, *supra* note 11, at 109–10. In other words, the number of agricultural workers alone that will be displaced amounts to over a third of Canada's population.

[38] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) [hereinafter SCM Agreement].

[39] *See infra* note 71 and accompanying text.

[40] Protocol, *supra* note 17, pt. I, para. 10(3). China's commitments under the SCM Agreement are discussed in detail in Part I.C below.

[41] *See* Working Party Report, *supra* note 3, para. 334. China's representative to the WTO Working Party on China's accession stated that China would make available translations "in one or more of the official languages of the WTO" (i.e., either English, French, or Spanish) all WTO-related laws, regulations, and other measures. *Id.*

[42] *See* Protocol, *supra* note 17, pt. I, para. 2.

[43] *See id.* pt. I, para. 18. China's protocol provides for a "transitional review mechanism," or a review by the WTO of the implementation by China of its commitments under the protocol and under the WTO agreements each year for eight years following accession. *Id.* This review is analogous to the Trade Policy Review Mechanism (TPRM) that was included in the Uruguay Round agreements. The purpose of the TPRM is to enhance transparency and understanding of WTO member countries' trade policies and practices through regular monitoring. *See* World Trade Organization, Trade Policy Reviews, *at* http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm (last visited Mar. 19, 2004). The frequency of TPRM review for any given WTO member increases with the overall amount of that member's trade; the largest trading country, the United States, is subject to TPRM review every two years. Smaller countries may be reviewed every six years. *Id.*; *see also* HOEKMAN & KOSTECKI, *supra* note 14, at 63.

- *Nonmarket economy treatment in anti-dumping cases.* Where a product that is subject to an anti-dumping investigation is exported from a nonmarket economy, the WTO Anti-Dumping Agreement allows authorities to determine the dumping margin by "constructing" the value of the product in the home market.[44] Under U.S. anti-dumping practice, authorities follow the controversial approach of utilizing the input costs of a "surrogate" third country for purposes of determining the constructed value.[45] Observers have severely

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China's protocol, by subjecting China to annual reviews for eight years, exceeds the requirements of even the largest WTO members under the TPRM. China's first transitional review was conducted at the end of 2002. *See* WTO Council for Trade in Goods, *Report of the Council for Trade in Goods on China's Transitional Review*, G/L/596 (Dec. 3, 2002); WTO Council for Trade in Services, *Transitional Review Under Section 18 of the Protocol on the Accession of the People's Republic of China*, S/C/15 (Nov. 8, 2002); WTO Council for Trade-Related Aspects of Intellectual Property Rights, *Transitional Review Under Section 18 of the Protocol on the Accession of the People's Republic of China*, IP/C/26 (Dec. 3, 2002). These reports are available online at http://docsonline.wto.org.

[44] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. 2.2, WTO Agreement, *supra* note 38, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) [hereinafter Anti-Dumping Agreement]. The anti-dumping margin of a given product is normally determined by comparing the price charged for the product in the home market of the exporting country with the price charged for the product upon export. *Id.* Article 2.2 of the Anti-Dumping Agreement provides that when, due to the particular domestic market situation of the exporting country, the price charged at home "do[es] not permit a proper comparison," a constructed value may be determined. In determining constructed value, authorities calculate the home market value of the product by adding production costs to a reasonable amount for administrative costs, marketing costs, and profits. *Id.* Such costs and profits may be determined on the basis of actual records kept by the producer under investigation, or, where that is not possible, on the basis of: (i) actual costs and profits incurred by producers in the same domestic market of products in the same general category; (ii) a weighted average of costs and profits incurred by producers under investigation in the same domestic market of like products; or (iii) "any other reasonable method." *Id.*

[45] John H. Jackson, *State Trading and Nonmarket Economies*, 23 INT'L LAWYER 891, 905 (1989). Professor John Jackson describes the "surrogate country" method of constructing value under U.S. anti-dumping law:

> In a case involving alleged dumping from a nonmarket economy, the U.S. authorities would examine the product in the nonmarket economy and establish all the various input components (parts, labor, overheads, etc.). Then the U.S. authorities would seek a "surrogate country," which would be a market oriented country at approximately the same level of economic development as the allegedly dumping nonmarket economy. The U.S. authorities would then take the list of inputs, a sort of "shopping list," to the surrogate country, and price each of those inputs on the market of the surrogate country. With this information it would then compile an overall constructed cost, and by adding the statutorily mandated amounts for administration and profit (the latter being 8 percent), the U.S. authorities would find the "home market price . . . ."

criticized this approach as arbitrary and discriminatory towards nonmarket economies.[46] In particular, China has long argued that it should not be treated as a "nonmarket economy" in light of the market orientation of its economy after years of reform.[47] Notwithstanding its position on this issue, China agreed in its protocol of accession to be treated as a "nonmarket economy" for fifteen years after accession for purposes of conducting anti-dumping investigations against Chinese companies.[48]

- *Discriminatory safeguard rule.* The WTO Safeguards Agreement severely restricts the ability of members to impose "safeguards" or otherwise WTO-inconsistent quotas and tariffs temporarily imposed in exceptional circumstances.[49] China agreed to allow WTO

Id.

[46] *See, e.g.*, William P. Alford, *When is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other "Nonmarket Economy" Nations*, 61 S. CAL. L. REV. 79, 89 (1987) (criticizing the "surrogate country" approach and listing the countries—including Paraguay, Thailand, the Dominican Republic, and Pakistan—that the U.S. Commerce Department has used as China's surrogate in calculating dumping margins).

[47] *See* Alford, *supra* note 46, at 86 (describing how, in 1980, counsel for China argued during an anti-dumping investigation that the menthol industry in China operated under market conditions); *China Blasts U.S. over Trade Obstacles*, KYODO NEWS SERVICE, Oct. 17, 1995, *available at* LEXIS, News Library, Jen File (describing Chinese foreign trade minister Wu Yi's critique of U.S. anti-dumping investigations against Chinese producers, in particular its treatment of the Chinese market as a "nonmarket economy"); Bruce Stokes, *Trade Moves China Off the Sidelines*, THE NAT'L J., May 2, 1987, at 1080, *available at* LEXIS, News Library, Ntljnl File (stating that the Chinese "want the opportunity to prove" to the United States that Chinese producers operate under market conditions for purposes of dumping determinations).

The argument that China is predominantly a market economy (at least for the purpose of setting prices) is supported by recent data: as of 1999, the prices of 95% of retail commodities, 86% of producer goods, and 83% of agricultural commodities in China were determined by market forces (as opposed to state-guided or state-fixed prices). LARDY, *supra* note 11, at 25 (relying on Chinese, IMF, and WTO data).

[48] *See* Protocol, *supra* note 17, pt. I, para. 15. The protocol permits a WTO member to use a "methodology that is not based on a strict comparison with domestic prices or costs in China." *Id.* In other words, the investigating agency may compare the export price of the good in question with either a "constructed price" or a "surrogate," third-country price to approximate the Chinese home market price. *Id.* As Nicholas Lardy argues, this methodology disadvantages China in a number of ways—for example, by using a surrogate country that has higher labor costs than China, or by including a profit margin in constructed value calculations. *See* LARDY, *supra* note 11, at 87–88.

[49] *See* Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, *supra* note 38, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) [hereinafter Safeguards Agreement]. For example, before resorting to safeguards, a country must show "serious injury" to domestic industry, *id.* art. 2(1), and must apply the safeguard in a nondiscriminatory manner (with some exceptions), *id.* art. 2(2). The Agreement also includes a 4-year sunset clause, which can be extended to 8 years. *Id.* art. 7.

members to apply a special safeguard rule, the "transitional product-specific safeguard" (TPSS) that applies only to China and will remain in effect for twelve years after accession.[50] The TPSS allows other WTO members to impose quotas and tariffs on Chinese goods upon a minimal showing of injury, and it restricts China's ability to retaliate.[51]

The Chinese tend to be sensitive to foreign interference in domestic affairs and attach a great deal of importance to reciprocity and mutual benefit in trade relations with the West.[52] To some degree, this

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[50] *See* Protocol, *supra* note 17, pt. I, para. 16.

[51] *Id.* Specifically, the TPSS may be imposed upon a showing of "market disruption" to domestic industry, may target only Chinese goods, and has no sunset clause. *Id.* Also, in contrast with the WTO Safeguards Agreement, which allows the target country to immediately retaliate when a safeguard has been imposed in response to a relative increase in imports, see Safeguards Agreement, *supra* note 49, art. 8, China may not retaliate under the TPSS until the safeguard has been in place for two years. Safeguards Agreement, *supra* note 49, art. 8.

The language of the TPSS in some respects tracks that of Section 406 of the U.S. Trade Act of 1974, 19 U.S.C. § 2436 (1974) ("Section 406"), a special safeguard provision under U.S. law that applies only to communist countries. *See also* John P. Erlick, *Relief from Imports from Communist Countries: The Trials and Tribulations of Section 406*, 13 LAW & POL'Y INT'L BUS. 617, 618–20 (1981); Jackson, *supra* note 45, at 902. Section 406 authorizes the President to impose quotas or tariffs on imports originating in a Communist country (defined as any country "dominated or controlled" by Communism) if, after investigation, U.S. authorities find evidence of "market disruption" to domestic industry. 19 U.S.C. § 2436(c). Section 406 defines market disruption to occur when imports "are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to domestic industry." 19 U.S.C. § 2436(e)(2)(A). Identical language is found in the TPSS.

As of September 2002, at least one country had invoked the TPSS. *See* Committee on Safeguards, *Transitional Product Specific Safeguard on Imports of Industrial Sewing Machine Needles into India from the People's Republic of China*, G/SG/54 (Sept. 18, 2002).

India submitted a notification to the WTO Committee on Safeguards, requesting consultations with China under the TPSS and notifying the committee of an application for imposition of a safeguard duty on imports of industrial sewing machine needles. *Id.*; *see also* LARDY, *supra* note 11, at 81–86 (noting that China also agreed to a special textile safeguard but predicting that the TPSS will be utilized instead, due to the absence of a sunset clause for the TPSS and the fact that the textile safeguard only lasts 7 years as opposed to 12). The terms of the textile safeguard are set forth in the Working Party Report, *supra* note 3, para. 238.

[52] Fewsmith, *supra* note 24, at 23 (noting that China's sensitivity to foreign pressure and unequal treatment can be illustrated by an incident that occurred during the spring of 1999—an incident which, combined with the U.S. bombing of the Chinese Embassy in Belgrade, threatened to derail the WTO accession negotiations between the United States and China). Chinese Premier Zhu Rongji visited the United States in April 1999 with the expectation of reaching agreement with the United States on the terms of China's accession. *Id.* at 24. On behalf of the Chinese leadership, Zhu offered numerous concessions that the United States had long been demanding as a condition to supporting China's bid.

can be attributed to a history of humiliating and discriminatory treatment that China suffered at the hands of Britain, France, and the United States at the turn of the century.[53] Viewed from this perspective, one wonders why the Chinese leadership agreed to WTO accession terms that, among other things, (1) require it to make broad and deep market access commitments across goods and services sectors; (2) bind China to Western norms of transparency, procedural fairness, and intellectual property protection; and (3) (with respect to the "nonmarket economy" treatment and the TPSS) single out China for less than most-favored nation (MFN) treatment.

There are obvious reasons why China would view WTO membership as beneficial. China stands to benefit from the recognition and prestige that WTO membership brings. WTO membership will deepen China's integration into the world economy and signal its status as a world economic power.[54] Conversely, the costs of remaining outside of the WTO may well exceed the costs of joining.[55]

Id. After President Clinton declined to conclude a deal, the office of the U.S. Trade Representative (USTR) made matters worse by posting details of China's concessions on its website. *Id.* at 30. The Chinese reaction to the posting was immediate, vociferous, and hostile. *Id.* The posting not only was viewed as a heavy-handed move on the part of the United States, but once the public had access to the substance of the concessions, the public accused Zhu of "selling out the country" to the United States. *Id.* at 31. Although China's leaders ultimately decided to resume negotiations, the incident permanently damaged Zhu Rongji's status within the leadership and in the eyes of the public. *Id.* at 34. Articles posted on the Internet labeled Zhu a "traitor," and Zhu's concessions to the United States were analogized to infamous demands Japan imposed on China in 1915. *Id.* at 31.

[53] *See* Di Jiang-Schuerger, *The Most Favored Nation Trade Status and China: The Debate Should Stop Here*, 31 J. MARSHALL L. REV. 1321, 1336–37. During the late 19th and early 20th centuries, Great Britain used "opium and troops" to open the Chinese market to trade and forced China to cede the port of Hong Kong. The United States and France, along with Britain, signed "unequal" treaties with China that allowed foreign law to apply in areas of China and imposed other discriminatory trade terms. *Id.* For example, China's trade treaties with the United States and Britain obligated China to grant MFN treatment without receiving MFN treatment in return. *Id.* at 1336 n.93.

[54] *See* Fewsmith, *supra* note 24, at 39.

[55] LLOYD GRUBER, RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS 4 (2000). Political scientist Lloyd Gruber argues that international cooperation through participation in institutions such as the WTO may make certain countries worse off, not only relative to other member countries, but in an absolute sense—that is, relative to the status quo prior to joining. *Id.* The "loser" countries may nonetheless participate in light of the fact that exclusion from the institution would be even worse than participating, given the power of the remaining countries to "go it alone." *Id.* at 7. According to this theory, China may have had little choice but to agree to the onerous terms of accession imposed by the WTO Working Party, since the alternative (exclusion from the international trading regime) was simply not a viable option. *Id.*

Additionally, there are a number of theories that have been offered to explain why China's leaders may have treated the issue of WTO accession with some degree of urgency. First, as some Chinese speculate, Jiang Zemin may have wished to complete the accession process before ceding power to a new generation of leaders.[56] Second, China wished to finalize its accession prior to the round of trade negotiations scheduled to commence in Seattle in November 1999.[57] Third and most significantly, the 1997 Asian financial crisis likely served as a "wake up" call for China,[58] signaling the need to complete its process of economic reform. The worsening impact of the state-owned sector as a drag on economic growth, combined with the growing debt crisis in the state-owned financial sector,[59] were problems that could not be ignored any longer. In this respect, China's leaders may have viewed WTO accession as generating necessary momentum to complete the most politically difficult stage of China's move to a market economy.[60]

C. *WTO as a Lever for Reform*

The essential function of the WTO has been described as providing a means to "resolve conflicts of interest *within, not between,* nations."[61] A more vivid analogy, along these same lines, characterizes the WTO as a "mast to which governments can tie themselves to escape the

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[56] Comment based on personal conversations.

[57] *See, e.g., China, US Sign Landmark Pact,* CHINA DAILY, Nov. 16, 1999, *available at* LEXIS, News Library, Chidly File (stating that the commencement of the Seattle Round was "widely seen as the deadline" for China to join the WTO); *EU's Lamy Expected to Meet China's Shi in Seattle,* ASIAN POLITICAL NEWS, Nov. 29, 1999, *available at* LEXIS, News Library, Iacnws File; William McMahon, *Even As China's WTO Bid Grows Dim, Backdoor Maneuvers Still Possible,* CHINAONLINE, Oct. 21, 1999, *available at* LEXIS, News Library, Chinao File. China concluded its bilateral agreement with the United States, which set forth the most significant terms relating to China's WTO accession, on November 16, 1999, just two weeks prior to the Seattle meetings. The scheduled round of negotiations at Seattle was thwarted by widespread protests and was effectively postponed until the Doha Ministerial meeting in December 2001.

[58] *See* LARDY, *supra* note 11, at 16.

[59] *See id.* at 13–15.

[60] *See* SUPACHAI PANITCHPAKDI & MARK L. CLIFFORD, CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE 140–41 (2002) (describing the decision by China's leaders to join the WTO as a "risky and courageous choice" that "reflects a belief that domestic reform needs the external pressure of WTO entry"). Dr. Supachai is currently Director-General of the WTO.

[61] FRIEDER ROESSLER, *The Constitutional Function of the Multilateral Trade Order, in* ESSAYS ON THE LEGAL STRUCTURE, FUNCTIONS & LIMITS OF THE WORLD TRADE ORDER 109 (Meinhard Hilf & Ernst-Ulrich eds., 2000) (emphasis added).

siren-like calls of various pressure groups."[62] Although these descriptions were made with reference to Western political tradition, China's situation provides a contrasting, but equally illustrative, example. While not a democracy, China nonetheless must deal with its own unique range of groups protecting their respective vested interests. These interests include central versus local governments, powerful ministry officials, the managers of China's state-owned enterprises (SOEs), and the diversity of interests across China's various provinces, which is pronounced due to the unevenness of economic growth within the country. Finally, there are divisions among different political factions within the CCP—some are convinced of the need to aggressively pursue market reform, while others are more reluctant, even reactionary.

WTO accession acts not just as a lever to force reform, but it also serves to lock in economic reform and make it irrevocable. In adopting the rules in China's protocol of accession, the WTO framework acts as a sort of constitution, imposing economic discipline by constraining the ability of those in China's government who might wish to take a different course of action. Thus, China's recent accession illustrates how the commitments imposed as a condition of WTO membership may provide the political leverage necessary to move difficult economic reforms to the next stage. In terms of imposing market discipline on the country, one could say the WTO is analogous to the International Monetary Fund (IMF).[63]

The most direct form of discipline that WTO accession brings is the increased competition that China's state-owned sector will face from opening up to foreign trade. But, as China expert Nicholas Lardy

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[62] HOEKMAN & KOSTECKI, *supra* note 14, at 29 (citing Frieder Roessler, *The Scope, Limits and Function of the GATT Legal System*, 8 WORLD ECON. 289–98 (1985)).

[63] *See* Jeffrey D. Sachs, *Strengthening IMF Programs in Highly Indebted Countries*, *in* PULLING TOGETHER: THE INTERNATIONAL MONETARY FUND IN A MULTIPOLAR WORLD 111 (Catherine Gwin & Richard E. Feinberg eds., 1989). Although IMF conditionality is a lever that pressures sovereign debtors, the IMF could be utilized to pressure creditors as well. *Id.* In an article published at the height of the Latin American debt crisis, Jeffrey Sachs argued in favor of IMF-mandated rules to force creditors to accept debt reduction (creditor agreements to reduce interest or principal payments on outstanding debt issued by deeply indebted sovereign borrowers). He reasoned that mandatory rules imposed by an international institution would actually work to the benefit of international banks, by shielding management from "disgruntled" shareholders. *Id.* Sachs suggested that creditors "want debt reduction to appear unavoidable" and privately reject the feasibility of a voluntary approach. *Id.* Although the IMF has not adopted such an approach to date, the IMF and the World Bank are currently exploring a proposal to adopt a mandatory, bankruptcy-like approach to sovereign debt problems. *See* Edmund L. Andrews, *World Financial Officials Back New World Debt Framework*, N.Y. TIMES, Sept. 28, 2002, at A6. Professor Sachs's argument regarding the IMF's potential role is analogous to the role that the WTO may play to provide leverage for economic reform in China.

observes, if China's state-owned banking sector continues to "channel disproportionate amounts of funds to inefficient state-owned companies," then the discipline provided by increased competition on China's domestic economy will be eroded, since the recipients of such funds gain an "unfair" advantage on the market.[64] The brunt of the state-owned sector's inefficiency is thereby borne by China's banks. Indeed, the staggering burden of nonperforming loans on China's banking sector is widely recognized as one of the most daunting challenges that the country faces in completing its transition to a market economy.[65]

There are two aspects of the WTO rules that could provide leverage to China's government authorities in stemming the flow of funds

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[64] China's reform of its state-owned sector bears some resemblance to that of certain Eastern European countries (such as Hungary and Yugoslavia) that underwent privatization in the late 1980s. As discussed below, Hungarian enterprises during the 1980s operated under a "soft budget constraint." *See infra* note 102.

In China's case, a source of the "soft budget constraint" on inefficient enterprises is generous credit terms from the state-owned banking system. *See* LARDY, *supra* note 11, at 128–30. As Lardy describes, even after China opens up its market to foreign competition, money-losing firms in China may continue to finance their losses by borrowing from state banks. Lardy argues that the cost to China of continuing to "policy [lend]" to inefficient firms is very high, both in terms of increasing the financial burden on the banks as well as inhibiting the flow of funds to more efficient uses. *Id.*

[65] *See Banking on Growth*, THE ECONOMIST, Jan. 18, 2003, at 67. Goldman Sachs recently estimated that $500–600 billion, or roughly half of all loans by Chinese banks, are unlikely to be repaid in full. Official figures put the level of nonperforming loans at just over 25%. *Id.*; *see also* NICHOLAS LARDY, CHINA'S UNFINISHED ECONOMIC REVOLUTION 115–22 (1998) (explaining why Chinese financial reporting underestimates the magnitude of the problems that the banks face and suggesting that, collectively, China's four major banks have a negative net worth); Keith Bradsher, *Another Asian Nation Battling a Crisis in Its Banking System*, N.Y. TIMES, Oct. 26, 2002, at B1 (citing an economist's estimate that the debt burden could cost China enough to retard its annual growth rate by as much as 2% in the next few years) [hereinafter Bradsher, *Another Asian Nation*]; Keith Bradsher, *New Challenge for China's Shaky Banks*, N.Y. TIMES, Sept. 17, 2002, at C1 (close to two-thirds of senior CCP officials recently surveyed believe that a financial crisis poses the "greatest danger" to China in the near future) [hereinafter Bradsher, *New Challenge*].

In 1999, the Chinese government set up four Asset Management Companies (AMCs)—each linked with one of China's four main state-owned banks—in an effort to take some of the banks' nonperforming loans off of their books. *See* Li Ying & Li Xin, Establishment of Financial Asset Management Companies and Related Impacts, *at* http://www.ahk-china.org/china-economy/berichte-analysen-financial-asset.htm (Mar. 10, 2004). The AMCs may then swap the debt for equity in the borrower company or find a buyer for the debt. *Id.* By June 2002, the AMCs had cleared 210.3 billion yuan (about $25 billion USD) of nonperforming loans from the banks' balance sheets. *Id.* Due in part to the lack of a developed capital market in China and the limitations of China's bankruptcy law, the work of the AMCs in disposing of the debt has proceeded very slowly. *Id.* As of October 2002, the AMCs had sold off only eleven percent of their loan portfolios and received on average twenty-one cents for each dollar of face value of assets sold. *See* Bradsher, *Another Asian Nation*, *supra* note 65, at 27.

from China's banking sector to its state-owned enterprises: first, WTO restrictions on industrial subsidies; and second, China's commitment under the GATS to open its banking sector to foreign competition.

The SCM Agreement[66] discourages and, to some extent, prohibits China's government from providing financial support to state-owned enterprises. The term "subsidy" is defined broadly in the SCM Agreement to include a financial benefit (such as a cash contribution, a tax break, or any contractual arrangement on terms more favorable than what the market would bear) granted by the government to an industry as a means of support.[67] While subsidies may further legitimate policy objectives of China's government in buffering its move towards a market economy (such as mitigating the effects of privatization on laid-off workers or supporting the development of new industries in regions that have been dominated by state-owned enterprises), the use of certain subsidies is either discouraged or prohibited by the SCM Agreement due to a distorting effect on trade.

The general approach of the SCM Agreement is to prohibit a limited range of subsidies while allowing other subsidies to be the basis for imposing countervailing duties.[68] Specifically, prohibited subsidies include those that are contingent upon export or the use of domestic over imported goods.[69] Notwithstanding China's status as a developing country, most of the phase-out periods and other special rules applicable to developing countries under the SCM Agreement will not

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[66] SCM Agreement, *supra* note 38. Commitments to reduce and/or eliminate subsidies are contained in two WTO agreements: industrial subsidies are covered in the SCM Agreement, and agricultural subsidies are covered in the WTO Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, *supra* note 38, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994).

[67] SCM Agreement, *supra* note 38, art. 1. The SCM Agreement defines a "subsidy" to include a "financial contribution" by a government that confers a "benefit" on the recipient producer. *Id.*; *see also* WTO Appellate Body Report on Canada—Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R (Aug. 20, 1999), para. 157 (explaining that a "benefit" may be found to have been conferred where "the recipient has received a 'financial contribution' on terms more favorable than those available to the recipient in the market").

[68] *See* SCM Agreement, *supra* note 38, arts. 2, 15. Countervailing duties are compensatory tariffs that a country may levy on imports that the government determines to have "unfairly" benefited from subsidies. The SCM Agreement authorizes a country to levy countervailing duties on subsidized products of an exporting country if the subsidy is "specific" (i.e., targeted to a particular industry), and the use of such subsidy can be shown to have caused "material injury" to the importing country's domestic industry. *Id.*

[69] *Id.* art. 3.1.

apply to China.[70] In addition, China agreed in its protocol of accession to define a given subsidy as "specific," and, therefore, subject to a countervailing duty action, if "disproportionately" large numbers of state-owned enterprises receive such subsidy.[71] Thus, a preferential loan program from a state-owned bank that disproportionately benefits state-owned enterprises may fall within the definition of a specific subsidy and, therefore, could be subject to a countervailing duty action on imports produced by the subsidized enterprises.[72] Thus, while only a limited category of subsidies is outright prohibited, a much broader range of subsidies will be actionable, which means among other things that they may be subject to countervailing duties.[73]

Whereas China's subsidy commitments impose external constraints on the government's ability to channel funds to state-owned enterprises, its commitment to open up the banking sector to foreign participation imposes discipline through market pressure. In other words, China's GATS commitments should encourage reform of the

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[70] For example, developing country WTO members were exempt from the SCM Agreement's prohibition of certain subsidies for a transitional period of up to eight years after the Agreement went into effect (i.e., until 2003). *See* SCM Agreement, *supra* note 38, arts. 27.2, 27.3. In addition, certain benefits conferred pursuant to the privatization program of a developing country WTO member are not actionable through the imposition of countervailing duties. *Id.* art. 27.13. China agreed not to reserve the right to benefit from these and a number of other benefits extended to developing countries under the SCM Agreement. *See* Working Party Report, *supra* note 3, para. 169.

[71] Protocol, *supra* note 17, pt. I, para. 10. The SCM Agreement used to define a category of "non-actionable" subsidies, such as certain research and development-related subsidies. SCM Agreement, *supra* note 38, art. 8. These provisions expired, however, and have not been renewed.

[72] *See* Working Party Report, *supra* note 3, para. 170. The possibility that preferential loans from state-owned banks might amount to an actionable subsidy was raised by the WTO Working Party during China's accession negotiations. *Id.* China's representative responded by noting that a loan that does not confer a benefit (i.e., a loan on market terms) would not amount to a subsidy, stating that "China's objective was that state-owned enterprises, including banks, should be run on a commercial basis and be responsible for their own profits and losses." *Id.*

[73] *See* SCM Agreement, *supra* note 38, arts. 15–21. The SCM Agreement allows a member that has been injured by another member's subsidy policies to respond either by imposing countervailing duties (which the Agreement permits if the subsidy has caused "material injury" to domestic industry of the importing country), *id.* art. 19, or by resorting to WTO dispute settlement, *id.* arts. 4, 7.

The U.S. government's review of China's subsidy practices is still ongoing and appears to be focused on the elimination of prohibited subsidies (i.e., subsidies that are conditioned upon export or import-substitution). *See* COMPLIANCE REPORT, *supra* note 12, at 22–23. While the USTR has concerns regarding the sufficiency of China's WTO notification regarding prohibited subsidies, the USTR has offered technical assistance to the Chinese authorities to improve notification in this area. *See id.*

banking system through competition from foreign enterprises. Under the GATS, each WTO member negotiated schedules of individual commitments to allow market access and/or to grant national treatment to foreign service providers across four different modes of supply: cross-border supply, consumption abroad, commercial presence, and presence of natural persons.[74] In its GATS Schedule of Specific Commitments, China agreed to eliminate all "nonprudential" restrictions on the banking sector, including ownership and operation restrictions, by December 2006.[75] If they meet the minimum asset requirements spelled out in the schedule,[76] foreign banks will be allowed to establish branches or subsidiaries in China. Finally, foreign banks will be able to engage in local currency transactions after three years of profitable business operation in China.[77]

While some observers have expressed concern that the competition from foreign banks could divert sufficiently large amounts of domestic deposits out of the state-owned banks to threaten the collapse of China's domestic banking system,[78] others predict that foreign participation will force Chinese banks to more effectively compete and that their existence will not be jeopardized.[79] Indeed, a

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[74] *See* HOEKMAN & KOSTECKI, *supra* note 14, at 250–51 (explaining the four modes of supply covered under GATS). Market access and national treatment commitments under the GATS operate through a "positive list" approach—that is, WTO members are only obligated to extend national treatment or provide market access with respect to service sectors and modes of supply listed in that member's GATS schedule. *Id.* at 254 n.4. Even where a given service sector is listed, such obligations apply only to the extent that exemptions are not otherwise specified in the schedule. *Id.*

[75] *See* Schedule of Specific Commitments, *supra* note 34, at 34–36 (agreeing to eliminate restrictions within five years after accession).

[76] *Id.* Banks must have total assets of more than US $10 billion (in the case of a subsidiary) or $20 billion (in the case of a branch) at the end of the year prior to filing the application. *Id.*

[77] *Id.*; *see* COMPLIANCE REPORT, *supra* note 12, at 41. Since accession China has generally complied with its GATS commitments in the banking sector. Although the U.S. government has complained that regulations enacted by the Bank of China on foreign banking operations impose prudential rules (such as minimum capital requirements) that "far exceed international norms," it also concedes that these measures have "kept pace" with China's WTO commitments. *See id.*

[78] *See* LARDY, *supra* note 11, at 114 (citing a study by a Chinese Central Bank researcher that predicts that foreign banks will capture 15% of China's domestic currency market by 2007); Bradsher, *New Challenge*, *supra* note 65 (citing "pessimists" who warn of a possible collapse of China's domestic banking system if it loses deposits and borrowers continue to default).

[79] *See* LARDY, *supra* note 11, at 119. Nicholas Lardy notes that as of 2000, the percentage of financial assets in China owned by foreign financial institutions was only 1.5%. *Id.* at 115. He predicts that even after 2007, when China has agreed to eliminate all "nonprudential" restrictions on foreign banks, foreign banks operating in China will continue

number of foreign banks, such as Citibank, ABN Amro, and the Hong Kong and Shanghai Bank, have already entered China's market and are competing with domestic banks for the country's most creditworthy borrowers.[80] There is even some early evidence that Chinese banks are learning and improving from the example and competitive pressure of foreign banks operating in China.[81]

To summarize, although far-reaching and potentially onerous, the commitments that China has undertaken in its protocol of accession will open the Chinese market to competition and pressure the government to end its practice of protecting inefficient state-owned enterprises—a practice that is a drag on the economy and threatens the continued stability of China's banking system. In the same way, the external pressure of WTO obligations may accelerate China's process of legal reform, as discussed in Part II below.

D. *Comparisons with Eastern Europe Under GATT*

The importance of WTO accession as a component of China's economic reform program can be contrasted with the experience of other Communist countries. There are a number of former Communist countries such as Mongolia or Albania that joined the WTO *after* the fall of Communism in their respective countries.[82] In contrast, China's continuing efforts to qualify for WTO accession (and later, to comply with the obligations of membership) has proceeded under the control of the CCP. While China is the only Communist country other

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to be limited by two constraints: first, the prudential and regulatory requirements imposed on Chinese banks; and second, the availability of creditworthy Chinese borrowers. *Id.* at 118–19. Lardy concludes that, with the introduction of foreign banks into the Chinese market, "Chinese banks are likely to face serious competitive pressure, even if foreign banks do not drain off a large-enough share of deposits to endanger the liquidity of domestic banks." *Id.* at 119.

[80] *See* Bradsher, *New Challenge*, *supra* note 65.

[81] *Id.* Bradsher indicates that the entry of foreign banking in China has caused Chinese banks to offer new products, such as mortgages and credit cards with revolving lines of credit. Foreign competition has also forced Chinese banks to expand into loan syndication and accounts-receivable financing, areas that Chinese banks had ignored in the past. *See* Karby Legett, *Citibank Stirs Fear in China by Buying Pile of Unpaid bills*, WALL ST. J., Aug. 27, 2002. Chinese banks are learning from Citibank's example how to develop more sophisticated techniques for servicing corporate clients, such as offering "their own, vastly improved cash-management products." *Id.*

[82] *See* WTO Website, *supra* note 1. There are a number of post-Communist countries that have acceded to the WTO. *Id.* Mongolia became a member of the WTO in 1997 and Albania in 2000. *Id.* Similar examples include Slovenia (1995), Moldova (2001), Georgia (2000), Estonia (1999), Latvia (1999), Lithuania (2001), and Armenia (2003). *Id.* Russia is currently in the process of negotiating the terms of its accession. *Id.*

than Cuba to gain accession to the WTO,[83] a number of Communist countries in Eastern Europe joined the GATT during the 1960–70s. The experience of these countries provides an interesting counterexample to the Chinese one.

There were three Communist countries that joined the GATT during this period: Poland in 1967, Romania in 1971, and Hungary in 1973.[84] These countries' interest in the GATT coincided with the post-Stalinist period in Eastern Europe and its corresponding focus on raising technical standards and improving the standard of living in socialist countries.[85] The terms of GATT accession for Hungary recognized the more decentralized nature of trade in Hungary's economic system—the terms of accession were based, at least in principle, on the existing GATT framework of tariff schedules.[86] In contrast,

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[83] *See* U.S. Department of State, Background Notes, http://www.state.gov/r/pa/ei/bgn/ (last visited Apr. 22, 2004) (containing general information for each country of the world). At present, only five countries in the world are still Communist: North Korea, Laos, Vietnam, Cuba, and China. *Id.* Of these, the only other WTO member is Cuba, an original signatory to the GATT but a tiny member whose involvement in the organization became severely limited after Fidel Castro came to power. *See* Grzybowski, *supra* note 32, at 547.

[84] *See* KOSTECKI, *supra* note 32, at xv, 25. Although Czechoslovakia was an original contracting party to the GATT, its status as a GATT member was irrelevant in practice, as it was treated by the West similarly to other non-GATT-member, Eastern European countries. *Id.*

Both politically and economically, Yugoslavia was a special case. Yugoslavia gained admission to the GATT in 1966, as a country with some state trading but whose foreign trade was based on a tariff system. *Id.* at 25–27. Eighteen years earlier, in 1948, the Tito regime broke with Stalinism, decentralized its economic system on the basis of "workers' self-management," and established itself politically as a nonaligned country. *See id.* at 25; Karen Halverson, *Privatization in the Yugoslav Republics*, 25 J. WORLD TRADE 43, 46–47 (1991) (describing workers' self-management). After 1965, Yugoslavia underwent a major program of economic reforms, which among other things facilitated the registration of new trading enterprises, liberalized foreign investment, loosened import controls, eliminated the licensing of exports, and allowed Yugoslav banks to borrow from abroad. *See* Harriet Matejka, *Foreign Trade Systems*, *in* THE NEW ECONOMIC SYSTEMS OF EASTERN EUROPE 443, 468–69 (Hans-Hermann Höhmann et al. eds., 1975) [hereinafter NEW ECONOMIC SYSTEMS]. Although Yugoslavia's 1965 economic reform program roughly coincided with GATT accession and may have been motivated in part by a desire to gain accession to the GATT, it appears that Yugoslavia's ability to adapt to the GATT system was due to its unique political and economic approach—in other words, Yugoslavia's economic and political reform provided the preconditions and momentum for eventual GATT membership, instead of the other way around. *Id.*

[85] KOSTECKI, *supra* note 32, at 6; *see also* Grzybowski, *supra* note 32, at 552–53 (quoting a Soviet author who recognized the importance of economic cooperation as a means of acquiring Western machinery, equipment, and technology).

[86] *See* KOSTECKI, *supra* note 32, at 31; Grzybowski, *supra* note 32, at 549. Although Hungary decentralized its foreign trade operations and shifted from a target-based to a tariff-based system, this does not necessarily mean that foreign trade in Hungary was determined by market forces. *See* KOSTECKI, *supra* note 32, at 31; Grzybowski, *supra* note 32, at 549. Its economy remained fundamentally socialist in nature, and therefore was ulti-

Poland and Romania joined the GATT without reforming their foreign trade systems, which, instead of utilizing tariffs, were based on targets specified in an economic plan.[87] Instead of negotiating tariff reduction commitments, Poland and Romania each agreed to increase their level of imports from GATT member countries by a specified amount.[88] In addition, the countries agreed to submit to periodic reviews that focused on the direction and make-up of each country's foreign trade.[89] In spite of its inconsistency with the MFN obligation, the new GATT members were permitted to trade on special terms with the bloc of countries in the Council for Mutual Economic Assistance (CMEA or COMECON).[90]

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mately controlled not by the market, but by the state. *See, e.g.*, Gábor Révész, *Hungary*, *in* NEW ECONOMIC SYSTEMS, *supra* note 84, at 155, 165 (describing Hungary's 1968 economic reforms as "[t]he new mechanism of the Hungarian socialist planned economy").

Consider the following observation of an East-West trade scholar, who emphasizes the central difference between foreign trade in market versus planned economies as relating to the degree of government control over trade:

> Tariffs in socialist economies have little influence on the volume of imports .... Tariffs are a non-essential part of the import control system. More efficient methods to regulate the flow of imports are licensing and foreign currency controls. They are practiced in Hungary as well as in other socialist countries. Indeed they are an indispensable instrument in realizing the goals and targets of the economic plan. However unrestrained and competitive Hungarian trade agencies may be in the selection of their trading partners and of the assortment of imported goods, they still need to obtain import licenses and foreign currency allocations ....

Grzybowski, *supra* note 32, at 551. The implication of Professor Grzybowski's observation is that any tariff concessions contained in Hungary's GATT schedule would be ineffective if the government restricted access to imports by withholding licenses or access to foreign currency. *See id.*

[87] KOSTECKI, *supra* note 32, at 27. Like Hungary, Poland experimented with a program of decentralization during the early 1970s and again during the 1980s. *See Perestroika Survey*, THE ECONOMIST, Apr. 28, 1990, at 10.

[88] Poland agreed to "increase the total value of its imports from the territories of the contracting parties by not less than 7 per cent per annum." KOSTECKI, *supra* note 32, at 94 (quoting GATT B.I.S.D. (15th Supp.) at 52 (1968)). As a developing country with greater balance of payments constraints, Romania sought a more flexible formula. *Id.* at 96. Therefore, Romania's terms of accession stated that it "firmly intends" to increase the value of its imports from GATT members "at a rate not smaller than the growth of total Romanian imports provided for in its Five-Year Plan." *Id.* at 96 (quoting GATT B.I.S.D. (19th Supp.) at 10 (1972)).

[89] Poland agreed to annual consultations whereas Romania and Hungary agreed to consultations every other year. *See* KOSTECKI, *supra* note 32, at 108.

[90] *See id.* at 104–06. The fact that trade within the CMEA was based on economic planning complicated any attempt to compare the terms of trade with GATT versus CMEA trading partners. *Id.* Even Hungary, which as noted above modified foreign trading to a tariff-based system for GATT purposes, continued to trade with CMEA countries on the

The accession of Hungary, Poland, and Romania to the GATT during the 1960–70s represented an important change in thinking regarding the role of Communist governments in the world trade system.[91] However, the participation of these countries in the GATT failed to achieve a meaningful integration of their economies into the world trading system and did not affect fundamental reform within the countries. In terms of overall trade flows, a study of the effects of GATT accession for Hungary, Poland, and Romania shows that the balance of trade for all three countries vis-à-vis the GATT countries was generally negative.[92] While imports from GATT countries increased dramatically during the early 1970s, the increase is attributable mainly to the availability of Western credit to importers.[93] Indeed, countries such as Poland resorted to bilateral arrangements to eliminate persistent, discriminatory trade restrictions against Polish exports that the GATT framework was ineffective in addressing.[94] Professor Kostecki concludes that GATT membership was of more symbolic than practical importance for these countries:

> When judged from a political perspective, the GATT East-West arrangements are second-best solutions—both for the

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basis of long-term agreements controlled by the requirements of economic planning. *See* Grzybowski, *supra* note 32, at 551.

[91] *See id.* at 552 (stating that the primary significance of the socialist countries' GATT accession was as a "reaffirmation that these four countries, traditionally a part of Western spiritual and economic reality, are finding their way into the old pattern of coexistence").

[92] *See* KOSTECKI, *supra* note 32, at 127–28. GATT accession did not result in the elimination of politically motivated restrictions imposed by Western countries on East European imports. *Id.* at 98–99. Even after the accession of Hungary, Poland, and Romania to the GATT, a number of Western European countries maintained discriminatory quantitative restrictions on Eastern European imports, and the United States refused to grant MFN status to Hungary or Romania. *Id.* Nor was the GATT ultimately effective in shifting the trade of these countries away from the CMEA. *Id.* By 1987, Poland's exports amounted to only 11.2% of GDP, and CMEA countries still accounted for over 40% of Poland's exports. *See* Jaroslaw Pietras, *The Role of the WTO for Economies in Transition*, *in* THE WTO AS AN INTERNATIONAL ORGANIZATION 353, 354 (Anne O. Krueger ed., 1998).

[93] *See* KOSTECKI, *supra* note 32, at 118. Professor Kostecki observes that the increase of imports from the West into Poland, Hungary, and Romania during this period was not due to GATT concessions, which he describes as "either meaningless or of a limited value," but rather due to grants of "sizeable Western credits" to importers. *Id.* One consequence of increased trade with the West on generous credit terms was the accumulation of external debt burdens that ultimately led to high inflation rates in these economies in the late 1980s. *See* Halverson, *supra* note 84, at 47.

[94] KOSTECKI, *supra* note 32, at 122–23 (observing that the eventual relaxation of discriminatory restrictions maintained by countries such as Austria, Denmark, Italy, and Sweden against Polish imports was achieved through bilateral agreement and not through GATT action).

> socialist bloc and the West. The GATT did not really succeed in becoming an instrument of Western policy .... despite the favouritism displayed toward the East European countries admitted to the GATT, Washington and Western Europe did not really grant them better commercial treatment than those East European states remaining outside the organization.[95]

China's terms of accession to the WTO required deep concessions on China's part and afforded China full participation as a WTO member and participant in the international market system. In contrast, Eastern Europe's participation in the GATT was ultimately too limited in scope to overcome the political barriers between the Soviet Bloc and Western countries.

The reforms that occurred within these countries were also limited in scope. Even in more decentralized economies such as Hungary, the means of production were predominantly owned and controlled by the state until the disintegration of the Eastern Bloc in 1989. By the mid-1980s, the share of state trading as a proportion of value added in the economy was over eighty percent in Hungary, Poland, and Yugoslavia.[96] Although pricing decisions in these economies were delegated to enterprises, in reality prices were not determined by market forces, but rather were manipulated by enterprise management for political or other reasons.[97] Eastern Europe's experience thus illustrates the limitations of the GATT in inducing reform in socialist countries.

While WTO accession has had a profound impact on both economic and legal reform in China, there is little evidence that participation in the GATT played a significant role in influencing reform in Eastern Europe. Several reasons could be offered to explain the difference. First, unlike the GATT, the WTO is a global trade organization

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[95] *Id.* at 137–38.

[96] *See Business in Eastern Europe Survey*, THE ECONOMIST, Sept. 21, 1991, at 10. In contrast with the United States, whose state-owned sector accounted for 1% of value-added in the mid-1980s, the corresponding percentages for Eastern Europe include Hungary (86%), Poland (82%), Yugoslavia (87%), and Czechoslovakia (97%). *Id.*

[97] *See* János Kornai, *The Hungarian Reform Process: Visions, Hopes and Reality*, *in* REMAKING THE ECONOMIC INSTITUTIONS OF SOCIALISM: CHINA AND EASTERN EUROPE 44–46 (Victor Nee & David Stark eds., 1989) (discussing "soft budget constraints" and the arbitrariness of prices set in decentralized socialist enterprises). Hungarian enterprises had little incentive to cut costs or otherwise compete, since they had access to subsidies, tax breaks, or other bail-outs from the state. *Id.* Hungarian economist János Kornai coined the phrase "soft budget constraint" to describe this phenomenon. *Id.*

with an expanded mandate,[98] a formal structure, an ongoing process for conducting trade policy reviews of its members,[99] and a binding dispute settlement mechanism.[100] As a consequence, the terms of accession to the WTO are much more extensive and rigorous than the terms of accession to the GATT.[101] Second, the political constraints in each case were very different. Since the advent of China's "open door" policy in the late 1970s, the CCP has made market reform part of its ideology and has staked its legitimacy on the success of economic reform. In contrast, the reforms in Eastern Europe that coincided with GATT accession were constrained by the influence and control of the Soviet Union. Thus, whereas the Soviet Union merely acquiesced in Eastern Europe's experimentation with GATT membership, China's Communist leaders have actively sought WTO accession as a means of furthering its market-oriented agenda. Finally, the eventual collapse of the Eastern Bloc, a growing consensus among countries in favor of market-based economic policies, and the forces of globalization have all enhanced the ability of the WTO as an institution to influence policy within a given member country.

Notwithstanding the differences, there are a number of interesting parallels between the past experience of the Eastern European countries and present-day China. First, the current crisis that China faces with its debt burden and "soft budget constraints" on Chinese enterprises mirrors the economic problems that Poland, Hungary,

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[98] *See* HOEKMAN & KOSTECKI, *supra* note 14, at 41. The adoption of the Uruguay Round agreements in 1995 led to more stringent rules in areas such as agriculture, subsidies, and safeguards. In addition, the scope of the WTO agreements expanded into previously uncharted areas, including trade in services and trade-related aspects of intellectual property. Finally, the fact that countries were obligated to sign on to the Uruguay Round agreements as part of a "single undertaking" expanded the scope of obligation for developing countries that previously opted out of certain of the GATT agreements. *Id.* at 49.

[99] See *supra* note 43 for a discussion of the WTO Trade Policy Review Mechanism (TPRM).

[100] Among other things, the WTO Dispute Settlement Understanding formalizes the dispute settlement process by allowing the right of appeal of WTO panel decisions to a permanent Appellate Body (art. 17) and providing for the automatic adoption of Appellate Body decisions unless the WTO decides by consensus not to adopt the report (art. 17.14). Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 17, WTO Agreement, *supra* note 38, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1226 (1994).

[101] For a discussion of how the WTO facilitated the economic transition of Poland, the Czech Republic, Romania, and Hungary, see Pietras, *supra* note 92, at 355–59. Pietras describes the economic situation of these countries prior to the late 1980s as characterized by "relative autarky" vis-à-vis the industrialized countries. *Id.* at 354.

and Yugoslavia faced in the 1980s.[102] The debt and soft budget constraints are problems that result from partial liberalization of the state-owned sector. Second, as elaborated below,[103] the dramatic scope of legal and economic reform in China over the past twenty years has created a crisis of values in China. The vacuum created by political liberalization and the introduction of a new legal framework in China has caused a rise in corruption and a sort of moral schizophrenia. This crisis of values mirrors similar crises experienced by countries in the Eastern Bloc, illustrated most dramatically in Yugoslavia, where dramatic legal and economic reform, along with the disintegration of the country, fueled intense nationalism, ethnic cleansing, and war.

Indeed, what sets China's example apart from other WTO members is the degree to which China's WTO undertakings served as a catalyst of legal and economic reform within the country. The following section describes China's WTO obligations relating to transparency and considers the degree to which accession has and will contribute to legal change in China.

II. WTO Accession and Legal Reform: Undertakings Relating to Transparency

The previous section of this Article discusses how China's WTO commitments may help propel economic reform through a politically difficult phase. WTO accession encompasses not only commitments to eliminate tariff and nontariff barriers to trade in goods but also a range of related commitments, including commitments to eliminate subsidies and to open service sectors to foreign participation. In addition to trade liberalization commitments, the WTO agreements include a special set of obligations that aim to promote transparency, predictability, and fairness in the implementation of China's WTO obligations. These fall into three general categories: obligations relating to public availability of trade-related laws, uniform administration of the laws, and the existence of an independent and impartial system for the review of administrative decisions.[104] China's undertakings in promoting transpar-

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[102] *See* Kornai, *supra* note 97, at 44–46 (using the term "soft budget constraint" to describe the problems that Hungarian state-owned enterprises faced as the country pursued economic reform throughout the 1980s.); *see also* Halverson, *supra* note 84, at 46–48 (describing similar problems in Yugoslavia).

[103] *See infra* notes 172–74 and accompanying text (discussing corruption/moral crisis in China).

[104] *See* Protocol, *supra* note 17, pt. I, para. 2. This Article uses the term "transparency-related rules" in referencing the publication, uniform administration, and independent

ency, although limited in scope to the enforcement of China's WTO commitments, have provided an impetus for legal reform in China.

The concept of transparency is central to the WTO agreements. Article X of the GATT 1994 requires that all trade-related laws, regulations, and rulings be promptly published and administered in an "impartial and uniform" manner.[105] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) devotes an entire chapter to enforcement obligations,[106] and the GATS, in addition to publication and notification requirements, requires setting up "enquiry points" to provide information at the request of any member.[107] Thus, the transparency-related obligations contained in the WTO agreements encompass not only the publication of trade-related laws, but also their accessibility as well as fair and effective implementation. In addition to these obligations, China's protocol of accession includes a number of specific commitments that confirm as well as supplement the obligations contained in the WTO agreements. This section describes these rules, points out certain obstacles to their effective implementation, and notes the extent to which the Chinese government has achieved progress in implementation.

There has been much written regarding the differences between China's legal culture and that of Western countries, including debate

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review rules contained in China's protocol and in the WTO agreements. Of course, there are other mechanisms in the WTO agreements that promote transparency, in particular, the Trade Policy Review Mechanism. *See supra* notes 41–43 and accompanying text (describing China's transparency commitment). China's protocol goes beyond the requirements of other WTO members by subjecting China's legal and economic system to review under the TPRM every year for the first eight years after China's accession. *See* Protocol, *supra* note 17, pt. I, para. 18.

[105] General Agreement on Tariffs and Trade, Oct. 30, 1947, art. X, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

[106] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, arts. 41–63, WTO Agreement, *supra* note 38, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1197 (1994). Specifically, the TRIPS Agreement requires the availability to intellectual property right-holders of "civil judicial procedures" for intellectual property enforcement, *id.* art. 42, and that laws, regulations, and rulings pertaining to intellectual property protection and enforcement be published and available upon the request of another member, *id.* art. 63.

The SCM and Anti-Dumping Agreements also contain transparency-related requirements. *See* SCM Agreement, *supra* note 38, arts. 12, 13; Anti-Dumping Agreement, *supra* note 44, arts. 22, 23 (requiring public notice of anti-dumping and countervailing duty investigations, written explanation of the basis on which determinations are made, and the availability of judicial, arbitral, or administrative review of final determinations).

[107] General Agreement on Trade in Services, Apr. 15, 1994, art. III.4, WTO Agreement, *supra* note 38, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1168 (1994).

on the degree to which China is a country governed by the "rule of law."[108] This Article does not address all of these questions but instead describes the transparency-related rules that bind China as a WTO member and assesses the general progress China has made, and the challenges that remain, in implementing these obligations. When compared with the state of affairs in 1978, China has made impressive progress in creating the legal framework necessary to support a market economy. Certainly, GATT (and later WTO) accession has proceeded alongside this massive rebuilding of China's legal system—a system that was virtually wiped out during the Cultural Revolution.[109] Yet it is increasingly apparent that WTO accession has also provided a catalyst for China's evolution away from a legal system driven by power relationships and towards a rule-based legal system.

A. *Background on the Legal Profession in China*

Any assessment of China's efforts towards establishing transparency, uniform application of law, and judicial review should be mindful of the mammoth task that the regime faced at the end of the Cultural Revolution, when China's wrecked legal and political system had to be rebuilt from scratch. Viewed from this perspective, the progress that China has made in establishing a judiciary and a practicing bar are incomplete but nonetheless substantial.[110] As a Chinese observer once said, Chinese law is "like a baby that has not grown up yet."[111]

The Chinese government reestablished the legal profession in the early 1980s with the issuance of "provisional regulations" on law-

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[108] *See generally* CHINA'S LEGAL REFORMS (Stanley Lubman ed., 1996) (containing papers by various authors); THE LIMITS OF THE RULE OF LAW IN CHINA (Karen G. Turner et al. eds., 2000) (containing papers by various authors addressing rule of law related issues in China); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999); PITMAN POTTER, THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE (2001); Randall Peerenboom, *Globalization, Path Dependency and the Limits of the Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 1 (2001).

[109] *See* LUBMAN, *supra* note 108, at 100–01. Although the Cultural Revolution swept away all legal institutions in China, these institutions had already been rendered practically irrelevant under Communist rule. *Id.*

[110] *See* CHEN, *supra* note 7, at 97. In 1993, the National People's Congress (NPC) and its Standing Committee adopted an average of one law every eighteen days. *Id.* at 97 n.1. In addition to building a practicing bar and judiciary, throughout the reform era China promulgated literally thousands of laws and regulations. By 1998, the NPC and its Standing Committee had enacted 328 statutes and decisions, the State Council had issued over 700 regulations, and regional bodies had adopted over 5000 local rules. *Id.*

[111] LUBMAN, *supra* note 108, at 126 (quoting the daughter of a Chinese high government official).

yers, which defined the lawyer's role as "serv[ing] the cause of socialism" and "protect[ing] the interests of the state and the collective."[112] In terms of sheer numbers, the number of lawyers in China has grown dramatically, from almost none at the start of reform to over 110,000 trained and registered lawyers in 1997.[113] The demand for lawyers in China increased rapidly throughout the 1980s and 1990s, as market reform transformed business practice, foreign investment flowed into the country, and the Chinese began defending their rights in court.[114] Today, the caliber of lawyer one sees in Beijing or Shanghai rivals that of lawyers in the West; however, the overall qualifications of the legal profession in China are still uneven.[115]

As with the legal profession, China's judiciary was reestablished in 1979, at the beginning of Deng Xiaoping's reforms and in a manner that reflected the strong ideological influence of the CCP.[116] Throughout the 1980s, most Chinese judges lacked either a university education or legal instruction, and they were transferred to their posts from the CCP or from the military.[117] Since that time, the court system has increased significantly in size (from 58,000 "court cadres" in 1979 to 250,000 judges in 1997)[118] and, although still somewhat politicized,[119]

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[112] *Id.* at 154 (citing "Provisional Regulations on Lawyers," passed on Aug. 26, 1980). The Provisional Regulations are translated in 1 CHINA L. REP. 217, 217–21, by Tao-tai Hsia and Charlotte Hambley. The more recent 1997 law on lawyers defines the lawyer's role as a professional and provides for the accreditation of lawyers and the regulation of their activity. *See* LUBMAN, *supra* note 108, at 155–56; Sarah Biddulph, *Through a Glass Darkly: China, Transparency and the WTO*, 3 AUST. J. ASIAN L. 59, 82 (2001) (citing the Lawyers Law, *Zhonghua Renmin Gongheguo Lushi Fa*, 1997).

[113] LUBMAN, *supra* note 108, at 155.

[114] *See* Minxin Pei, *Is China Democratizing?*, FOREIGN AFFAIRS, Jan.–Feb. 1998, at 76 [hereinafter Pei, *Is China Democratizing?*]. However weak and evolving judicial institutions may be, data shows that Chinese people are utilizing the courts to protect individual rights. Between 1986 and 1996, lawsuits against the government by Chinese citizens increased 12,483 percent. *See id.* In a 1993 poll of over five thousand Chinese, seventy-eight percent of those questioned agreed with the statement "Private property is sacred and must not be violated." *Id.*

[115] *Cf.* LUBMAN, *supra* note 108, at 155. The Ministry of Justice at first did not require passing a bar examination to practice law; all that was required was a college education and some work experience. *Id.* at 154. The bar examination began to be administered on an annual basis only in 1993. *Id.* at 155. As of 1996, almost thirty percent of Chinese lawyers had no formal education beyond high school. *Id.*

[116] *Id.* at 253.

[117] *See id.* People's Liberation Army (PLA) officers were considered to be particularly good candidates, due to their experience in "enforcing proletarian dictatorship" and their "appropriate ideological outlook." *Id.*

[118] *Id.*

[119] *See id.* at 256–58 (discussing the degree to which judges are still "soldiers of the state" in terms of the government's criteria for advancement and recognition of judicial excellence).

has developed a more professional competence. A 1995 law imposed more exacting qualifications for judges, including minimal education and other requirements.[120] Since WTO accession, the government has pushed to enhance the capabilities of Chinese judges, as illustrated by some recent initiatives. In March 2002, a unified "National Judicial Examination" was administered to attorneys, judges, and prosecutors.[121] Although it is not yet a universal prerequisite for serving as a judge, passing the examination is required for judicial promotion.[122] More recently, the Supreme People's Court (SPC) introduced a reform package aimed at improving the judiciary, including initiatives to require that all future judges pass the national judicial examination, provide specialized training for judges, and introduce a system of law clerks.[123]

B. *China's Transparency-Related Commitments*

1. Publication and Access to Information

In its protocol, China agreed that only those WTO-related laws, regulations, and other measures that are published and readily available to other WTO members and to the public shall be enforced, and that China shall make drafts of all such documents available for comment prior to their implementation or enforcement.[124] In addition, China agreed to establish or designate an official journal for the publication of WTO-related rules, regulations, and other measures and to

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[120] *See* LUBMAN, *supra* note 108, at 254–56. The Judges Law requires that judges obtain a college-level or graduate degree, with a specialization in law, or "professional legal knowledge" plus two years of work experience. *Id.* at 255. The Judges Law provides for the use of exams as a basis for promotion, annual performance reviews, and the dismissal of any judge who has been rated "incompetent" for two years in a row. *Id.* at 255–56. An amendment to the Judges Law recently raised the minimum educational requirement to a "university degree." Shao Zongwei, *Reforms to Improve Quality of Judges*, CHINA DAILY, July 8, 2002, at 1.

[121] *China Sets Up Judicial Exam for Judges, Prosecutors and Lawyers*, AGENCE FRANCE PRESSE, Feb. 7, 2002, *available at* LEXIS, News Library, Afp File.

[122] *See id.* Although at least 360,000 people registered for the examination, the Chinese government reported that only seven percent of those who took the examination passed. *Id.*; Feng Qihua, *More Qualified Judges Needed*, CHINA DAILY, July 23, 2002, at 4.

[123] Shao, *supra* note 120, at 1.

[124] Protocol, *supra* note 17, pt. I, para. 2(C)(1). As for the consultation requirement, although China does not have in place a universal system for receiving public input on draft legislation, when drafting legislation, Chinese officials often consult with foreign experts and take into account the content of foreign laws. *See* Biddulph, *supra* note 112, at 72–73.

make copies of the journal readily available.[125] Finally, China agreed to establish an inquiry point where all such information may be obtained.[126]

Chinese law currently requires that all legislation be published, typically in the gazette of the body that issued the legislation and sometimes in the national daily newspaper.[127] The obstacle in implementing the WTO publication requirements relates less to China's formal legislation than to making public the overlapping rules and less formal interpretations of law issued within China's bureaucracy. Below the level of legislation issued by the National People's Congress (NPC)[128] and administrative regulation is an amorphous category of administrative directives referred to as rules (*guizhang*) and normative documents (*guifanxing wenjian*) that are issued by central and local government bodies as a means of instructing those vested with authority to carry out the law.[129] In the early years of economic reform in China, it was standard practice for Chinese bureaucrats to issue such administrative directives, which had legal effect but were "internal" or unpublished.[130] As discussed below,[131] the use of such directives has decreased but has not disappeared.

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[125] Protocol, *supra* note 17, pt. I, para. 2(C)(2). The publication requirement applies specifically to all "laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPs or the control of foreign exchange." *Id.* The WTO Working Party Report, *supra* note 3, para. 334, also states that China agreed to make available translations of these laws "in one or more of the official languages of the WTO."

[126] Protocol, *supra* note 17, para. 2(C)(3). There is an exception to the publication obligation for laws involving national security, foreign exchange or monetary policy, or other measures, "the publication of which would impede law enforcement." *Id.*

[127] Biddulph, *supra* note 112, at 64 n.11, 67 (citing the PRC Legislation Law, *Zhonghua Renmin Gongheguo Lifa Fa*, effective Jul. 1, 2000 [hereinafter Legislation Law]).

[128] *See* CHEN, *supra* note 7, at 101–03. The National People's Congress (NPC) is China's legislature. *Id.* at 101. China's Constitution vests exclusive power to enact "basic law" in the NPC. *Id.* The Standing Committee, a part of the NPC, is vested with authority to enact other laws. *Id.* at 102. Thus the laws enacted by the NPC and its Standing Committee enjoy the highest status in the hierarchy of Chinese law, subordinate only to the Constitution. *Id.* at 101–03.

[129] *See* CHEN, *supra* note 7, at 118–19; Biddulph, *supra* note 112, at 64–65 (discussing the ambiguous status of government rules and normative documents); Peerenboom, *supra* note 108, at 216 (providing a helpful description of the legislative hierarchy and observing that the distinction between rules and normative documents is often difficult to make).

[130] LUBMAN, *supra* note 108, at 197. Prior to 1979, "many if not most" laws and regulations were for internal circulation only. *Id.* at 146. Professor Lubman observes that the practice of issuing internal regulations is not only a feature of Communist systems, but mirrors traditional Chinese conceptions about law. *Id.* at 146–47. Such rules, which Westerners regard as "legal," were not intended to provide notice to the public but rather served the purpose of guiding bureaucrats in the execution of their work. *Id.*

[131] *See infra* Part II.B.3.

A recently adopted Chinese law requires the publication of all legislation, not only NPC-level legislation and amendments, but also administrative regulations, local and regional regulations, departmental rules, and local level rules—that is, everything except normative documents.[132] To the extent that normative documents are unenforceable (i.e., are not "law"), the publication requirements set forth in the law are consistent with China's WTO obligations. However, as discussed below, the continued legal status of normative documents remains unclear.[133]

Even assuming that all governmental directives that have the effect of law are published, as a practical matter it is very difficult to access them. Therefore, the protocol specifically requires China to publish an official journal and establish a single inquiry point for WTO-related material.[134] Just prior to China's WTO accession, China's Ministry of Foreign Trade and Economic Cooperation (MOFTEC) established such an inquiry point, the China WTO Notification and Enquiry Center, and has set up a website to facilitate the Center's work of disseminating information.[135] However, there is no single official journal for WTO-related law. Although MOFTEC has been publishing foreign investment and trade-related laws and regulations in an official gazette since 1993,[136] according to China's Working Party Report, the Chinese government listed, not one, but seven official journals that contain WTO-related information.[137] Nonetheless, establishing an official WTO website could greatly facilitate the ability of outsiders to gather legal information. The website at least purports to make current information

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[132] The statute supercedes earlier Chinese law, which did not impose a comprehensive publication requirement. Biddulph, *supra* note 112, at 67 (discussing the Legislation Law).

[133] *See infra* note 163 (discussion of normative documents under the ALL).

[134] *See* Protocol, *supra* note 17, pt. I, para. 2.

[135] *See China Establishes WTO-Related Organizations*, XINHUA NEWS AGENCY, Oct. 31, 2001, *available at* LEXIS, News Library, Xinhua File (announcing the establishment of the China WTO Notification and Enquiry Center). Information regarding the WTO Notification Center can be found on the Chinese government's new website on the WTO. *See infra* note 138.

[136] Biddulph, *supra* note 112, at 68.

[137] Working Party Report, *supra* note 3, para. 325. These official sources include, in addition to the "MOFTEC Gazette," the "Gazette of the People's Republic of China State Council," and the "Collection of the Laws and Regulations of the People's Republic of China." A recent article in *China Daily* suggests that the Chinese government views the publication requirement as requiring publication in "an" official journal (as opposed to "the" official journal). *See* Meng Yan, *Legislative Efforts Benefit WTO Accession*, CHINA DAILY, Jan. 7, 2002, *available at* LEXIS, News Library, Chidly File (quoting a government official who pledged that all WTO-related laws and regulations involving intellectual property "will be published in an official journal").

regarding the WTO accessible to the public, provides links to China's WTO-related laws and regulations, and allows visitors to ask questions.[138]

2. Uniform Administration

China agreed in its protocol to apply and administer all WTO-related laws, regulations, and other measures in a "uniform, impartial and reasonable manner."[139] Scholars of Chinese law express skepticism regarding China's ability to meet this obligation, which assumes the existence of enforcement institutions with clear lines of authority and the capacity to render neutral decisions.[140] There are a number of characteristics of China's system that impede the impartiality and predictability of those who administer the law.

First, Chinese legislation tends to be drafted in vague terms, with a lack of specific definition.[141] These tentative, broadly worded rules create a broad sphere of authority and promote discretionary decision-making on the part of interpretive bodies.[142] One consequence of this state of affairs is that Chinese bureaucrats are vested with great discretionary power. Second, perhaps due to the relative newness of China's lawmaking institutions, the authority among China's main legislative bodies to create law is ill-defined.[143] This results in a proliferation of

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[138] *See China to Open Official WTO Website*, XINHUA NEWS AGENCY, Sept. 12, 2002, *available at* LEXIS, News Library, Xinhua File. MOFTEC launched the official website on September 13, 2002. *See id.* The website, which at present is only available in Chinese, includes basic knowledge about the WTO, current announcements, documents relating to China's accession, Chinese laws and regulations relating to foreign trade and the economy, and links to other Chinese websites that contain trade-related statistics and regulations. *See id.* According to government reports, the website can also accommodate questions from those who visit it. *See id.* The website can be accessed at http://www.chinawto.gov.cn (last visited Mar. 12, 2003). *Id.*

[139] Protocol, *supra* note 17, pt. I, para. 2(A)(2).

[140] *See supra* notes 137–38.

[141] *See* LUBMAN, *supra* note 108, at 147 (describing the techniques that characterize Chinese legislative drafting, including "the use of general principles, vagueness and ambiguity, undefined terms, broadly worded discretion, omissions and general catch-all phrases").

[142] *See* CHEN, *supra* note 7, at 106. According to one Chinese legal scholar, without interpretation by legislative, judicial, and administrative bodies, Chinese law would be "unusable, if not meaningless." *Id.*

[143] *See, e.g.*, CHEN, *supra* note 7, at 115–17 (discussing the lack of clarity regarding the scope of authority and relative power among three of China's primary lawmaking bodies: the NPC, the NPC Standing Committee, and the State Council). Similarly, it is difficult to define the boundaries of power between central and local government bodies. *Id.* at 117. Professor Chen provides the example of a "provisional regulation" issued in Fujian province, which purports to prescribe crime and punishment even though the Constitution

sometimes overlapping or contradictory laws at all levels of government. Finally, those vested with broad discretion to interpret and implement the laws tend not to be neutral but rather are influenced by a range of extralegal factors, including the political influence of the CCP, corruption, and the traditional importance in Chinese culture of personal relationships (*guanxi*). These factors are discussed in greater detail below.[144]

While acknowledging the reasons for skepticism regarding uniform application of law in China, it is important at the same time to appreciate the extent to which the CCP promotes and supports legal reform. China's government has aggressively moved to create legal institutions to support the development of a market. The CCP's emphasis on legal reform dates back to Deng Xiaoping's "two hands" policy, which called for the development of the economy on one hand and the strengthening of the legal system on the other.[145] The regime understands the need for a stable legal infrastructure, including neutral application and enforcement of the law, to support a market system. In addition, fostering neutral and predictable application of law is a means of promoting stability, which is of paramount concern to China's leaders. WTO accession is providing China's leaders additional leverage to push for the implementation of such commitments,[146] although, be-

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reserves these matters to the exclusive legislative authority of the NPC. *Id.* Although in theory the NPC could annul the contradictory legislation, such power has never been exercised. *Id.* at 117.

[144] *See infra* notes 161–87 and accompanying text.

[145] CHEN, *supra* note 7, at 40. One illustration of the importance that the Party attaches to legal reform is its launching of successive five-year campaigns for the popularization of legal knowledge. *See* Shao Zongwei, *Knowledge of Law a Must for Official Promotion*, CHINA DAILY, June 4, 2002, at 2. The most recent five-year campaign, for the years 2000–2005, features particular emphasis on "rule of law" as opposed to administrative regulation, including the laws relating to economic regulation, criminal prohibitions against corruption, and the rules of the WTO. *See id.* The study of such law is a precondition for promotion of government officials. *See id.*

[146] China's official press is replete with examples of officials announcing the importance of transparency and rule of law in light of the country's WTO obligations. *See, e.g.*, *Timetable Set for China's Entry to WTO*, XINHUA NEWS AGENCY, Nov. 3, 2001 (trade minister quoted as saying that the "most important" change resulting from China's WTO entry will be improving transparency of laws); Meng Yan, *Legislative Efforts Benefit WTO Accession*, CHINA DAILY, Jan. 7, 2002 (NPC representative observes that "transparency and public participation" have recently been emphasized during the NPC's legislative process after China's WTO entry); Shao Zongwei, *Judicial Rules to Comply with WTO*, CHINA DAILY, Feb. 26, 2002 (senior prosecutor pledges that China's procuracy will incorporate WTO principles of "openness, integrity and transparency").

The government's commitment to transparency in WTO matters extends beyond public expressions of support, however. *See* Working Party Report, *supra* note 3, para. 75. Dur-

cause of the factors mentioned above, it is unrealistic to expect that these changes will be immediately realized.

3. Review of Administrative Decisions

China's protocol requires it to establish (or designate) and maintain "impartial and independent tribunals, contact points and procedures" for the prompt review of all administrative actions relating to the implementation of the laws, regulations, judicial decisions, and administrative rulings of general application referred to in the WTO transparency-related rules.[147] Review procedures must include the opportunity to ultimately appeal to a judicial body.[148]

In 1978, China had no meaningful legal institutions. As discussed above, the government has made remarkable progress since that time in creating a practicing bar and judiciary. In addition, the government passed legislation that offers a limited basis on which the administrative decisions of powerful bureaucrats may be subject to judicial review. Finally, the SPC has emerged as an important force in establishing some degree of coherence to the judicial review process in China. The latter two of these developments is discussed below. However, these encouraging developments must be viewed within the context of China's political situation. Specifically, while Chinese law allows judicial review of administrative acts, and while China's leaders remain committed to promoting the professionalism of judges in China, the fact remains that the courts enjoy neither power nor independence from the CCP.

As suggested above, government officials in China's huge bureaucracy are very powerful and, in particular, are vested with the authority to implement WTO-related law.[149] A key question from a legal standpoint is the extent to which China's judges have the

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ing China's accession negotiations, China's representative confirmed that, to promote the uniform application of WTO-related rules in China, any instance of non-uniform application of China's trade regime could be brought to the attention of central government authorities, who would contact the responsible government agency to promptly address the situation, "taking into consideration China's international obligations and the need to provide a meaningful remedy." *Id.*

[147] *See* Protocol, *supra* note 17, pt. I, para. 2(D)(1).

[148] *Id.* pt. I, para. 2(D)(2). The Protocol also requires that the relevant tribunal provide written notice of the decision on appeal, including the reasons for such decision. *Id.; see also* Working Party Report, *supra* note 3, para. 78 (requiring that the tribunals responsible for judicial review be "impartial and independent of the agency entrusted with administrative enforcement" and have no "substantial" interest in the outcome).

[149] *See supra* notes 134–35.

authority to review and correct administrative decisions. While this Article does not attempt to summarize all of Chinese administrative law, there are a number of statutes[150] with features worth highlighting, since they reveal the existing limitations of an evolving legal framework for the review of administrative decisions in China. Three of these features are described below.

1. *Extra-judicial review.* Chinese law provides for the supervision of administrative decision-making by administrative or government bodies, conducted either internally (i.e., within the agency hierarchy) or externally.[151] The limitation of administrative review, of course, is that by definition it is not independent, and thus it may be prone to conflicts of interest.[152]

2. *Procedural safeguards for "administrative punishment."* At present, there is no comprehensive law imposing procedural requirements on administrative agencies.[153] There is a 1996 law, the Administrative Punishments Law (APL), that scholars suggest may be a "blueprint" for such a code in the future.[154] The APL is designed to eliminate arbitrariness and/or overlapping assertions of jurisdiction in the imposition

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[150] *See generally* PRC Administrative Reconsideration Law (*Xingzheng fuyi fa*, 1999); PRC Administrative Supervision Law (*Xingzheng jiancha fa*, 1997); PRC Administrative Penalties Law (*Xingzheng chufa fa*, 1996) [hereinafter APL]; PRC State Compensation Law (*Guojia peichang fa*, 1994); PRC Administrative Litigation Law (*Xingzheng sugong fa*, 1989) [hereinafter ALL]. These laws are cited in Peerenboom, *supra* note 108, at 210–11 nn.248–52. *See also* CHEN, *supra* note 7, at 141–65; Biddulph, *supra* note 112, at 75–80.

[151] CHEN, *supra* note 7, at 149, 152. One example of agency review is "administrative reconsideration," a type of review typically involving supervision by the next highest administrative entity internal to the agency that rendered the challenged decision. *Id.* at 149. Because it is essentially controlled by the bureaucracy, administrative reconsideration has been "jealously guarded" by China's bureaucrats as a defense against an expansion of judicial review of administrative acts. *Id.*

Another, less frequently utilized type of review is "administrative supervision," which may be carried out by CCP officials and other bodies (such as the Ministry of Supervision and the Party Discipline Inspection Commission) vested with authority to monitor unlawful behavior by administrative officials. *See id.* at 152. The process tends to operate like a disciplinary enforcement mechanism rather than an impartial review. *Id.* at 154. Either administrative reconsideration or administrative supervision may be initiated upon the petition of a citizen, legal person, or other entity. *See* Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 427, 435 (2002). For a detailed treatment of these two methods, see Corne, *supra*, at 426–27; Peerenboom, *supra* note 108, at 229–33.

[152] *See, e.g.*, CHEN, *supra* note 7, at 149, 154. *But cf.* Corne, *supra* note 151, at 433 (suggesting that although "unpredictable" and depending on the government conducting the review, administrative reconsideration can be reasonably professional and impartial).

[153] *See* Peerenboom, *supra* note 108, at 192. A more comprehensive Administrative Procedures Law is being drafted but has not yet passed. *Id.*

[154] *See* APL, *supra* note 150; CHEN, *supra* note 7, at 142–43.

of an administrative "penalty" (such as a fine or revocation of a license). The APL is a unique Chinese law in the degree to which it incorporates procedural safeguards, including the right to a hearing in certain cases.[155] However, the APL is very limited in its scope. For example, the APL does not apply to the many administrative decisions that are not "punitive." To the extent that the penalties covered by this statute include confinement, the APL resembles a criminal procedure statute more than an administrative statute.[156]

3. *Limited judicial review of "concrete" acts.* The availability of independent, judicial review of administrative acts has little precedent in China, where administrators tend to enjoy greater power and influence than judges, and where judicial and administrative processes tend to overlap.[157] But in 1989, China adopted a controversial piece of legislation, the Administrative Litigation Law (ALL), which allows an individual to bring a lawsuit to challenge an administrative decision.[158] An explanation of the ALL's novelty to Chinese legal tradition is provided by one of the law's drafters: "The stipulation in the Administrative Litigation Law that 'common people can sue officials' is an issue that is conceptually rather new. It is a question for which there is no custom and to which we have not adapted, and yet it is an enduring issue."[159]

The scope of the ALL was narrowly drawn. Courts may only review specific or "concrete" acts, such as the imposition of a fine, the withholding of a license, or the breach of a personal or property right.[160]

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[155] *See* CHEN, *supra* note 7, at 144–47. The right to hearing applies when "serious" penalties are at stake. *Id.* In addition, the APL provides that (i) penalties may only be imposed and enforced by authorities that are specifically authorized to do so (art. 15), (ii) a penalty may not be based on rules contained in internal, or unpublished, documents (art. 4), and (iv) no administrative body may impose fines for the same offense twice (art. 24). *See id.*

[156] *See* CHEN, *supra* note 7, at 147 (stating that under the statute, "personal freedoms may be restricted up to four years" and noting the APL's resemblance to a criminal statute).

[157] *See generally* LUBMAN, *supra* note 108, at 295 (stating that "[t]he extent of hierarchical review of judicial decisions, within and between courts . . . suggests that Chinese judicial decision-making is more of an administrative process than a judicial one"); Biddulph, *supra* note 112, at 80–81 (referring to the lower status of judges *vis-à-vis* administrators); Peerenboom, *supra* note 108, at 214–18 (describing factors that weaken China's judiciary).

[158] *See* CHEN, *supra* note 7, at 155. The ALL is based on a provision in China's 1982 Constitution, which refers to the rights of citizens to compensation for the infringement of civil rights by the state. *See id.*

[159] *Id.* at 156 (quoting Wang Hanbin, *Explanation of the (Draft) Administrative Litigation Law of the PRC, Delivered at the 2nd Session of the Seventh NPC* (Mar. 28, 1989), *translated in* 3 CHINESE LAW AND GOVERNMENT 35, 35–36 (1991)).

[160] *Id.* at 157 (citing ALL art. 5). "Concrete" acts (as opposed to "abstract" acts) involve specific applications of a rule to a particular case, as opposed to rulemaking. For definitions, see LUBMAN, *supra* note 108, at 206.

This means that a foreign company would not be allowed under the ALL to challenge the rulemaking authority of MOFTEC, (for example, regarding a decision to place a particular good on a restricted import list).[161] In addition, courts may only review administrative decisions for their legality—that is, they may not inquire into a decision's appropriateness or reasonableness.[162] Interestingly, the ALL provides that neither rules nor normative documents are binding on courts, although courts should "consult" any existing rules when rendering a decision.[163]

Although narrow in scope, the ALL has been utilized by Chinese plaintiffs with a relatively high success rate.[164] Moreover, even though the number of cases decided under the ALL is relatively small, the incidence of lawsuits under the ALL has increased over time while that of administrative reconsideration (internal review) has decreased.[165] This could mean that Chinese plaintiffs perceive that judicial review under the ALL is more effective than internal review.

The foregoing summary of Chinese legislation demonstrates that China has in place a legal framework for promulgating and publish-

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[161] *See* Biddulph, *supra* note 112, at 83. *But see* Corne, *supra* note 151, at 428–29 (suggesting that in practice, a court deciding whether to apply a given administrative rule amounts to a de facto judgment relating to that rule's validity).

[162] CHEN, *supra* note 7, at 157 (citing ALL art. 5).

[163] *See* Peerenboom, *supra* note 108, at 236–37. The distinction between rules and normative documents under Chinese law is addressed at *supra* notes 127–32 and accompanying text.

Normative documents are not even mentioned in the ALL, which suggests that they lack binding effect. *See* Peerenboom, *supra* note 108, at 236. This is a good thing from the perspective of WTO transparency since normative documents are not subject to the publication requirements of the Litigation Law. *See supra* notes 159–60 (discussing Litigation Law).

Although, formally, normative documents may not carry weight under the ALL, judges are likely to continue to consult them as a practical matter. *See* Biddulph, *supra* note 112, at 65 ("such a well-entrenched mechanism for the internal management of decision-making cannot be abolished overnight"); Peerenboom, *supra* note 108, at 236–37 (commenting that in practice, courts may continue to give weight to normative documents, particularly if there is no other legislation on point). In a recent survey of 280 Chinese judges, only 12.5% of those questioned stated that they would "never refer to" unpublished, normative documents when considering a case. Corne, *supra* note 151, at 417.

[164] *See* Peerenboom, *supra* note 108, at 234. Professor Peerenboom reports that the overall success rate for Chinese plaintiffs under the ALL is forty percent, which is significantly higher than in the United States. *Id.*

[165] *See id.* at 234. While still "amazingly few" relative to the total, the number of specific administrative acts that were challenged under the ALL increased by 48% between 1995–96, and again by 13% between 1996–97. *Id.* at 224. In contrast, the number of administrative acts that were referred to administrative reconsideration decreased each year between 1991 and 1996. *Id.* at 232; *see also* Corne, supra note 151, at 432–34 (analyzing the relative advantages and disadvantages of administrative reconsideration versus judicial review under the ALL and applying each method to hypothetical scenarios).

ing WTO-related law, uniformly administering such law, and reviewing administrative decisions that implement such law. While in some respects China's legal framework may fall short of the obligations set forth in the protocol, in general, China has laws in place that comport with the protocol's basic obligations. Of course, there is often a gap between creating laws and institutions on the one hand and implementing and enforcing the law on the other.

Notwithstanding the progress that has been achieved by the Chinese government with institutional reform, there remain a number of institutional factors that weaken the judiciary and impede judicial independence in China. The factors that undermine the neutrality of Chinese judges include: political influence and the continued involvement of CCP,[166] the lower status of judges vis-à-vis administrators,[167] financial interests in court decisions at the local level (i.e., the interconnectedness of local government and the private sector),[168] the funding of courts at the local level and the resulting dependence of judges on local government,[169] the pull of personal connections (*guanxi*),[170] and outright corruption.[171] More generally, the weakening authority of the CCP, along with the growing importance of wealth as a measure of success, has left a moral vacuum, which exacerbates conditions that promote corruption

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[166] Peerenboom, *supra* note 108, at 215; *see* CHINA'S LEGAL REFORMS, *supra* note 108, at 26.

[167] Potter, *supra* note 108, at 30; Biddulph, *supra* note 112, at 80, 83.

[168] *See* LUBMAN, *supra* note 108, at 264–65; *see also* Corne, *supra* note 151, at 434 (observing that "where government interests are potentially at stake, courts often are little more than agents of the local people's government to which the relevant court is associated").

[169] LUBMAN, *supra* note 108, at 265; Peerenboom, *supra* note 108, at 214–15. This manifests itself, for example, in judges tending to dismiss a case on overly narrow technical grounds in order to avoid issuing a ruling against a local entity with strong government backing. *See* Biddulph, *supra* note 112, at 83; Peerenboom, *supra* note 108, at 216–17.

[170] There has been much written on the Chinese tendency to value personal relationships and the tension between such cultural values and Western notions of legality. *See, e.g.*, LUBMAN, *supra* note 108, at 17, 19–21, 24–25; POTTER, *supra* note 108, at 12–13, 30–31.

[171] One of the unfortunate byproducts of China's rapid move to a market is increased corruption. As Professor Lubman puts it, the reforms have "created many institutional settings in which government officials can use their power to affect economic outcomes," which in turn creates the expectation for bribes. LUBMAN, *supra* note 108, at 120. The government has made corruption in the judiciary a high-profile issue. *See* Dian Tai, *Judges Told to Improve in Quality*, CHINA DAILY, July 6, 2002, at 2 (reporting a government crackdown against Chinese judges that abuse their powers for personal gain).

For a discussion of the problem of corruption in China's legal system, see, for example, LUBMAN, *supra* note 108, at 120–21; PANITCHPAKDI & CLIFFORD, *supra* note 60, at 160 (observing that "all too often, there is an unhealthy symbiotic relationship between businesses and government officials"); POTTER, *supra* note 108, at 31; Peerenboom, *supra* note 108, at 227 n.369.

and complicates efforts to promote neutral and objective decision-making.[172] Widespread corruption of public officials in China not only impedes effective lawmaking, but also has incited violence among disaffected groups in China.[173] Minxin Pei describes corruption as a "growing cancer" on China's political system.[174] These factors will operate to prevent effective implementation of China's transparency-related obligations, particularly the requirement to allow judicial review of administrative decisions.

Since these impediments to judicial independence are rooted in social and political conditions in China, making progress in these areas can only be achieved over time. Yet China is certainly not the only WTO member that faces institutional barriers to promoting transparency. What is unique about China as a WTO member is the degree to which the existence of "rule of law" in China became part of the accession debate. The transparency-related commitments outlined above may provide leverage to the CCP in furthering certain aspects of legal reform, such as promoting judicial competence and eliminating corruption throughout the country.

The judicial institution that has played the most active role in promoting judicial competence and independence in China is the Supreme People's Court (SPC). The SPC has been described as the "most important and active interpretation authority in China."[175] In contrast with the U.S. Supreme Court, the SPC functions both as a tribunal and as supervisor of China's judicial system.[176] Institutional

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[172] *See* LUBMAN, *supra* note 108, at 119–21; Peerenboom, *supra* note 108, at 225–27.

[173] *See* Erik Eckholm, *Corruption Protest in China Leads to Charges, Top and Bottom*, N.Y. TIMES, Sept. 13, 2002, at A5 (providing one recent example where, in March 2002, tens of thousands of demonstrators took to the streets to protest pervasive corruption among government officials in Liaoning Province).

[174] MINXIN PEI, FUTURE SHOCK: THE WTO AND POLITICAL CHANGE IN CHINA 5 (Carnegie Endowment for Int'l Peace, Pol'y Brief Vol. 1, No. 3, 2001) [hereinafter PEI, FUTURE SHOCK]. He estimates the aggregate cost of corruption at four to eight percent of China's GDP and argues that, if allowed to continue unchecked, corruption ultimately may lead to the occurrence of an Indonesian-style collapse of government in China. *Id.*

The NPC is considering proposed legislation that could curb one source of corruption among Chinese bureaucrats. The law would strictly limit the right of administrative departments to decide which activities need administrative licenses. The law would limit this rule-making authority to the highest levels of government—the NPC, the NPC Standing Committee, and the State Council. *See* Meng Yan, *Admin License Under Scrutiny*, CHINA DAILY, Aug. 29, 2002, at 2. This draft law is also discussed in Peerenboom, *supra* note 108, at 248.

[175] CHEN, *supra* note 7, at 108.

[176] *See* Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 145 (1993).

and economic reform has transformed the SPC since its re-emergence after the Cultural Revolution.[177]

In an effort to provide guidance to the courts and to bring some degree of coherence to the law, the SPC issues official opinions and interpretations of Chinese legislation in the official gazette of the SPC.[178] Since 1985, the SPC has also published its decisions, or selected and revised versions of lower court decisions, in order to educate and provide guidance to the courts, thus enabling the judicial system to handle more complex cases.[179] The SPC has also worked to improve the level of professionalism in the judiciary—for example, by introducing a reform package in July 2002 to enhance the qualifications of the judiciary.[180]

Significantly, the SPC has emphasized China's WTO transparency-related obligations as a means to promote judicial independence in cases affecting international trade. In August 2002, the SPC issued what the CCP's English language newspaper called a "landmark" regulation.[181] The SPC's Trade Regulation[182] establishes the supervi-

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[177] *Id.* at 147.

[178] LUBMAN, *supra* note 108, at 283. For example, the SPC recently issued an interpretation that should enhance transparency in proceedings under the ALL. *See* Meng Yan, *Evidence Move Aims to Help Individuals*, CHINA DAILY, July 26, 2002, at 1. The interpretation requires that, in litigation challenging administrative decisions, the administrative body defending the decision must disclose all evidence and documents utilized in making a decision. *Id.* According to SPC Justice Li Guoguang, this was the first "systematic" judicial interpretation concerning evidentiary rules in administrative litigation cases. *Id.*

[179] *See* LUBMAN, *supra* note 108, at 284–85. The editor of the SPC Gazette, Liang Huixing, publicly commented on the significance of the SPC's publication of judicial decisions, particularly in the context of China's civil law system. *See id.* at 285. Professor Lubman describes Liang Huixing's remarks:

> Chinese law . . . was undergoing the same kind of evolution that the civil law systems of Europe had experienced. As European society became more complex . . . judges began to create "important legal principles . . . despite the fact that the civil law system still did not admit the validity of precedent." The [SPC], by deciding to publish decisions in the Gazette, "has moved [China's] legal system from nineteenth-century traditional legal theory into modern legal theory."

Id. at 285 (quoting Liang Huixing, *Minfa de fazhan yu minfa de fangfalun* [The Development and Methodology of Civil Law], Lecture at the Fourth Meeting of Correspondents of the Supreme People's Court Gazette (1995), at 3). The comparison with the European legal system suggests that the SPC is seeking to introduce Western notions of judicial review, albeit in a civil law context. *See id.*

[180] *See* Shao, *supra* note 120, at 1.

[181] Fu Jing, *New Role for Legal System in Trade*, CHINA DAILY, Aug. 30, 2002, at 1.

[182] Provisions of the Supreme People's Court on Certain Questions Concerning the Hearing and Handling of International Trade Administrative Cases (effective Oct. 1, 2002) (Judicial Interpretation, Supreme People's Court, P.R.C.) (*Fa Shi* [2002] No. 27), *available*

sory powers of China's courts, in accordance with the provisions of the ALL, to review administrative decisions relating to international trade and intellectual property.[183] It allows parties, including foreign investors, to institute litigation in the courts to request judicial review of any "concrete" act of a government authority in connection with a WTO-related matter.[184] The regulation specifies that, where more than one reasonable interpretation is applicable to a matter, the interpretation that is consistent with China's international treaty obligations shall prevail.[185] The vice-president of the SPC publicly stated that the purpose of the regulation is to "keep our domestic laws and regulations consistent with WTO rules."[186] While the Trade Regulation is particularly important, it is not the sole example of WTO obligations providing the impetus for legal reform. The government has also invoked China's WTO obligations in connection with a number of other reform-oriented measures.[187]

The SPC's authority to promote judicial independence is circumscribed both by the supremacy of the CCP[188] and by specific statutory limitations on its authority to interpret law.[189] Thus, it is important to

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at http://www.isinolaw.com (Isinolaw Reference ID: JI–0–15626–0–360) [hereinafter Trade Regulation].

[183] *Id.* The scope of the Trade Regulation encompasses any administrative case concerning international trade, including specifically: (i) trade of goods; (ii) trade in services; and (iii) protection of intellectual property rights. *Id.*

[184] *Id.* art. 3. Thus the Regulation does not confer authority on the courts to review the rulemaking authority of Chinese administrative authorities. *Id.* The Trade Regulation also clarifies the aspects of judicial review that a court is authorized to undertake. *Id.* art. 6. Specifically, the court may consider: the truth and sufficiency of the evidence, the accuracy of the law applied, the legality of the procedure followed, whether the agency acted within its authority, whether there was an abuse of authority, whether the penalties applied were "patently unjust," and the existence of any refusals or delay in performing the agency's statutory duties. *Id.*

[185] Trade Regulation, *supra* note 182, art. 9.

[186] Fu Jing, *New Role for Legal System in Trade*, CHINA DAILY, Aug. 30, 2002, at 1.

[187] *See generally* Meng Yan, *Evidence Move Aims to Help Individuals*, CHINA DAILY, July 26, 2002, at 1 (observing that the judicial provisions of the SPC regarding evidence in administrative cases "reflect the requirements of the World Trade Organization"); Dian Tai, *Judges Told to Improve Quality*, CHINA DAILY, July 6–7, 2002, at 2 (describing government efforts to reduce corruption in the judiciary, the "new challenge" of dealing with increasing numbers of foreign litigants in light of China's entry to the WTO); sources cited in *supra* note 146 (government quotations on WTO transparency).

[188] *See* LUBMAN, *supra* note 108, at 139 (discussing the "supreme authority" of the CCP in China, citing the 1982 Constitution). The Preamble to China's Constitution refers to the so-called "Four Fundamental Principles," one of which is upholding the leadership of the CCP. *See* CHEN, *supra* note 7, at 70 (citing the 1982 Constitution).

[189] *See* LUBMAN, *supra* note 108, at 145, 283. Under Chinese law, the sole source of legal rules is legislation. *Id.* at 145. As a formal matter, the power of the SPC to interpret legisla-

recognize the political constraints in order to understand the extent to which legal reform is feasible. The American concept of "rule of law" encompasses not only transparency but also judicial independence and the notion that no person, including a government official, is above the law.[190] China's leadership has expressed a commitment to promoting judicial independence in a narrow sense of the phrase—that is, by ensuring that judges decide WTO-related cases (including review of administrative acts) on the basis of China's international obligations, as opposed to being influenced by *guanxi*, corruption, or political influence at the local level. However, it is unlikely that such change will involve any significant expansion of the courts' power vis-à-vis the CCP or the administrative apparatus. WTO accession has and will continue to further legal reform by enhancing the professionalism of the courts and reducing local government influence. Notwithstanding its limitations, China's success in this endeavor would represent a significant step forward.

The title of Stanley Lubman's book on Chinese legal reform is *Bird in a Cage: Legal Reform in China After Mao.* The metaphor of a bird in a cage expresses Professor Lubman's view of the status of legal reform in China today—unquestionably existing and evolving, yet constrained as if enclosed behind bars.[191] This is reflected in the lack of independence of the judiciary and the continuing dominance of the CCP over policy-making. Of course, to the extent that the Party's priorities and objectives include promoting transparency in economic decision-making, the CCP policy will not constrain legal reform. Thus, it can be expected that efforts to enhance the professionalism and competency of the judiciary in China will continue. What is less certain is whether the judiciary will play a meaningful role in correcting abuses of discretion or WTO-inconsistent rulemaking by the administrative branch. While it is still rather early to judge, anecdotal evi-

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tion is limited to "the interpretation of problems of the concrete application of laws or regulations." *Id.* (citing the Organic Law of the People's Courts, art. 83). In practice, the SPC has been expansive in its interpretations of law, at times creating new rules or even contradicting NPC legislation. *See id.* at 283.

[190] *See, e.g.*, Richard Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7–9 (1997) (listing the elements of rule of law in the United States on which there is some scholarly agreement, including the "supremacy of legal authority" over both officials and citizens, and the existence of a fair and impartial court system to enforce the law).

[191] LUBMAN, *supra* note 108, at 297. The metaphor was first used during the early days of reform, when a senior Chinese economist suggested that the private sector of the economy be kept like a "bird in a cage." *Id.*

dence suggests that WTO accession has already influenced some Chinese judges towards greater professionalism and neutrality, at least with respect to trade-related matters.[192]

III. Potential for Future Political Reform in China

As stated in the Introduction, China is at a turning point. While China has undergone dramatic economic and even legal changes in the process of joining the WTO, the CCP has endeavored to maintain rigid control over other spheres of Chinese society. While it is impossible to predict the future path of political reform in China, there are some encouraging signs that China's integration with the world market might, over time, lead to political and social liberalization as well.

It is worth noting that China has already undergone extensive political reform over the past two decades. As with the discussion of legal change,[193] whether China has achieved political reform depends on the viewpoint one takes. China's political leadership either could be described as repressive and undemocratic (compared to Western norms) or much improved (compared to the Maoist era).[194] However, China is unlikely to undergo a *perestroika*-style political reform any time in the near future.[195] In contrast with Deng Xiaoping's era of market reform, where benefits were immediately realized and the

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[192] *See* Zhang Yong, *New Court System to Handle Foreign Cases*, China Daily, Feb. 5, 2002, (quoting Li Ke, president of the Beijing No. 2 Intermediate People's Court) (on file with author). According to the *China Daily*, a special team of judges in Beijing has been designated to handle cases involving international business and trade. *Id.* The special bench, which was set up to provide a "transparent, just and efficient" forum to resolve international cases, plans on sending judges abroad to gain legal experience. Anecdotal evidence also suggests that courts in Beijing, Shanghai, Shenzhen, and Guangzhou are increasingly willing to rule in favor of foreign parties. *See Beijing Eyes Fairer Legal, Tax Systems*, Nikkei Weekly, Sept. 9, 2002, *available at* LEXIS, News Library, Nikkei File.

[193] *See supra* Part II.

[194] *See, e.g.*, Pei, *Is China Democratizing?*, *supra* note 114, at 68–69 (observing that in 1978, when Deng Xiaoping first took power, the Chinese political system that he inherited "resembled a Hobbesian world," with a seriously weakened bureaucracy, nonexistent legal system, and complete lack of institutions of political participation). Pei argues that, in addition to economic reform, China's leadership under Deng has allowed limited institutional changes that could have a dramatic impact in the future on the division of power in China—in particular, strengthening the NPC and making extensive reforms to the legal system. *Id.* at 75–77.

[195] *See Full Text of Jiang's Speech at CPC Anniversary Gathering*, Xinhua News Agency, July 1, 2001, *available at* LEXIS, News Library, Zinhua File (urging China to "resist the impact of Western political models such as the multi-party system or separation of powers among the executive, legislative and judicial branches"). Thus, CCP pronouncements continue to reject Western political models even as the Party pursues economic reform. *Id.*

more difficult aspects of economic reform were delayed, WTO accession presents a more difficult stage for China. As a result, the Chinese leadership will continue to use repression as a way to stifle social discontent and will be very wary of loosening its grip on power.[196] At the same time, the government recognizes the need to build political institutions sufficient to support a market economy and to that end is introducing limited changes, such as the legal reforms described in the previous section. In addition, market liberalization has weakened the CCP's ability to control all aspects of the peoples' lives.

One such limited political change is the government's tolerance of democratic-style elections in parts of China's rural provinces. The example of Buyun Township, a poor, agricultural region in Sichuan province, was described in *The Economist's* recent survey of China.[197] Several years ago, Buyun conducted direct elections for the position of township chief without seeking permission from the central government.[198] In 2001, apparently to discourage other townships from following Buyun's example, the CCP issued an order that the usual method of election be followed. However, Buyun township officials interpreted the wording of the order "creatively" and conducted competitive elections for a single candidate. In this manner, almost one-third of Sichuan's townships allowed the public to elect candidates.[199] Such limited experiments in democratic elections may be the result of encouragement from certain reform-minded leaders in the CCP,[200] but it is also a function of the Party's lack of control in the countryside.[201]

Another factor that has undermined the Party's ability to control the public is the widespread availability of information over the Internet. Since the mid-1990s, when the Internet was introduced to China,

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[196] *See* PEI, FUTURE SHOCK, *supra* note 174, at 4–5.

[197] *Seeds of Change?*, THE ECONOMIST, June 15, 2002.

[198] *Id.* Normally, an "indirect" election method is utilized, whereby the only candidate elected by the township people's congress is the one chosen by the Party. *Id.*

[199] *Id.* The elected candidates were then submitted to the township people's congress for approval. *Id.*

[200] *See infra* note 218 (discussing *The Fourth Generation* and noting that powerful CCP officials who have been said to advocate experimenting with limited political reforms include Li Ruihuan, recently retired chairman of the Chinese People's Political Consultative Conference; and Zeng Qinghong, recently elected Vice President and head of the CCP Secretariat).

[201] *See* Pei, *Is China Democratizing?*, *supra* note 114, at 80. The decline of the Party's control in rural parts of China dates back to the early years of reform, when Deng Xiaoping dismantled the collective farms. As market reform has progressed, and constraints on movement of people have been lifted, most young, capable CCP members have left the villages for better jobs in the cities. *Id.*

the CCP has attempted to implement controls to prevent the public's access to politically sensitive information. A recent example of this is the government's blocking of Chinese Internet users' access to the Google and AltaVista search engines.[202] In preparation for the Sixteeenth CCP Congress in November 2002 (when Jiang Zemin stepped down as CCP General Secretary), the CCP cracked down on access to Internet material that was openly critical of the regime.[203] However, as former President Clinton once observed, trying to control the Internet is like "trying to nail Jell-O to the wall."[204] There are other ways to access search engines like Google, such as by entering a numerical address.[205] Even while imposing controls, the CCP at the same time encourages Internet use and has even allowed foreign participation in the telecommunications industry as a means of modernizing the economy.[206] Thus, attempts by the CCP to control the Internet may ultimately prove to be elusive. In fact, the CCP has enough difficulty constraining its own press, which increasingly is following the dictates of the market rather than government directives.[207]

Finally, as people enjoy increased wealth and personal liberty as a result of market reform, a number of diverse groups in Chinese society are creating formal and informal organizations to promote their interests. These groups have increased in number and activity level as

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[202] Joseph Kahn, *China Toughens Obstacles to Internet Searches*, N.Y. TIMES, Sept. 12, 2002, at A3 (describing how, in September 2002, Chinese Internet users attempting to access Google's search engine were routed either to the Chinese search engine GlobePage, or to Shanghai Hotline, a webpage run by China Telecom).

[203] *E.g.*, Falun Dafa Clearwisdom.net, Exposing the Crimes of Jiang Zemin, *at* http://www.clearwisdom.net/emh/special_column/expoevil.html (last visited Sept. 22, 2002). Google is of particular interest to Chinese Internet users, as it allows for searches using simplified Chinese characters. But Google, unlike other search engine companies such as Yahoo!, does not have a physical presence in China and therefore has not agreed to government controls limiting users' access to information. *See* Kahn, *China Toughens Obstacles*, *supra* note 202.

[204] *Clinton's Words on China: Trade is the Smart Thing*, N.Y. TIMES, Mar. 9, 2000, at A10.

[205] *Stop Your Searching*, THE ECONOMIST, Sept. 7, 2002, at 42.

[206] *See* Schedule of Specific Commitments, *supra* note 34, at 17 (allowing foreign suppliers of telecommunications services, including on-line information and database retrieval services, to establish joint venture enterprises in China).

[207] *See* Elisabeth Rosenthal, *Beijing in a Rear-Ground Battle Against a Newly Spirited Press*, N.Y. TIMES, Sept. 15, 2002, at A1. A notable example is *Caijing*, a business magazine that has published articles that are critical of state-owned banks and politically favored companies. *Id.* Although the propaganda arm of the Party works to control the activity of the press, observers describe the effort as a "futile battle," due to the growing size and diversity of China's media. *Id.*

the Party's ability to control the population has waned.[208] While many of China's non-governmental organizations (NGOs) were initially established by the state,[209] others have evolved in a grassroots fashion through the activity of dedicated individuals.[210] A look at several examples illustrates the impressive degree to which the initiative and creativity of individuals has been channeled into social causes, notwithstanding the constraints imposed by the CCP.

1. *Maple Women's Psychological Counseling Centre:* a center that has been conducting policy research and providing counseling services for women in Beijing since 1988. It established a women's telephone hotline and provides legal information through a telephone service. With the support of the Ford Foundation, it established an "Ark Family Centre" for single parents and their children.[211]

2. *"Friend" Exchange:* a magazine based in Qingdao with a circulation of 8000 whose purpose is to promote the physical and mental well-being of gays and lesbians. The magazine focuses on HIV/AIDS and STD awareness and education.[212]

3. *Volunteer Mothers' Association for Environmental Protection:* an association based in Xi'an that organizes volunteer activities, education, and training to promote environmental awareness and public participation in environmental protection. It began a "Hand in Hand" school-

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[208] George Gilboy & Eric Heginbotham, *China's Coming Transformation*, FOREIGN AFF., July–Aug. 2001, *available at*, LEXIS, News Library, Forafr File. China Development Brief, an online research service in China, recently published 250 CHINESE NGOs: CIVIL SOCIETY IN THE MAKING, *supra* note 2. The special report describes 250 national and local non-governmental organizations currently operating in China, including information regarding Chinese NGOs' history, scope, and future projects. To order the special report or to read updates on the continuing growth of NGO activity in China, see http://www.chinadevelopmentbrief.com/ (last visited Apr. 22, 2004).

[209] *See* Nick Young, *Searching for Civil Society*, *in* 250 CHINESE NGOs, *supra* note 2, at 13. Since the early days of Mao Zedong's rule, the Chinese government and the CCP set up organizations (referred to as government organized NGOs, or GONGOs), initially as an instrument for disseminating CCP policy, and later on to pursue research, policy, or charitable endeavors. *See id.* Examples of GONGOs include the All-China Youth Federation and the China Disabled Persons Federation. *Id.* For a description of various legal activities conducted by NGOs affiliated with Chinese universities, research centers, and bar associations, see C. David Lee, *Legal Reform in China: A Role for Nongovernmental Organizations*, 25 YALE J. INT'L L. 363, 382–413 (2000).

[210] *See* Young, *supra* note 209, at 16 (observing that, in addition to GONGOs, "growing numbers" of activists have established NGOs in China, notwithstanding government restrictions, through the dedication of key individuals).

[211] *Id.* at 101.

[212] *Id.* at 226.

based environmental education campaign involving over 120 elementary schools and has organized environmental awareness workshops.[213]

The Chinese government, wary of the potential of social groups to promote instability and discontent, has severely limited the ability of NGOs to operate, diversify, or otherwise expand their activity.[214] Nonetheless, official attitudes towards these groups have begun to soften in light of the many contributions that they provide.[215] The government thus has had an awkward time dealing with NGOs because, while some NGOs may be viewed by the CCP as fulfilling a valuable function, the CCP nonetheless imposes rigid constraints on their activities.

In addition to organized social activity, there is a range of informal social activity conducted by "dissatisfied" groups, including farmers, the unemployed, consumers, industry associations, labor unions, religious movements, special-interest groups, and separatists.[216] Eventually, the CCP may need to liberalize constraints on social organizations as a "safety valve" to relieve the pressure created by such discontent.[217] Some China observers have argued that the new generation of China's leaders is likely to introduce modest political reform in China by legitimizing the activity of these organizations and allowing greater input by citizen groups in policy-making.[218] In any event, while the

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[213] *Id.* at 222.

[214] *See, e.g.*, Regulations for Registration and Management of Social Organizations (1998) (P.R.C. State Council Order No. 250) (published in *People's Daily*, Apr. 11, 1998), *translated in* 250 CHINESE NGOs, *supra* note 2, at 290 [hereinafter State Council Order No. 250]. Consider, for example, Article 4 of State Council Order No. 250, which establishes regulations governing the operation of social organizations:

> Social organizations must observe the constitution, state laws, regulations, and state policy; must not oppose the basic principles of the constitution, harm the unity, security or ethnic harmony of the state, or interests of the state and society, or the lawful interests of other organizations or citizens, or offend social morality.

State Council Order No. 250, *supra*, art. 4. In addition, government regulations require that NGOs be sponsored by the government or the CCP, severely limit the number of organizations that may operate at a given level, and require that organizations only operate within the geographic area where registered. 250 CHINESE NGOs, *supra* note 2, at 14. At the same time, the government recognizes the value and many contributions of these organizations. *Id.* at 16.

[215] *See* Young, *supra* note 209, at 16 n.11 (citing a number of *China Daily* articles that praise the activities of the Maple Women's Counseling Centre).

[216] Gilboy & Heginbotham, *supra* note 208.

[217] *See* Young, *supra* note 209, at 15 ("It may be that, precisely in order to assure social stability and cohesion, the Party will have to loosen social controls.").

[218] Gilboy & Heginbotham, *supra* note 208. *But see* PEI, FUTURE SHOCK, *supra* note 174, at 5. Dr. Pei believes that, "however appealing," a political approach of including popular participation by organized social interests is unlikely to be adopted by the Party. Instead,

CCP continues to crack down on dissident speech and other forms of public protest, the scope of permissible expression in China is much broader than it was in the past.[219]

What role has the WTO played in this process? While it has not played a direct role, WTO membership affects China indirectly in ways that will further undermine the CCP's ability to control society. In March 2000, former President Clinton explained how WTO accession could accelerate a process of liberalization in China that has already been underway for some time:

> By lowering the barriers that protect state-owned industries, China is speeding a process that is removing government from vast areas of people's lives. In the past, virtually every Chinese citizen woke up in an apartment or a house owned by the government, went to work in a factory or a farm run by the government and read newspapers published by the government. State-run workplaces also operated the schools where they sent their children, the clinics where they received health care, [and] the stores where they bought food. That system was a big source of the Communist Party's power. Now people are leaving those firms, and when China joins the W.T.O., they will leave them faster. The Chinese

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he predicts that China's leadership will most likely respond to the short-term adjustments resulting from WTO accession with continued repression against political dissent and social unrest, pragmatism in economic matters, and "extremely cautious and incremental tinkering" with the political system to increase effectiveness. *Id.*

Recently leaked confidential reports compiled by the CCP suggest that supporters of such reform include one newly-appointed and one departing member of the all-powerful CCP Politburo Standing Committee: Li Ruihuan, who will be retiring from his number-four rank in the CCP, and Zeng Qinghong, Jiang Zemin's closest protégé, recently appointed Secretary of the CCP Secretariat and new Vice President. The reports suggest that these leaders advocate limited competitive elections at the local level and a partially free media to impose discipline on CCP officials and operate as a check on corruption and abuse of power. *See id.*; Andrew Nathan & Bruce Gilley, *China's New Rulers: What They Want*, N.Y. REV. BOOKS, Oct. 10, 2002, at 28–30; *see also* Andrew Nathan & Bruce Gilley, *China's New Rulers: 1. The Path to Power*, N.Y. REV. BOOKS, Sept. 26, 2002, at 12. These two articles present the main findings of a book that was written by a CCP insider (under pseudonym). *See* ZONG HAIREN, DISIDAI [THE FOURTH GENERATION] (2002); *see also Who's in Charge Now?* THE ECONOMIST, Nov. 23, 2002, at 41 (observing that Zeng Qinghong has increasingly spoken up on the need for limited political reform as a check on the conduct of government officials).

[219] *See* Elisabeth Rosenthal, *Chinese Freer to Speak and Read, But Not Act*, N.Y. TIMES, Feb. 12, 2003, at A3 (describing how the CCP has grown increasingly tolerant of dissident speech that in the past was grounds for exile or imprisonment).

> government no longer will be everyone's employer, landlord, shopkeeper and nanny all rolled into one.[220]

The developments described in the previous paragraphs suggest that President Clinton's predictions are being realized. What remains to be seen is whether the weakening of government control and economic dislocation, resulting from economic reform, will ultimately produce mass unrest and further repression,[221] or whether it will produce continued growth and gradual political liberalization.

CONCLUSION

A Chinese government official from Jilin province recently shared an anecdote regarding his experience studying in the United States. He related how an American acquaintance he had met in Chicago asked him why he had come to the United States. When the Chinese official explained that he came to the United States "to learn more about the WTO," he was very surprised to discover that the American did not know to what the acronym "WTO" referred. He asked whether such ignorance of the WTO is typical in this country.[222] At one level, this example lends support to the stereotype of Americans' lack of awareness regarding world affairs. But on another level, it illustrates how much the WTO has figured into the consciousness of the Chinese.[223] The CCP tends to issue propaganda that is favorable regarding the WTO while downplaying any negative effects. The government's message is

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[220] *Clinton's Words on China*, *supra* note 204.

[221] An interesting precedent is Mexico's situation following the conclusion of NAFTA in 1990 (NAFTA entered into force in 1994). Like China when it acceded to the WTO, when joining the NAFTA, Mexico agreed to profound economic and legal changes to accommodate the demands of Canada and the United States, including dismantling its tariff and nontariff barriers to trade, extending national treatment to Canadian and U.S. investors, and agreeing to investor-state arbitration of investment disputes. *See* GRUBER, *supra* note 55, at 146–49. The political situation in Mexico rapidly deteriorated during the several-year period between the announcement and the effective date of NAFTA, which coincided with the outbreak of a Zapatista-led insurgency in Chiapas. *Id.* at 151. The Chiapas insurgency was followed by the peso crisis in December 1994, triggered by the government's decision to allow a fifty percent depreciation in the value of the peso. *Id.* at 149–51.

[222] In fact, I have had numerous conversations with Chinese visiting or studying in the United States who have expressed surprise at the lack of interest and/or knowledge of the WTO among Americans.

[223] A search of the English-language website of the CCP official newspaper (the *People's Daily*) for articles containing the term "WTO" pulled over two thousand stories. *See* http://english.peopledaily.com.cn (last visited Mar. 12, 2003); *see also* PANITCHPAKDI & CLIFFORD, *supra* note 60, at 32 (describing the WTO as taking on an "almost mythic importance" in China).

that, while painful in the short term, WTO membership will be beneficial for China in the long run. Over the coming years, China will be tested. It will be tested economically through painful adjustments resulting from China's exposure to the world market. It will also be tested politically, as the new generation of China's leaders decides whether and how to adapt the CCP's approach to governing an increasingly independent, informed, and economically diverse population.