

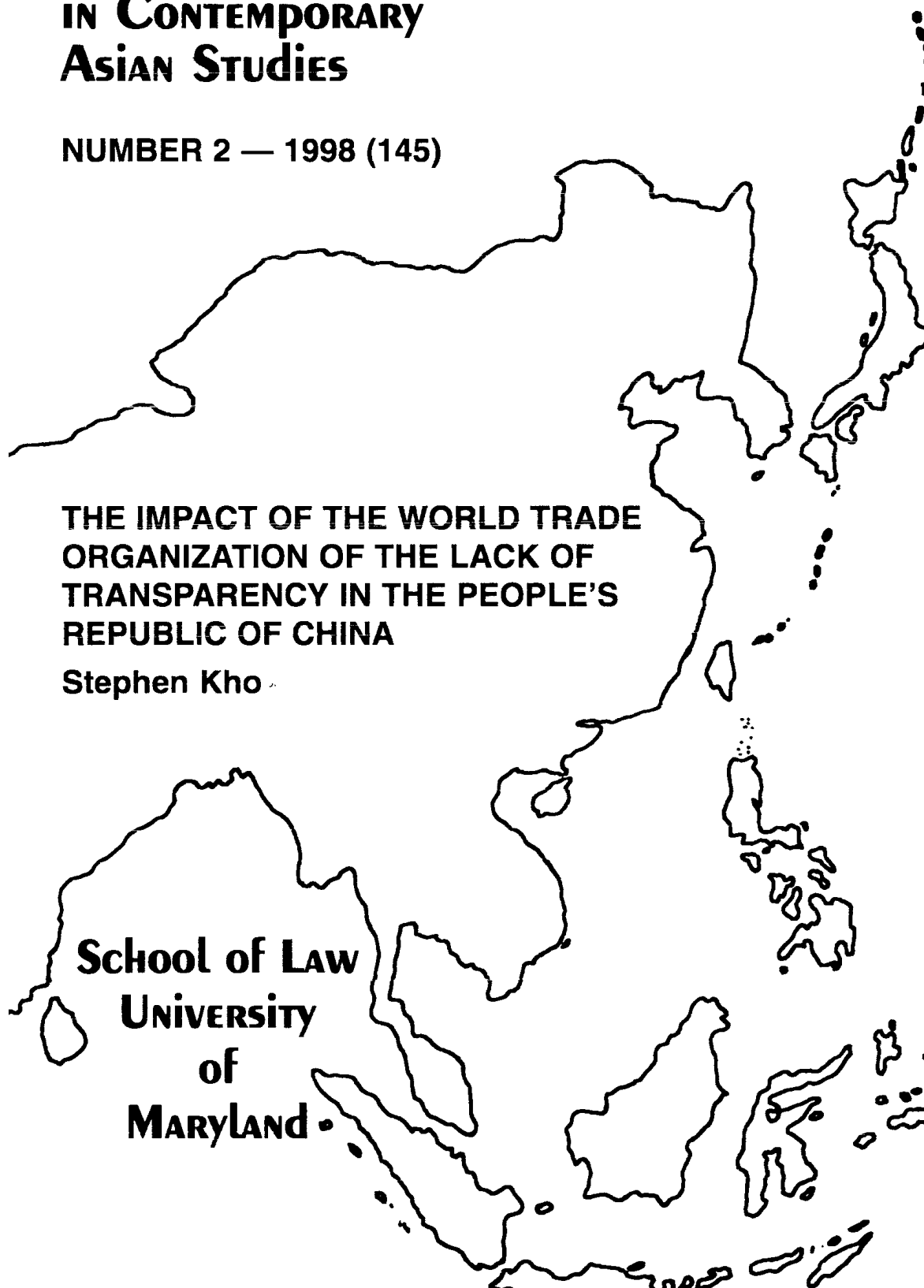
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**THE IMPACT OF THE WORLD TRADE
ORGANIZATION OF THE LACK OF
TRANSPARENCY IN THE PEOPLE'S
REPUBLIC OF CHINA**

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of
MARYLAND**



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*Stephen Kho**

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I. INTRODUCTION

An American company, after completing negotiations with its local partner for restructuring its joint venture in the People's Republic of China (hereinafter China or PRC), was informed by government officials that this new agreement was somehow inadequate. The officials told the company that in order for this restructuring deal to be approved, an export commitment was necessary. The company protested, arguing that (1) the local partner was not a state-owned enterprise and therefore should be exempt from government interference, and (2) there were no legal requirements for an export commitment in this particular situation. However, it was then informed that a new regulation was promulgated that required just such an export commitment. But when the company asked to see this regulation, it was told that it was an "internal" regulation, and could not be shown to the public.

A. Transparency in the PRC - Does it Exist?

Stories like the above from foreign entities doing business in China abound, for China is notorious for the lack of transparency in its laws and regulations.¹ Transparency is important to a country's

1. There does not appear to be a standard, agreed-upon definition for "transparency." For example, one source defined the principle of transparency as full and public access to information regarding a country's laws and regulations with which the government expects full compliance. See United States-China Business Council, *China and the World Trade Organization*, Washington, D.C.: U.S.-China Business Council, 1996, p. 4. Another source defined transparency as the publication of all laws, regulations and policies underlying such rules (so as to encourage justification, rather than mere enumeration, of these laws and regulations). See "Confidential WTO Document Shows China's Inspection Requirements", *Inside U.S. Trade*, December 26, 1997. For the purposes of this paper, transparency shall be defined broadly as the publication of

economic growth and stability because it is generally understood that information on trade, industrial performance and market conditions allow business entities to make informed investment and trade decisions, and thereby alleviate certain transactional risks.² Unfortunately, despite China's enticing market size and economic potential, a transparent environment, business or otherwise, does not yet exist. Interestingly, while many foreign countries slowly become wary of trading with the PRC due to this lack of transparency, China itself remains defiant in changing its ways.

B. The WTO

However, this may soon change with China's accession to the World Trade Organization (hereinafter the WTO). The WTO was created on January 1, 1995, after the successful completion of the General Agreement on Tariffs and Trade (hereinafter GATT) Uruguay Round negotiations.³ Along with forming the WTO legal framework into an international organization, the Uruguay Round also produced a series of multilateral and plurilateral trade agreements to be implemented by the WTO for the facilitation of international trade.⁴ The goal of the WTO is to provide a "common institutional framework for the conduct of trade relations among its Members."⁵ In addition, through its trade policy surveillance and dispute settlement systems, the WTO hopes to encourage "world economic and political convergence," which include extending assistance to lesser developed countries and promoting global environmental protection.⁶

In order to best achieve this common institutional framework, the WTO set about to encourage transparency among its member states. Transparency has been and still remains an important norm

all laws, regulations, policies, and administrative/judicial rulings relevant to a country's trade regime; the adequate and timely notice of changes in these laws, regulations, policies and rulings; and the uniform implementation and enforcement of these laws, regulations, policies and rulings throughout a country's territory.

2. Robert E. Herzstein, "China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade", *Law and Policy in International Business*, Vol. 18 (1986), p. 399.

3. Ralph H. Folsom et al., *International Trade and Investment in a Nutshell*, St. Paul, Minn.: West Publishing Co., 1996, p. 70.

4. See generally *International Legal Materials*, Vol. 33 (1994), p. 1140.

5. *Ibid.*, p. 1144.

6. Thomas J. Dillon, Jr., "The World Trade Organization: A New Legal Order for World Trade?" *Michigan Journal of International Law*, Vol. 16 (1995), p. 361.

in the WTO regime,⁷ and it is rigorously promoted by way of incorporated agreements, which provide that members must make transparent their foreign trade regimes through such requirements as the publication of their laws and regulations.⁸

C. Can China and the WTO Mix?

The question is, though, how does a staunchly non-transparent country like the PRC integrate into such a transparency-laden organization like the WTO, particularly now that the WTO has built within itself a powerful enforcement mechanism, the dispute settlement system, to more effectively enforce its requirements? There is no doubt that China is interested and eager to join the WTO; the WTO may be the best opportunity to bring about true economic transparency in China. However, as long as there has been a trading system in China, there has always been non-transparency. Rules and regulations in the PRC have never been readily accessible to the public, and to make matters worse, they tend to vary from region to region.⁹ Not only do foreign entities doing business in the PRC not understand the Chinese trading system, often times the local officials themselves lack a solid understanding of how their own system works.¹⁰ The lack of transparency has been further exacerbated by China's unique mix of a centrally-planned economy and a market-oriented economy, called the "socialist market economy."¹¹

The principles of this hybrid non-market economy appear inherently inconsistent with the WTO, free-trade regime. The WTO assumes that business is to be conducted by independent entities driven by and responsive to profit motivation and market forces.¹² Yet in China, trading decisions are often based on government requirements, and not on commercial considerations.¹³ This, and

7. See Loretta F. Smith, "The GATT and International Trade", *Buffalo Law Review*, Vol. 39 (1991), p. 919. The GATT is fully incorporated and expanded upon in the WTO framework, and according to Smith, the three most important norms of the GATT are transparency, non-discrimination and reciprocity.

8. T. K. Chang, "Token Liberalization Limits Foreign Interest in Investment", *China Law & Practice*, February 1997, p. 21.

9. Xiu-Fang Carroll, "The Foreign Trade Law of the People's Republic of China and the GATT 21" (1994) (unpublished manuscript, the University of Maryland School of Law).

10. *Ibid.*

11. *Ibid.*, p. 2.

12. See generally Herzstein, "China and the GATT", *supra* note 2, pp. 374-375.

13. See generally *ibid.*

other related practices, is a cause of concern for the WTO. To be fair, China's economy is not entirely ineffectual. Since 1979, the PRC has transformed itself from a stagnant society to a vibrant, more liberalized market in the 1990s; it is now the world's third largest economy.¹⁴ And for this reason alone, many believe that it is vital to bring China into the WTO regime. But once again, the lack of transparency remains a serious consideration. China is often criticized for its non-transparency, and this despite publishing many of its trade regulations in an effort to comply with the WTO.¹⁵

Given the above observations, and the realization that previously China has proudly and stubbornly resisted change brought about by external pressures, it is entirely possible that China may not be able to accede to the WTO. But if it did, and many WTO members have already proposed that China be admitted as soon as certain trade concessions are made,¹⁶ then can the WTO effectively bring about transparency in China?

D. The Scope of This Paper

In an attempt to answer this question, this paper will first offer a brief history on the lack of transparency in China. The next section will concentrate on the WTO itself, and analyze the principle of transparency in the various agreements and administrative framework. The third section will re-focus on China, and trace the transparency issue in its WTO accession process from 1986 to the present. Finally, the paper will conclude by analyzing the effects the WTO has had and will have on bringing about true transparency in China.

II. NON-TRANSPARENCY IN THE PRC: A HISTORICAL PERSPECTIVE

One should realize that from the beginning, Chinese society has always been fairly opaque, so much so that most of its citizens are completely comfortable with the lack of information and with uncertainty. For well over 2,000 years, China has isolated itself from the rest of the world, and this general sense of isolation continues

14. Robert P. O'Quinn, "How to Bring China and Taiwan into the World Trade Organization", *Asian Studies Center Backgrounder*, Vol. 140 (1996), p. 7.

15. Gretchen Harders-Chen, "China MFN: A Reaffirmation of Tradition or Regulatory Reform?" *Minnesota Journal of Global Trade*, Vol. 5 (1996), p. 399.

16. Chang, "Token Liberalization", *supra* note 8, p. 18. This was proposed by the European Community, and Chang believes that several other nations, especially the Asian nations, will not likely object.

today.¹⁷ Much of China is still closed to the outsider. Couple this with a long feudalistic history, where people have had a relatively weak sense of law, and you have the makings of a non-transparent society.¹⁸

Given this background, it should come as no surprise that, traditionally, Chinese government officials have relied on purely administrative means to manage economic and social affairs, while giving little or no thought to written codes.¹⁹ This often led to the abuse of power and to the open violation of rules and regulations, which eventually culminated in the imbedded cultural attitude that law causes coercion, and is thus "an inferior means of affecting behavior."²⁰ A reinforcement of this concept was provided in traditional Confucian teachings, which taught that:

. . . a ruler should govern by means of *virtue* rather than *law*. That is, through a painstaking process of socialization and education, the people first learn and then internalize the rules of proper behavior. Only when a person is an extreme recalcitrant or when the educational system has broken down would it be necessary to use the severe sanctions of law. If society is functioning harmoniously, law is something to be avoided - even feared. Thus, a ruler who governs by the "rule of law" is admitting the loss of virtue and the breakdown of the system of education.

This concept has also been applied to commercial and civil matters. For example, when there are disputes, parties are encouraged to resolve their differences by compromises and negotiation. If they do not, then the implication is that they are unreasonable and dishonorable people.²¹

With the rule of law being discouraged and corruption running rampant, the Chinese people eventually turned to the concept of relationships, or *guanxi*, as a proxy to handle and govern their everyday transactions. Along with close-knit relationships among family members, the Chinese would build intricate, overlapping

17. Philip R. Harris and Robert T. Moran, *Managing Cultural Differences*, 3rd ed., Houston: Gulf Publishing Co., 1991, p. 409.

18. Carroll, "The Foreign Trade Law", *supra* note 9, p. 26.

19. *Ibid.*

20. Victor H. Li, "Reflections on the Current Drive Toward Greater Legalization in China", in Howard M. Holtzmann and Walter Sterling Surrey, eds., *A New Look at Legal Aspects of Doing Business with China: Developments a Year After Recognition*, New York: Practising Law Institute, 1979, p. 86.

21. *Ibid.*

networks of relationships among all members of a community.²² This concept of *guanxi* effectively displaced the need for the rule of law, making it negligible. A vicious cycle was then created, whereby the lack of transparency (due to the fact that there were either no laws or no knowledge of laws) brought about the need for *guanxi*; and *guanxi* in turn ensured that there was no need for the law, thus promoting non-transparency.

A. 1949 to 1978

When the PRC was created in 1949, one of the major reforms undertaken was to get rid of the system of *guanxi*, and establish the rule of law for the purposes of strengthening the legal system and providing “a more secure and stable environment for carrying out the PRC’s four modernization programs.”²³ Unfortunately, this was a disaster due mostly to a miscalculation in the drafting of these laws: the idealistic authors of this new legislation contended that law ought to be broad and simple so that they would encourage the masses to act reasonably and honorably, and that “[s]o long as all people are knowledgeable about what is happening, make every effort to carry out their work properly, and are willing to speak up whenever any impropriety is seen regardless of who is the perpetrator or the victim, then society will operate smoothly and individuals will be well protected.”²⁴ This was in fact a re-manifestation of traditional Confucian thought, which was the very thing the communist leaders sought to abolish, or so they claimed. The result was that when people followed the law and spoke out against the government, it enraged the Communist Party so that they cracked down on their own citizens in the anti-rightist campaign of 1957, thus effectively halting China’s law reform program.²⁵

By the late 1950s, Chinese society had reverted back to a centrally-controlled structure, where unwritten rules were arbitrarily

22. See *ibid.*, pp. 86-87.

23. Hungdah Chiu, “The 1982 Chinese Constitution and the Rule of Law”, *Occasional Papers/Reprints Series in Contemporary Asian Studies*, Vol. 4 (1985), p. 1.

24. Li, “Reflections on the Current Drive”, *supra* note 20, p. 91. Li termed this thought as the “rule of man,” which is different from the “rule of law.” This “rule of man” intended to promulgate broadly based laws which, in essence, maintained the tradition that law is inferior to reason.

25. Jerome Alan Cohen, “The Year of the Law”, in *A New Look at Legal Aspects of Doing Business with China*, *supra* note 20, p. 150. It was during the Hundred Flowers Bloom era of 1956-1957 that Chinese citizens were encouraged to speak out, according to the new legal reforms.

and sporadically established on the basis of administrative orders.²⁶ To make matters worse, the government embarked on the ill-conceived Great Leap Forward, a so-called “political economic campaign” that disregarded basic economic rules.²⁷ This was followed by the infamous Cultural Revolution from 1966 to 1976, which brought about more political instability, further disruption to the economy and “flagrant disregard for the rule of law.”²⁸

Up to this point it was clear that not much had changed between the old, imperial China and the new, communist China. Both societies utilized their administrative capacities to enforce their control; both maintained the Confucian concept of reason over law; and both suppressed the theory of an autonomous legal system in fear that this would threaten their base of power.²⁹ Generally speaking, both societies preferred to be non-transparent.

B. 1979 to the Present

When Mao Zedong died in 1976, there was a general consensus that change was needed. China realized that it could no longer isolate itself, and that it must be an active participant in the global community in order to survive, much less grow. This meant opening its doors to the outside world, politically and economically. In 1979, China adopted its “Open Door Policy” and began once again to trade across national borders.³⁰ Although its economy, due to the misfortunes of the past thirty years, was inefficient and lacked suitable market mechanisms, China was nevertheless dedicated to reform, albeit in its own unique “Chinese style.”³¹

China began these reforms by first attempting to regulate foreign trade more effectively with the use of exchange rates, customs

26. See Henry R. Zheng, *China's Civil and Commercial Law*, London: Butterworths, 1988, pp. 45-46.

27. *Ibid.*, p. 46.

28. *Ibid.* It was during the Cultural Revolution that Mao Zedong favored the “transforming of human consciousness” while attacking laws and institutions. Barret L. McCormick, *Political Reform in Post-Mao China: Democracy and Bureaucracy in a Leninist State*, Berkeley: University of California Press, 1990, p. 100.

29. *Ibid.*, pp. 95-97.

30. “China’s Status as a Contracting Party: Memorandum on China’s Foreign Trade Regime”, pp. 7-8 (1987), *microformed on* GATT Fiche L/6125 (No. 87-0207). China has a long history of international trade, stemming back to the days when tea and silk were its main exports. However, after 1949, cross-border trade was limited to other communist countries like the former Soviet Union and North Korea.

31. *Ibid.* pp. 4-5.

duties and taxes.³² From there China began to change into a more market-oriented economy.³³ In its endeavor to separate the functions of central government planning from local enterprise management (so as to allow business entities to operate under commercial considerations), it decentralized its foreign trade system and allowed regional authorities and local enterprises to negotiate directly with foreign companies.³⁴ This turned out to be a mistake because, on the one hand, regional authorities generally lacked experience in the area of international business, and on the other hand, there was no legal framework to provide guidance and predictability for international transactions.³⁵

The lack of the rule of law and of non-transparency was finally revealed for the world to see. The state of China's legal system was indeed distressing. For example, while the PRC Civil Code was first proposed in 1954, it remained in draft form until 1986.³⁶ If China was to create a healthy society where a market economy could flourish, it would need to create an effective legal framework for support and reliance.³⁷ This concern was echoed by Deng Xiaoping himself, who proclaimed that, "In terms of the number of laws, the U.S. ranks first. . . on our part, we have too few laws, and it is imperative that we adopt some."³⁸ With this in mind, China proceeded to enact hundreds of laws, including the above mentioned Civil Law, a Criminal Law, Criminal and Civil Procedures, as well as numerous items of economic legislation.³⁹ Moreover, to ensure that these new laws were made transparent, the Communist Party em-

32. *Ibid.* p. 11.

33. See Wei Jia, "Tidal Changes in Chinese Foreign Investment Laws and Policies", *Tulane Journal of International and Comparative Law*, Vol. 2 (1994), p. 49.

34. Zheng, *China's Civil and Commercial Law*, *supra* note 26, p. 48.

35. This lack of legal guidance caused a member of China's Standing Committee to proclaim, "we had no laws to rely on in the past. . ." See *ibid.*

36. *Ibid.*, p. 49.

37. See *FBIS*, May 12, 1994, pp. 14-16.

38. "Walter Surrey's Remarks to Deng Xiaoping", *China Business Review*, July-August, 1979, p. 15.

39. Yufan Hao, "Ethics in Government in China to 2010", Conference Paper for the Atlantic Council Conference on China 2010: The Rule of Law and Prospects for Institutionalizing Change, December 9-10, 1996, p. 10. The many economic-related laws enacted include the Joint-Venture Enterprise Law, Cooperative-Operated Enterprise Law, Foreign-Invested Enterprise Law, Foreign-Related Economic Contract Law, Commercial Inspection Law, Animal and Plant Quarantine Law, Maritime Commercial Law, etc. See "Minister Wu Yi Views Foreign Trade Issues", *FBIS Daily Report*, April 26, 1997, p. 36.

barked on a massive campaign to promote juridical and legal awareness.⁴⁰

Unfortunately, regardless of the legal reforms, the government still maintained its power and control through *guanxi*, and through the reservation of certain policies that discouraged true transparency. For instance, the central leadership retained the 1951 State Secrets Law, and this in spite of the promulgation of the 1982 Constitution and other new legislation.⁴¹ Also, it kept within its authority some absolute centralized control in order to guarantee that “the planned development of foreign trade” was maintained “under the policy and guidance of” the Communist Party.⁴² This should have left no doubt that, after much rhetoric, the PRC trade regime was still an extension of its political system.

C. The Current Situation

This is not to say that China’s transformation from a centrally-planned economy to a market-oriented society has not been impressive. On the contrary, many of the economic reforms China introduced since 1979 have already shown “unmistakable signs of bearing fruit” by giving encouragement to market forces and by liberalizing much within China’s trade regime.⁴³

However, one cannot underscore the numerous remaining problems of this “socialist market economy.” For one thing, the law is still regarded by many as an instrument of secondary importance, although it is “useful in expressing flexible and changeable policies.”⁴⁴ This lack of concern with formal law and with its ambiguities has limited its application within China’s economy. In addition, the practice of *guanxi* is still pervasive. As noted earlier, the ineffective legal system *vis-a-vis* China’s business practices has led to a

40. See *ibid.* Also see McCormick, *Political Reform in Post-Mao China*, *supra* note 28, p. 104. McCormick felt that these campaigns did not bring about transparency because they were implemented in a “thoroughly Leninist fashion,” with careful central control with limited information provided, and before the laws were even published. See *ibid.*

41. Chiu, “The 1982 Chinese Constitution”, *supra* note 23, p. 14. This law states that almost everything in China not officially released publicly is considered a “state secret,” and anyone who leaks these secrets can be punished as a counterrevolutionary. See *ibid.*

42. John W. DePauw, *US-China Trade Negotiations*, 1981, p. 13.

43. Peter D. Sutherland, “Global Multilateral Trading System: The Role of the PRC”, Address at the 1994 China Summit Meeting (May 11, 1994) *microformed on GATT Fiche GATT/1633* (hereinafter Sutherland speech), pp. 2-4.

44. DePauw, *US-China Trade Negotiations*, *supra* note 42, p. 42.

greater reliance on relationships with the trade bureaucracy.⁴⁵ Moreover, by decentralizing much of its foreign trade authority, China's international commercial framework has been adversely affected in that trade laws and regulations now are not uniformly applied throughout the country.⁴⁶ Complaints abound about the different foreign business practices between the national and provincial governing bodies.⁴⁷ It is the inaccessibility of relevant legislation that contributes to the lack of transparency, and it is this lack of transparency that gives rise to the varying regional rules that are a part of this system. Finally, new problems have arisen recently in direct relation with this newly created legal regime. They include the lack of qualified and experienced personnel to staff the system; the need for better and more complete education about law; more laws to be promulgated and implemented effectively so as to conform with international standards; and, of course, the enforcement of these new and existing laws.⁴⁸

Currently, China's legal system has limited autonomy and remains a tool to serve the purposes of the state.⁴⁹ Ordinary citizens have little access to the law, prompting them to seek informal interactions and private avenues to accomplish economic activities, hence the continued advancement of *guanxi*. Similarly, the unenforceability of the law tempts government officials to manipulate rules for private gain. Both parties, then, contribute to the effective abolition of the utility of law. For the masses, however, this is often inadvertent because they are in "powerless and passive positions," for such is their status throughout China's history and within the communist hierarchy.⁵⁰ And after being in these positions for so long, with traditional concepts and skepticism of law firmly in-

45. In an article in the July 29, 1985 issue of *Forbes* magazine, entitled, "The China *Guanxi*: Thinking About a Joint Venture in China", Nick Gilbert noted that "Dozens of U.S. corporations are setting up shop in China. Pity the lawyers who draft those joint venture contracts, however. They aren't easy. There's very little case law to rely upon." Harris and Moran, *Managing Cultural Differences*, *supra* note 17, p. 406.

46. See Jamie P. Horsley, "Investing in China in 1985", in Eugene Theroux, ed., *Legal Aspects of Doing Business with China 1985*, New York: Practising Law Institute, 1985, pp. 149-150.

47. Carroll, "The Foreign Trade Law", *supra* note 9, p. 12.

48. See Li, "Reflections on the Current Drive", *supra* note 20, pp. 94-97.

49. McCormick, *Political Reform in Post-Mao China*, *supra* note 28, p. 113. Government officials have demonstrated in the past that they can and have readily changed statutes and eliminated procedural guarantees to serve their temporal goals. *Ibid.*, p. 125.

50. DePauw, *US-China Trade Negotiations*, *supra* note 42, p. 17.

grained in their culture, it is not surprising that they remain the major obstacle to the development of China's legal system.⁵¹

As for government officials, law has ceased to be the "rule of the game," but is instead "an object of conflict," where the winners of the moment set out to alter the constitution, change the legislation, and restructure the whole institution in order to satisfy their needs.⁵² This has led to "bureaucrats exploiting inconsistent procedures and deficient supervision for private gain. [And where] [w]eak enforcement mechanisms and sporadic campaigns were simply insufficient to control [the] spreading corruption. . ."⁵³ China has become a hybrid socialist system that "lacks clear-cut ethical, legal and commercial codes to regulate market-driven activities."⁵⁴ And again, despite the legal reforms (and the optimism of many who believe that as "the Chinese market economy is further integrated into the world economic system, the Chinese legal system will surely be developed and strengthened"⁵⁵), China still maintains more formal trade barriers than most major countries. In fact, "no other country practices the same persistent and sweeping government protectionism as is practiced in China today."⁵⁶ Such barriers include trade regulations that are enforced but not published, or are simply inconsistent from region to region.⁵⁷ Also, in addition to the officially published legislation, China retains the practice of maintaining so-called internal, or *neibu*, rules, which, although enforceable, are unavailable to the public.⁵⁸

51. McCormick, *Political Reform in Post-Mao China*, *supra* note 28, p. 95.

52. *Ibid.*, p. 100.

53. Hao, "Ethics in Government", *supra* note 39, p. 9.

54. *Ibid.*

55. *Ibid.*, p. 13. Hao's comment, however, contains the caveat that the Chinese legal system will be developed and strengthened "with Chinese characteristics." It is unclear what this phrase means, and Hao does not give a definition. This phrase is also popular with the Chinese government, which, the author believes, purposely maintains the ambiguity of the wording so that it can be used as a "fall back" position for any acts found inconsistent with China's international obligations.

56. Gregory J. Mastel, "China and the WTO: Economy at the Crossroad", *Economic Strategy Institute*, 1994, p. 18.

57. Carroll, "The Foreign Trade Law", *supra* note 9, p. 22. The PRC government often claims that it does not publish laws because of "security reasons." As for inconsistent application of laws, provincial and local governments sometimes ignore the central government for many reasons, including protecting local industries. *Ibid.*

58. Often times, foreign entities doing business in China will be told that what they are doing is prohibited by a *neibu* regulation, or that a *neibu* has precedence over a known regulation. Unfortunately, the foreign entity will not be permitted to see the *neibu*. See Joseph Massey, "301: the Successful Resolution", *China Business Review*, Vol. 19 (1992), pp. 9-10.

China still lacks transparency, and public ignorance and disregard of existing laws remains an obstacle to bringing about effective change. The rule of law is as yet unreliable, and if major political turmoil, social unrest or a significant transfer of power were to occur, it may contribute to a swift, downward spiral of the PRC business environment. It is this society that members of the WTO presently have to contend with in determining whether China can or cannot join the multilateral trade organization.

D. China in the GATT

As the Republic of China (hereinafter the ROC), the PRC was one of the 23 original contracting parties to the GATT in 1948. But in 1950, the ROC government, which had by then lost the Chinese civil war and retreated to Taiwan, withdrew its participation. Subsequently, as the PRC government assumed China's position in the various international organizations, such as the United Nations and the International Monetary Fund, it also sought to "re-claim" its membership in the GATT.⁵⁹ China argued that since it was an original member, albeit under different leadership, it is entitled to resume its participation immediately.⁶⁰ This was summarily yet diplomatically rejected by the GATT members. China became an observer to the GATT in November of 1982, and then formally applied to resume its status as a full GATT participant on July 11, 1986.⁶¹

By 1987, a GATT working party was formed to consider China's application, which involved China submitting a memorandum describing its trade regime, followed by meetings with pro-

59. John H. Jackson et al., *Legal Problems of International Economic Relations: Cases, Materials and Text*, 3rd ed., St. Paul, Minn.: West Publishing Co., 1995, p. 1153. After the Communist takeover of 1949, China initially isolated itself from the rest of the world. Slowly, however, it sought recognition from the international community in the political arena. But not until 1979, when China initiated the "Open Door" policy and actively promoted international trade once again, did it take interest in the GATT. China finally began its accession negotiations in 1980 as part of its market-oriented reforms. See generally Harold K. Jacobson and Michel Oksenberg, *China's Participation in the IMF, the World Bank and GATT: Toward a Global Economic Order*, Ann Arbor: University of Michigan Press, 1990, pp. 83-92. Also worth noting is that although China did not ultimately become a party to the GATT, it was permitted in 1984 to participate in the GATT Multifiber Arrangement, which affected trade in textiles and clothing. See "Peter Sutherland to Visit Beijing to Discuss GATT/WTO Membership with Chinese Leaders" (1994), *microformed on GATT Fiche GATT/1632* (No. 94-0830), p. 2.

60. Harders-Chen, "China MFN", *supra* note 15, p. 397.

61. O'Quinn, "How to Bring China and Taiwan into the WTO", *supra* note 14, p. 8.

spective trading partners in order for China to answer detailed questions regarding trade issues.⁶² Although China did not ultimately become a party to the now defunct GATT (due to negotiation setbacks caused by the 1989 Tiananmen Square incident, the rising concerns regarding China's human rights record and the expansive interpretations of trade obligations after the Uruguay Round), it is continuing its bid to join the international trade regime by attempting to accede to the newly-formed WTO.⁶³

III. TRANSPARENCY WITHIN THE WTO REGIME

The WTO is heralded as the "crowning achievement" of the Uruguay Round, the eighth and final round of multilateral negotiations for the GATT.⁶⁴ The GATT was considered the principal multilateral instrument that governed international trade until 1995.⁶⁵ The Uruguay Round negotiations ultimately resulted in not only the furthering of trade liberalization, but also, more importantly, the establishment of the rules-based WTO.⁶⁶

The WTO was intended to remedy the organizational shortcomings of the GATT, as well as to expand the GATT's multilateral principles to areas beyond its traditional trade in goods.⁶⁷ It is administrative and procedural in character, and has been described as a "minimalist institution," for the purposes of facilitating economic cooperation and unifying trade obligations, all within one organiza-

62. Jackson et al., *Legal Problems*, *supra* note 59, p. 1153.

63. Jeffrey J. Schott, *WTO 2000: Setting the Course for World Trade*, Washington, D.C.: Institute for International Economics, 1996, pp. 39-40. China was an observer to the GATT during the Uruguay Round, and was eventually a signatory to the WTO agreements. This was done with the hope that China would be able to conclude its accession negotiations in time to become an original member of the WTO, and to affirm to the other member States that China planned to abide by the WTO framework.

64. Dillon, "The World Trade Organization: A New Legal Order for World Trade?", *supra* note 6, p. 371. The Uruguay Round lasted over seven years, and was considered the largest trade negotiation in world economic history. See generally GATT, *GATT Activities 1994-1995*, Geneva: GATT, 1996, pp. 1-5.

65. See GATT, *ibid.*, p. 1. By 1995, the GATT had become a global trade body with 128 members.

66. *Ibid.* Technically, the WTO was established after the GATT Ministerial Conference in Marrakesh, Morocco, which adopted the decisions from the Uruguay Round to create the WTO. *Ibid.*, p. 5.

67. Dillon, "The World Trade Organization: A New Legal Order for World Trade?", *supra* note 6, p. 355. The GATT, after all, was merely a multilateral agreement with a limited scope of the international trading of goods. It did, however, maintain a very loose and informal administrative framework, which lacked, *inter alia*, an effective enforcement mechanism.

tional structure.⁶⁸ What this means is that the signatories to the Final Act in Marrakesh have resolved themselves, according to the preamble to the WTO Agreement, to “develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all the results of the Uruguay Round of multilateral trade negotiations.”⁶⁹

As of January 1, 1995, the WTO succeeded the GATT as the legal and institutional foundation of the international trading system. It now provides the principal contractual obligations to determine how sovereign states shall frame and implement domestic economic laws. In addition, it shall serve as the forum in which trade relations among member states will evolve through collective discussion, negotiation and adjudication.⁷⁰ The hope now is that the WTO will “strengthen the world economy and lead to more trade, investment, employment and income growth.”⁷¹

The WTO has gotten off to a good start. The general assessment at the first biennial meeting of the Ministerial Conference in Singapore was that the WTO, for the first two years of its existence, was effective in sustaining a rule-based system in order to liberalize trade.⁷² Moreover, the member states re-committed themselves to further liberalizing trades in goods and services; further eliminating tariff and non-tariff trade barriers; rejecting discriminatory treatment and other forms of protectionism; integrating all economies, whether developed, in transition, developing or least developed, into the WTO; and finally, encouraging the “maximum possible level of transparency” within all member countries and within the WTO framework.⁷³

A. The Heart of the WTO

Transparency is pervasive throughout the WTO. Possibly for the purposes of setting an example, the WTO obliges the principle of transparency upon itself. To enhance public understanding of its framework and its goals, as well as to garner respect and support

68. “Uruguay Round Legislation, March 23, 1994: Hearings Before the Senate Finance Committee”, 103d Cong., 2d Sess. 196-199 (1994) (testimony of John H. Jackson) (hereinafter Jackson testimony).

69. *International Legal Materials*, Vol. 33 (1994), p. 1144.

70. WTO, *1997 Annual Report*, Geneva: WTO, 1998, p. 94.

71. *Ibid.*

72. *Ibid.*, p. 97.

73. *See ibid.*, pp. 97-101.

for its work, the WTO has attempted to furnish sufficient information regarding its procedures, meetings and rulings.⁷⁴ This openness on the part of the WTO will undoubtedly help strengthen its ability to provide leadership in the world economic system. The notion of making the whole regime transparent was evident even prior to the creation of the WTO. For instance, during the Uruguay Round, the GATT administration maintained an elaborate reporting system to ensure transparency throughout the negotiations.⁷⁵

The WTO also encourages transparency for its members. A broad objective of the Uruguay Round, explicitly stated during its negotiations, was to bring "greater transparency to the international trading system."⁷⁶ Improving transparency within member countries via effective monitoring of trade policies, better organization of the multilateral institution, and greater coherence of international economic policies was first proposed by the Leutwiler group in its 1985 report, "Trade Policies for a Better Future."⁷⁷ Inspiration from the report led to such proposals as making mandatory annual assessments by countries of their own trade policies, combining all notification requirements under the various WTO provisions, and applying some simple measurement technique as a standard of analysis.⁷⁸ Another proposal was to review

74. John H. Jackson, "The Uruguay Round and the Launch of the WTO: Significance and Challenges", in Terence P. Stewart, ed., *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, Washington, D.C.: American Bar Association, Section of International Law and Practice, 1996, (hereinafter *The World Trade Organization*), p. 18.

75. See John Croome, *Reshaping the World Trading System: A History of the Uruguay Round*, Geneva: WTO, 1995, p. 78. It is interesting to note, however, that the original GATT framework was often criticized for its lack of transparency. Apparently the members believed that transparency was one of the necessary changes to be made in transforming the GATT into a World Trade Organization.

76. *Ibid.*, p. 222.

77. The Leutwiler Group was formed unilaterally by Arthur Dunkel, then Director-General of the GATT and one-time chief negotiator for Switzerland at the GATT's Tokyo Round negotiations. The group, chaired by Fritz Leutwiler, head of the Swiss central bank (hence the name), consisted of "non-governmental figures of recognized standing" and was invited by Dunkel to independently "identify the fundamental causes of the problems afflicting the international trading system and to consider how these may be overcome during the remainder of the 1980's." Although the report received substantial publicity, it remained largely irrelevant, due to the political battle between the developed countries and the developing countries at the time. It was not until the Uruguay Round a couple of years later that the report became of some influence. See *ibid.*, pp. 18-20.

78. *Ibid.*, p. 154.

the trade policies of member states on a rotational basis, comparing these with a Secretariat report.⁷⁹

Although there were some hesitation on the part of the countries to accept such sweeping transparency requirements,⁸⁰ most believed nevertheless that these were necessary to achieve the goal of an equitable and prosperous world trading system. The outcome of these proposals was the eventual embodiment of transparency provisions within many of the WTO agreements.⁸¹ These provisions require disclosure of domestic legislation, regulations, judicial decisions and administrative rulings that affect the trade in goods, services, intellectual property rights and other business transactions. Such disclosures are to be made both at the national level, through publication in designated journals, and at the multilateral level, through official notifications to the WTO.⁸²

B. Transparency in the Agreements

The original GATT only covered trade in goods, whereas the agreements of the WTO cover trade in goods (incorporating the original GATT, with amendments, and renaming it GATT 1994),⁸³ trade in services and trade in “ideas,” or intellectual property.

1. The Multilateral Trade Agreements (Trade in Goods)

The WTO contains four basic sets of agreements, the first of which, the Multilateral Trade Agreements, relates to trade in goods. The foundational document in this set of agreements is GATT 1994,

79. *Ibid.* These specific proposals were eventually incorporated into WTO's Trade Policy Review Mechanism, which was established at the end of the Tokyo Round and was gradually developed. Other proposals encouraging transparency for WTO members were also integrated into the final WTO regime.

80. Developing countries did not welcome the additional examinations of their trade policies, while developed countries were concerned that these reviews might be misused by unfriendly nations. *See ibid.*, pp. 154-155.

81. United States-China Business Council, *supra* note 1, p. 4.

82. *See generally International Legal Materials*, Vol. 33 (1994), p. 1140.

83. The GATT 1994 embodies all of the original GATT, with the exception of the Protocol of Provisional Application, which in the past had limited the GATT's application in a country's domestic law. Moreover, the GATT 1994 modifies and expands various existing GATT obligations through newly attached agreements focusing on agriculture, sanitary and phytosanitary measures, textiles, standards, investments, pre-shipment inspection, rules of origin, import licensing procedures, antidumping, valuation, subsidies and safeguards. Finally, included in the GATT 1994 package of agreements are numerous understandings on interpretations of specific GATT articles, provisions and waivers of obligations. *See ibid.*, p. 1154 (Final Act, Part II, ann. 1A).

successor to the original GATT.⁸⁴ The principle of transparency is embodied within GATT 1994 in its Article X, which, in addition to the explicit requirement of notifying the WTO administration and its members of any and all laws and regulations related to trade in goods (such as classification and valuation issues; the rates of duties, taxes and charges;⁸⁵ and the restrictions on imports, exports, payments, use and distribution of goods⁸⁶), also insists upon timely notification of changes to existing legislation and regulations. Furthermore, this provision compels members to fully disclose information regarding the trading activities of any state-owned enterprises.⁸⁷ And finally, Article X requires the uniform, impartial and reasonable implementation of GATT-consistent trade laws throughout a member's territory, as well as the establishment of domestic adjudicatory mechanisms for the effective enforcement of such laws.⁸⁸

Using Article X as a model, the principle of transparency was expanded to other parts of the WTO trading of goods regime. Annexed to the GATT 1994 are twelve other agreements related to specific GATT issues, each with provisions that mirror those of Article X. These are the Agreement on Agriculture,⁸⁹ the Agreement

84. Although considered a separate, distinct agreement from the original GATT, GATT 1994 nevertheless retained enough similarities for some to suggest that the WTO is in fact guided by the customary practices of the original GATT. See Folsom et al., *International Trade and Investment*, *supra* note 3, pp. 70-71.

85. The requirement for transparency *vis-a-vis* duties and charges is further expanded in the "Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994," which requires the recordation of any "other duties or charges" levied on bound tariff items in the Schedules of concessions, to be annexed to the GATT 1994.

86. Although Articles XII and XVIII of the GATT 1994 allow for restrictive import measures to be imposed for balance-of-payment purposes, the "Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994" requires that members must promptly notify the WTO of any changes made in regard to such restrictive measures.

87. This is expanded upon in the "Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994," which, in the interest of ensuring transparency, insists on the notification of all information regarding commercial activities of state enterprises. This notification requirement has also been extended to include non-state-owned "enterprises with monopolies or exclusive or special privileges." WTO, *1997 Annual Report*, *supra* note 70, p. 78.

88. These transparency requirements are meant to apply not only to tariffs, but also to non-tariff measures. See Croome, *Reshaping the World Trading System*, *supra* note 75, pp. 188-195.

89. Article 18 states that the Committee on Agriculture is responsible for the periodic review of the implementation of the enumerated commitments contained within

on the Application of Sanitary and Phytosanitary Measures,⁹⁰ the Agreement on Textiles and Clothing,⁹¹ the Agreement on Technical Barriers to Trade,⁹² the Agreement on Trade-Related Investment Measures,⁹³ the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,⁹⁴ the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994,⁹⁵ the Agreement on Preshipment Inspection,⁹⁶ the Agreement on Rules of Origin,⁹⁷ the Agreement on Import Licens-

this agreement. Part of this responsibility includes the review of notifications by members in the areas of market access, subsidies, quotas, licenses, restrictions and changes in regulation. See WTO, 1997 *Annual Report*, *supra* note 70, pp. 105-106.

90. Transparency is covered in Article 7 and Annex B. In addition, Article 12 establishes the Committee on Sanitary and Phytosanitary Measure to ensure consistent implementation of this agreement, as well as to receive notification of changes in laws and regulations.

91. Article 8 establishes the Textiles Monitoring Body, which enforces notification requirements that exist pervasively throughout the agreement.

92. In addition to creating a Committee on Technical Barriers to Trade in Article 13, this agreement requires members to fulfill notification obligations as well as establish domestic inquiry points, for the purposes of establishing transparency to ensure that industrial standardization, safety and environmental regulations are not used as non-tariff trade barriers.

93. Transparency is provided through Article 5 (notification requirements), Article 6 and Article 7 (the establishment of a Committee on Trade-Related Investment Measures), albeit limitedly due to the investment exceptions allowed by GATT 1997 via Article 3. However, a Working Group on the Relationship between Trade and Investment was recently established to attempt to rectify this and other issues. See WTO, 1997 *Annual Report*, *supra* note 70, p. 116.

94. Article 18 requires the notification and review of domestic antidumping legislation to the Committee on Antidumping Practices. Analogous provisions are also provided for domestic countervailing duty legislation.

95. With its attempt to unify the procedures for customs valuation, this agreement requires that members conform their laws to its provisions by informing the Committee on Customs Valuation of changes in this regard. Such notifications are subject to examination by the Committee.

96. This agreement was constituted for the purposes of ensuring that domestic inspection requirements were conducted in a transparent manner, and do not become trade barriers. Article 5 provides for specific notification requirements, while Article 4 brought about the creation of an Independent Entity to resolve disputes between exporters and domestic preshipment inspection agencies. See WTO, 1997 *Annual Report*, *supra* note 70, pp. 114-115. In order to further improve transparency, work has begun at the WTO to revamp fee structures in contracts, develop a code of conduct, and standardize inspection formats for preshipment inspection entities. The WTO will also attempt to reform customs procedures and simplify the customs system. See "U.S. Trade Representative Charlene Barshefsky Highlights WTO Anti-Corruption Action", USTR Press Release, December 22, 1997, available at www.ustr.gov.

97. Article 4 created the Committee on Rules of Origin, which is currently working on the Harmonization Work Programme. Until this program is complete, member

ing Procedures,⁹⁸ the Agreement on Subsidies and Countervailing Measures,⁹⁹ and the Agreement on Safeguards.¹⁰⁰

2. *The General Agreement on Trade in Services*

When the original GATT framework was created in 1947-48, the assumption was that international trade would merely involve the transfer of goods across national borders. But what was not fully anticipated was that international trade would develop so extensively, and come to encompass the transfer of services, intellectual property, labor and capital. One of the main reasons the WTO was created was to update the international trade regime to embody all these activities, presently flourishing in the world business community.

Debates surrounding the issues of international trade in services began in the late 1970s with informal GATT meetings, and were elevated to legitimate discussions in the 1984 annual session, when the United States and United Kingdom called for negotiations to create a framework of rules for services, comparable to the GATT.¹⁰¹ An agreement among the GATT contracting parties was eventually reached in September of 1986 to negotiate services in the Uruguay Round, with the intention of expanding basic GATT principles to trade in services.¹⁰² A new Group of Negotiations on Services (hereinafter GNS) was then established.

countries are expected to make their rules of origin transparent, and to administer them in a uniform manner. See generally GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, Geneva: GATT, 1994, p. 241.

98. Among the various transparency requirements imposed upon members in this agreement are publishing information regarding licensing procedures before the set time limit, and notifying the Committee on Import Licensing of national laws and regulations regarding license applications.

99. An essential part of this agreement, transparency is required through provisions such as Article 25, which compels members to make a new and full notification of subsidies every three years. In addition, due process is encouraged through assurances that countervailing duties are not imposed until a transparent hearing on the merits has been provided. See M. Jean Anderson and Gregory Husisian, "The Subsidies Agreement", in *The World Trade Organization*, *supra* note 74, pp. 320-325.

100. Transparency is ensured through Article 12, which requires members to notify the Committee on Safeguards of their safeguard legislation and their "grey area" measures. In addition, Article 13 promulgates the surveillance function of the Committee.

101. Croome, *Reshaping the World Trading System*, *supra* note 75, p. 122.

102. See *ibid.*, pp. 122-124. Negotiations on trade in services began slowly due to the reluctance of developing countries to participate. They feared that these negotiations would be linked with negotiations on goods, and would cause further trade imbalances with the developed countries.

GNS began with practical discussions on the basic concepts of GATT *vis a vis* services. With regards to transparency, GNS considered notification requirements of national rules and practices that affect the various service sectors, and proposed methods of incorporating these into the eventual agreement.¹⁰³ Unfortunately, with the scale and diversity of services in the numerous domestic economies, the surging growth of the sector internationally, the complexity of the various regulations imposed upon it, and the general lack of knowledge among contracting parties, the GNS was prevented from pushing the negotiations past its initial stages for the first several years.¹⁰⁴ Discussions were at a relative standstill until 1989, when there finally came a gradual acceptance of the idea to implement as soon as possible such foundational obligations as transparency in the services framework.¹⁰⁵ After several more years of negotiating, a very broad and flexible agreement, the General Agreement on Trade in Services (hereinafter GATS), was finally concluded and integrated into the WTO regime.¹⁰⁶ Given the numerous unresolved issues however, unique to services, a decision was made to continue sectoral negotiations beyond the Uruguay Round deadline.¹⁰⁷

The GATS, as mentioned before, seeks to establish a framework for liberalizing international trade in the area of services. It is the first multilateral agreement covering this subject, and utilizes the examples obtained from the fifty-years of the GATT to stimulate the services trade by providing for deregulation and secured access to markets.¹⁰⁸ Transparency requirements are explicitly

103. *Ibid.*, p. 125.

104. *See generally ibid.*, pp. 242-251.

105. *Ibid.*, p. 246.

106. Although general obligations were agreed to in 1990, the text of the agreement was not thoroughly formulated until the submission of the Draft Final Act, also known as the "Dunkel Text." It was in 1992 that earnest negotiations to liberalize trade in the services sectors truly began, and commitments were then made on specific rules and disciplines. Richard B. Self, "General Agreement on Trade in Services", in *The World Trade Organization*, *supra* note 74, pp. 523-524.

107. *See ibid.*, pp. 546-554. These ongoing negotiations have led to the conclusion of three new agreements within the services regime, namely, the Financial Services agreement, the Basic Telecom Agreement, and the Information Technology Agreement. *See* "Statement by Secretary Rubin and Ambassador Barshefsky Regarding the Successful Conclusion of WTO Financial Services Negotiations", White House Office of the Press Secretary, December 13, 1997, available at www.ustr.gov.

108. GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations - Market Access for Goods and Services: Overview of the Results*, Geneva: GATT, 1994, p. 39.

stated in Article III: in addition to the publication of all laws and regulations affecting trade in services,¹⁰⁹ members are obligated to timely notify the Council for Trade in Services of the introduction of any new laws, or changes pertaining to these laws.¹¹⁰ Moreover, members are required to respond promptly to any inquiries regarding these relevant laws and regulations, as well as to establish "one or more inquiry points" to provide information for such requests.¹¹¹

In addition to Article III, member nations are encouraged to be transparent in all their service-related activities by various provisions within GATS. An example of this includes special procedures to provide information on monopolies and exclusive service suppliers.¹¹² Also, timely notifications to the WTO are required for the formation of economic integrations;¹¹³ the establishment of bilateral reciprocity arrangements for the recognition, certification and licensing of service providers;¹¹⁴ and the conclusion of labor market integration agreements.¹¹⁵

3. *The Agreement on Trade-Related Aspects of Intellectual Property*

Also included in this new WTO regime is the significant, albeit long debated, Agreement on Trade-Related Aspects of Intellectual Property (hereinafter TRIPs). TRIPs came about due to the increased recognition that the "value of goods and services entering into international trade resides in the know-how and creativity incorporated into them."¹¹⁶ For many years, prior to the WTO, issues regarding the global protection of intellectual property were seriously considered, yet there remained a general belief, especially among the developing countries, that the GATT forum was not the proper place to discuss this matter.¹¹⁷ Eventually, however, TRIPs

109. An exception is provided where, if it is impractical to publish relevant international agreements, a member country may satisfy their obligation by making these agreements publicly available. *International Legal Materials*, Vol. 33 (1994), p. 1170 (GATS Art. III (1) and (2)).

110. *Ibid.* (GATS Art. III (3)).

111. *Ibid.* (GATS Art. III (4)). These liaison offices are to be established within two years of the date of entry into force of the WTO Agreement, with exceptions permitted for developing countries in Art. XV of the GATS.

112. *Ibid.*, p. 1175 (GATS Art. VIII (3) and (4)).

113. *Ibid.*, p. 1171 (GATS Art. V).

114. *Ibid.*, p. 1174 (GATS Art. VII (4)).

115. *Ibid.*, p. 1172 (GATS Art. V bis).

116. WTO, *1997 Annual Report*, *supra* note 70, p. 124.

117. Croome, *Reshaping the World Trading System*, *supra* note 75, p. 130.

were brought forth for deliberation in the Uruguay Round.¹¹⁸ After a slow start and many years of difficult negotiating, Uruguay Round participants were finally able to conclude an intellectual property rights agreement that embodied the basic concepts of the GATT; provided minimum standards for the protection for copyrights, trademarks, patents, geographical indications, industrial designs, layout-designs of integrated circuits and trade secrets;¹¹⁹ and offered enforcement for such protection.

The main provision in TRIPs that compels transparency upon members is Article 63, which requires the publication or the public availability of laws and regulations related to the protection of intellectual property.¹²⁰ Also, notification to the Council for TRIPs is required for all relevant rules,¹²¹ and responses are expected when other members inquire about information regarding a nation's intellectual property regime.¹²² In addition, members are obliged to give timely notices of their implementing legislation for TRIPs as well as information on how they are meeting the obligations of TRIPs, through responses to questions put forth by the Council for TRIPs.¹²³ Finally, other notification requirements that also bring about a more transparent global intellectual property framework include those concerning the "mail-box" and exclusive marketing rights provisions,¹²⁴ as well as technical and financial cooperation.¹²⁵

4. *The Plurilateral Agreements*

Whereas the three previous sets of agreements are mandatory for all WTO members, the fourth set of agreements, the Plurilateral Trade Agreements, are voluntary in that countries can choose whether to accept these agreements or not.¹²⁶ These Plurilateral

118. *Ibid.*, p. 131.

119. These were built upon existing international conventions administered by the World Intellectual Property Organization, such as the Berne Convention for the Protection of Literary and Artistic Works and the Paris Convention for the Protection of Industrial Property. See United States-China Business Council, *supra* note 1, p. 18.

120. *International Legal Materials*, Vol. 33 (1994), p. 1221 (TRIPs Art. 63 (1)).

121. *Ibid.* (TRIPs Art. 63(2)).

122. *Ibid.* (TRIPs Art. 63(3)).

123. See WTO, 1997 *Annual Report*, *supra* note 70, pp. 124-126. Developed countries are given one year to bring their laws into TRIPs-conformity, while Developing and Least Developed Countries are given five and ten years, respectively.

124. *International Legal Materials*, Vol. 33 (1994), pp. 1223-1224 (TRIPs Article 70).

125. *Ibid.*, pp. 1222-1223 (TRIPs Article 67).

126. Folsom et al., *International Trade and Investment*, *supra* note 3, p. 71.

Agreements include the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement.¹²⁷ The agreements exist because, despite the overall success of eliminating from the previous GATT regime the “a la Carte” mentality,¹²⁸ whence contracting parties were able to pick and choose which obligations they were to be bound by, the four areas of aircrafts, procurement, dairy and beef were subject to such immensely varied domestic regulations that there were no other options but to set these agreements aside as “Plurilateral.”¹²⁹

Although the principle of transparency exists throughout the whole of these four agreements, the one that arguably most embodies the essence of transparency in its subject matter (and is a priority within the WTO to undertake further negotiations on in order to elevate its status from a plurilateral to a mandatory agreement), is the Agreement on Government Procurement.¹³⁰ This agreement covers the procurement of services and goods by central government entities, sub-central entities and public utilities.¹³¹

In an attempt to further develop the Agreement on Government Procurement mandatory, the Ministerial Conference at Singapore made a declaration to “establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement.”¹³² Since the Ministerial Conference, the Working Group on Transparency in Government Procurement has been busy collecting factual information on provisions related to transparency in the various international procurement instruments as well as in national procurement procedures and practices, and addressing certain critical issues re-

127. See generally GATT Secretariat, *The Results of the Uruguay Round*, *supra* note 97, p. 241 (WTO Agreement, Annex 4).

128. Jackson testimony, *supra* note 68, p. 197.

129. Dillon, “The World Trade Organization: A New Legal Order for World Trade?”, *supra* note 6, p. 359.

130. See WTO, *1997 Annual Report*, *supra* note 70, p. 142. Although China has emphatically insisted that it will not sign the Government Procurement Agreement as part of its WTO accession package, it is interesting to note that Hong Kong, a special economic zone in China as well as a member of the WTO, acceded to this agreement on June 19, 1997 (this occurred prior to Hong Kong’s reversion to Chinese rule on July 1 of the same year). See “Hong Kong Accedes to the WTO Government Procurement Agreement”, USTR Press Release, June 19, 1997, available at www.ustr.gov.

131. See WTO, *1997 Annual Report*, *supra* note 70, p. 142.

132. *Ibid.*, p. 100.

garding the assurance of transparency during procurement processes.¹³³

C. Transparency in the Administrative Framework

One of the most significant differences between the WTO regime and the original GATT regime is, of course, the “institutional framework” created to “conduct. . . trade relations among. . . [the WTO] members.”¹³⁴ As a formalized, administrative organization, the WTO’s functions include facilitating the “implementation, administration and operation, and further the objectives” of all agreements;¹³⁵ providing a “forum for negotiations among its Members concerning their multilateral trade relations;”¹³⁶ administering both the Trade Policy Review Mechanism (hereinafter the TPRM) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the Dispute Settlement Understanding or DSU);¹³⁷ and “achieving greater coherence in global economic policy-making” in the arena of international trade and business.¹³⁸

The WTO hierarchy consists of, first and foremost, the Ministerial Conference.¹³⁹ The Ministerial Conference is the highest authority of the WTO, and is composed of representatives from all WTO members.¹⁴⁰ The second tier of this structure is the General Council.¹⁴¹ In addition to conducting the day-to-day operations of the WTO, representatives of the General Council also convene as (1) the Trade Policy Review Body, which administers the TPRM by conducting regular reviews of member countries’ trade policies and

133. See *ibid.*, pp. 142-143. Other international instruments covering government procurement procedures include the UNCITRAL Model Law on Procurement of Goods, Construction and Services; and the World Bank Procurement Guidelines.

134. *International Legal Materials*, Vol. 33 (1994), p. 1144 (WTO Agreement, Art. II(1)). While the GATT also had its own administrative framework, it was informal and very loosely organized.

135. *Ibid.*, p. 1145 (WTO Agreement, Art. III (1)).

136. *Ibid.* (WTO Agreement, Art. III (2)).

137. *Ibid.* (WTO Agreement, Art. III (3) and (4)).

138. *Ibid.* (WTO Agreement, Art. III (5)).

139. *Ibid.* (WTO Agreement, Art. IV (1)).

140. See WTO, 1997 *Annual Report*, *supra* note 70, p. 94. The Ministerial Conference meets on a biannual basis, and can take decisions on all matters related to the Multilateral Trade Agreements.

141. *International Legal Materials*, Vol. 33 (1994), p. 1145 (WTO Agreement, Art. IV (2)); WTO, 1997 *Annual Report*, *supra* note 70, p. 94. The General Council also consists of representatives from every WTO member country.

practices, and (2) the Dispute Settlement Body, which administers the DSU and oversees its procedures.¹⁴²

In addition to these organs, virtually every agreement has established its own council or committee, charged with specific responsibilities and authority to administer the particular agreement.¹⁴³ The WTO Agreement itself created three councils to administer the three sets of mandatory agreements while operating under the guidance of the General Council.¹⁴⁴ These are the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter the Council for TRIPs).¹⁴⁵ These councils are open to all representatives of member states, and have the authority to establish their own respective rules of procedures, as well as create other subordinate organizations as they deem necessary to promote transparency.¹⁴⁶

The Council for Trade in Goods oversees the functions of the Multilateral Trade Agreements, including the GATT 1994 and all its related agreements in Annex 1A. And because of the numerous committees each of these agreements have created, the activities of this Council have been largely linked to these subsidiary committees.¹⁴⁷ Its work includes overseeing these subordinate bodies, encouraging the compliance of notification requirements by members for all Multilateral Trade Agreements, and providing a forum for

142. See *ibid.*, pp. 1145-1146 (WTO Agreement, Art. IV (3) and (4)); also see WTO, 1997 Annual Report, *supra* note 70, p. 94.

143. See Dillon, "The World Trade Organization: A New Legal Order for World Trade?", *supra* note 6, p. 367. The roles of these committees and councils are not unlike those of the Ministerial Conference and the General Council; they are authorized to review and implement their respective agreements, as well as to act as a surveillance body to ensure compliance by member countries. *Ibid.*

144. See *International Legal Materials*, Vol. 33 (1994), p. 1146 (WTO Agreement, Art. IV (5)). The WTO Agreement also creates bodies to administer the Plurilateral Trade Agreements, and committees that, although not directly related to any specific trade agreement, perform necessary tasks to ensure the smooth function of the WTO as a whole. These committees include the Committee on Trade and Development, the Committee on Balance-of-Payment Restrictions, and the Committee on Budget, Finance and Administration. See *ibid.* (Art. IV (7) and (8)).

145. *Ibid.* (WTO Agreement, Art. IV (5)).

146. See *ibid.* (WTO Agreement, Art. IV (5) and (6)); Folsom et al., *International Trade and Investment*, *supra* note 3, pp. 73-74.

147. The committees that administer these agreements include the Textiles Monitoring Body, the Committee on Agriculture, the Committee on Sanitary and Phytosanitary Measures, etc.

members to voice their concerns regarding the trading practices of others.¹⁴⁸

The Council for Trade in Services oversees the GATS and its related agreements. In addition to promoting notification by member states in the services sector, this Council is considering the development of an "information exchange programme" that will hopefully provide access to "information regarding laws, regulations, administrative guidelines and policies affecting trade in services" for all members.¹⁴⁹ This will help future negotiations by allowing for better assessment of the services sectors.¹⁵⁰

The Council for TRIPs, of course, oversees the administration of TRIPs. It also insists that member states provide notification of their TRIPs-related rules and regulations.¹⁵¹ However, given the existing transitional periods for developing countries, and the numerous options available for the performance of notification obligations, this Council is presently making arrangements to enhance the notification process.¹⁵² Moreover, this Council has been inviting inter-governmental organizations with observer status, such as the World Intellectual Property Organization and the Organization for Economic Cooperation and Development, to also provide information on their TRIPs-related activities, all for the sake of transparency.¹⁵³

With this framework, the WTO is a platform upon which multilateral trade negotiations can occur. Additionally, it is cooperating with other international organizations to form coherent global economic policies.¹⁵⁴ Most importantly, though, it is instilling the principle of transparency among its members and throughout the global economic system. With WTO's administrative structure, it seems that transparency can be induced most effectively and practically through three specific mechanisms.

148. See WTO, 1997 *Annual Report*, *supra* note 70, pp. 101-102.

149. *Ibid.*, p. 119.

150. *Ibid.*

151. *Ibid.*, p. 124.

152. See *ibid.*, pp. 124-126.

153. *Ibid.*, p. 125.

154. See generally *ibid.*, pp. 94-153. Among the many international organizations the WTO cooperates with are the International Monetary Fund, the World Bank group, and the United Nations Conference on Trade and Development. See *ibid.*, pp. 147-152.

1. Notification Requirements

It has been noted that a large part of the work of the councils and committees within the WTO regime involves encouraging and obtaining notifications, by individual member countries, of changes in domestic laws and regulations that affect international trade. This undoubtably promotes transparency within the WTO regime. However, one cannot help but question their worth and effectiveness when these multitudinous, so-called notification "requirements" and "obligations" are in actuality voluntary and non-binding.¹⁵⁵

Notification obligations were part of the original GATT framework, where contracting parties have always held that surveillance of trade policies and improved notification procedures would be beneficial to the multilateral trading system as a whole.¹⁵⁶ (In fact, "greater transparency in trade policies" was a "basic aim" of the Uruguay Round.¹⁵⁷) However, most countries felt that notification requirements should be made on a voluntary basis, and not by binding commitments. Because of this, many members have neglected to submit any of their notifications of new or changed laws, while those that complied usually did so because their more important economic stature subjected them to greater scrutiny.¹⁵⁸ And while it was foreseeable that, if left on a voluntary basis, notifications in the WTO would merely continue to provide for limited transparency, not enough support could be generated to bring about a change to the status quo.¹⁵⁹ What ultimately was mustered was a "broad review of notification" that established a central registry where all notification requirements would be stored, which would "show how governments were living up to their obligations to notify, and what information was available."¹⁶⁰ This at least is a step in the right di-

155. Croome, *Reshaping the World Trading System*, *supra* note 75, p. 271.

156. *Ibid.*, p. 159. The Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance was adopted in the Tokyo Round negotiations on November 28, 1979. *Ibid.*

157. *Ibid.*

158. *Ibid.* Croome noted that in discussing the possible improvement of notification procedures during the Uruguay Round, some countries even complained that certain requirements were a "waste of time, or effectively duplicated calls for information already provided." *Ibid.*

159. *See ibid.*, p. 271. Many countries were willing to "endorse the value of domestic monitoring of trade policies," but insisted that it remain "entirely voluntary." And although a few countries were reluctant to support this view, insisting that the GATT was contractual by nature, and should not "concern itself with non-binding commitments," they were easily "overcome without much difficulty." *Ibid.*

160. *Ibid.*, p. 159.

rection in that nominal enforcement can be maintained through peer pressure, as non-compliance is more visible due to public access of this central registry.

Specifically, the expanded notification obligations were embodied in the WTO through the various agreements within the world trade regime. To further encourage participation in these activities, a Decision on Notification Procedures was incorporated into the Final Act.¹⁶¹ This Decision declared that, in order to “contribute to the transparency of Members’ trade policies and to the effectiveness of surveillance arrangements,” the operation of notification procedures shall be improved (1) by obliging members to affirm their commitment to publish and notify the WTO of their respective trade laws and regulations, and (2) by establishing the previously mentioned central registry to maintain records of such notifications.¹⁶² And in following the theory of enforcement by peer pressure, this central registry shall “inform each Member annually of the regular notification obligations to which that Member will be expected to respond in the course of the following year. . . [and it] shall draw the attention of individual Members to regular notification requirements which remain unfulfilled.”¹⁶³

Unfortunately, as anticipated, a voluntary system of notification, however “improved,” did not and will not bring about effective transparency within the WTO. During the first Ministerial Conference of the WTO, it was declared that “[c]ompliance with notification requirements has not been fully satisfactory. Because the WTO system relies on mutual monitoring as a means to assess implementation, those Members that have not submitted notifications in a timely manner, or whose notifications are not complete, should renew their efforts. At the same time, the relevant bodies should take appropriate steps to promote full compliance while considering practical proposals for simplifying the notification process.”¹⁶⁴

One of the positive steps that the WTO has taken since the issuance of this declaration in late 1996 was to implement several recommendations put forth by the Working Group on Notification Obligations and Procedures, whose goal was to simplify, standardize and consolidate notification obligations for the Multilateral

161. *International Legal Materials*, Vol. 33 (1994), p. 1250 (Final Act, Ministerial Decisions and Declaration).

162. *See generally ibid.* (Final Act, Decision on Notification Procedures).

163. *Ibid.* (Decision on Notification Procedures, Section II).

164. WTO, *1997 Annual Report*, *supra* note 70, p. 98.

Trade Agreements to the greatest extent possible.¹⁶⁵ One example of such recommendation was to update notification status of member states on a semi-annual basis.¹⁶⁶ Regardless, in its final report, the Working Group reiterated:

that the goal of improving compliance with the notification obligations was a key responsibility of all Members to maximize transparency of trade policies and measures. Detailed monitoring of all agreements by the responsible committees could only be achieved if there was sufficient transparency through compliance with the notification obligations.

In another words, further improvements in this mechanism are still needed.

2. *The Trade Policy Review Mechanism*

A much more effective tool in bringing about transparency in the WTO is the TPRM. As already established, transparency is an essential element in pursuing international trade liberalization; and the logic follows that if such transparency is to be ensured, a mechanism is necessary to regularly monitor national trade policies as they evolve from the formulation stage to the implementation stage.¹⁶⁷ This essentially is what the TPRM does; it examines a country's trade policies and practices on a periodic basis, while keeping the government accountable for introducing protectionist measures.¹⁶⁸

The proposal for a mechanism to review national policies in the GATT was first introduced in 1987.¹⁶⁹ Although this idea was generally accepted, concerns were raised about the legal obligations of each contracting party to such a mechanism.¹⁷⁰ Further debates often centered around this issue, and of the role that the Secretariat of the GATT would play in making such obligations binding.¹⁷¹

165. The Working Group on Notification Obligations and Procedures was established by the Council for Trade in Goods on February 20, 1995, pursuant to the Uruguay Round Ministerial Decision on Notification Procedures. See *International Legal Materials*, Vol. 33 (1994), pp. 1250-1251 (Final Act, Decision on Notification Procedures, Section III); WTO, *1997 Annual Report*, *supra* note 70, p. 117.

166. WTO, *1997 Annual Report*, *supra* note 70, p. 101.

167. See GATT, *The Results of the Uruguay Round*, *supra* note 108, p. 52.

168. See *ibid.*

169. Croome, *Reshaping the World Trading System*, *supra* note 75, p. 157.

170. *Ibid.*

171. See *ibid.*, pp. 161-162.

Eventually an agreement was struck, and the TPRM was placed into the GATT framework in 1989 on a provisional basis.¹⁷²

Greater multilateral surveillance of trade policies was achieved through this mechanism, which first required individual members to prepare a "Country Report" on their trade policies. The Secretariat of the GATT (later the WTO), then, simultaneously prepared its own trade policy report on particular countries. Thereafter, the two reports were presented to the TPRM's Trade Policy Review Body (hereinafter the TPRB) for evaluation. A final report was then published, which stated the concerns of the TPRB regarding the said member's adherence to the multilateral trading system, and then it was submitted to the Ministerial Conference.¹⁷³ This process was repeated periodically for each member, and it was finally confirmed on a permanent basis and incorporated into the WTO as Annex 3 of the Final Act.¹⁷⁴

As it stands, the TPRM does appear to achieve greater transparency in the trade practices of all WTO members. It also allows for a fuller appreciation and evaluation of a country's legislation and regulations.¹⁷⁵ And unlike the voluntary notification "requirements" of the various WTO agreements, the TPRM "provides a broad mandate for multilateral surveillance of Members' trade policies and practices."¹⁷⁶ However, it is important to note that the compulsory proceedings of this mechanism do not include any authority to rectify deficient policies, or impose new commitments.¹⁷⁷ In this sense, the TPRM is effective as a tool that exposes the lack of transparency. Its practice of mandating period reviews of a country's policies is one step beyond mere notification requirements. However, after pinpointing non-transparent areas, it still lacks the mechanism necessary to compel change.

3. *The Dispute Settlement Understanding*

It is in this predicament that one can appreciate the major innovation of the WTO that is the Dispute Settlement Understand-

172. GATT, *The Results of the Uruguay Round*, *supra* note 108, p. 52.

173. See generally Folsom et al., *International Trade and Investment*, *supra* note 3, pp. 74-75; see also GATT, *The Results of the Uruguay Round*, *supra* note 108, p. 52.

174. See GATT Secretariat, *The Results of the Uruguay Round*, *supra* note 97, p. 434 (Final Act, Annex 3).

175. GATT, *The Results of the Uruguay Round*, *supra* note 64, p. 61.

176. WTO, *1997 Annual Report*, *supra* note 70, p. 79.

177. Dillon, "The World Trade Organization: A New Legal Order for World Trade?", *supra* note 6, p. 370.

ing.¹⁷⁸ Although the DSU, on its face, does not relate directly to the promotion and encouragement of transparency within the WTO regime, it does provide the effective mechanism needed to enforce the numerous transparency requirements of the WTO upon member states.

Differences between the DSU and the dispute settlement system under the original GATT are many. First of all, the DSU integrates all dispute settlement procedures as established under the individual WTO agreements, be it the Multilateral Trade Agreements, the GATS, or TRIPs.¹⁷⁹ Second, the DSU provides procedural automaticity in terms of establishing a panel, adopting panel rulings and authorizing retaliation.¹⁸⁰ Third, to ensure confidence in the quality of legal proceedings, a layer of appellate review is added.¹⁸¹ And finally, clearly defined time-frames throughout the dispute settlement process have been established. This includes the requirement to conform one's laws and practices if found inconsistent with WTO standards within a "reasonable period of time."¹⁸² All of this contributes to the DSU's efficiency and effectiveness in settling disputes and in enforcing WTO agreements and administrative rulings.¹⁸³ And it is this new and improved DSU that hopefully will bring member states into conformity with the transparency commitments of the WTO.

As an aside, it is ironic to note that the proceedings of the DSU are surprisingly non-transparent.¹⁸⁴ While the WTO has already ameliorated much of the problem in this area from the original GATT, one author suggests that "there is still room for greater openness and transparency if the enhancement of administrative

178. *International Legal Materials*, Vol. 33 (1994), p. 1226 (Final Act, Annex 2).

179. See GATT, *The Results of the Uruguay Round*, *supra* note 108, pp. 52-53. By contrast, the dispute settlement system of the GATT were separate from the other agreements that resulted from the GATT's trade negotiations. *Ibid.*

180. *International Legal Materials*, Vol. 33 (1994), pp. 1230, 1235, 1239-1241 (DSU, Art. 6, 16, 22). Whereas previously, consensus was needed for retaliation, now consensus instead is needed to refrain from retaliation.

181. *Ibid.*, pp. 1236-1237 (DSU, Art. 17).

182. See GATT, *The Results of the Uruguay Round*, *supra* note 108, p. 53.

183. For a more detailed discussion of the workings of the DSU, see generally Dillon, "The World Trade Organization: A New Legal Order for World Trade?", *supra* note 6, pp. 373-402.

184. See James R. Cannon, Jr., "Dispute Settlement in Antidumping and Countervailing Duty Cases", in *The World Trade Organization*, *supra* note 74, pp. 393-394. The process of the DSU is apparently so non-transparent that Section 126 of the URAA instructs the USTR to "advocate within the WTO that more transparent procedures be adopted for dispute resolution. . ." *Ibid.*

and rule of law principles are to be consistent with other developments in the DSU.”¹⁸⁵

D. Expectations of WTO Members

Despite ample room for improvement, the promotion of transparency among its members by the WTO since its inception has been surprisingly staunch and relentless, which for many is a refreshing turn in the field of international trade. The WTO continues its insistence on higher transparency standards for the near future. As new “regulatory issues” arise (i.e. competition policy, insurance and procurement), the WTO seems set on applying general transparency principles to these subjects.¹⁸⁶ One can assume that, in order to be or become a meaningful participant of the WTO, transparency of national laws and regulations is necessary. Transparency will no doubt be encouraged as long as the WTO exists, and as long as a country remains a member of the WTO.

IV. THE ISSUE OF TRANSPARENCY IN CHINA’S ACCESSION PROCESS

Accession to the original GATT was made possible under Article XXXIII, whereby the applicant country or autonomous customs territory first submitted a request to join. A two part process was then initiated: (1) A “working party” would be formed by the GATT contracting parties to identify and examine all relevant aspects of the applicant’s trade regime and policy, making sure that the applicant would comply with all GATT obligations; (2) simultaneously with this working party, the applicant would enter into bilateral negotiations with individual GATT contracting parties to determine its schedules of concessions and commitments, as a form of “entrance fee” into the multilateral trade framework. When this two-track process was completed to the satisfaction of all interested parties, the final package of accession, including the report of the working party and the draft protocol of accession, was submitted to

185. While the GATT dispute settlement panels have been criticized for their secrecy, the DSU presently continues to meet in closed session. Kim Rubenstein and Jenny Schultz, “Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO”, *St. John’s Journal of Legal Commentary*, Vol. 11 (1996), p. 292.

186. See Jackson, “The Uruguay Round and the Launch of the WTO”, *supra* note 74, pp. 23-24.

the entire GATT membership for a decision of approval, which required a two-thirds majority vote.¹⁸⁷

Article XII of the WTO Agreement states that any "State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in" the WTO may accede to the multilateral trade body.¹⁸⁸ Procedurally, accession to the WTO is no different from the original GATT. A two-part process is also initiated after the applicant country submits a request for accession and a memorandum detailing its foreign trade laws and practices, which will act as a basis for the working party negotiations. The working party will consist of all interested WTO members, and will have the task of formulating the basic terms of accession (including the applicant's trade liberalization commitments and timetable for implementing such commitments) in the form of a draft protocol. Parallel bilateral negotiations also will be conducted with interested existing members, usually the applicant's major trading partners, with the contents of the agreed-upon tariff rates and other concessions being incorporated into the draft protocol and extended to all WTO members. Again, a two-thirds vote is necessary from the Ministerial Conference for final approval, although any WTO member that has requested bilateral negotiations with the applicant can effectively veto the applicant by merely failing to conclude a bilateral agreement.¹⁸⁹ Because accession to the WTO means that the applicant accepts the Multilateral Trade Agreements, the GATS and TRIPs (the Plurilateral Agreements are optional), more complicated negotiations than for the GATT are invariably required, for the purposes of covering the much broader range of commercial issues.

Accession negotiations, on both the multilateral and bilateral levels, will deal with all aspects of an applicant's foreign trade practices, including market access concessions, commitments on goods, services and intellectual property, as well as legislative framework

187. See GATT, *The Text of the General Agreement on Tariffs and Trade*, Geneva: GATT, 1986, p. 51 (Article XXXIII of the GATT); see also GATT, *GATT Activities 1994-1995*, *supra* note 64, p. 111. The original GATT also allowed for accession under Article XXVI for customs territories formerly part of an existing contracting party that became autonomous, at least in its conduct of foreign trade. See *ibid.*, pp. 45-46 (Article XXVI (5)(c) of the GATT).

188. *International Legal Materials*, Vol. 33 (1994), p. 1150 (WTO Agreement, Article XII(1)).

189. See United States-China Business Council, *supra* note 1, pp. 4-5; see also O'Quinn, "How to Bring China and Taiwan into the WTO", *supra* note 14, p. 5.

and enforcement mechanisms.¹⁹⁰ Complexity of negotiations is amplified by the fact that the many nations presently requesting accession are from centrally-planned and transition economies, and therefore are at different stages of their reform process.¹⁹¹ This makes it difficult for the WTO to formulate explicit accession standards, nor is precedent helpful in determining detailed requirements for applicants to follow so as to ensure successful entry.

To further complicate matters, the accession procedure is constantly evolving. For one thing, exceptions for developing countries and least developed countries have been seriously curtailed, raising the entrance standard to ever increasing levels.¹⁹² Where, in the past, countries were admitted based upon a few commitments, this is no longer possible. Also, transition provisions provided at the inception of the WTO apparently will not be, and have not been, offered to accession applicants.¹⁹³ Furthermore, there appears to be an unwritten rule that the time spent on negotiating a draft protocol is inversely proportional to the effort an applicant exerts in modifying its overall trading system to the satisfaction of WTO members.¹⁹⁴ The Ministerial Council hinted at this in its Singapore declaration when it said that it will “work to bring. . . applicants expeditiously into the WTO system. . .” so long as “the 28 applicants now negotiating accession contribute to completing the accession process by accepting the WTO rules and by offering meaningful market access commitments.”¹⁹⁵ No set time frame for accession will be applied.

For China’s accession process, not only is it necessary to publish its relevant commercial rules, but China must also assure the WTO that unpublished laws and regulations will not be applied.¹⁹⁶ Given the continuous criticism China has received concerning the lack of transparency in its foreign trade regime, China has promulgated literally hundreds of new laws since 1979.¹⁹⁷ However, transparency is not merely the publication of legislation. To provide true transparency, more work is needed, as chronicled below.

190. WTO, *1997 Annual Report*, *supra* note 70, p. 95.

191. *Ibid.*, p. 94.

192. Jeffrey J. Schott, *WTO 2000*, *supra* note 63, p. 39.

193. Terence P. Stewart, “China’s WTO Accession: The Final Chapter - Issues and Options”, Conference Paper for the Atlantic Council Conference on China 2010: The Rule of Law and Prospects for Institutionalizing Change (December 9-10, 1996), p. 4.

194. *Ibid.*

195. WTO, *1997 Annual Report*, *supra* note 70, p. 97.

196. Stewart, “China’s WTO Accession”, *supra* note 193, p. 1.

197. Harders-Chen, “China MFN”, *supra* note 15, p. 381.

A. Bold Beginnings (1986-1992)

In June of 1986, China submitted a formal request, during a special Council meeting, indicating its desire to once again become a contracting party to the GATT.¹⁹⁸ At the start of the Uruguay Round, China confidently proclaimed that it believes its "resumption of membership in GATT will be in the interest of not only China but also other contracting parties. It will also contribute to the strengthening of the multilateral trade system and further the realization of the GATT objectives. . . The Chinese Government wishes to . . . make its due contributions to trade liberalization as well as economic and trade growth of the world."¹⁹⁹

China submitted its memorandum on its foreign trade regime to the Council in early 1987.²⁰⁰ In it, China listed over 100 relevant laws and regulations it had promulgated for the purposes of guaranteeing "successful economic reform" and "smooth implementation of [its] open policy."²⁰¹ In addition, the memorandum enumerated the various bilateral trade, investment and double taxation agreements, and the international treaties, to which China was a party; as well as the international economic and financial organizations in which it was a member.²⁰² Moreover, China commented that it had revised its already existing "Regulations on Import and Export Duties of the PRC" and "Customs Import and Export Tariff" rules for the benefit of foreign countries.²⁰³ In regards to its commodity inspection system, China enacted the "Regulations on the Inspection of Import and Export Commodities of the People's Republic of China."²⁰⁴ And in terms of China's licensing system, it promulgated the new "Interim Regulations on Licensing System for Import

198. GATT, *GATT Activities 1986*, Geneva: GATT, 1987, pp. 76-77.

199. "China: Statement by Mr. Shen Jueren, Head of the Delegation, at the Meeting of the GATT Contracting Parties at Ministerial Level, 15-19 September 1986, Punta Del Este, Uruguay" (September 17, 1986), *microformed on* GATT Fiche MIN(86)/ST/24, (No. 86-1426), pp. 2-3.

200. "China's Status as a Contracting Party - Memorandum on China's Foreign Trade Regime" (February 18, 1987), *microformed on* GATT Fiche L/6125 (No. 87-0207).

201. These include the "Law of the PRC on Joint Ventures Using Chinese and Foreign Investment", "Income Tax Law of the PRC Concerning Foreign Enterprises", and the "Patent Law of the PRC". See *ibid.*, p. 8.

202. See generally *ibid.*, p. 9, Annexes I, II and XI.

203. *Ibid.*, pp. 13-15.

204. *Ibid.*, p. 15. This is administered by the State Administration for the Inspection of Import and Export Commodities, which is "in charge of unified supervision and administration of the import and export commodities inspection." *Ibid.*

Commodities of the PRC” and the “Interim Procedures for the Export Licensing System of the PRC.”²⁰⁵

Aside from its legal framework, China claimed in this memorandum that its rules and policies were fully implemented and in effect throughout the country, “unifiably” and without regional restrictions.²⁰⁶ Thereafter, China listed its “Institutions and Publications Relating to Trade.”²⁰⁷ These institutions were the State Council, the State Planning Commission, the State Economic Commission, the Ministry of Foreign Economic Relations and Trade (which changed its name to the Ministry of Foreign Trade and Economic Cooperation, hereinafter MOFTEC), the Ministry of Finance, the People’s Bank of China, and the Customs General Administration.²⁰⁸ Ten “official” publications were listed as being relevant to foreign trade.²⁰⁹

On its face, it appeared that China’s foreign trade regime was transparent. However, one should realize that this regime was relatively new. China only entered the arena of international commerce less than ten years prior to its bid to rejoin the GATT. Most of its laws were enacted during this time period. In fact, many of these law were not implemented correctly or uniformly. As mentioned earlier, incomplete implementation was brought about in part by China’s decision to decentralize its trading system. Additionally, although in theory there were divisions of authority for China’s many trade-related agencies, in practice their jurisdictions often overlapped, which caused quite a lot of infighting. Moreover, the heavy bureaucracy, so typical of a centrally-planned socialist economy, contributed to the lack of public information about which office should be approached for what, and whose regulations should be followed. Finally, even though China claimed full publication of its trade rules, it retained its long-standing culture of *guanxi*; while often revealing, at its convenience, that in fact internal regulations, or *neibu*, still exist. As questions regarding China’s trade environment arose, and the GATT contracting parties gained experience about China through business transactions, it becomes evident that China’s trade regime was anything but transparent.

On March 4, 1987, a GATT working party was established for the purposes of examining “the foreign trade regime of the People’s

205. *Ibid.*, pp. 17-18.

206. *Ibid.*, pp. 11 and 17.

207. *Ibid.*, p. 22.

208. *Ibid.*, pp. 22-24.

209. *Ibid.*, p. 25.

Republic of China,” developing “a draft Protocol setting out the respective rights and obligations,” and providing “a forum for the negotiation of a schedule.”²¹⁰ China’s memorandum on its foreign trade regime was then circulated among the GATT contracting parties. A set of questions was consequently submitted, to which China responded in November of 1987.²¹¹

Through this initial communication, China perhaps was made aware that more changes were needed before its trade system would be satisfactorily transparent. In January 1988, China promised to “speed up the process of economic structural reform.”²¹² Also, at the February meeting of the working party that same year, China admitted that its new system was just “taking shape.”²¹³ Nonetheless, the working party concluded that China’s admission into the GATT would strengthen the global trading system, while at the same time help China modernize its economy and accelerate its development.²¹⁴ By the end of the year, GATT contracting parties were invited to conduct bilateral negotiations with China, the working party was ready to begin negotiations for the terms of a draft protocol, and everyone involved felt that a accession package could soon be presented for final approval.²¹⁵

Progress of the working party was consistent during the first half of 1989. China aided the process by, albeit slowly, promulgating such necessary laws as the “Import and Export Commodity Inspection Law” in February 1989, which established coherent rules for safety inspections of imported goods.²¹⁶ In April of the same year, the working party declared that, notwithstanding the “relatively advanced stage” its work has reached, concerns remained regarding China’s pricing mechanisms, customs procedures, bilateral

210. “Working Party on China’s Status as a Contracting Party” (February 25, 1988), *microformed on GATT Fiche L/6191/Rev.1* (No. 88-0306).

211. “Working Party on China’s Status as a Contracting Party - Questions and Replies Concerning the Memorandum on China’s Foreign Trade Regime” (November 27, 1987), *microformed on GATT Fiche L/6270* (No. 87-1926).

212. “Statement by H. E. Mr. Qian Jiadong, Ambassador, Permanent Representative (speaking as an Observer)” (Jan. 6, 1988), *microformed on GATT Fiche SR.43/ST/41* (No. 88-0026), p. 2.

213. GATT, *GATT Activities 1988*, Geneva: GATT, 1989, p. 129.

214. *Ibid.*

215. See “Statement by H.E. Mr. Qian Jiadong, Ambassador, Permanent Representative (Speaking as an Observer)” (November 25, 1988), *microformed on GATT Fiche SR.44/ST/28* (No. 88-1810), p. 2; see also GATT, *GATT Activities 1988*, *supra* note 213, p. 129.

216. Office of the United States Trade Representative, *1997 National Trade Estimate Report on Foreign Trade Barriers*, Washington, D.C.: USTR, 1998, p. 48.

trade agreements and the continued “need for greater transparency in trade regulations.”²¹⁷

Then suddenly, June 4, 1989 erupted. Officially, and very diplomatically, the GATT summarized the situation as such:

It was intended that the June meeting of the working party would begin consideration of the elements which would form the basis of a protocol. In the event, political and economic upheaval in China, in the early Summer, led participants to conclude that no useful work could be done at that stage. The working party met again in December to consider a report by the Chinese authorities on the current state of economic reform and intentions for the future. At this meeting participants were anxious to clarify whether the recent cutbacks in imports and slowdown in the pace of reform was a short-term reaction to an overheated economy or represented a more permanent change of approach. The working party decided that the examination should be continued at a meeting to be held in the Spring of 1990.²¹⁸

Basically, work on China's accession came to a halt, with contracting parties reluctant to proceed with the negotiations. This, along with outspoken global criticism, prompted China to retort, “States should make their own choice as to what economic system suits their domestic circumstances and development needs. It would run counter to the principles of state sovereignty and basic norms governing international relations, if a certain economic system and development pattern were imposed on the others.”²¹⁹ Although the Working Party continued to meet on a regular basis, China's accession bid stalled for over a year. After the Tiananmen Incident, it seemed the global community became very reluctant to offer China any benefit of the doubt. Companies and countries appeared to grow fearful of China, which may have led contracting parties like the United States to insist that economic reforms be implemented first before accession.

By early 1992, the absence of transparency in China's foreign trade regime was brought to the forefront. Complaints by foreign

217. GATT, *GATT Activities 1989*, Geneva: GATT, 1990, p. 130.

218. *Ibid.*, pp. 130-131.

219. “Statement by H.E. Mr. Fan Guoxiang, Ambassador, Permanent Representative (Speaking as an Observer)” (December 21, 1989), *microformed on* GATT Fiche SR.45/ST/32 (No. 89-1955), p. 1.

entities regarding inaccessible Chinese legislation that varied from region to region were increasingly ubiquitous, and *neibu* that often took precedence over known regulations were found to exist throughout the trading system.²²⁰

B. Scrambling to be a Founding Member (1992-1994)

In an attempt to regain the momentum lost in its GATT accession process, and realizing that it must now offer more concessions than before, China pledged in 1992 to continue "its endeavor to ensure maximum transparency and uniformity of its foreign trade regime," and accelerate its economic reforms.²²¹ Although not much was happening in the multilateral realm between 1989 and 1992, bilaterally at this time the Chinese was involved in heated disputes with the United States. These disputes resulted in an agreement that appeared to provide the impetus to bring about significant changes in the trouble area of transparency.

Under pressure from Congress, President Bush in 1991 instigated a Section 301 investigation on market access *vis-a-vis* Chinese protectionism, which focused on the issues of transparency; import licensing requirements; import restrictions; and standards and certification requirements.²²² After threatening trade retaliation and the non-renewal of the Most-Favored Nation (hereinafter MFN) status for China, a Memorandum of Understanding on market access (hereinafter MOU) was reached by the two countries on October 10, 1992²²³ to encourage true transparency, especially as it pertained to import and export goods.²²⁴

The MOU declared that the Chinese government must publish, regularly and promptly, all laws, regulations, judicial decisions, ad-

220. See Carroll, "The Foreign Trade Law", *supra* note 9, p. 12. One example of this was when the China National Cereals, Oils and Foodstuffs Import and Export Corporation (CEROILS), the sole authorized importer of distilled spirits, was issued internal, unpublished quotas by MOFTEC annually. In addition, importers other than CEROILS may import distilled spirits, but they must have obtained an import license from MOFTEC, which was granted on a case-by-case basis for each individual shipment. See Office of the United States Trade Representative, *supra* note 216, p. 47.

221. "Statement by H.E. Mr. Fan Guoxiang, Ambassador, Permanent Representative (Speaking as an Observer)" (December 20, 1991), *microformed on* GATT Fiche SR.47/ST/6 (No. 91-1883), p. 2.

222. Mastel, "China and the WTO", *supra* note 56, pp. 20-21.

223. See generally "People's Republic of China-United States: Memorandum of Understanding Concerning Market Access", *International Legal Materials*, Vol. 31 (1992), p. 1274.

224. Mastel, "China and the WTO", *supra* note 56, p. 21.

ministrative rulings and policies that relate to the customs classification or value of products; the rates of duty, taxes and charges on imports and exports; the restrictions on imports and exports, and on payments; and the restrictions on the use and distribution of imports.²²⁵ In addition, a time frame of twelve months was set up to ensure that internal laws and regulations were published expeditiously, and a central repository was to be established for all published trade laws. Furthermore, internal directives that remained unpublished were not to be used or given any weight, and only laws, made publicly available before their effective dates, could be enforced (and done so uniformly). Finally, all import- and export-related approval processes should be made transparent, all administrative agencies and their roles were to be identified, and an effective appeals process for trade disputes was to be maintained.²²⁶

The MOU succeeded in committing China, at least on paper, to substantially improving the transparency of its foreign trade regime. It established, arguably for the first time, a foundation from which China could effectively reform this all important aspect of its economy.²²⁷ Within the year, the repository for all central government trade regulations was established, and its publications circulated to the provinces in an attempt to ensure uniform application of all national trade laws. (This procedure supplemented MOFTEC's publication, the *GAZETTE*, which was already supposed to carry official texts of all trade-related laws.)²²⁸ Additionally, China made public most of its export control regulations,²²⁹ provided a quota liberalization schedule,²³⁰ and streamlined its import approval process.²³¹ With these changes, China regained some U.S. support for its GATT accession application.²³²

However, to say that China was in complete compliance with the MOU would be a gross misstatement. Although in late 1993 the

225. *International Legal Materials*, Vol. 31 (1992), pp. 1274, 1275 (Art. I(1) of the MOU).

226. See generally *ibid.*, p. 1274 (MOU); see also Office of the United States Trade Representative, *1994 National Trade Estimate Report on Trade Barriers*, Washington, D.C.: USTR, 1995, pp. 55-56.

227. Office of the United States Trade Representative, *supra* note 216, p. 47.

228. *Ibid.*

229. "China Cuts Export Restrictions on 138 Goods as Part of GATT Accession", *Inside U.S. Trade*, January 8, 1993.

230. "China Agrees to Negotiate MOU on End-User Checks for Dual-Use Technology", *Inside U.S. Trade*, January 15, 1993.

231. Mastel, "China and the WTO", *supra* note 56, p. 21.

232. Carroll, "The Foreign Trade Law", *supra* note 9, p. 13.

United States Trade Representative (hereinafter USTR) judged China to be "in substantial compliance with the [1992] Agreement," China still had a long way to go.²³³ First of all, the MOU did very little in eliminating the use of *neibu*, which was in fact one of the key objectives of the 1991 Section 301 negotiations.²³⁴ Although the central repository was established, along with publications of new regulations in the GAZETTE, *neibu* continued to be enforced, particularly at the provincial and local levels. Furthermore, China had yet to create a system, pursuant to the United States' request, whereby public comments could be submitted, and advance notice received, before new trade-related legislation was implemented.²³⁵ In sum, despite the advancement brought about by the MOU, China still maintained a trade regime that was inconsistent with the GATT principle of transparency.²³⁶

Nevertheless, there was no denying that these and other bilateral interactions complemented the work of the GATT at the multi-lateral level. Simultaneously with, and perhaps spurred on by, the conclusion of the bilateral MOU, the working party resumed its negotiations on China's accession process in 1992, after a hiatus of almost two years. In following its economic reform, and in the interest of mending its tarnished image, China submitted a list of tariff reductions and made considerable effort in further providing information on its trade regime.²³⁷ As in the past, for clarity's sake, contracting parties took to questioning China on the new information provided. Gamely, China responded with fairly comprehensive answers, and in December, it submitted a "voluminous document cataloguing the various types of tariff and non-tariff measures and government intervention in effect for each product."²³⁸ By year's end, enough progress was made for the working party to declare that it was once again ready to consider the provisions of a draft protocol.²³⁹

This was good news to China. In fact, 1992 alone was so successful that it proclaimed, "China has continued to reform the foreign trade system by substantially enhancing its transparency and taking important trade liberalizing measures. . . All these demon-

233. Mastel, "China and the WTO", *supra* note 56, p. 21.

234. Carroll, "The Foreign Trade Law", *supra* note 9, p. 23.

235. United States-China Business Council, *supra* note 1, p. 7.

236. Mastel, "China and the WTO", *supra* note 56, p. 21.

237. GATT, *GATT Activities 1992*, Geneva: GATT, 1993, p. 94.

238. *Ibid.*, pp. 94-95.

239. *Ibid.*, p. 95.

strate China's willingness to abide by international economic and trade rules and disciplines and to make contributions to the strengthening of the multilateral trading system."²⁴⁰ And despite its shortcomings, a "speedy resumption of China's status as a contracting party to GATT will help its further reform and opening process, and [thus] reinforce the multilateral trading system. . ."²⁴¹

The working party met three times in 1993. Following the lead of the Uruguay Round, during which transparency for the first time was placed in the forefront of the global trading system, the discussions surrounding China's application focused primarily on assuring transparency in the PRC.²⁴² During the May working party meeting, contracting parties actively sought a commitment from China to create a consistent and uniform trading system, while eliminating the practice of maintaining distinctive regional trade regulations.²⁴³ In September, the working party followed up by proposing the establishment of a "special review mechanism" that would examine China's trade practices and deal with such issues as China's non-uniform treatment of its special economic and autonomous areas.²⁴⁴ Unfortunately, nothing concrete has yet to be agreed upon.

Around the same time, as part of its bilateral negotiations with China, the United States put forth five conditions that must be met before the United States would support China's bid to become a GATT participant. Included was the condition for China to provide "full transparency" in its trade regime, "so that all quotas and licensing requirements are fully known to firms that want to export to China. . . Chins is still refusing to put these requirements in writing, and is still insisting that certain rules about exporting and the issuing of licenses must remain secret."²⁴⁵ Negotiations between the two countries soon broke off, as a frustrated United States declared China not in full compliance with its 1992 MOU obligations.²⁴⁶

240. "Statement by H.E. Mr. Jin Yongjian, Ambassador, Permanent Representative of China (Speaking as an Observer)" (December 23, 1992), *microformed on GATT Fiche SR.48/ST/6* (No. 92-1920), p. 2.

241. *Ibid.*

242. GATT, *GATT Activities 1993*, Geneva: GATT, 1994, p. 104.

243. "Progress Still Slow on Protocol for Chinese Accession to GATT", *Inside U.S. Trade*, May 28, 1993.

244. GATT, *GATT Activities 1993*, *supra* note 242, pp. 104-105.

245. "China's Bid to Join GATT Stalls Following Negotiations with U.S. on Protocol", *Inside U.S. Trade*, March 5, 1993.

246. See "Kantor Charges China Failing to Adhere to Market Access MOU", *Inside U.S. Trade - Special Report*, October 22, 1993; see also "Barshefsky Threatens China over Implementation of 1992 MOU", *Inside U.S. Trade*, November 5, 1993.

The timing could not have been worse. For by the end of the Uruguay Round, and with the dissolution of the GATT looming ahead, China made it known to all that it wished to conclude a draft protocol in time so as to be a founding member of the WTO.²⁴⁷ However, without the support of countries like the United States, which by then (from its experience with the MOU) felt that China was capable of non-compliance with WTO requirements, this did not seem to be possible.

C. The Draft Protocol (1994-1995)

To ease tension and to promote engagement, the United States in early 1994 conceded that China had, in good faith, made strides to increase transparency of its trade regime, through the promulgation of some new and previously internal laws.²⁴⁸ However, the United States balanced this statement with a caveat that more transparency was needed. For instance, at this time, regulations in the telecommunications sector had yet to be published, as it was still unclear as to the permitted extent of foreign participation. Similar criticism was levied at distribution, insurance, and other service sectors.²⁴⁹

Although the numerous bilateral negotiations concerning specific GATT concessions, and work on the draft protocol by the working party, were in full swing, many still felt that China was not wholeheartedly cooperating because reforms were not being implemented fast enough.²⁵⁰ For its part, China seemed content in relying

247. GATT, *GATT Activities 1993*, *supra* note 242, p. 105.

248. "Kantor Cites 'Great Progress' on Chinese Market Access Agreement", *Inside U.S. Trade*, January 7, 1994.

249. "U.S. to Press China on Insurance, Telecom and Distribution", *Inside U.S. Trade*, February 4, 1994. At this time, China was also drafting a new insurance law, to be issued in June of 1994. The United States urged China to ensure that this new law would be transparent, and "avoid a situation such as that in Japan, where informal 'administrative guidance' constitutes much of the regulatory system. . ." "U.S. Lobbies for National Treatment in New Chinese Insurance Law", *Inside U.S. Trade*, March 18, 1994.

250. See "MFN Waiver Opens Way for U.S.-China Talks on GATT Accession", *Inside U.S. Trade*, March 25, 1994. Although the European Union (hereinafter the EU) and Japan appeared more supportive of China's application by calling for the acceleration of the process, the United States maintained its position that China's accession process "should take whatever time is necessary, whether that be months or years, to ensure that it is done properly. . ." and that China must meet "the same obligations as . . . other developed contracting parties on transparency. . ." "Ways & Means Leadership Draws Hard Line on China's GATT Accession", *Inside U.S. Trade*, April 15, 1994. Later the EU also demanded additional obligations, justifying it by insisting that

on rhetoric to promote its accession, and continued to issue such statements as, "An open China needs the world trading system while this system would be incomplete without countries like China. An earlier resumption of China's contracting party status is in the common interest of both China and GATT members."²⁵¹

While there was this mad dash to complete China's accession package by January of 1995, it was not until mid-1994 that the GATT Director-General, on a visit to Beijing, enunciated the multilateral trade regime's standard and expectation regarding transparency as it related to China's accession. While he confirmed that China was in the final stages of its accession process and welcomed China's "commitment to the principles and rules of a new world trading system," he made it clear that one of the remaining concerns was "about transparency in China's trade regime, uniform administration of the trade regime, certainty relating to the treatment of imports (including the application of quotas, licences and standards), and the role of the state-trading enterprises."²⁵² The GATT Director-General implied that China so far had not taken transparency seriously; and while the GATT (and soon the WTO) equitably allowed for such transitional instruments as phase-in/phase-out periods so that a newly admitted country might open its markets without detriment to its society, transparency is first needed to determine what phase-in/phase out periods should be afforded and what other transitional instruments might be used.²⁵³ He concluded by declaring that "full transparency is the basis on which China's request for resumption will be judged."²⁵⁴ The standard for entry into the GATT and the WTO, therefore, appears to be "full transparency," and the expectation is for this full transparency to occur immediately, even prior to accession.

To its credit, China has made gains in providing for more transparency. As part of its campaign to join the GATT before the end of 1994, China reformed its exchange, tax, state trading, licensing, tariffs and non-tariff systems.²⁵⁵ Furthermore, China published vari-

China's application is "special" because of its size and the transitional nature of its economy, which was "completely non-transparent. . ." See "U.S., EU Clash Over China GATT Accession, Tariff Negotiations", *Inside U.S. Trade*, May 20, 1994.

251. "Statement by Mr. Yufeng Tang, Minister-Counselor, Deputy Permanent Representative (Speaking as an Observer)" (February 18, 1994), *microformed* on GATT Fiche SR.49/ST/18 (No. 94-0313).

252. Sutherland speech, *supra* note 43, p. 4.

253. *Ibid.*, pp. 4-5.

254. *Ibid.*, p. 5.

255. *Ibid.*

ous investment-related planning policies, including its industrial policy for the auto industry, the "Catalogue Guiding Foreign Investment in Industries," and the "Interim Provisions on Guiding the Direction of Foreign Investment."²⁵⁶ In addition, China for the first time promulgated the Foreign Trade Law of the People's Republic of China (hereinafter the Foreign Trade Law).²⁵⁷

According to the Chinese, enacting this new law alone, which was meant to terminate China's dependence on direct administrative means to govern foreign trade, fully demonstrated the PRC's determination to bring its economy in line with the rest of the world.²⁵⁸ The Foreign Trade Law was passed to appease the concerns of the existing GATT contracting parties with respect to transparency.²⁵⁹ For instance, Article 4 promoted uniformity by stipulating the adoption of a standardized foreign trade system.²⁶⁰ Also, Articles 16 and 17 authorized MOFTEC to promulgate and publish all foreign economic laws.²⁶¹ With these provisions so similar to the 1992 U.S.-China MOU, the Foreign Trade Law could finally be considered the implementing legislation for the MOU, although its enforcement was still in question. Unfortunately, the promulgation of the Foreign Trade Law did not obtain the results the Chinese had hoped for. The United States felt that this law was too vague, and further pressed China to explain its provisions.²⁶²

By July 1994, a wide gap still remained in the working party over several key issues, so much so that some participants infor-

256. United States-China Business Council, *supra* note 1, pp. 16-17. These publications drew a lot of criticism from the contracting parties of the GATT, which insisted on changes to these policies before China was admitted. However, as will be discussed later, the author believes that making such policies public is an important part of making the society transparent; problems cannot be resolved unless one knows what the problems are.

257. "The Foreign Trade Law of the People's Republic of China", *Renmin Ribao (People's Daily)*, May 14, 1994, available on Lexis.

258. See "Wu Yi Questioned on Foreign Trade Law", *FBIS Daily Report*, May 16, 1994, p. 27.

259. Carroll, "The Foreign Trade Law", *supra* note 9, pp. 13-14.

260. Art. 6 of the Foreign Trade Law. An article in a Chinese law journal interpreted the Foreign Trade Law as requiring all foreign trade activities in China, regardless of their level (national, provincial or local), to be governed by this new law. In addition, the use of *neibu* regulations was discouraged. See *ibid.*, p. 17.

261. See *ibid.* (Articles 16 and 17 of the Foreign Trade Law) These provisions also seemed to imply that only published and readily available laws will be enforced.

262. "U.S. to Press China on Foreign Trade Law in GATT Entry Talks", *Inside U.S. Trade*, June 3, 1994. The United States believed this law was GATT-inconsistent and would discriminate against foreign companies. *Ibid.*

mally conceded that the deadline of January 1, 1995 would be impossible to attain.²⁶³ Nonetheless, China fervently continued to push for a conclusion, claiming that the Chinese populace was growing impatient, and that it was of "vital importance" to all that China join the WTO has an original member.²⁶⁴ For China, accession had become a purely political issue, one upon which it had precariously hung its pride. Despite the GATT Director-General's remarks in Beijing earlier in the year, China still contended that it must be given transition periods to phase-in transparency obligations, which by now was being upheld as a basic principle of the WTO.²⁶⁵ China complained that it should not be required to provide complete transparency immediately, and that this was a stricter demand than those applied to existing GATT participants in similar circumstances.²⁶⁶

Progress in the negotiations was soon hindered by what was perceived as China's "unwillingness to meet the demands of the U.S. and other major trading partners."²⁶⁷ One reason could be that, as noted above, China saw the WTO accession package as a political agreement with a political solution for each issue, whereas the GATT contracting parties claimed that the package was an economic agreement, and therefore looked towards formulating economic solutions in order to ensure that China joined on "commercially meaningful terms."²⁶⁸ By year's end, the transparency issue extended beyond the principle itself; China had already agreed to full transparency ultimately. Instead, the argument now revolved around whether China would be allotted certain transition times so as to gradually make its foreign trade regime more transparent.²⁶⁹

263. "GATT Working Party on China Focuses on Member's List of Demands", *Inside U.S. Trade - Special Report*, July 1, 1994.

264. *Ibid.*

265. "Chinese Officials Concede PRC May Not Join WTO as Founding Member", *Inside U.S. Trade*, July 8, 1994.

266. "China Rejects Chairman's Non-Paper as Basis for Entering GATT", *Inside U.S. Trade*, July 29, 1994.

267. "Trading Partners See Little Progress by China on GATT-Entry Offer", *Inside U.S. Trade*, November 4, 1994.

268. "Lord Sees China in GATT as Founding Member, Even if Talks Incomplete", *Inside U.S. Trade*, October 21, 1994.

269. A minor issue also remained, in that the United States interpreted transparency as not just the publication of all laws and regulations, but also making all documents readily available to the public at large, and setting up contacts within each relevant authorizing body for effective exchange of information. See "Barshefsky Calls on China for Additional Concessions to Enter GATT", *Inside U.S. Trade*, October 14, 1994.

As of early December 1994, there was still no protocol agreement.²⁷⁰

Amazingly, at the working party's last meeting of the year, the participants rallied and a draft protocol was hammered out, with "substantive agreement" being reached on several issues including transparency.²⁷¹ In it, China agreed to "uniformly, reasonably and impartially" administer its trade regime throughout its entire customs territory, including in the special economic areas and the autonomous regions.²⁷² Also, China agreed to establish a mechanism so that the public could report any non-uniform application of China's laws and regulations, and it agreed to provide notification to the WTO of changes in its laws.²⁷³ Furthermore, China agreed to establish another official journal to publish all relevant laws, regulations and "other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange;" to make this journal readily available, and to establish an "inquiry point" where information regarding the relevant laws could be obtained within a set period of time.²⁷⁴ In addition, it promised to make available all laws prior to their implementation, and to enforce only laws and regulations that were published or available to all WTO members.²⁷⁵

In regard to more specific issues, China agreed to establish tribunals for judicial review purposes, although no details were given.²⁷⁶ China also agreed to such matters as notifying the WTO of its trade arrangements with other countries and customs territories.²⁷⁷ It agreed to ensure that import purchasing procedures of state enterprises were transparent and WTO-compliant, and to provide full information on these state enterprises' pricing mechanisms for exports.²⁷⁸ As for import/export licensing, China agreed to publish, on a regular basis, a list of all relevant authorities, procedures for obtaining licenses and other approvals, a list of products subject

270. "China Begins New WTO Entry Talks with Few Hints of Concessions", Inside U.S. Trade, December 2, 1994.

271. GATT, *GATT Activities 1994-1995*, *supra* note 64, p. 113.

272. Part I(2)(A)(2) of the Draft Protocol and Working Party Report, December 20, 1994, as printed in "TEXT: Draft Protocol and Working Party Report", *Inside U.S. Trade -Special Report*, January 27, 1995.

273. *See ibid.* (Draft Protocol, Part I(2)(A)(3) and (5), and Part I(2)(B)(1)).

274. *Ibid.* (Part I(2)(C)(2) and (3)).

275. *Ibid.* (Part I(2)(C)(1)).

276. *Ibid.* (Part I(2)(D)).

277. *Ibid.* (Part I(4)(1)).

278. *Ibid.* (Part I(6)).

to specific requirements and restrictions, and any changes to the above.²⁷⁹ In addition, China agreed to comply with WTO's notification requirements concerning imports and exports.²⁸⁰ Furthermore, it agreed to publish a list of goods and services that were subject to price control,²⁸¹ and to publish "complete commodity inspection criteria, whether formal or informal."²⁸² Finally, China agreed to submit to notification requirements for its agriculture sector²⁸³ and for its sanitary and phytosanitary measures.²⁸⁴

What China had not yet fully agreed to included any promises to impose transparency requirements on non-tariff measures or subsidies.²⁸⁵ Additionally, none of the details in the Annexes with regard to trade and economic information were provided.

In the attached draft outline of the "Report of the Working Party on China," remaining concerns of contracting parties to the GATT were noted. Regarding the uniform administration of China's trade regime, members expressed concern about the inability of the central government to control agencies at sub-national levels, and to obtain information about non-uniform practices at these levels. With respect to special economic and autonomous regions, members complained about the different treatment afforded these regions as opposed to the rest of China. Also, concern was raised regarding the non-transparent activities of the state owned entities, which did not seem to be in accordance with WTO obligations. As for non-tariff measures, members were afraid that these were being imposed by provincial and local authorities in a non-transparent and discretionary manner. And as to subsidies, concerns were expressed about China's refusal to notify members of all subsidies (China justified this by claiming it had a "different definition" of what a subsidy is). In addition, members bemoaned the "discriminatory internal taxes" applied to imported goods and services, including those applied by provincial and local authorities. Regarding sanitary and phytosanitary measures, members insisted that China should notify the WTO of all laws and regulations related to such measures as soon as possible. Also, concerns were raised over the lack of transparency and consistency in the application of stan-

279. *Ibid.* (Part I)(8)(1)(a)).

280. *Ibid.* (Part I)(8)(1)(b), (c) and (d)).

281. *Ibid.* (Part I)(10)(3)).

282. *Ibid.* (Part I)(15)(3)).

283. *Ibid.* (Part I)(14)).

284. *Ibid.* (Part I)(16)).

285. *Ibid.* (Part I)(7) and Part I)(11)).

dards. Moreover, members were wary of the overall lack of transparency in China's service regime. And finally, suggestions were made for a Transitional Review of China upon its entry into the WTO, in addition to the regular Trade Policy Review of China, for the purposes of supervising the transitional safeguards that would later be imposed.²⁸⁶

Despite all this work, many important questions remained unsettled, and the working party agreed that more negotiations and consultations were needed before the accession package could be considered complete.²⁸⁷ Although the draft protocol showed the impressive progress made, especially in relation to such a unique situation like China's, what it also highlighted was the "major gaps between the positions of major trading countries and China."²⁸⁸ All in all there were approximately ten central issues yet to be resolved. And in terms of transparency, while there was "pretty much agreement" on the protocol language, questions persisted about the allowance of transitional provisions concerning notification and implementation of laws. Moreover, there was still the issue of whether the public would be given time to comment on proposed regulations.²⁸⁹

D. Reignited Interest (1995-1997)

By now it was obvious that China would not be a founding member of the WTO. Given this blow to China's infamous pride, concern arose within the newly formed WTO about whether China would continue to seek accession to this multilateral trade organization.²⁹⁰ China itself made the point, correctly, that a WTO without China would "jeopardize the effectiveness and universality of the

286. See generally *ibid.* In response to the question of uniformity, China told its trading partners that it had the constitutional power to override the inconsistent regulations of the provincial and local governments. However, it also noted that it intended to apply all WTO rules to the "fullest extent not inconsistent with mandatory legislation in existence on the date of entry into force of the Protocol." This statement was unclear, and seemed to suggest that existing legislation in China was exempt from WTO rules. See "Confidential Draft Protocol Proposed Unlimited China Safeguard", *Inside U.S. Trade - Special Report*, January 27, 1995.

287. GATT, *GATT Activities 1994-1995*, *supra* note 64, p. 113.

288. "Draft WTO China Protocol Show Major Gaps, Little Progress", *Inside U.S. Trade*, December 23, 1994.

289. *Ibid.*

290. See *ibid.*

world trading system.”²⁹¹ While the working party met several times after the issuance of the draft protocol, it was only on an informal basis, and nothing was accomplished.²⁹²

But while multilateral negotiations went nowhere, bilateral interactions continued in earnest. In early 1995, the U.S. General Accounting Office issued a report entitled, “U.S.-China Trade: Implementation of Agreements on Market Access and Intellectual Property,” which evaluated the results of the 1992 MOU.²⁹³ The report singled out the declining control of the central government over provincial and local authorities as a most disturbing issue. With all of China’s attempts to curb regional protectionism and autonomy, China’s trade regime was still “far from transparent.” The report pointed to newly discovered quotas and import restrictions, as well as other arbitrary practices by government agencies such as the Chinese Customs Service.²⁹⁴ The United States once again charged China of not fulfilling its 1992 MOU obligations, of continual and pervasive non-transparency, and of a lack of uniform enforcement and implementation of its rules and regulations.²⁹⁵ However, the United States diplomatically injected as an aside that if China was to restart negotiations for entry into the WTO, the United States “stands ready to go to either Geneva or Beijing at a moment’s notice.”²⁹⁶

While the WTO waited for China, China continued to operate its trade regime without full transparency. For example, in the area of insurance, China agreed to open its market to foreign companies, but only in select cities, and on “a gradual but experimental basis.”²⁹⁷ In further defiance, China purposefully postponed publishing a list of liberalization measures in accordance with the MOU by

291. “Statement by Mr. Long Yongtu, Assistant Minister, Ministry of Foreign Trade and Economic Cooperation (Speaking as an Observer)” (December 22, 1994), *microformed on* GATT Fiche SR.50/ST/19 (No. 94-2899), p. 2. China signed the Final Act of the Uruguay Round in April of 1994 in anticipation of being a founding member of the WTO. *Ibid.*

292. GATT, *GATT Activities 1994-1995*, *supra* note 64, pp. 113-114.

293. “GAO Points to Chinese Failure to Implement Market Access Commitments”, *Inside U.S. Trade*, February 3, 1995.

294. *Ibid.*

295. “Barshefsky Says China Not Fully Implementing Market Access Deal”, *Inside U.S. Trade*, February 10, 1995.

296. “Barshefsky Says China Undecided on Continuing WTO Talks”, *Inside U.S. Trade*, March 3, 1995.

297. “U.S. Insists Position Remains Unchanged on China Entry into WTO”, *Inside U.S. Trade*, March 17, 1995.

linking its actions to its displeasure over the lack of U.S. support during China's bid to be an original WTO member.²⁹⁸ Informal talks with China revealed that China was still seeking concessionary transitional periods for transparency, but the United States and the EU steadfastly refused to consider this possibility.²⁹⁹

Interest on the part of China to resume accession negotiations quietly resurfaced in the fall of 1995 following China's decision to apply for observer status in the WTO.³⁰⁰ Once again, the United States issued a statement assuring China that it would support China's membership in the WTO so long as accession was based on "commercially viable terms," which would successfully integrate China into the "rules-based trading system of the WTO."³⁰¹ Accordingly, the United States suggested that China continue to provide further transparency in its trade regime.³⁰²

To gather momentum for the accession negotiations, bilaterally and multilaterally, delegates from the United States traveled to Beijing in November 1995 to "convince China to adhere to the rule of law" that is embodied in the WTO.³⁰³ While there, the United States presented China with a confidential "road map" that outlined the "full range of WTO commitments" that China must meet in order for the United States to support China's accession bid.³⁰⁴ This "road map" was not to be a step in the bargaining process, but instead was the "bottom line" of U.S. requirements (in the "road

298. "China Backtracks on March Commitment to Implement 1992 MOU", *Inside U.S. Trade*, April 14, 1995. In a related incident, members of the EU business community complained of the "lack of clarity and transparency in Chinese rules and laws," specifically in the restrictions on companies and sectors, and of the application of varying, unofficial quotas by the Chinese on individual EU member states so as "to ensure a balance among them." "Brittan Calls on All Sides to Make Fresh Start on China WTO Entry", *Inside U.S. Trade*, April 21, 1995.

299. "Quad Trade Ministers Adopt Common Line on China WTO Negotiations", *Inside U.S. Trade*, May 12, 1995.

300. "Request by the People's Republic of China for Observer Status in WTO Bodies" (June 28, 1995), *microformed on* WTO Fiche WT/L/72 (No. 95-1766).

301. "U.S. Moves to Assess Support for Position on China WTO Accession", *Inside U.S. Trade*, October 6, 1995.

302. "TEXT: Chamber of Commerce Statement on China", *Inside U.S. Trade*, November 19, 1995.

303. "Barshefsky to Discuss WTO, IPR, Market Access in China Next Week", *Inside U.S. Trade*, November 3, 1995. According to this article, the "rule of law" included making China's trade regime transparent, eliminating arbitrary discretion of bureaucrats, and providing other limitations on the reckless use of government authority.

304. "Barshefsky Calls on China to Take Next Step on WTO Accession", *Inside U.S. Trade*, November 17, 1995.

map,” the United States supposedly scaled back several of its previous demands).³⁰⁵ In essence, the “road map” clearly and succinctly informed China of the practical steps it needed to take to be assured of membership in the WTO.

On December 7, 1995, China officially applied for accession to the WTO, and negotiations officially resumed.³⁰⁶

In February 1996, China responded to the U.S. “road map” by complaining that it was too stringent and that the demands were unreasonable, and that they exceeded what was required of other WTO members.³⁰⁷ Yet despite China’s response, negotiations at the working party continued. China maintained its barrage of political babble,³⁰⁸ while the United States continued to pressure China for “substantial structural changes” to “boost the transparency” of its trade, investment and inspection regimes.³⁰⁹

By end of 1996, China had in fact published most of its national trade laws and regulations.³¹⁰ Also, it was in the process of bringing the varying trade practices of its special economic regions into uniformity with the rest of the country.³¹¹ It implemented a new customs procedure for the registration of intellectual property products,³¹² and was attempting to publish a series of industrial policies on machinery, electronics, construction and water resources.³¹³ However, in spite of these reforms, the numerous Chinese ministries still continue to operate under guidelines that remain largely unpublished.³¹⁴ There remained a lack of uniformity in customs valuation practices, where different ports of entry would administer

305. “U.S. Softens Demands on China Accession into World Trade Body”, *Inside U.S. Trade*, December 1, 1995.

306. “Communication From China” (December 7, 1995), *microformed on* WTO Fiche WT/ACC/CHN/1 (No. 95-4026).

307. “Chinese Official Says Roadmap Too Demanding for WTO Accession”, *Inside U.S. Trade*, February 16, 1996.

308. MOFTEC said that excluding China from the WTO is a “big shortcoming” for the multilateral system; “. . . China needs to join the WTO and the WTO needs China”; China also repeated its position that the initiative for China to join the WTO is in the hands of the WTO member states. See “Wu Yi Says Excluding China Hurts Multilateral Trading System”, *Inside U.S. Trade*, October 4, 1996.

309. “U.S.-China Business Council VP Warns Against Weak Accession Deal”, *Inside U.S. Trade*, December 13, 1996.

310. Office of the United States Trade Representative, *supra* note 216, p. 47.

311. *Ibid.*, p. 52.

312. “China Releases Intellectual Property Customs Regulations”, *Inside U.S. Trade*, April 12, 1996.

313. United States-China Business Council, *supra* note 1, p. 7.

314. *Ibid.*

different duty charges, all on the same product.³¹⁵ Often information regarding the quantity or value of products under quotas remained inaccessible.³¹⁶ Problems regarding the non-transparency of statutory inspection and standards requirements still existed.³¹⁷ As for government procurement, a national procurement code was not yet available, for regulations in this area have traditionally been unpublished.³¹⁸ And in the services sector, the lack of transparency abounds because of the severe restrictions and “experimental” policies of the PRC government (to offer service licenses selectively and only in limited regions).³¹⁹ Finally, although investment guidelines were issued in June 1995, non-transparency in the investment approval process and the overall lack of uniformity in the implementation of relevant regulations continued to hinder the foreign investor.³²⁰

E. The Redrafted Protocol (1997-1998)

By scaling back some of its previous requirements, the United States provided the catalyst needed to drive accession negotiations with China forward, enough so that a revised draft protocol was produced on March 6, 1997.³²¹ As with the original draft, this redrafted protocol laid out the policies China would have to follow in order to accede to the WTO. And this time, there were agreements on more than half of the draft language.³²²

With respect to the general principles of uniformity and transparency, China’s commitments remained relatively the same as what was agreed to in the 1994 draft protocol. Minor changes were made in that time limits were finally agreed upon for notifications and publications of laws, and the disciplines of transparency were

315. Office of the United States Trade Representative, *supra* note 216, p. 45.

316. *Ibid.*, p. 46.

317. *Ibid.*, p. 48.

318. *Ibid.*, p. 49. And all this in spite of the 1992 MOU. Only one tendering body in China, the National Tendering Center for Machinery and Electrical Equipment, published a guide, albeit brief and vague. Tendering procedures also were equally non-transparent for international procurement bids, due to the fact that state trading companies often oversaw such procurement processes. *See ibid.*, pp. 49-51.

319. *Ibid.*, pp. 53-54.

320. *Ibid.*, p. 55.

321. “New Draft China WTO Protocol Shows U.S. Concessions on Trading Rights”, *Inside U.S. Trade*, March 14, 1997.

322. “China WTO Protocol Shows Progress But Wide Gaps on Trade Rules”, *Inside U.S. Trade*, March 14, 1997.

expanded to the TRIPs agreement and to foreign exchange issues.³²³

As for other issues, an agreement was reached whereby the scope of judicial review was limited to the satisfaction of the Chinese.³²⁴ In addition, China agreed to enforce only regional import/export requirements that were authorized by the central government.³²⁵

Just as before, while there were substantial agreements on most of the fundamental obligations, discrepancies remain on many specific issues such as subsidies. (These would need to be resolved in future negotiations on the draft protocol's schedules and annexes.) And although there was agreement on the fundamental principles of transparency, with substantial progress being made by China to open up its trade regime, the United States still maintained its staunch position that China must be completely transparent prior to entering the WTO. Therefore, given high U.S. expectations and the politics and culture of China, "the amount of work to be done on [improving transparency] is 'astronomical'."³²⁶

After all these years, the world community still looked to the WTO accession process as its one opportunity to bring China's trade practices into conformity with international norms and standards.³²⁷ The United States, for example, remained very concerned about the transparency issue, deeming it "the most serious obstacle" for American companies doing business in China.³²⁸ This would explain the continual, adamant refusal of the United States government to negotiate any transitional provisions for the obliga-

323. "TEXT: New Draft Protocol on China WTO Accession", *Inside U.S. Trade*, March 14, 1997 (Part I(1)(2)(C)).

324. *Ibid.* Part I(2)(D). The scope was limited to a review of import/export licenses; of permits; of quotas; and of the application of trade measures for safeguard, balance of payment, or the protection against unfair trade purposes. The right of review was also scaled back for measures related to the TRIPS and services agreement. Later China would confirm that it would "revise its patent and trademark laws so that. . . all of its laws and regulations will be consistent with protocol requirements on procedures for judicial review of administrative actions." "TEXT: Draft Working Party Report", *Inside U.S. Trade*, May 30, 1997.

325. *Ibid.* Part I(7)(4).

326. "Barshefsky Says China Must Make More Concessions Before WTO Accession", *Inside U.S. Trade*, March 21, 1997.

327. "USCIB Presses for Strong Services Deal as Part of China WTO Package", *Inside U.S. Trade*, November 7, 1997.

328. "China WTO Comments Show Primary Interest is Better Market Access", *Inside U.S. Trade*, March 28, 1997.

tions of transparency, while insisting that transparency be provided by China immediately upon accession to the WTO.

Currently, the United States has turned towards applying its high transparency standards to China's services regime.³²⁹ While one may argue that China has already successfully committed to making its trade in goods regime sufficiently transparent, it still has a long way to go in providing transparency for its proposed GATS schedule of commitments, at least to the point of satisfying the United States. Thus in 1998, a new wave of WTO bilateral negotiations began: China is offering to provide minimal transparency in services until after its WTO accession, while the United States is insisting on full transparency now. One example of this is that, in response to U.S. pressure, China has promulgated such laws as the "Shanghai Pudong New Zone, Administration of Pilot Operation of Business by Foreign Investment Financial Institutions Tentative Procedures," and the "Establishment of Pilot Sino-foreign Trading Equity Joint Ventures Tentative Procedures."³³⁰ These laws, while considered transparent simply because they were published, in fact create further controversy because they limit the access of foreign service providers quantitatively, sectorally and geographically. This is a difficult balance, for although China's trade regime is more transparent today, it is this transparency that brings to light more problems that must be resolved before China can successfully accede to the WTO.

V. WILL THE WTO BRING ABOUT TRUE TRANSPARENCY IN CHINA?

Everyone agrees that China should join the WTO, and that its continued absence in this multilateral body somehow makes the

329. For instance, the United States is insisting on full access to China's services market. China, of course, prefers to take many exceptions in its services schedule. See "Services Groups Call for Strong WTO Deal for China, Other Entrants", *Inside U.S. Trade*, July 4, 1997. Market access is often granted experimentally on a non-transparent, case-by-case basis for foreign financial service providers. See "CSI Demands Broad Services Deal as Part of China's WTO Accession", *Inside U.S. Trade*, December 12, 1997. Retail distribution services, wholesale trade services, and basic telecommunication services are all restricted in China due to government regulations that prevent foreign businesses from establishing themselves beyond a few, designated cities. This, argues the United States, is non-uniform application of the laws. See "Confidential China Offer Shows Scant Access in U.S. Priority Areas", *Inside U.S. Trade*, December 19, 1997.

330. Chang, "Token Liberalization", *supra* note 8, p. 19.

global economic organization deficient.³³¹ Everyone also agrees that China is in a unique position; the integration of such a large transitional economy into the WTO poses challenges never faced before.³³² But while all WTO members support China's accession, there is vast disagreement on when China should be admitted. Some argue that the sooner China enters the WTO, the sooner its trade regime will be liberalized.³³³ Others argue that China's trade regime should first be liberalized before it can enter the WTO. China itself stands outside the sphere of these arguments, for it believes that its accession has nothing to do with the liberalization of its trade regime at this time, but instead perceives the accession process as a political battle.³³⁴ With these extremely divergent points of views, it's no wonder that accession is difficult and long in coming.

Although the question of whether China will successfully accede to the WTO is interesting and often contentious, it is outside the scope of this paper.³³⁵ Rather, the more important question here is whether the WTO can bring about true transparency in the PRC?

331. See "Peter Sutherland to Visit Beijing to Discuss GATT/WTO Membership with Chinese Leaders", *supra* note 59, p. 1; see also Robert S. Ross, "Enter the Dragon", *Foreign Policy*, Vol. 104 (1996), p. 19.

332. *Ibid.*, p. 1.

333. See Chang, "Token Liberalization", *supra* note 8, p. 21; see also Nicholas R. Lardy, "China and the WTO", *Policy Brief*, Vol. 10 (1996), p. 4.

334. Chang, "Token Liberalization", *supra* note 8, p. 22.

335. It is the author's personal, optimistic speculation that China will most likely never back away from the WTO accession process. China has already advertised to its masses and to the world that it needs to enter the WTO because of the WTO's importance. It has made its accession to the WTO a pride issue, and pride has often been the most important element in past decisions by the Chinese leadership. The United States, then, should use this to its advantage. While it should maintain its stance on seeking an overall, commercially-viable accession package for China, it should also relent and submit to China's request for seeking a political compromise. One possible solution may be to seek commitments from China to adhere to the core WTO obligations immediately, then allow for the details to be worked out after membership has been bestowed. The United States should not attempt to negotiate every little detail of market access. This may drive China towards taking more and more exceptions in its WTO accession package, which will eventually work "against [the U.S.'s] overall purposes." See R. Michael Gadbaw, Vice-President and Senior Counsel of General Electric Company, "WTO Accession: A Private Sector View", Address at the Third Annual Conference of the Library of International Relations at Chicago-Kent College of Law on China in the World Trading System: Defining the Principles of Engagement (November 6-7, 1997) (hereinafter Gadbaw address), p. 6. A balance between the political solution and the commercially-viable solution should be the goal in the remainder of China's accession process.

The goal of the WTO, beginning with the accession process and continuing throughout membership, is to persuade China to abandon its traditional practices of *guanxi* and arbitrary governance, and to transform its trade regime into one based on rules and certainty. However, this is a daunting task, given the fact that it is often difficult for a trade agreement to translate into real changes in enforced policy.³³⁶ Therefore, in order to ensure that there is meaningful participation by China in the WTO, the first step must be to instill the principle of transparency within China so as to promote a society based on the rule of law. Any reform process must begin with the identification of problems, and this can only be done by making the trade regime transparent.

In its three years of existence, the WTO has proven itself to be an effective tool to bring accountability to the world economic order, and accountability in turn can bring about transparency in a country's trading system. The current WTO agreements seem capable of assuring that China abides by international rules of conduct, which will make its trade and investment actions more predictable. In addition, the organizational framework of the WTO can further promote transparency in the PRC through the TPRM and the DSU, which can be utilized on a mutually beneficial basis after China's accession. The TPRM will allow for the scrutiny of China's trade policies by all members, while the DSU has shown that it can be highly effective in resolving trade disputes in an equitable and non-political manner.³³⁷

Furthermore, the WTO operates on a multilateral (not bilateral) level. In the past countries like the United States have attempted to force economic reform and adherence to the rule of law upon China by way of bilateral agreements, which have proven ineffective because it leaves the United States in a "perpetual state of

336. Greg Mastel, "Beijing at Bay", in *Foreign Policy*, Vol. 104 (1996), p. 29. This observation is reinforced by China's poor track record of fully implementing other international treaties to which it is a signatory.

337. An argument to be balanced with the use of the DSU is that many WTO developing and least-developing countries still have problems complying with WTO obligations, and China may be no different in the future. To alleviate some of these concerns, the United States should assist China in building an institutional framework that will be able to implement and enforce these WTO obligations effectively, and not rely solely on the DSU to address all future problems. See "The Future of United States-China Trade Relations and the Possible Accession of China", November 4, 1997: Hearings Before the House Comm. on Ways and Means, Subcomm. on Trade, 105th Cong., 1st Sess. 8-9 (1997) (testimony of Terence P. Stewart).

negotiations” instead of actual implementation.³³⁸ An example, as provided in this paper, relates to the United States’ endeavor to bring about transparency in China through the 1992 MOU. It has taken six years for China to finally implement this agreement to minimal U.S. satisfaction, although this conclusion is open to debate, and this only after numerous complaints and threats. In fact, it can be argued that the only reason China is more transparent today is not because of any pressure exerted by the United States, but because of its desire to join the WTO. Thus, one can say that the WTO’s effectiveness in bringing about transparency in China extends even to its bilateral relationships. In this sense perhaps the most effective threat the United States currently has at its disposal, to control China, is to link all the reforms it would like China to undertake with bilateral WTO negotiations.³³⁹

Of course some may disagree with this assessment, and insist that progress in the area of transparency really owes its “genesis to [the U.S.’s] underlying bilateral agreements.”³⁴⁰ However, one only has to refer to the history of China’s WTO accession negotiations, as well as the overall history of U.S.-China economic relations, to see that it is routinely China’s practice to be opposed to U.S. interests, sometimes merely out of spite. China progresses as it chooses, for it holds tightly to its rights as a sovereign nation. More than likely, it is more transparent today because of its own efforts.

If and when China accedes to the WTO, however, a fear is that China may simply choose to disregard its obligations of reform and transparency. If so, China’s continued protectionist policies may well destabilize the whole WTO system, and the integrity of the WTO may be severely damaged. In fact, some have argued that China, as a communist country, “clearly has no intention of ending the issuance of [such WTO-inconsistent practices as] industrial guidelines”; that China will have “innumerable opportunities to tilt regulatory decisions in favor of, or against, any enterprise”; and that government influences over the Chinese economy is so “perva-

338. Gadbow address, *supra* note 335, p. 6.

339. As the reader may recall, this was exactly what the United States did with the 1992 MOU, as well as the three IPR agreements of 1992, 1995 and 1996. One can argue that it was only when the United States linked the implementation of these bilateral agreements to the WTO negotiations that China finally got around to fulfilling its obligations under the bilateral agreements.

340. Charlene Barshefsky, USTR, “China at the Crossroads of Reform”, Remarks before the U.S.-China Business Council (January 29, 1998), p. 3.

sive that the WTO trading rules will prove inadequate to create a level playing field."³⁴¹

While this is a legitimate concern, one must keep in mind that proposals other than the WTO, such as bilateral arrangements, also have not brought about true transparency. Thus, there are really no alternatives but to trust the foreseeable solutions offered by the WTO regime, which include the use of the DSU, the TPRM, and the various notification requirements throughout the system (although, as noted earlier, the WTO currently is struggling with the lack of compliance with many of these notification requirements; however, with China being such a significant country, it is probably unlikely that its trading partners will allow it to neglect these requirements). With the support of its members, the WTO regime hopefully will prove to be a sufficient instrument to compel transparency and the rule of law onto such a complex country as China.

A second, related concern revolves around speculation that perhaps China still has not yet understood the true implications of WTO membership. Despite all the difficulties and challenges, China has somehow maintained an on-going attitude of ambivalence towards the whole accession process.³⁴² If this is so, then China may run the risk of implementing and enforcing the WTO rules in an uneven and haphazard manner.³⁴³ Such a possibility, however, may be unavoidable, and not entirely within China's control. China already has trouble implementing its own laws, many of which are often ignored or neglected, while others go unenforced due to lack of judicial power and resources.³⁴⁴ As a matter of fact, there are some in China's excessively bureaucratic government who admittedly either "know nothing about the law, know about it but fail to implement it at all, or fail to implement it strictly."³⁴⁵ Needless to say, inconsistent enforcement of the rules will result in the minimization of the WTO's influence on the elimination of non-transparency in China.³⁴⁶ However, there is still hope. As the acces-

341. Mastel, "Beijing at Bay", *supra* note 336, pp. 30-31.

342. "Ruggiero Says More China Market Access Needed to Drive WTO Talks", *Inside U.S. Trade*, April 25, 1997.

343. See O'Quinn, "How to Bring China and Taiwan into the WTO", *supra* note 14, p. 12.

344. Hao, "Ethics in Government", *supra* note 39, p. 12.

345. "Qiao Shi Addresses NPC Session, Stresses Need for a Proper Legal Framework", *Xinhua*, translated in *FBIS*, December 29, 1993.

346. An example of this is the current PRC intellectual property rights regime (hereinafter IPR). Although adequate laws have been enacted as a result of a 1992 bilateral

sion process continues, China will have the opportunity to learn more about the realistic impact of the WTO on its territory. In fact, it is through accession negotiations that China has already come to understand "the nature of the WTO much better than it did" before.³⁴⁷

Perhaps the best way to determine whether China will allow the WTO to bring about greater transparency and uniformity in the application of China's laws is to look at China's past accomplishments. Based on the above chronology of China's accession process, it is evident that China is serious about change. One must realize that it is not easy for China to reform; China is struggling against thousands of years of non-transparency, as well as against numerous culturally-laden business practices such as *guanxi*. However, China's record in meeting its obligations as a member of other international organizations should provide some confidence in its fulfillment of future WTO requirements.³⁴⁸ To see the numerous changes China went through in the last twenty years, it is hard to deny that China is truly interested in becoming a more transparent society.

In looking at its reforms thus far, China seems motivated not only by its desire to join the WTO, but also by its hope to effectively "nationalize" its laws and regulations.³⁴⁹ China claims that it has already agreed to provide "complete transparency" upon acces-

memorandum of understanding between China and the United States, implementation and enforcement of laws have been non-existent. This brought about two more agreements with the United States to enforce China's IPR laws in 1995 and 1996. To date, the 1992 IPR agreement has yet to be fully implemented. See generally Office of the United States Trade Representative, *supra* note 216; see also Chang, "Token Liberalization", *supra* note 8, p. 21. In fact, in order to compel full implementation, the United States has linked the enforcement of the 1992 IPR agreement with China's WTO accession negotiations. See "Barshefsky Says China WTO Entry Depends on IPR Compliance", *Inside U.S. Trade*, September 15, 1995.

347. "Barshefsky Sees Momentum But Tough Year Ahead in China WTO Talks", *Inside U.S. Trade*, January 30, 1998. This statement was confirmed by a Chinese official, who said that China was now "much better informed" about the WTO accession process. *Ibid.*

348. See generally Lardy, "China and the WTO", *supra* note 333, p. 5. An example cited by Lardy is China's participation in the IMF, which brought about a complete and voluntary overhaul of China's foreign exchange system, so as to conform to IMF principles. This, therefore, should lend some credibility to China's claim that it will abide by WTO rules when it becomes a member. *Ibid.*

349. Harders-Chen, "China MFN", *supra* note 15, p. 399.

sion to the WTO,³⁵⁰ and it further proclaims that it will instigate major initiatives in the near future to improve the rule of law in the PRC.³⁵¹ While China is not yet a member, the WTO has already heavily impacted China, and made it more transparent than ever before in its history. There is no doubt that the WTO can influence China even more once China actually obtains membership to this world trade body. Therefore, given China's present desires to enter the transparency-oriented WTO, and the consideration of the above analysis and arguments, one can confidently say that, yes, the WTO can and will ultimately be able to compel transparency upon China's foreign trade regime.

VI. CONCLUSION

The WTO accession process has progressed to the point where China's next step must be to accept, and upon entry immediately implement, the main obligations of the WTO regime, namely national treatment, MFN and transparency. Of these three main obligations, transparency is arguably the most important. There cannot be effective national treatment or MFN within China, or an effective WTO for that matter, without first having a transparent China.

Those who believe that "[w]hether China today meets WTO standards is less important than adopting policies to promote the development of a Chinese economy compatible with the WTO" are on the right path.³⁵² Development will no doubt take a long time for China, because it must reform thousands of years of culturally ingrained business practices. Therefore it is probably best to first establish the broad obligations of transparency before compelling the society as a whole to implement the many changes required by the WTO. This is the difference between having a long-term vision of creating a transparent, rules-based society, and a short-term goal of specific commitments which, unfortunately, may turn out to be temporal and unenforceable.

Transparency is the first step in solving any problem, for it is important to first identify the issue before applying the solution. By not fully publishing its laws, regulations and policies, China has failed to take this first step in problem-solving. But if transparency can be promoted, foreign entities struggling with such issues as na-

350. "Chinese Official Optimistic on WTO Market Access Deal This Year", *Inside U.S. Trade*, June 13, 1997.

351. See Gadbow address, *supra* note 335, p. 2.

352. Ross, "Enter the Dragon", *supra* note 331, p. 20.

tional treatment and MFN can at least pinpoint the problem, and then seek an appropriate remedy.³⁵³ And while it has been difficult to persuade China to reform its trade policies, to incorporate the rule of law within its society, and to make its foreign trade regime more transparent, the WTO should remain encouraged because China has not backed away from the negotiating table. It is still very interested in joining the WTO, and it has made great efforts in its attempts to appease its trading partners. China longs to be recognized globally as being “serious about international rules and practices,”³⁵⁴ which it finds immensely valuable, given its pride and its desire to become a legitimate world power. This is an advantage the accession negotiators can use to encourage China to join the WTO. The priority now is to ensure that the principle of transparency, first and foremost, is applied thoroughly throughout China.

353. An example of this occurred when China published its industrial policies for the automobile sector, and numerous WTO members complained that it was in violation of the TRIMs agreement. However, one should at least be encouraged that China even published these policies. It is through this publication that the global community can pinpoint the issues to be discussed in future negotiations. If this policy was not published, then future problems will no doubt be aggravated. See “Barshefsky Says New Policies Push China Away from WTO Threshold”, *Inside U.S. Trade*, December 22, 1995.

354. “Chinese Official Optimistic on WTO Market Access Deal This Year”, *Inside U.S. Trade*, June 13, 1997.

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