1. Reflection Paper on China in the World Trading System: Defining the Principles of Engagement

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China's prospective membership in the World Trade Organization is one of the most significant developments relating to international institutions to take place in the past several decades. It comes in the midst of the broad transformation of post-World War II command economies to market orientation. It comes shortly after the transition of the GATT into a more comprehensive international economic organization, based on the rule of law. It represents the potential integration of over one-fifth of the world's population into the primary system established for the purpose of enhancing worldwide economic growth and employment. It will transform the WTO into an inclusive organization, and the WTO may become a less comfortable place from an OECD country standpoint than it has been for the past 50 years. China's prospective entry into the WTO is an opportunity and a challenge for China, for the United States and other industrialized states, and for the WTO.

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The importance of this development may to some extent account for the slow progress of negotiations to date. There is uncertainty on all sides, and at least an implicit understanding that the stakes are high. The negotiations do not take place in a historical vacuum. China and the United States were Cold War adversaries, and there is some concern in the United States about China's long term strategic plans in the Asia-Pacific area. China has achieved a trade surplus with the United States rivaling Japan's, and there is concern in the U.S. political branches that a systemic trade imbalance comparable to that with Japan may be developing.

Despite grounds for concern, the advantages to the United States and other countries of bringing China into the WTO system seem obvious.[1] China would agree to open its huge internal market to foreign goods and services. China would provide assurances of fair treatment to importers and foreign service providers. China would agree to be bound by the rule of law in the conduct of its trade relations. China would be anchored in the global economy in ways that would encourage stability in external security relations.

On China's side, the advantages of membership in the WTO also seem

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[1] *Accord see* Report of the Commission on United States — Pacific Trade Policy, Building American Prosperity in the 21st Century, April 1997 [hereinafter President's Commission], Recommendation 1: China:

> The United States should continue to lead the effort to integrate China into the global economy and continue to support China's accession to the World Trade Organization. China's accession to the WTO should be conditioned on commercially viable terms. The United States should be inflexible on China's agreement to WTO principles, but flexible with regard to time for implementation of other WTO obligations. . . . (at Executive Summary, pg. x)

See also Madeleine K. Albright, *Frank Talk with China*, WASH. POST, June 10, 1997, at A17; Statement of Charlene Barshefsky, USTR, Before Senate Finance Committee, *Renewal of MFN Status for China*, FED. NEWS SERV., June 10, 1997 ("President Clinton has repeatedly affirmed U.S. support for China's accession to the WTO, but only on the basis of commercially meaningful commitments that provide greatly expanded market access and ensure compliance with WTO obligations."); Statement of Carla A. Hills to the U.S. House of Representatives Committee on Ways and Means, March 18, 1997, FDCH CONG. TEST. ("It makes little sense to talk about a World Trade Organization in which a country with 20 percent of the world's population, having an almost $1 trillion economy, and which is the world's eleventh largest exporter, is not a member. China's entry into the WTO, based on a sound protocol of accession, is very much in our nation's interest."); Laura D'Andrea Tyson, *Beyond MFN*, WALL ST. J., May 28, 1997, at A18.

obvious.[2] As its economy gains strength and becomes more competitive with OECD economies, it would reduce the risk of being arbitrarily shut out of export markets. It would less likely be subject to ad hoc decisions by foreign governments about whether it would continue to enjoy trade privileges. The security of its access to foreign capital markets and foreign direct investment would be enhanced. It would have access to neutral dispute settlement.

The integration of China into the WTO also means international economic relations will be playing a greater role in its external world view. Stable external economic relations are becoming increasingly important to the vitality of China's economy. Military-security relations and concerns of the Cold War era are being translated into economic relations and concerns. On the whole, this transition appears to be a positive one for the international community.

The speakers who have agreed to participate in this meeting and publication are among the leading thinkers and influential forces in economics, law and government. All are either in government, recently out of government, hold senior business management position, or are distinguished for their scholarship on international trade — and all have an interest in China. All will be gathering outside the government meeting hall at an important historical juncture: the point at which governments around the world will make critical decisions about the future of China's role in the WTO. It seems that this gathering should provide a useful, and perhaps unique, opportunity to employ collective energies to furthering the common interest in development of sound international trade policy with and for China — to address, and perhaps to provide tentative answers, to some of the key questions facing government policy makers.[3]

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[2]*Accord see* EAST ASIA ANALYTICAL UNIT, AUSTRALIA DEP'T OF FOREIGN AFFAIRS AND TRADE, CHINA EMBRACES THE MARKET 165-69(1997)[hereinafter EAAU], stating, *e.g.*,

> Modeling undertaken for this report indicates that trade liberalization associated with WTO membership would deliver China a rise in national income of 4.6 per cent in the long term, if a modest improvement in productivity were assumed (1 to 2 per cent depending on the sector). *Id.* at 166.

See also World Trade Organization, Daily Report, Singapore Ministerial Conference Report, Statement by Mr. Long Yongtu, Assistant Minister of Foreign Trade and Economic Cooperation, China, 12 December 1996 (www.wto.org).

[3]Participants were advised in advance of the meeting of plans to publish the results.

I. CHINA IN THE WORLD TRADE ORGANIZATION

A. GATT Participation and Uruguay Round Negotiations

China was a founding member of the General Agreement on Tariffs and Trade 1947. The government of the Republic of China (Taiwan), which occupied China's seat in the United Nations until 1971, formally withdrew from the GATT in 1950.[4] In the early 1980s, China began to attend selected GATT meetings as an observer, and in November/December 1984 China requested and received permanent observer status in the GATT Council.[5] China has stated its belief that Taiwan's act of withdrawal from the GATT in 1950 was not legitimate,[6] and it applied in 1986 to resume its status as a GATT Contracting Party.[7] During the Uruguay Round negotiations it claimed entitlement as a Contracting Party of the GATT to be a founding Member of the WTO.[8] China participated as an observer in the Uruguay Round negotiations and signed the Final Act in Marrakesh. China's claim to be a founding Member of the WTO was not accepted by the GATT Contracting Parties,[9] and China did not become a Member of the WTO when the WTO Agreement entered into force on January 1, 1995.

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[4]HAROLD K. JACOBSEN AND MICHEL OKSENBERG, CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT 62-63 (1990)[hereinafter Jacobsen and Oksenberg]; EAST ASIA ANALYTICAL UNIT, AUSTRALIA DEP'T OF FOREIGN AFFAIRS AND TRADE, CHINA EMBRACES THE MARKET 165 (1997)[hereinafter EAAU].

[5]*Id.*

[6]Jacobsen and Oksenberg, at 89.

[7]A Working Party on China's Status as a Contracting Party first convened in October 1987, and met 18 times through the conclusion of the Uruguay Round. EAAU, at 165.

[8]*Id.* at 87-109. China formally applied to resume its Contracting Party status in July 1986. EAAU, at 165.

[9]*See* World Trade Organization, Daily Report, Singapore Ministerial Conference Report, Statement by Mr. Long Yongtu, Assistant Minister of Foreign Trade and Economic Cooperation, China, 12 December 1996 (www.wto.org). China's schedules of concessions accompanying its signature of the Final Act were not verified or accepted. EAAU, at 165-67. It was not a foregone conclusion during the Uruguay Round negotiations that China would not be entitled to resume its status as a founding member of the GATT, and the foregoing discussion is not intended to reflect on the legitimacy of China's assertion that it had not consented to withdrawal from the GATT. The reasons

Whether or not Taiwan's withdrawal from the GATT on behalf of China was illegitimate under international law, China did not participate in the various rounds of GATT reciprocal trade liberalization negotiations that took place from the 1950s onward, and in 1995 its internal rules relating to international trade were GATT-inconsistent in a variety of ways. Through the end of the Uruguay Round negotiations, it had not made the commitments that established the "balance" of trade concessions that constituted an integral element of GATT membership.

B. Joining the WTO

1. The WTO Agreement Text

The Agreement Establishing the World Trade Organization elaborates the procedure for accession at Article XII.[10] This article provides that terms of accession will be as agreed between the acceding state (or autonomous customs territory) and the WTO, and that the accession will apply to the WTO Agreement and the annexed Multilateral Trade Agreements (MTAs).[11] Approval of accession requires an affirmative two-thirds majority

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that China's approach were not successful include both economic and political elements, including a change in the political climate in the OECD following the Tienanmen incident in 1989.

[10]It provides:

1. 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 this Agreement and the Multilateral Trade Agreements may accede to this Agreement, in terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

[11]The Multilateral Trade Agreements (or MTAs) are binding on all WTO Members. They are the GATT 1994, General Agreement on Trade in Services (GATS), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),

vote of the Members of the WTO.[12] This voting requirement must be read in conjunction with Article IX:1 of the WTO Agreement which establishes a preference for continuing the GATT 1947 practice of voting by consensus, although it does not demand that this practice be adhered to when consensus is absent. Article XIII of the WTO Agreement provides that "This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 [GATT 1994, GATS, TRIPS and the DSU] shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application."[13] Either the United States or China (or both) can decide not to bring the WTO Agreement into force as between them at the time of China's accession, even if each country is otherwise satisfied that China should become a Member of the organization.

Article XII does not place constraints on the subject matter that may be incorporated in an accession agreement (or protocol), nor does it preclude the use of transitional arrangements. In stating that the accession will apply to the WTO Agreement *and* to the MTAs, Article XII indicates that a decision by an acceding Member to join the GATS and TRIPS Agreement is not optional, *i.e.* that the accession process will not be used to recreate the GATT *a la carte* of the Tokyo Round.

2. *What It Means to Be a WTO Member*

The Working Party on the Accession of China to the WTO [hereinafter China Working Party], which first met in 1996, essentially continues the work program of the Working Party on China's Status as a Contracting Party of the GATT.[14] The main agenda item of the China Working Party is

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Understanding on Dispute Settlement (DSU) and Trade Policy Review Mechanism (TPRM).

[12]The "of the Members" language in art. XII:2 indicates that this supermajority is required with respect to the number of Members of the organization, and not of the Members present and voting, which would be the case in the absence of the express language. *See* art. IX:1.

[13]WTO Agreement art. XIII:3 provides that in the case of accession, notification of non-application must be given to the Ministerial Conference before approval of the accession agreement.

[14]*See* note 7, *supra*.

the preparation of a Protocol on China WTO Accession [hereinafter Protocol]. A draft Protocol has been circulated among WTO Members, and the specific terms of this draft will be discussed in the following section. However, while the Protocol will supplement, and in some cases vary, the terms of the WTO Agreement and related MTAs as they apply to China, the accession of China to the WTO would broadly mean that it accepts the obligations of the WTO Agreement and MTAs [hereinafter WTO Agreement]. Therefore, it is important to begin by setting out in a summary way what it means to be a WTO Member.[15]

A. The WTO Agreement

(1) Institutions

The WTO Agreement has both institutional and substantive components. On the institutional side, the WTO Agreement constitutes the WTO as an international organization, establishes its internal organizational framework, provides rules for decision-making by Members, and establishes a procedure for the settlement of disputes among Members. The WTO is a one-state, one-vote organization, and China as a participant in the organization would be on an equal footing with all other Members from the standpoint of voting rights.[16] The WTO Agreement establishes a variety of internal committees that are responsible for decision-making, including a Ministerial Conference and General Council, as well as Councils on Trade in Goods, Services and Trade-Related Aspects of Intellectual Property Rights (TRIPS). Each Member of the WTO is equally entitled to be represented on each of the internal decision-making bodies, and China would be entitled to representation on each such body.

The customary practice of Contracting Parties to the GATT 1947 was to make decisions by "consensus," and the WTO Agreement states a preference for continuation of this GATT practice. However, just as the GATT prescribed voting procedures that might be used in the absence of consensus, so the WTO Agreement sets forth voting procedures to be used in the

[15]The first two Reports of the International Trade Law Committee of the International Law Association, 1994 and 1996 (E-U Petersmann and F. M. Abbott, Co-Rapporteurs), provide a useful explanation of the operation of the WTO Agreement and the MTAs.

[16]WTO Agreement, art. IX:1.

event that consensus cannot be reached.[17] Details with respect to voting procedures, and the potential policy implications of China's accession for the consensus procedure, are discussed in section III.A *infra*.

The former GATT 1947 dispute settlement mechanism involved the establishment of panels of experts responsible for preparing reports and recommendations on disputed issues for consideration by the GATT Council. The Council adopted a report and recommendations only by consensus. If a Contracting Party to a dispute (or any other Contracting Party) objected to the adoption of a report, it would not be adopted, and would not become the binding decision of the Council.

The WTO Dispute Settlement Understanding (DSU) substantially modifies the GATT practice. Pursuant to the terms of the DSU, a panel report is adopted by the Dispute Settlement Body (DSB) (*i.e.* the Council sitting in a dispute settlement mode) unless there is a consensus against its adoption, and in virtually all foreseeable cases this means that the adoption of a report by the DSB is "automatic," unless a panel decision is appealed. A panel decision may be appealed by a disputing Member to a newly formed Appellate Body which has the authority to review the legal basis of panel decisions, and to overrule panels. If a panel report is appealed, the decision of the Appellate Body is automatically adopted by the DSB in the sense just described. As a consequence of the new DSU procedure, a recalcitrant Member may not impede the operation of the dispute settlement mechanism. China, as all other Members, would be bound by DSU rules and decisions.

(2) Rules

As did its predecessor GATT, the WTO establishes the basic rules for the operation of the international trading system. The former GATT 1947, which governed trade in goods, is incorporated as the GATT 1994 (an MTA) in the new WTO system. In addition, "new area" agreements in the fields of services (the General Agreement on Trade in Services or GATS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), as well as a modest Agreement on Trade-Related Investment Measures (TRIMS), are incorporated in the WTO Agreement.

There are several fundamental principles underlying the operation of the WTO-GATT system. These are:

[17]WTO Agreement, art. IX:1.

1. Most favored nation treatment: Each Member must treat all other Members on an equivalent basis in the granting of trade concessions.
2. National treatment: Imported goods must receive at least as favorable treatment as domestically produced goods for purposes of internal sale. This principle applies to a service when a Member has made a specific sectoral commitment for that service.[18]
3. Binding of tariffs: Members will maintain tariffs on goods no higher than as indicated on their respective schedules of concessions.
4. Prohibition against use of quotas: Members will not impose quantitative restrictions on imports or exports of goods, or impose measures having the equivalent effect of quotas. This principle applies to services when a specific sectoral commitment is made.
5. Protection of intellectual property rights (IPRs): Members agree to provide the minimum substantive standards of IPRs protection as set forth in the TRIPS Agreement, and to establish adequate internal systems for the enforcement of those standards.
6. Application of the principle of reciprocity: Members are not expected to grant trade concessions in the absence of concessions from other Members.
7. Special and differential treatment for developing countries: Members agree that developing members may receive more favorable treatment than developed Members under appropriate circumstances. This may involve a waiver of the reciprocity principle.
8. Attention to sustainable development: In making decisions, Members will have in view the need to assure that economic development does not occur at the expense of the environment.

The foregoing principles are the subject of detailed rules, interpretations by Members and dispute settlement bodies, and so forth. Nevertheless, in a broad brush sense, these principles underpin the liberal international

[18]According to the President's Commission, *supra* note 1:

> China has never demonstrated genuine commitment to the two core principles of the multilateral trading system: national treatment, which accords foreign firms every right and advantage available to domestic firms, and most-favored nation (MFN) trading status, which grants all nations the same trading privileges granted any one nation. . . . If China refuses to implement national treatment and MFN, any future market access commitments by the Chinese would be meaningless because American firms and other foreigners would never be able to compete on a level playing field in China. . . . *Id.* at 32.

trading system embodied in the WTO, and these are the basic principles which China would agree to adhere to when acceding to the WTO Agreement.

As these principles and rules are interpreted and applied by the Dispute Settlement Body, they constitute a law-based system for the conduct of international trade and international trade relations among states. In considering the details of the China Accession Protocol, it is important to maintain in view that China's accession to the WTO would entail a general acceptance of this rule-based system and its underlying principles.

3. *The Draft Protocol of Accession*

In March 1997 the confidential text of a draft Protocol was published,[19] and this draft has been confirmed by knowledgeable sources as authentic. This published version of the Protocol did not incorporate referenced draft Schedules of Concessions and Commitments to GATT 1994[20] and Schedules of Specific Commitments to GATS and List of Article II exemptions to GATS. These schedules are critical components of a final Protocol, and major outstanding items for negotiation involve the terms of these schedules.[21] In customary GATT style, the draft Protocol includes standard text as to which there is substantial agreement, and bracketed and italicized text signifying where there is not yet agreement. The Chair of the Working Party[22] indicates his understanding in an introductory note that

[19]*China WTO Protocol Shows Progress but Wide Gaps on Trade Rules*, 15 INSIDE U.S. TR., Mar. 14, 1997, at 1 and 22 et seq. [hereinafter Draft Protocol].

[20]On October 1, 1997 China announced a further round of tariff cuts on agricultural products, autos and consumer electronics products intended to facilitate its entry into the WTO. *China Details Cuts on Farm Products, Autos, TVs as Part of WTO Accession Effort*, 14 BNA INT'L TR. REPTR. 1666, Oct. 1, 1997. *See also China to Lower Tariffs on Raw Materials for the Second Time in Two Years, Ministry Says*, 14 BNA INT'L TR. REPTR. 1542, Sept. 17, 1997, reporting China's decision to substantially lower tariffs on raw materials, but noting that China continues to maintain relatively high tariffs on manufactured goods, and that few concessions in this area are planned for the near term. Chinese official Sun Zhenyu reportedly commented that "This is being done on a voluntary basis . . . to seek membership in the WTO."

[21]*See* discussion *infra* at 13, 21-26 regarding issues in agriculture and services.

[22]Pierre-Louis Girard (Switzerland).

"in line with the practice followed so far in the GATT/WTO, nothing is definitively agreed until everything is agreed."[23] The draft Protocol suggests that substantial progress has been made toward defining the terms of China's accession to the WTO.

A. Rule of Law

Draft general provisions would obligate China to apply WTO rules throughout its territory, including special economic zones.[24] They would obligate China to make its trading regime transparent[25] and, most importantly, to maintain tribunals for the review of administrative actions relating to the implementation of the regime, independent of the agencies responsible for administrative enforcement.[26] There remains a bracketed provision which raises some doubt as to whether China might be permitted to create exceptions from the general practice of independent judicial review.[27] If and when this bracketed language is eliminated, or it is limited to certain specific cases, China will have accepted an important commitment to the rule of law in international trade.

B. Treatment of Foreign Enterprises

The draft Protocol obligates China to assure that enterprises doing business anywhere in its territory have the right to trade throughout the territory,[28] and that foreign purchasers of internally-produced goods will be treated on the same basis as domestic purchasers.[29] Certain aspects of

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[23]Draft Protocol, at 23.

[24]*Id.* at Part I, para. 2.

[25]China would agree, *inter alia,* that only "those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange" that are published and readily available would be enforced. *Id.* at Part I, para. 2(C)(1).

[26]*Id.* at Part I, para. 2:C&D.

[27]Part I, para. 2:D:4, says that in all cases, including when an appeal is initially determined by an administrative body, there will be "opportunity for appeal of the decision to a judicial body *[, except as otherwise provided in relevant laws].*"

[28]Part I, para 5:1&2.

[29]Part I, para 3. This obligation is fully bracketed, and reference to procurement of "services" is italicized.

these commitments will be subject to phase-in, particularly where state enterprises are concerned,[30] and related commitments concerning services remain bracketed.

C. State Trading

The draft Protocol obligates China to follow existing WTO/GATT rules with respect to state trading enterprises. A recent conference on State Trading in the WTO held in Berne focused on whether any improvement is needed in WTO rules relating to state trading enterprises.[31] A particular question discussed was whether reform of GATT Article XVII rules is needed in connection with China's accession to the WTO. There was no strong sentiment among participants that this is required.

D. Non-Discrimination and Non-Tariff Barriers

The draft Protocol obligates China to phase in the requirements of GATT Article III [national treatment] and XI [prohibition of quotas] in accordance with an annex.[32] In addition, China would be obligated not to impose new measures inconsistent with WTO obligations, and to administer existing restrictions in accordance with related rules (*e.g.*, GATT Article XIII on the non-discriminatory administration of quotas). These commitments would also encompass the Agreement on Agriculture.

China's general commitment to the provision of national treatment for imported goods, and agreement to eliminate quotas, would be among the most significant legal undertakings of the accession agreement. The extent to which these commitments are limited cannot be discerned without reference to the appropriate annex, and therefore without reference to the annex the scope of commitments cannot be assessed. Nevertheless, published reports have suggested that China's offer of commitments on elimination of barriers with respect to trade in goods have come at least close to

[30]In particular, the obligation to permit trade throughout the territory among designated goods produced by state enterprises would be subject to phase-in. Part I, para. 5:1.

[31]Trade Liberalization and Property Ownership: State-Trading in the 21st Century, Gerzensee, Sept. 12-13, 1997. Several of the participants in that conference participated in this one.

[32]It is reported that at the March 1997 meeting of the WTO China Accession Working Party, China pledged to eliminate non-tariff barriers on approximately 400 products at the 8-digit HTS level, including certain agricultural products, alcoholic beverages and color film. *China's WTO Application Progresses Slowly*, Int'l Econ. Rev., July 1997, at 7.

approximating the demands of WTO Members, including the United States, European Community and Japan. The major exception appears to be in the area of agricultural products, as to which there remains significant developed Member concern over quotas and other restrictions.[33]

Non-tariff barriers to trade in agricultural products, such as quantitative restrictions, were for a long time a major stumbling block to trade liberalization in the GATT. The Agreement on Agriculture of the Uruguay Round achieved tariffication of quantitative restrictions and a scheduled reduction of the resulting tariffs (export subsidies in agriculture as well as trade-distorting domestic support are also to be reduced over 6 years for developed countries and 10 years for developing countries). The administration of tariff rate quotas created as part of the agricultural market access commitments has, however, often impeded the attainment of the access that was expected under the Agreement. China's reluctance to make effective commitments in the field of agriculture is, in short, not a new phenomenon for the GATT/WTO.

(1) Local Content and Technology Transfer

A bracketed provision in the non-tariff barriers paragraph of the draft Protocol that is of particular interest states:

> [China shall ensure that the distribution of import licenses, quotas, tariff-rate quotas, or other means of approval for importation or the right of importation by national and sub-national authorities shall not be conditioned on whether competing domestic suppliers of such products exist or on performance requirements of any kind, including local content or mixing requirements, the transfer of technology, the conduct of research and development, minimum export requirements, or the nationality or nature of the enterprise.][Except with respect to local content and export performance requirements, which China shall eliminate by the year 2000, China shall fully implement the Agreement on Trade-Related Investment Measures as of the date of entry into force of this Protocol.][34]

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[33]*See* Statement of Charlene Barshefsky, USTR, Before Senate Finance Committee, Renewal of MFN Status for China, FED. NEWS SERV., June 10, 1997; *China to Lower Tariffs on Raw Materials for the Second Time in Two Years, Ministry Says*, 14 BNA INT'L TR. REPTR. 1542, Sept. 17, 1997, reporting stalemate in WTO on agriculture issues, and citing examples of Chinese restrictions. *See also* President's Commission, at 33, regarding concerns over China's market access barriers in agriculture.

[34]Draft Protocol, at Part I, para 7:3.

Disagreement concerning this bracketed and italicized provision reflects at least in part a fundamental difference between WTO Members such as the United States and European Communities, and China, over whether China should be accorded the treatment of a developing country in respect to its membership, or whether China should be treated as a developed country. This general issue is discussed in more detail *infra* at Section II.B.

The imposition of local content and related requirements have been typical of developing economies and economies in transition. Such requirements establish preferences in favor of locally established businesses, and distort the global allocation of capital. Although local content requirements are prohibited under the general terms of GATT Article III (national treatment) because they discriminate against foreign-produced goods, their use has been sufficiently widespread that the Agreement on Trade-Related Investment Measures (TRIMS Agreement) specifically mandates their elimination, progressively for developing countries.

Developed country private enterprises, for example those in the aerospace sector, have been particularly concerned with China's imposition of transfer of technology requirements as a condition of the sale of goods, such as commercial aircraft. It has been a practice of China to demand that foreign exporters of commercial aircraft establish local production facilities to supply a portion of the aircraft, and transfer know-how to these production facilities to enable them to produce.

Government-mandated technology transfers as a condition for the purchase of goods might be considered a quantitative restriction under GATT Article XI, since such demands serve as an impediment to the import of goods. For example, a company that is interested in exporting aircraft from the United States to China might consider it commercially unsound to do so if required to give up valuable rights in technology. When technology transfer demands are conjoined with a local production requirement, they are a clear violation of GATT Article III because they represent a preference for local production. These demands are problematic when they occur in the context of government procurement, because GATT Article III:8 provides an exception from the obligation to provide national treatment in respect of government purchasing (not for resale).[35]

[35]The GATT Article III:8 exception for government procurement would not relieve a government-mandated quota from potential GATT-inconsistency, since the government procurement exception does not apply to GATT Article XI that prohibits quotas. However, proving an Article XI violation would require demonstrating that a

Transfer of technology demands are not specifically addressed in the GATT 1994 or related agreements on trade in goods. They are, however, expressly addressed in the Plurilateral Agreement on Government Procurement (GPA),[36] in which they are generally prohibited as a condition of purchase. However, there is an exception to this prohibition in favor of developing countries that, in the accession process to the GPA, negotiate the right to condition the qualification of bidding on the transfer of technology (though they may not so condition the award of contracts).[37]

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technology transfer demand was a government-imposed condition of purchase, and in some cases this might be difficult.

[36]The Plurilateral Trade Agreements to the WTO need not be accepted by Members of the WTO, and are only applicable among those parties that have accepted them. This distinguishes the Plurilateral Agreements from the Multilateral Trade Agreements, which must be accepted, and apply among all Members. WTO Agreement, art. II:2&3.

[37]Agreement on Government Procurement [hereinafter GPA], art. XVI. *See generally* Frederick M. Abbott, *Technology and State Enterprise in the WTO*, Gerzensee Conference, *supra* note 31. Article XVI of the GPA provides:

> Offsets
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> 1. Entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets. [n 7]
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> n. 7 Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, countertrade or similar requirements.
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> 2. Nevertheless, having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement. The existence of such conditions shall be notified to the Committee and included in the notice of intended procurement and other documentation.

It is not entirely clear how an offset would be used as a condition to qualify for bidding, but not as a condition of award — since any accepted bid would presumably include the offset.

Adding another layer of complexity, the purchase of large commercial aircraft is generally not subject to the GPA, but rather to the Plurilateral Agreement on Trade in Civil Aircraft (CAA), even though many purchases of large civil aircraft are made by government-owned enterprises (*e.g.*, national airlines).[38] The CAA itself generally appears to prohibit local content

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The GPA also addresses local content requirements in its Article III, which provides general rules against discrimination in the government procurement sector (for covered entities). Since local content requirements clearly discriminate in favor of local producers, they would be prohibited under GPA Article III, even without specific reference in Article XVI:1.

[38]The GPA applies to the purchase of goods and services by listed government "entities", including non-central government entities that will purchase in accordance with the Agreement GPA, Art. 1, footnote, and ref. Annex 3. A review of the GPA Annexes has not revealed the listing of public/government airlines. This does not exclude the possibility that some government airline might be incorporated within the structure of a transport ministry, though it would seem that in most cases a government airline would stand alone as a public corporation.

Though it is possible that some obligations imposed by the GPA will be imposed on some Parties with respect to the purchase of civil aircraft and components, for the present it appears that the CAA is intended to govern procurement in this particular sector.

The author has confirmed this in informal discussion with a WTO Secretariat officer whose responsibilities include legal oversight of the CAA and GPA. This conclusion is implicitly confirmed by the Uruguay Round Agreements Act Statement of Administrative Action and the subsequent Report of the ACTPN regarding Trade in Civil Aircraft. The ACTPN is the public advisory group that consults with the USTR regarding the WTO and the implementation of the Uruguay Round Agreements. *See* ACTPN, WTO Implementation Report, Trade in Civil Aircraft, Internet http://www.ustr.gov/reports/wto/civil_aircraft.html (07/04/96 03:24:56). For example, the Uruguay Round Agreements Act (URAA) Statement of Administrative Action, prepared by USTR, states:

> The United States will also seek to ensure that all WTO Members, as well as countries applying for WTO membership, that are involved in the development, production, and integration of aerospace products undertake the obligations of the Agreement on Trade in Civil Aircraft. (URAA Statement at B.1.o)

The ACTPN refers to the necessity of assuring that acceding Members of the WTO such as the People's Republic of China (PRC) sign and comply with the CAA, and says:

> The Agreement has eliminated imports duties on trade in aircraft, engines and other related assemblies and parts. It also prohibits certain non-tariff barriers such as requiring offsets (which require vendors to place procurement subcontracts in the local country), stipulating that national carriers purchase from national suppliers, and employing standards to discriminate against imported products. (ACTPN Report, at Introduction)

requirements.[39] There is no specific language concerning technology transfer, which is dealt with obliquely in a subsequent 1992 Agreement between the European Community and the United States, intended to supplement and clarify the CAA.[40] If demands for technology transfer by China in respect to purchases of civil aircraft are to be effective dealt with in the context of accession, specific terms such as those of the EC-US Agreement may need to be employed.[41]

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[39]Article 4 of the CAA provides, inter alia:

> 4.3 Signatories agree that the purchase of products covered by this Agreement *should be made only on a competitive price, quality and delivery basis.* . . . [emphasis added]

[40]In July 1992, the EC and the United States entered into an Agreement Concerning the Application of the CAA to Trade in Large Aircraft. European Community-United States: Agreement Concerning the Application of the GATT Agreement on Trade in Civil Aircraft to Trade in Large Civil Aircraft, 1993 BDIEL AD LEXIS 60, done at Washington and Brussels, July 17, 1992.

[41]The EC and U.S. agree to act in conformity with an Interpretative Note set forth in an Annex, which reads in relevant part:

> Article 4.3.
>
> (Mandatory Subcontracts)
>
> The first sentence states that "signatories agree that the purchase of products covered by the Agreement should be made only on a competitive price, quality and delivery basis". This means that signatories will not intervene to obtain favoured treatment for particular firms and that they will not interfere with the selection of vendors in a situation where vendors of different signatories are competing.
>
> *By emphasizing that the only factors which should be involved in purchase decisions are price, quality and delivery terms, the signatories agree that Article 4.3. does not permit government-mandated offsets.* Further, they will not require that other factors, such as subcontracting, be made a condition or consideration of sale. Specifically, a signatory may not require that a vendor must provide offset, specific types or volumes of business opportunities, *or other types of industrial compensation.*
>
> Signatories shall not therefore impose conditions requiring subcontractors or suppliers to be of a particular national origin.

The EC-U.S. interpretative Annex which prohibits the requirement of "other industrial compensation" may be considered to cover technology transfer, yet it remains less than entirely clear.

Though the technology transfer issue may appear an esoteric one, it is a concrete item on the China accession agenda, affecting important segments of U.S. and European industry.[42]

E. Price Controls

As a general proposition, the draft Protocol obligates China to allow prices for traded goods and services to be determined by market forces.[43] Price controls may be maintained on goods and services designated in an annex, and China, save in exceptional circumstances (with notification) agrees not to extend price controls to additional goods and services. There appears to be a consensus among economists that prices in the Chinese economy are now largely dictated by market forces, and not by government price controls.[44]

F. Subsidies

The draft Protocol provisions regarding subsidies are entirely bracketed and italicized, and it is difficult to determine what areas of disagreement exist among China and WTO Members.[45] China presumably will not maintain an objection to generally notifying the WTO of subsidies it maintains, though it may object to providing additional details as suggested by the bracketed text. It would seem likely that the main area of disagreement concerns the list of subsidies that China would be obligated to phase out, and the schedule for such phase-out.[46] However, the possibility remains that the Chinese government will find it difficult to open up its economic

[42]For an expression of congressional concern on the transfer of aerospace production from the United States to China, by a congressional opponent of renewal of China's MFN status, *see* Comments of Rep. Nancy Pelosi, in Hearing of the Trade Subcommittee of the House Ways and Means Committee: U.S. China Relations, FED. NEWS SERV., June 17, 1997.

[43]Part I, para 10.

[44]According to the EAAU, over 90% of retail prices and 80 percent of producer and agricultural prices are determined by the market. EAAU, at 3. *See also* Will Martin and Christian Bach, *The Importance of State Trading in China's Trade Regime*, *infra* this book, at 155, 160-61.

[45]Part I, para. 11.

[46]*Id.* at para. 11:2.

system to complaints by WTO members directed at non-prohibited, yet actionable, subsidies.

G. Balance of Payments

As with respect to subsidies, the draft Protocol provision on balance of payments measures is entirely bracketed and italicized. One reason for this may be that the provision would limit China's choice of policy instruments to be used in emergencies. Only price-based measures, such as import surcharges that would be applied in excess of bound tariffs on goods, could be used, and the use of quotas would be prohibited. Because currency/balance of payments type crises have affected the international economic system with some frequency in recent years, the provisions made for dealing with such eventualities have assumed increasing importance.[47]

H. Taxes

According to the draft Protocol, China would agree to follow general GATT 1994 disciplines with respect to the imposition of taxes on imported goods, which would generally require non-discriminatory treatment under Article III. This would be a substantial undertaking from the standpoint of importing enterprises. In addition, China would agree to phase in non-discriminatory border tax adjustments.

I. Standards and Technical Regulations

One of the greatest areas of concern to exporters is the application of technical standards and regulations that may be discriminatory either on their face or by operational effect. According to the draft Protocol, China would undertake to comply with the terms of Agreement on Technical Barriers to Trade (TBT Agreement) which is one of the mandatory GATT 1994 agreements. The TBT Agreement generally obligates Members to use international standards, where available, unless circumstances justify their non-use. China would be obligated to justify any exceptions to the TBT Committee, and its grounds for justification would be more limited than those provided in the express terms of the TBT Agreement. In addition, in

[47] *See, e.g.*, David Sanger, *New Economic Chief Sees Slow March to Open China Markets*, NY Times, Sept. 23, 1997, reporting alarm among Chinese officials with respect to the speed at which the recent Southeast Asia currency crisis spread.

bracketed text, China would be obligated to refrain from inspecting shipments for compliance with the terms of commercial contracts, and to refrain from retesting products that had been tested by a widely recognized conformity assessment body. In a non-bracketed provision, China would agree by a specific (yet to be determined) date to "eliminate the two-tiered system used for imports and domestic products," and otherwise to assure that domestic products are not favored over foreign products.[48]

J. Safeguards

The draft Protocol contains a fully bracketed and italicized provision on "Transitional Safeguards Mechanism."[49] This provision would allow WTO Members to take expedited action to offset market disruptions caused by unusual increases in Chinese exports.[50] In addition, this provision would permit China or another Member to suspend the operation of the Protocol, and part or the whole of the WTO Agreement, as between them if either is not satisfied with its operation.[51] A Member is ordinarily entitled to withdraw from the WTO on six months' notice.[52] The draft Protocol safeguards provision is unusual, given its character as a complete "safety valve" permitting a Member to opt out of the arrangement with another Member at its discretion. Perhaps this safety valve has been incorporated in the draft Protocol at the insistence of industrialized Member governments anticipating parliamentary resistance to China's accession. It seems, however, an unfortunate precedent for Members otherwise seeking to more deeply embed the rule of law in the world trading system.

K. Antidumping and Price Levels

An obvious "special interest" feature of the draft Protocol is an italicized provision that would allow flexibility to Members to continue to treat China as a non-market economy in the determination of price levels in antidumping cases.[53] The establishment by antidumping authorities in the United States and European Communities of so-called "surrogate" market

[48]Part I, para. 15:8.

[49]Part I, para. 19.

[50]*E.g., id.*, at para 19:A:4.

[51]*Id.* Para. 19:B.

[52]WTO Agreement, art. XV:1.

[53]Unnumbered paragraph, "Price Comparability in Determining Subsidies and Dumping."

prices and "simulated" constructed values for goods allegedly dumped from non-market economy countries is widely acknowledged to yield unpredictable results. Since one of China's substantial incentives for joining the WTO is to add discipline to U.S. antidumping procedures, it will be interesting to see whether protection-seeking lobbying groups are once again able to exert an exceptional impact on U.S. trade negotiators.

L. SCHEDULES

As noted previously, the terms of schedules of concessions and commitments under the GATT 1994 and GATS are a critical element of the negotiations, and draft schedules are not attached to the draft Protocol published in March.[54] Published reports referred to in various footnotes to this reflection paper suggest that considerable progress has been made with respect to achieving acceptable Chinese levels of tariffs and certain non-tariff barriers to trade in goods. In bilateral negotiations, China has made substantial offers to reduce tariff barriers across a wide range of goods. Though the United States continues to seek assurance that China's substantial reductions in average tariffs do not disguise tariff "spikes" directed at important U.S. export sectors, differences over tariff rates do not appear to be a major obstacle to concluding a Protocol of Accession, particularly after President Ziang's commitment during his visit to the United States in late October 1997 that China would join the International Technology Agreement, and thus eliminate tariffs across a range of high-technology imports. However, through the end of 1997, little progress appears to have been made with respect to commitments on trade in services.

II. SERVICES AND DEVELOPING COUNTRY STATUS

A. Commitments on Trade in Services

It is reported, and discussions with government representatives confirm, that a major obstacle to the conclusion of the Protocol is China's re-

[54]Part II of the draft Protocol only refers to the incorporation of these schedules as annexes to the protocol. Part III relates to the formal mechanism for deposit by China of its acceptance of the Protocol, which will have been approved by WTO Members in accordance with procedures discussed *supra*.

luctance to make specific sectoral commitments under the GATS.[55] The GATS requires that Members accept certain general obligations in respect to their services sectors. Most important is the application of general most favored nation (MFN) treatment, pursuant to GATS Article II (subject to very limited exception). Each Member is obligated to treat service providers of other Members on an equivalent basis, *i.e.* no favoritism among third country providers. In addition, requirements such as transparency and the availability of remedial processes are applicable to all services sectors. However, the main substantive obligation under GATS, that of providing national treatment to foreign services providers, arises only when a Member has made a specific sectoral commitment in its schedule of commitments. These schedules may include exceptions from a general national treatment obligation.

When the GATS entered into force on January 1, 1995 most of the Members had made only standstill commitments with respect to national treatment. In other words, in various sectors they agreed that they would not adopt new non-conforming measures. For members that maintain relatively open services sectors, such as the US and EC, this commitment may have been significant since they agreed to maintain relatively open market access structures. For Members with less open services sectors, this commitment was of less importance.

Facts and perceptions fluctuate on almost a daily basis with regard to how "close" or "far" China is from meeting U.S. preconditions on market access concessions for an acceptable Protocol. On August 5, 1997, USTR Barshefsky was reported as saying that the Chinese "'have yet to make even a first-time offer' on opening their market for services."[56] On the same date, China's preparation to table an offer on services was reported. China's prospective proposals were said to cover banking, insurance, distribution and telecommunications. However, Chinese officials were said to caution against unrealistic expectations regarding their undeveloped services sec-

[55]*Accord see* Statement of Charlene Barshefsky, USTR, Before Senate Finance Committee, *Renewal of MFN Status for China*, FED. NEWS SERV., June 10, 1997; *China to Lower Tariffs on Raw Materials for the Second Time in Two Years, Ministry Says*, 14 BNA INT'L TR. REPTR. 1542, Sept. 17, 1997.

[56]Adding, "and they have not come forward with detailed proposals' to remove barriers to foreign agricultural products." Paul Blaustein, *U.S. Says China Isn't Close to WTO Accord; Beijing's Statements on Talks Disputed*, WASH. POST, Aug. 5, 1997, at C1.

tor, and EU officials said "the Chinese damped hopes of significantly improved access for foreign companies in financial services and telecommunications, two of the biggest services sectors."[57] In December 1997, China reportedly tabled new offers in banking, insurance, telecommunications, distribution and legal services; yet China's trade negotiators have already acknowledged that these offers do not adequately address the concerns of developed WTO Members.[58] U.S. services industry groups are urging U.S. negotiators to demand substantial further concessions from China.[59]

1. Telecommunications

Post entry into force of GATS, Members succeeded in concluding an agreement on market access in the basic telecommunications sector which applies to virtually all significant WTO Member economies.[60] This is a very important agreement since the WTO Members have agreed to permit non-discriminatory access to their basic telecommunications services markets, *i.e.* basic voice telephone. WTO members have also come close to reaching

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[57]Francis Williams and Nancy Dunne, *Hopes high for China's WTO Bid*, FIN. TIMES, Aug. 5, 1997, at 4.

[58]*WTO: Trade Officials in Geneva Criticize China's Latest WTO Services Offer*, 14 BNA INT'L TR. REPTR. 2124 (Dec. 10, 1997).

[59]*China to Be Called on to Further Open Its Services Market in WTO Accession Talks*, 15 BNA INT'L TRADE REPTR. 42 (Jan. 14, 1998).

[60]Fourth Protocol to the General Agreement on Trade in Services, WTO S/L/20, 30 April 1996 (www.wto.org/wto/archives4prot-e.htm, 8/21/97), done at Geneva 15 Apr. 1997. Commitments for implementation are scheduled for Jan. 1, 1998, unless otherwise specified. Fifty-six (56) countries will permit foreign ownership or control of all telecommunications services and facilities (covering 97% of WTO Member countries' total basis telecommunications services revenues). Sixty-five (65) countries guarantee pro-competitive regulatory principles (covering 94% of WTO Members' total basic telecommunications services revenues). Fifty-three (53) countries guarantee market access to international telecommunications services facilities (covering 99% of WTO Members' total basic telecommunications services revenues); with six (6) Members open for selected services. Forty-two (42) countries guarantee market access for satellite communications services and facilities (covering 80% of WTO Members' total satellite services revenues). (www.ustr.gov/agreements/telecommunications/agreements.html, 8/21/97).

an agreement on access in the banking and financial services sectors, although U.S. dissatisfaction with offers from a number of Asian Members has to date precluded a general agreement on this subject matter.[61]

Chinese officials have generally conveyed the impression that they would not agree to open the domestic telecommunications market to foreign service providers.[62] Nevertheless, as noted above, Chinese trade officials have tendered at least some limited market access offer in telecommunications.[63]

In considering areas such as basic telecommunications and banking services, it would be useful to recall the history of such negotiations among present WTO Members.

Negotiations on telecommunications market access were pursued in the GATT since the early 1970s.[64] Until about 5 years ago, these negotiations were largely within the province of government procurement, and concerned telecommunications equipment. Access to large scale transnational equipment purchasing was restricted by the government procurement exception of GATT article III:8, and progress on market access in the telecommunications equipment sector was exceedingly slow.

Most basic telephone service providers were government-owned or chartered monopolies, and GATT Contracting Parties showed little interest in allowing foreign service providers to compete against the government-owned and chartered carriers.[65] Over the past 5 to 10 years, the structure of regional telecommunications markets has changed dramatically, with privatization/demonopolization occurring rapidly in the U.S., Europe and Japan. The GATS telecommunications agreement fairly rapidly followed this privatization trend. However, by the time the GATS market access

[61]The process by which such agreements are concluded is discussed *infra* at 32.

[62]*See Beijing Puts a Wall Around Its Thriving Phone System,* WALL ST. J. INT'L , Aug. 28, 1997 and *China to Keep Telecommunications Market Closed to Foreign Operators, Minister Says,* 14 BNA INT'L TR. REPTR. 1460, Sept. 3, 1997.

[63]*Supra* notes 58-59.

[64]*See generally,* Frederick M. Abbott, *GATT and the European Community: A Formula for Peaceful Coexistence,* 12 MICH.J. INT'L L. 1 (1990).

[65]For many years the United States and European Community had little to discuss in the context of telecommunications service market access since the U.S. market was domestically dominated by a regulated monopoly, and the EC market was dominated by national carriers. The same situation pertained in Japan.

agreement was concluded, the U.S., Europe and Japan each maintained a highly developed telecommunications infrastructure.

In light of the very recent conversion of the OECD telecommunications markets to competitive structures, it would be a bit odd to place an immediate demand on China to fully open its telecommunications market. In this context, it would appear reasonable to establish a transition arrangement in respect to the Chinese basic telecommunications market. During the transition period while access to the Chinese market remained limited, Chinese enterprises might be restricted from competing in foreign Member telecommunications markets.[66]

2. *Banking*

Similar reasoning applies with respect to banking. Most Chinese banks are state-owned banks, and most deal extensively with China's state-owned enterprises (SOEs).[67] Private banking enterprise is quite new in China, and handles a small part of banking relations. From a purely commercial standpoint, much of the indebtedness of the SOEs to the state-owned banks is not sound.[68] If China's state-owned banks were immediately required to compete with foreign private banks, they might not be able to survive while continuing to support the SOEs. It appears reasonable that the Chinese banking system be given a period of time to cope with the transition of the SOEs to enterprises operating on a market basis.

A commitment by China to open its market to foreign banking competition might be modeled somewhat along the lines of the NAFTA, which set parameters for total foreign penetration over specified periods. Since Mexico's economy in 1994 was further along the market model than is China's today, somewhat more generous parameters than those used in the

[66]In the context of China's accession, it is possible for Members to agree that China would accede to the GATS, but without the benefit of MFN treatment in respect to the new arrangements in telecommunications and banking, if China is unwilling to make comparable commitments in these areas. This could be accomplished under the WTO Agreement Article IX :3 waiver rules (*see* GATS Annex on Article II Exemptions, at para. 2) or as a special term of the Protocol.

[67]EAAU, at 113-114.

[68]*Id.* at 126-28.

NAFTA might be considered. These parameters would themselves serve to foster an orderly transition of the Chinese banking system from state to private-operator dominated.

3. *General*

The main reason for suggesting that China be obligated to make reasonable commitments in the services sectors is articulated by Jacobsen and Oksenberg in a related context. In considering China's prospective admission to the GATT, they expressed concern that the conditions of accession be tight enough that China not be viewed as a substantial exception to the general application of GATT rules by developing countries and economies in transition.[69] If China is given too much leeway to act as a command economy, the liberal international trading system itself may come under pressure.

This concern seems reasonable, and provides a basis for suggesting that China accept a balanced level of obligation in regard to trade in services. However, it is equally reasonable to suggest that China not be expected to move much faster than the OECD countries themselves in the context of providing market access in sensitive sectors, so that at least medium-duration transition arrangements might be contemplated in these sectors.

B. Developing Country Status

Another of the major obstacles said to be impeding conclusion of an accession Protocol is China's insistence on being considered a "developing country" Member of the WTO.[70] As noted earlier, developing Members are

[69]*See* Jacobsen & Oksenberg, *infra* at 34-35.

[70]*See China Details Cuts on Farm Products, Autos, TVs as Part of WTO Accession Effort*, 14 BNA INT'L TR. REPTR. 1666, Oct. 1, 1997 (reporting comments of Chinese Finance Minister Liu Zhongli, " . . . if the requirements for China's entry do not reflect China's situation as a developing country and are too demanding, then we will not join.") ; World Trade Organization, Daily Report, Singapore Ministerial Conference Report, Statement by Mr. Long Yongtu, Assistant Minister of Foreign Trade and Economic Cooperation, China, 12 December 1996 (www.wto.org) critiquing treatment of developing countries in WTO, and suggesting that excessive demands on developing

entitled to special and differential treatment in the WTO context. There is no settled objective test in the WTO-GATT system for determining which Members are considered "developing."[71] Ordinarily, a developing Member would be expected to have a relatively low GDP per capita compared to developed Members. China claims that developing status is self-designated, and should not be the subject of a WTO Member accession decision. However, it is clear from the broad terms of Article XII of the WTO Agreement that Members may decide to make a determination on this subject a condition of accession.

There are a number of ways that being considered a "developing" Member affects the application of the WTO Agreement. Developing Members are not expected to offer the same level of concessions in trade negotiations as developed Members, and they are eligible to receive more favorable and discriminatory tariff treatment under the so-called "enabling clause" which authorizes the operation of the Generalized System of Preferences.[72] In addition, many of the new WTO agreements include transition arrangements applicable to developing Members. For example, the TRIPS Agreement permits a 5-year transition for developing Members to adopt compliant IPRs substantive standards, and for new patent subject matter coverage permits a 10-year transition.[73] As a further example, the Agreement on Subsidies contains special transition arrangements for developing Members.[74]

China maintains a GDP per capita that is quite low by OECD standards.[75] On the other hand, China is one of the world's largest economies,[76]

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countries in accession negotiations will have a negative effect. *See also* David Sanger, *New Economic Chief Sees Slow March to Open China Markets,* NY TIMES, Sept. 23, 1997, reporting remarks of China's new Minister of Economics, Zhu Rongji, including regarding WTO accession, "This problem will be solved eventually . . . It is unreasonable to make such demands on China, which is still a developing economy".

[71]*See* JOHN JACKSON, WILLIAM DAVEY & ALAN SYKES, INTERNATIONAL ECONOMIC RELATIONS 1108-38 (3D ED. 1995) and Michaela Eglin, *China's entry into the WTO with a little help from the EU,* 73 INT'L AFF. 489, 501-08.

[72]*Id.*

[73]TRIPS Agreement, art. 65:4.

[74]Subsidies Agreement, art. 27.

[75]As of 1990, per capita GDP in China was less than 10% of that in the United States. For the U.S., per capita GDP was $21,866; for China, $2,047. EAAU, at 46, Table 1.4.

[76]China's total GDP is already the second largest in the world. In 1990 figures, $2.323 trillion. *Id.*

and it is a major exporting country.[77] In this regard, China is something of a unique case for the WTO-GATT. Because China maintains a large and growing trade surplus with many OECD countries, particularly the United States, there is a concern in the OECD that authorizing it to receive trade concessions without providing concessions in return will exacerbate already existing political difficulties that accompany persistent trade imbalances.

A logical solution to the unique case of China would be for China and WTO Members to reach specific agreement on what aspects of developing Member treatment would be available to it, and what aspects would not be. For example, a good case can be made for permitting China's economy-in-transition to make use of the transition periods generally available to developing Members. On the other hand, given China's strength as an exporting Member, it might not expect to receive trade concessions in the absence of *quid pro quo* concessions in future trade negotiations with developed Members.

III. CHINA AS A WTO DECISION-MAKER

A. WTO Decision-Making Processes

China's entry into the WTO may affect the general governance climate of the organization. As noted earlier, the GATT 1947 functioned through a consensus decision process.[78] This meant that decisions were not taken if any one Contracting Party was sufficiently opposed to a proposed decision to voice a formal objection.[79] The consensus decision process served the GATT 1947 and serves the WTO (to date) well. The consensus process provides a pressure release for developing Members. If major industrialized

[77]China's merchandise exports in 1995 were valued at $148.8 billion. *Id.* at 141.

[78]Decision-making and voting arrangements under the GATT 1947, including provisions relating to the amendment of the General Agreement, are described and analyzed in Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689, 721-31 (1989).

[79]The WTO Agreement expressly defines "consensus" as follows:

> The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision. Article IX, note 1.

Members push a proposal too hard, developing Members can refuse to accommodate them. Similarly, developing Members, with numerical superiority, can not dominate the agenda of the organization. It can well be argued that the GATT 1947 succeeded as well as it did precisely because all of its Members agreed to the fundamental decisions. Failure in the GATT 1947 to achieve consensus on new agreements at the end of the Tokyo Round in 1979 led to the adoption of various Codes among industrialized Members, and the resulting GATT *a la carte* was widely viewed as an unsatisfactory arrangement. One of the great achievements of the Uruguay Round was consensus on a final result that reunified GATT — now WTO — commitments.

Members of the WTO make decisions on a variety of matters. These include decisions relating to: (1) amendment of the WTO Agreement;[80] (2) interpretation of the WTO Agreement;[81] (3) waivers that permit Members to deviate from WTO rules;[82] (4) adoption of new commitments under the GATS and TRIPS Agreement;[83] (5) acceptance/disapproval of dispute set-

[80]Amendment procedures are set forth in WTO Agreement, art. X. As a general rule, amendments require two-thirds acceptance of Members, and apply only to those Members that accept the amendment. Art. X:3. However, there is an exceptional procedure by which a three-fourths majority of Members may decide that an amendment will be binding on all Members, leaving those Members which do not wish to be bound free to withdraw from the WTO, or to obtain special approval to remain a Member. *Id.* There are other specific procedures, such as a procedure for expedited approval of amendment of the TRIPS Agreement under strictly limited circumstances (Art. X:6). Amendments that would fundamentally alter the WTO Agreement require unanimous consent. Art. X:2.

[81]Adoption of an interpretation requires a three-fourths majority vote of the Members. Article IX:2.

[82]Waivers are granted pursuant to three-fourths vote of the Members. Article IX:3.

[83]The GATS provides that Members will negotiate additional liberalization commitments in successive rounds, and provides that "[f]or each round, negotiating guidelines and procedures shall be established. GATS Article XIX:1&3. It also provides that "[t]he process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement." GATS Article XIX:4. Article X of the WTO Agreement provides that amendments to Part IV of the GATS, which includes the provision on progressive negotiations (Article XIX) and provides for the listing of market access commitments in an annex (Article XX), requires a two-thirds majority vote. Other amendments to the GATS also require a two-thirds majority, but in these other cases a three-fourths majority may bind Members to commitments they do not accept. GATS Article XIX:5. Members that wish

tlement decisions and authorization of withdrawal of concessions,[84] and; (6) the management of the organization, including budgets.[85] In the absence of consensus, decisions of Members are taken by a majority of votes cast, unless otherwise specified in the WTO Agreement.[86] Most important decisions require a two-thirds majority approval of Members. The granting of waivers and decisions that bind Members without their consent require a three-fourths majority.[87]

As a general proposition, amendments to the WTO Agreement are binding only on Members that accept them. However, the WTO Agreement, as did the GATT 1947, includes a procedure by which three-quarters of the Members may bind others without their consent, leaving the non-consenting Members free to withdraw from the WTO or to remain Members with the consent of the Ministerial Conference.[88] The procedure by which some Members might bind others Members without their consent was never used under the GATT 1947, and it has not been used in the WTO.

As noted earlier, the WTO Agreement changed the GATT 1947 dispute settlement process so that a single Member can no longer block a decision in the dispute settlement context. The establishment of panels and the

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to accept commitments without extending their obligations on an MFN basis must seek a waiver under the WTO Agreement Article IX:3 waiver procedure, which requires a three-fourths majority vote of Members. GATS Annex on Article II Exemptions.

The TRIPS Agreement includes an expedited amendment procedure for cases in which the agreement will be amended in line with multilateral agreements adopted in other fora (*e.g.*, WIPO)(TRIPS Agreement art. 71:2 and WTO Agreement, art. X:6), but this procedure may only be used when all Members of the WTO are parties to the other multilateral agreement, and this is likely to be a rare circumstance. *See* Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 HASTINGS INT'L & COMP. L. REV. 661, 667-70 (1997).

[84]WTO Dispute Settlement Understanding, at, *e.g.*, art. 16, 17:14 & 22:2. The quasi-automatic adoption procedure for panel and Appellate Body reports is discussed, *supra* at 8. Decisions on suspension of concessions would be by majority of votes cast. WTO Agreement, art. IX:1.

[85]Approval of the annual budget, including Member contributions, requires a "two-thirds majority comprising more than half of the Members of the WTO." WTO Agreement, art. VII:3. Other ordinary business and decisions are taken by a majority of Member votes cast (except as otherwise provided in the WTO Agreement). *Id.* art. IX:1.

[86]WTO Agreement, art. IX:1.

[87]*See* notes 80 and 82 *supra.*

[88]Regarding the GATT, *see* Protecting First World Assets, *supra* note 78, at 729-31. Regarding the WTO Agreement, *see* note 80 *supra.*

adoption of panel and Appellate Body reports are quasi-automatic.[89] The accession of a Member that might be prone to exercising a blocking vote will not have an impact on the dispute settlement process.

Outside the dispute settlement process, a breakdown of consensus decision-making could be envisioned in two principal ways. First, substantial groups or blocks of Members might act to oppose each others' proposals. Forty-five (45) industrialized Members and newly-industrialized economy Members (NIEs), and 85 developing Members and Members in transition, might, for example, constitute themselves into opposing blocks.

In the second foreseeable situation, one or a few Members could act to thwart the achievement of consensus on various matters.

The first situation has always been a prospect in the GATT-WTO system, and the organization has done well to avoid a polarization into industrialized and developing blocks thwarting the progressive evolution of the system. A single new Member such as China might affect the overall balance between industrialized and developing Members. As a very large economy, China's influence is likely to be greater than that of most other developing Members. It might be expected that China will be less influenced by political pressures from the great economic powers of Europe, Japan and the United States than are many other developing countries. China is in a substantially better position to pursue a path of self-sufficiency and inward looking economic development than are many other countries. China could conceivably lead developing Members toward a stalemate with industrialized Members on new agenda items. Even with the use of less-than-consensus decision-making rules that require majority and super-majority approvals, industrialized Members would have a very difficult time overcoming entrenched resistance from a large block of developing Members. Such resistance would certainly undermine the effectiveness of the WTO.

China has always possessed the opportunity to influence other developing countries of the world, including GATT-WTO Members. The fact that it is not a Member of the GATT-WTO does not preclude China from expressing its views. It has for some time had observer status in the organization, and it has had the opportunity to communicate. Over the past few

[89]Understanding on the Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], at arts. 6:1, 16:1 and 17:14. On the operation of the new WTO dispute settlement system, *see generally* INTERNATIONAL TRADE LAW AND THE GATT-WTO DISPUTE SETTLEMENT SYSTEM (E.-U. PETERSMANN ED. 1997).

decades, China has not had a strong influence on the economic policies of other developing countries. This may change to some extent now that China has adopted a more outward-oriented approach to economic development. Yet there seems no compelling reason to believe that China will soon emerge as the leader of a large block of developing Members seeking to prevent constructive decision-making in the WTO.

The second possibility is that China might seek to block the adoption of new initiatives, either alone or conjunction with a small group of WTO Members. Whether or not this is a realistic possibility, the WTO decision-making structure would permit the organization to continue to function fairly effectively; that is, to work around a single recalcitrant Member.

To take a concrete example: assume that there is general agreement among WTO Members on a new banking and financial services protocol to the GATS which would obligate all Members to provide national treatment in their domestic market. Assume further that China is unwilling to accept this commitment, and would propose to block the consensus adoption of a protocol. Since approval of a protocol would require a two-thirds majority vote, this could be undertaken without China's acceptance. However, because GATS Article II requires each Member to extend MFN treatment to all other Members, China would in theory have the benefit of market access in other Members without accepting a protocol. To deprive China of this right, WTO Members could adopt, in accordance with the GATS Annex on Article II Exemptions, a waiver of the GATS MFN obligation in respect to China for this limited purpose. While this is not an ideal path for the WTO to follow, it is available, and its use in respect to one or a few persistently objecting Members would seem unlikely to undermine the essential functioning of the organization.

This is an entirely speculative exercise. We should recall that China signed the Final Act of the Uruguay Round. In evaluating China's prospective conduct as a Member of the WTO, and whether or not China might threaten to undermine the consensus decision-making process, we might nevertheless usefully consider China's conduct in other important international organizations, for example the United Nations.

B. China in the United Nations and Other International Organizations

Recall, first, that while China was a founding member of the United Nations and, since its inception, was a permanent member of the Security Council, until 1971 a representative of the Republic of China (Taiwan) was accredited to the Council. This fact obscures what the PRC's role on the Council might have been until 1971. So, for example, it would seem likely that the presence of the PRC might have precluded the authorization of UN action on the Korean peninsula in the 1950s if its representative had been sitting (and present) on the Council.

Regarding events since 1971, the Chinese government cannot be characterized as an obstructionist member of the Security Council. China did not interfere with collective action supported by the United States and Europe in the cases of Iraq, Bosnia, Libya, Somalia or Haiti, nor has its presence significantly deterred efforts to achieve peaceful dispute settlement in the Middle East. Certainly China's presence as a permanent member on the Council has affected decisions, causing modifications of US/European proposals. China's interests differ from U.S. and European interests. It is reasonable to expect that a permanent member and major world political power would seek to affect Security Council decision-making. There does not, however, appear to be an incident since 1971 in which China, as a member of the UN Security Council, acted in a way that might be characterized as politically irresponsible.

There are a number of governments and non-governmental organizations that have objected to China's successful blocking of the adoption of reports of the UN Human Rights Commission critical of China's internal human rights-related practices.[90] China is among those countries which have most steadfastly resisted what its government maintains is external interference into internal affairs. It is clear that, under general principles of international law, human rights practices of a government are not a matter solely of internal concern. Human rights practices of all governments, including China's, are of manifest concern to the international community.

[90]This was most recently accomplished through China's sponsorship of a no-action motion in the Commission, which the United States, Canada, various European states and Japan opposed. *See* M2 PRESSWIRE, April 17, 1997, Lexis-Nexis ALLNEWS database.

A primary goal of the WTO is to improve standards of living around the world. In this sense, the WTO is an organization directly concerned with human rights.

Many WTO Members, including the United States, resist external interference in their internal affairs. The U.S. Congress consistently seeks to assure that the WTO will not make decisions that might result in changes to U.S. legislation, or affect U.S. legislative prerogatives. U.S. environmental NGOs demand assurances that U.S. legislation will not be affected by decisions taken in Geneva. China's objections to the activities of the UN Human Rights Commission might foreshadow some form of resistance to decisions taken at the WTO which China would consider inappropriate interference in its internal affairs. This prospect is worth considering. Nevertheless, it is also worth bearing in mind that government resistance to this kind of decision is not limited to the Chinese context.

China is a member of a number of other important international organizations, including the World Bank, International Monetary Fund and World Intellectual Property Organization. Regarding China's initial participation in the World Bank and IMF,[91] Jacobsen and Oksenberg concluded:

> The record at the World Bank and IMF and the brief record in GATT's MFA reveals an orderly process of initial participation of China. The dire predictions from some quarters that Chinese participation would be disruptive have not proven to be correct. [We] posited four possibilities: (1) that China would be a voice for major change on behalf of the developing countries; (2) that it would press for incremental changes so that Chinese traditions would be applied more generally; (3) that China would seek to receive special treatment; or (4) that China would basically accept the existing framework. By and large the fourth outcome is largely what has occurred.
>
> But an orderly entry does not mean that China's membership has been without consequences or challenges for the parties involved.[92]

Jacobsen and Oksenberg suggested that the terms of China's entry into the GATT would serve as the "litmus test" for China's participation in the international economic system. "[T]he real challenge," they said "looms

[91]As well as China's participation in the GATT Multifibre Arrangement prior to entry into force of the WTO Agreement.

[92]Jacobsen and Oksenberg, at 124-25.

ahead in crafting a protocol that will preserve the basically neoliberal orientation of the international trade regime."[93] They expressed concern that a protocol which gave China too much leeway to pursue neomercantilist trade policies would encourage other trading states, including those in the west, to likewise pursue neomercantilist policies.[94]

C. Conclusion Regarding China as a WTO Decision-Maker

The government and people of China have learned their economic lessons through a long period of trial-and-error experimentation in state and collective planning. That experience was direct, and caused considerable disruption in the personal lives of individuals. The progression of the Chinese economy from the neo-feudal during the Sun Yat-Sen era, through the Mao Zedong era, and to the Deng Xiaoping/Jiang Zemin era has demonstrated serious flaws inherent in the command economy structure. The government and people of China have seen first hand that the loosening of constraints on individual decision-making and private incentive have had an enormous positive impact on economic output, growth and personal disposable wealth. It is doubtful — though certainly not inconceivable — that China will choose to reverse its present course in the near to medium term.

China should be expected, as other states, to pursue its own interests in international economic and political affairs. China is pursuing a gradual adaptation of its economy to market orientation. Accession to the WTO, and participation in this organization, should benefit China in its pursuit of sustained economic growth. There is reason to believe that China's orientation in the WTO will differ from that of the United States and European Communities. However, there is little in the historical record to suggest that China will do other than act as a responsible Member of the WTO from the standpoint of its participation in decision-making processes.

[93] *Id.* at 159.
[94] *Id.* at 167-68.

IV. THE ACCESSION OF CHINA AND THE U.S. CONSTITUTIVE PROCESS

The approval by WTO Members of an Accession Protocol with China, as discussed in section I.B, is undertaken by vote of the Members, acting either by consensus or a two-thirds majority. The United States is represented in the WTO by its executive branch under the leadership of the U.S. Trade Representative, and its representatives include an Ambassador to the WTO. At a meeting of the WTO General Council at which approval of an accession Protocol would be voted upon,[95] the appropriate representative of the U.S. executive branch would cast the U.S. vote. The act of this representative would be effective on the international plane to bind the United States with respect to the decision of the WTO.

A. The Uruguay Round Agreements Act and Statement of Administrative Action

1. Provisions on Accessions

In the U.S. constitutional framework, the Congress has primary authority in the conduct of external trade relations, and the President and executive branch act in the field of international trade relations under both general and specific grants of authority from the Congress.[96] Congress authorized U.S. adherence to the WTO Agreement in the Uruguay Round Agreements Act (URAA), which act also implemented the WTO Agreement in U.S. domestic law.[97] In connection with the congressional fast-track approval process that was used for the URAA, the executive branch submitted to the Congress a Statement of Administrative Action that was and is intended to represent the authoritative interpretation of the agreements by the executive branch both for purposes of U.S. international obligation and

[95]Such vote could also be taken by the Ministerial Conference. WTO Agreement, art. IV:1&2 and IX:1.

[96]*See generally*, Stefan A. Riesenfeld and Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI-KENT L. REV. 571, 637-38 (1991), and in PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES (STEFAN A. RIESENFELD AND FREDERICK M. ABBOTT EDS. 1994).

[97]Uruguay Round Agreements Act (hereinafter URAA), Pub. L. 103-465, 108 Stat 4809 (1994), sec. 101(a)(1).

domestic law.[98] The Statement of Administrative Action was approved by Congress in connection with approval of the URAA.[99] The President accepted the WTO Agreement and related Uruguay Round Agreements following approval by Congress[100] and in accordance with the procedures prescribed in Article XIV of the WTO Agreement. The WTO Agreement and related agreements entered into force for the United States on January 1, 1995.[101]

The URAA and Statement of Administrative Action each address the accession of new Members to the WTO. Section 122(b) of the URAA provides that "the Trade Representative shall consult with the appropriate congressional committees before any vote is taken by the Ministerial Conference or the General Council relating to - . . . (5) the accession of a state or separate customs territory to the WTO Agreement . . . if the action described . . . would substantially affect the rights or obligations of the United States under the WTO Agreement or another multilateral trade agreement or potentially entails a change in federal or state law." In addition, Section 122 (c) provides that the USTR must submit a report on a WTO accession decision at the end of the calendar year in which it was made, and include "whether the United States intends to invoke Article XIII of the WTO Agreement [on non-application between Members]."[102]

In sum, under U.S. domestic law relating to the WTO Agreement, the executive branch is technically only under an obligation to consult with the

[98]Office of the U.S. Trade Representative, The Uruguay Round Agreements Act Statement of Administrative Action, at introduction. URAA, sec. 101(d).

[99]URAA, sec. 101(a)(2).

[100]URAA, sec. 101(b).

[101]*See* 19 USCA §3511 (1996).

[102]WTO Agreement Article XIII:3 on non-application in the context of an acceding Member provides that the Ministerial Conference must be notified of this decision before approval of the agreement on the terms of accession. Although the language of the URAA on reporting suggests that USTR would submit reports only after decisions are taken, the Statement of Administrative Action also states that "With respect to votes on . . . another country's accession to the WTO, . . . in the case of an accession, the report will state whether the United States intends to invoke the 'non-application' provisions of the WTO Agreement." Administrative Statement, at 22. The Administrative Statement acknowledges that "a government that decides not to apply those provisions may do so only at the time . . . the other government becomes a WTO Member" *id.* at 9. Therefore, despite the apparent inconsistency between the language of the statute and the Statement of Administrative Action, it would logically be the intent of the USTR to provide its written report to Congress before a vote was taken.

Congress before it votes in favor of an accession agreement or Protocol at the WTO. However, the Congress could by vote of a majority of members of the Senate and House chose to adopt a binding resolution or legislation denying the President authority to vote in favor of a specific accession. In view of the primacy of Congress in the field of trade, the President would be bound to abide by such a decision. Moreover, since the President must continually seek approval of his or her general trade policy and other matters (including the budget) from the Congress, the executive branch would have a strong incentive not to act in a matter such as the accession of China in the face of widespread congressional opposition.

B. The Jackson-Vanik Amendment to the Trade Act of 1974

Section 122(b) of the URAA must be read in light of the Jackson-Vanik Amendment to the Trade Act of 1974.[103] The Jackson-Vanik Amendment requires the President to deny MFN status to non-market economy countries which deny their citizens emigration rights. The President may grant such MFN status if he or she determines and reports to Congress that the subject country is permitting emigration, or the President may grant MFN status based on an annual waiver of the otherwise applicable restriction. Annual presidential waivers are subject to disapproval by joint resolution of Congress. China has been granted MFN status since 1980 based on a presidential waiver (and in accordance with the terms of a conditional U.S.-China trade agreement reciprocally granting MFN status).[104] Annual congressional hearings on proposed resolutions of disapproval have been widely reported.[105]

The Jackson-Vanik Amendment must be read in connection with Sec-

[103]19 USCA §2432 (1997).

[104]The Agreement on Trade Relations Between the United States and the People's Republic of China of July 7, 1979 permits a party to suspend application of the agreement "If either Contracting Party does not have the domestic authority to carry out its obligations under this Agreement . . . " Art. X:3. This escape clause leads me to characterize the agreement as "conditional."

[105]The most recent congressional hearings on this subject are, *e.g.*, at Hearing of the Trade Subcommittee of the House Ways and means Committee: U.S. China Relations, FED. NEWS SERV., June 17, 1997.

tion 102 of the URAA which provides "(a) Relationship of Agreements to United States Law. — (1) United States Law to Prevail in Conflict. — No provision of any of the Uruguay Round Agreements, nor the application of any such provisions to any person or circumstance, that is inconsistent with any law of the United States shall have effect." The Statement of Administrative Action states:

> . . . the section reflects the Congressional view that necessary changes in federal statutes should be specifically enacted rather than provided for in a blanket preemption of federal statutes by those agreements.
>
> *****
>
> Accordingly, at this time it is the expectation of the Administration that no changes in existing federal law, rules, regulations, or orders other than those specifically indicated in the implementing bill and this Statement will be required to implement the new international obligations that will be assumed by the United States under the Uruguay Round agreements. Should it prove otherwise, the Administration would need to seek new legislation from Congress or, if a change in regulation is required, follow normal agency procedures for amending regulations.[106]

Does the President require further Congressional approval before voting in favor of China's accession at the WTO? One could argue that (a) since the WTO Agreement contemplates accessions, and (b) Congress in the URAA explicitly required prior consultation if an accession might require a change in federal law, that (c) the President need only consult with the Congress before voting in favor of China's accession. However, since the USTR's Statement of Administrative Action says that the executive will seek new legislation from Congress if the WTO Agreement requires any change to federal legislation, the executive might have some difficulty in justifying this interpretation in light of Jackson-Vanik.

Generally speaking, the U.S. follows a "last in time" rule in respect of the relationship between treaties and ordinary federal legislation.[107] To the extent of an inconsistency, a later in time treaty will supersede a federal statute, and *vice versa*. Thus, absent another controlling legal rule, an accession agreement between China and the WTO, which binds the United

[106]Office of the U.S. Trade Representative, The Uruguay Round Agreements Act Statement of Administrative Action (1994), at 14.

[107]Riesenfeld and Abbott, *supra* note 96, at 576.

States, would control operation of the Jackson-Vanik Amendment and act to permanently grant MFN status to China under U.S. domestic law.

It would appear to be the intention of Congress in enactment of Section 102(a)(1) of the URAA that decisions taken at the WTO level that are inconsistent with existing federal legislation not be considered to automatically supersede that legislation, and that necessary changes to federal legislation must be made by the Congress. A WTO China Accession Protocol might be considered a "later in time" treaty from the standpoint of continued application of the Jackson-Vanik Amendment, and therefore under ordinary circumstances be considered to supersede that statutory provision. However, since (1) Congress has primary authority to regulate the conduct of foreign commercial affairs; (2) Congress authorized approval of the WTO Agreement on the basis that it not be deemed to supersede federal legislation; and (3) Congress retains the power from a domestic law standpoint to override the WTO Agreement and Accession Protocol — the approval of a China Accession Protocol would perhaps not be considered to supersede the Jackson-Vanik amendment for U.S. domestic law purposes — absent a specific indication of congressional assent to such an effect. Though this conclusion is open to debate, it would appear necessary for Congress to resolve a potential inconsistency between U.S. obligations under the WTO Agreement and China Accession Protocol, and the terms of the Jackson-Vanik Amendment, in connection with China's accession to the WTO.[108]

What if Congress should decide to authorize a vote in favor of China's accession to the WTO while maintaining the Jackson-Vanik Amendment in force? In other words, what if it says in essence that the United States will grant China MFN status on a year-to-year basis through the mechanism of a presidential waiver? Would the United States be violating a WTO obligation?

There are several GATT dispute settlement panel decisions which hold that the maintenance in force of domestic legislation which permits GATT-

[108]This conclusion is implicitly supported by the President's Commission, which writes:

> The Commission recommends that the negotiation of China's accession to the WTO be completed before the United States grants permanent MFN privileges to China. To grant MFN prematurely would remove a major incentive for China to bring its trade and investment practices into conformity with prevailing world standards. *Id.* at 33.

inconsistent action, but does not mandate such action, is not subject to successful challenge.[109] These decisions might suggest that mere maintenance in force of the Jackson-Vanik Amendment in respect to China would not violate the WTO Agreement. However, a recent WTO Appellate Body Report confirms that a WTO Member must establish sound legal mechanisms for implementing its obligations under the WTO Agreement.[110] If, as a WTO Member, China faced an annual review of its MFN status in the U.S. Congress, would the United States have fulfilled its obligation to provide a sound legal basis for according MFN status to China in its domestic law?

As a matter of legal coherence, it might be expected that a congressional debate concerning China's WTO accession that ended with a favorable attitude toward accession would also result in a congressional decision to modify the Jackson-Vanik amendment so that China would not be covered by its terms. This will not necessarily be the result.

V. CONCLUDING OBSERVATIONS

There appears to be a consensus among United States and European Union trade negotiators strongly in favor of China's accession to the WTO, but on the condition that China accept the "fundamental rules" applicable to WTO Members, and that China accept a level of commitments that "is commensurate to the size and importance of that economy."[111]

This approach appears to have merit.

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[109]For example, in *United States–Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, Report of the Panel adopted June 17, 1987, the panel held that U.S. legislation imposing certain discriminatory tax penalties, but allowing Treasury authorities to issue non-discriminatory implementing regulations, was not GATT-inconsistent (at paras. 5.2.9-5.2.10).

[110]India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, Report of the Appellate Body, WT/DS50/AB/R, 19 Dec. 1997, *e.g.*, at paras. 57-58.

[111]*See U.S., EU Agree Progress Needed by China in WTO Accession Negotiations, Brittan Says*, 14 BNA INT'L TR. REPTR. 1667, Oct. 1, 1997 (quoted comments by Sir Leon Brittan, reflecting discussions with USTR Barshefsky and Undersecretary of State Eizenstat). Japan is not referred to as a member of this consensus because of reported perceptions that its government may be willing to accept more concessionary terms than are acceptable to the U.S. and EU.

There has always been pressure within the GATT, now the WTO, for backsliding from market liberalization. All governments have reasons for protection and protectionism. Jobs in industries made noncompetitive as a result of foreign competition are always under threat. Self-sufficiency in agriculture is a constant demand. Demands for governments to "rationalize" domestic and international markets are ever-present.

China is a great presence in the international economic and political arenas. By providing unusually favorable treatment to China, Members of the WTO might send the wrong signal — a signal that protectionism is tolerated by the WTO, provided that the political importance of the potential protectionist is sufficiently great.

In addition, the viability of the WTO as an international institution depends on continued political support within the parliaments and legislatures of its Members. A China Accession Protocol that achieves a reasonable level of market access commitments will be important to assuring a favorable reaction in these popular legislative bodies.

It is also clear that China's economy is in the midst of transition from a command structure to a market structure. China's leaders have good reason to be concerned that an economic "shock" might accompany immediate market liberalization and might be destabilizing for the country as a whole. The virtually instantaneous collapse of the Soviet-Russian economic command structure and the rapid Russian transition to open markets generated a period of very serious internal turmoil and potential threat to world public order. There is little in the Russian transition that lends itself as a model.

The use of transitional arrangements intended to bring China's market access commitments in line with those of other major WTO economies appears to be a reasonable course. The OECD business community and financial markets are incessantly anxious for immediate results. Yet it is useful to recall that the member states of the European Economic Community agreed to liberalize the Community services market in 1957/58, and that major progress had been largely unrealized until implementation of the 1992 Plan. Whether China's services markets are open in 5 years, 10 years, or even 15 years, is not a burning question for the international economic system; provided that China is committed to meeting a defined timetable which ultimately produces a substantive result commensurate with that of other WTO Members.

The end of the Cold War era is demanding more inclusive international economic institutions. The widening of membership in these institutions cannot be accomplished without some element of risk. This risk should be welcomed in a trade-off against the greater risk of isolating and alienating the major economic and political powers whose transition to market orientation may otherwise portend a very positive contribution to the international community.