Sino 301: How Congress Can Effectively Review Relations with China after WTO Accession

Charles Tiefer
Sino 301: How Congress Can Effectively Review Relations with China After WTO Accession

Charles Tiefer*

Introduction .................................................... 56

I. The Framework for a Sino 301 .................................................... 60
   A. The Annual MFN Review .................................................. 60
   B. The Section 301 System and the Previous MOUs with China ............ 63
   C. The WTO and the Accession Agreement .................................. 67

II. How a Sino 301 Would Continue the Central Aspects of the Annual MFN Review ........................................ 69
   A. Likely Problems With China's Trade Liberalization .................... 69
      1. Local Chinese Protectionism ........................................... 69
      2. State-Owned Enterprises .............................................. 72
      3. Nontransparent, Arbitrary, and Sometimes Corrupt Administration .......... 74
   B. Tools and Remedies that a Sino 301 Could Trigger .................... 76
      1. Enhanced Antidumping and Countervailing Duty Remedies ............. 76
      2. Import Surge Safeguards ............................................. 79
      3. Retaliation for Chinese Failures to Achieve Trade Liberalization Benchmarks .......... 81
      4. Encouraged Negotiation of Sino-American Restraint Agreements ........ 83
   C. Sino 301 Triggering Processes ......................................... 84
      1. Initial Tasking of USTR ............................................. 84
      2. Annual Review ..................................................... 85

III. The Upholding of a Sino 301 Provision Based on the WTO "301 Panel" Decision ........................................ 87

Conclusion ...................................................... 91
   A. Relations with China .................................................. 91
   B. The American Balance in Trade Relations ............................ 92

* Professor, University of Baltimore Law School; B.A., summa cum laude 1974, Columbia College; J.D., magna cum laude 1977, Harvard Law School. The author would like to thank Jennifer Ferragut for her research assistance and the skilled staff of Emily R. Greenberg for their library/computer assistance. Appreciation is also expressed for the help from colleagues on the law faculties of Beijing University, Fudan University, and East China University for discussions about the significance of the WTO during a trip to China in 1997.

34 CORNELL INT’L LJ. 55 (2001)
Introduction

China's agreement with the United States regarding accession to the World Trade Organization (WTO)\(^1\) challenges Congress to undertake an active response summarized by the term "Sino 301." China's WTO accession forces Congress to determine what can or should take the place of the review of trade and other relations with China, known as the "annual Most Favored Nation (MFN) review," which was formerly conducted annually during the 1990s, but was ended by Congress in October 2000.\(^2\)

This article contends that international trade law and the China-U.S. WTO Accession Agreement leave room for a system akin to the annual MFN review. The U.S. Trade Representative (USTR) can continue to prepare an annual evaluative report on China and recurring Congressional hearings and potential votes can take place, with the possibility of an ultimate option of a Congressionally-triggered resort to China trade tools to follow. Changes must occur to make this system workable, and this article addresses the related intellectual challenge—that of envisioning a new Congressionally-established structure and process for American debate over trade and other relations with China in years to come.\(^3\)

China's rapidly expanding economy and its opportunities for American trade and investment, on the one hand, and its exploding trade imbalance and Beijing's mixed record on international relations and human rights, on the other, have combined to produce a highly volatile American domestic debate regarding trade and other relations with China. The annual MFN review provided structure and process to the American debate about China. It allowed Congress to serve as the forum for this debate, without precluding the United States and China from developing closer trade and other international relations. However, the annual MFN review system depended, to make the debate meaningful, on an adverse vote in

---


Congress triggering the backward-looking tool of returning China to non-MFN high tariff levels. The WTO rules no longer allow Congress to threaten such action. However, that may not matter as much as it seems. MFN review was just one phase of the half-century evolution of American trade law regarding Communist countries in general and China in particular. Congress never actually ordered a withdrawal of China's MFN status, not even in its strong reaction after Tienanmen Square, nor did it block China's quest for WTO accession.

What gave weight to the annual MFN process consisted less in the magnitude of this never-used tool, but rather that Congress could realistically debate action at all. Similarly, during annual Sino 301 reviews, Congress could use an adverse triggering vote to impose those potent curbs on China's trade that pass muster under the WTO rules. As this article discusses, China is not likely to make a rapid and smooth transition to a liberalized rule-oriented economy. In turn, China's inability, notwithstanding a good-faith effort, to come into compliance with its trade liberalization undertakings gives the United States the option to declare that its rights have been violated and invoke retaliatory trade options against China. Thus, Sino 301 legislation could result in Congressional votes seeking the invocation of maximum trade remedies permitted against a noncompliant China.

Observers with an intense free-trade orientation, or "free-trade enthusiasts," hope that China's accession to the WTO, with the accompanying elimination of the annual MFN review, would better the relationship between China and the United States. This conclusion stems from the reduction or channeling of national protectionist reactions to the expansion of trade that General Agreement on Tariffs and Trade (GATT) and WTO have brought on in other spheres. Conversely, observers with an

---


7. For that quest, see Monica Hsiao, China and the GATT: Two Theories of Political Economy Explaining China's Desire for Membership in the GATT, 12 UCLA Pac. Basin L.J. 431 (1994).

opposing orientation, or "China-critics," fear that eliminating the annual MFN review will effectively silence valid U.S. grounds for criticism of China’s trade and other practices. This article takes a process-oriented viewpoint that looks not for how to rule in, or out, either the free-trade enthusiast or the China-critic orientation. Rather, the article advocates a statutory process whereby both viewpoints obtain a hearing in annual debates, thus keeping U.S. policy balanced, flexible, and dynamic.

Since 1962, Congress has constructed a system known by the statutory citations as “Section 301,” “Special 301,” and “Super 301,” of the Trade Adjustment Act. This system applies to countries within the GATT and WTO and provides a mechanism by which the United States threatens trade sanctions against countries not complying with their legal obligations. Building on the existing 301 system, this article envisages an amendment to Section 301 specially oriented to trade relations with transitional, formerly nonmarket economies—a Sino 301. In international trade law, Sino 301 would draw justification from China's special status as a transitional former nonmarket economy under an accession agreement. The potential U.S. actions pursuant to a Sino 301 would consist in part of maximum resort to the WTO-recognized tools of antidumping remedies, countervailing duties, and import surge safeguards. Added to this would be the U.S. ability to declare China a violator of American rights by


10. For how that balance has worked generally regarding American trade unilateralism, see, for instance, Thomas O. Bayard & Kimberly Ann Elliott, Reciprocity and Retaliation in U.S. Trade Policy (1994); AGGRESSIVE UNILATERALISM: AMERICA’S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh Patrick eds., 1990). For the author’s recent study of that balance in American trade relations, see Charles Tiefer, Adjusting Sovereignty: Contemporary Congressional-Executive Interactions About International Organizations, 35 TEX. INT’L L. 239 (2000) [hereinafter Tiefer, Adjusting Sovereignty].


failing to comply with its trade liberalization undertakings. A Sino 301 would also include a mechanism to encourage negotiations with China of supplemental bilateral trade restraint agreements. If China takes steps in trade and other relations that push Congress toward, or actually into, setting off the trigger in its annual review, such negotiated restraint agreements would afford Beijing a way, albeit a painful one, of dealing with the frictions between the United States and China within a framework of mutually agreed adjustments.

Part I of this article describes the existing framework of trade relations law, tracing its key aspects from their origins. This Part includes discussion of the annual MFN reviews, Section 301 regime, previous Memoranda of Understanding (MOUs) with China, the WTO, and the China-U.S. WTO Accession Agreement. Part II focuses on the function and fit of Sino 301 into the above framework. It addresses problems likely to persist regarding China's compliance with WTO and accession agreement rules, including the problems of state-owned enterprises, local protectionism, and failure to achieve transparency. This Part then considers tools and remedies triggered by a Congressional vote or an Executive finding. It explains the workings of particularly potent tools available to the United States, such as antidumping remedies, countervailing duties, import surge safeguards, retaliations for failure to achieve accession agreement "benchmarking," and encouraged negotiation of bilateral trade restraint agreements with China.

Part III explains why a Sino 301 provision would survive a challenge by China in the WTO. A seminal ruling by a WTO panel in December 1999 on a major challenge by the European Union (EU) ultimately found


16. For a recent review of the law and policies from their origins to almost the final negotiations for the accession agreement, see MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION 8-60 (1999).


the 301 system not a violation of the WTO agreements when construed in light of the system’s practical workings.\textsuperscript{20} A challenge by China to a Sino 301 would fail similarly.

The conclusion addresses the implications of Sino 301 implementation to China and the United States. For relations with China, it would continue the dynamic balance between Administration-guided cooperation and Congressionally-guided critical review. For U.S. participation in the international trade regime, it would continue U.S. balance between Administration-guided trade multilateralism and Congressionally-adjusted statutory trade unilateralism. These balances would place the United States in the role of an ambivalent, yet successful, democratic superpower.

I. The Framework for a Sino 301

The framework for new legislation regarding trade with China has three components: the annual MFN review of trade with China that dominated the 1990s, the 301 system that has already shaped trade relations and produced trade agreements with China, and the rules of the WTO and the accession agreement for China. Each of these elements arose from a political evolution. These reflect Congress’s historical role as a forum for debate between U.S. political forces on opposing sides of the free-trade issue.

A. The Annual MFN Review

There were three stages in the evolution of the annual MFN review: America’s initial stance toward Communist countries, the Jackson-Vanik Amendment of 1974 focusing on nonmarket Communist countries, and the active employment of that Amendment in the 1990s with respect to China. This process reflects how, in political terms, Congress became the forum for debate between U.S. political forces on opposing sides of the China free-trade issue. From the early 1900s, the United States employed a dual-tariff system: a minimum tariff for favored countries and a high tariff for disfavored ones.\textsuperscript{21} After World War II, the track for favored countries—the MFN status—became connected with successful fostering by the United States of the GATT international institution and agreement. However, the Cold War led Congress to maintain disfavored status for Communist nations.\textsuperscript{22} Nonetheless, during the 1950s and 1960s, Congress allowed treatment of Yugoslavia, Poland, and Hungary to deviate from the hostile trade treatment accorded to the remainder of the Communist states. Congress did so based on a political assessment of those nations’ regimes, considering factors such as its desire to support Tito’s separation from Moscow. Congress did not conduct nonpolitical assessments of economic


\textsuperscript{21} ROBERT A. PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY, 1929-1976 (1980); Kuo, supra note 2, at 95-96.

\textsuperscript{22} M.M. KOSTECKI, EAST-WEST TRADE AND THE GATT SYSTEM (1979); Kuo, supra note 2, at 97-101.
or international trade law in determining a nation's status.\textsuperscript{23} 

In the late 1960s and early 1970s, legislative authorization of trade relations temporarily ceased as Congress reacted against what it considered excessive free-trade diplomacy by the Executive branch. This attitude continued until Congress extensively updated U.S. trade law via the Trade Act of 1974.\textsuperscript{24} Additionally, Congress adapted détente with the Soviet Union by the Jackson-Vanik Amendment.\textsuperscript{25} The Amendment allowed the President to extend MFN status to Communist countries, but only after first determining whether they allowed substantially free emigration.\textsuperscript{26} Congress enacted the Jackson-Vanik Amendment with the Soviet Union in mind, without initially considering its possible application to China. In 1974, with China's economy underdeveloped and isolated after decades of Mao's mistaken policies, trade relations with China received no attention. However, with the beginning of Chinese economic liberalization in 1978, the Chinese economy and the potential for significant trade with China began to grow.\textsuperscript{27} The Jackson-Vanik Amendment permitted the President to engage in an annual MFN review process.\textsuperscript{28} The President was empowered to make annual waivers of the Amendment's requirements, subject to Congressional override, thereby allowing MFN treatment for countries subject to the Amendment.\textsuperscript{29} In 1979, President Carter made the first of a series of annual waivers of Jackson-Vanik Amendment for China.\textsuperscript{30} This waiver continued for a decade with relatively little controversy. During this time, the Chinese economy made tremendous progress, with foreign direct investment and foreign trade at its core.\textsuperscript{31} 

The era of noncontroversial trade relations with China continued until the Tienanmen Square incident in June 1989. Thereafter, the MFN review and related processes became a test of U.S. political attitudes about trade and other relations with China.\textsuperscript{32} Initially, during 1990-92, the Democratic Congress took a harder line toward the Beijing regime than President Bush wished, with legislative processes exhibiting strong vocalizations of the political reaction against Beijing.\textsuperscript{33} Then, following the 1992 campaign in which relations with Beijing were a political issue, President Clinton

\textsuperscript{23} See generally id.
\textsuperscript{24} Trade Act of 1974, 19 U.S.C. § 1411; Jackson et al., supra note 5, at 818.
\textsuperscript{25} Section 401 of the Trade Act of 1974, 19 U.S.C. § 2432.
\textsuperscript{26} Congress specifically aimed in the Jackson-Vanik provision to condition trade with the Soviet Union on that nation's allowing Soviet Jews to emigrate to Israel. Paula Stern, Water's Edge: Domestic Politics and the Making of American Foreign Policy 28-30 (1979).
\textsuperscript{28} Id. at 1329.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 1334.
\textsuperscript{31} Id. at 1334-38.
\textsuperscript{32} Randall Green, Human Rights and Most-Favored-Nation Tariff Rates for Products from the People's Republic of China, 17 U. Puget Sound L. Rev. 611, 616 (1994); Jiang-Schuerger, supra note 27.
\textsuperscript{33} Jiang-Schuerger, supra note 27, at 1321-24.
attempted to link the continuation of China's MFN status with improvements in its human rights record. However, the Beijing regime stood firm during the following two years against human rights improvements sought by Washington. Ultimately, in 1995, President Clinton separated discussions of China's human rights and its MFN status. Thereafter, Congress held serious debates and elicited test votes on China's MFN status during 1997-2000, criticizing China but never voting to end its MFN status.

On one side, this sequence of events reflected a number of U.S. discontentments with China on trade and other relations: perceived shortcomings in trade relations such as refusals to open key sectors to U.S. investment and sales, the massive and growing trade imbalance with the United States, the human rights record of the Beijing regime, and foreign relations issues such as nuclear espionage, alleged 1996 campaign contributions, and threats about Taiwan. Moreover, these dissatisfactions occurred against the background of a political backlash against free trade on labor and environmental grounds and from concerns about the nation's large trade deficit, as reflected in the House's failure to renew "fast track" in 1997 and the demonstrations in Seattle in November 1999 at the start of a new round of WTO negotiations.

On the other side, the number of votes was insufficient for Congress to decide against permanent normal trade relations with China. Nor did China's WTO accession become an issue disputed by the major party presidential candidates in the 2000 election. This reflected the political strengths of free trade, particularly its strong business support. It also reflected American public sympathy for the Chinese people and their successful economic liberalization, notwithstanding the disagreements over policy with Beijing.

34. Lampton, supra note 2, at 9.
35. Jiang-Schuergen, supra note 27, at 1334.
36. Id.
37. Lori Nitschke, Trade Measure Won't Clear Until Fall; House Backers See a Risky Delay, Stave Off Annual Move Against China, 57 CONG. Q. 1823 (July 22, 2000) (noting House vote against ending China's MFN status); Lori Nitschke, China's Human Rights Record Dominates Debate as House Votes to Keep Trade Doors Open, 57 CONG. Q. 1887 (July 31, 1999) (noting House vote against ending China's MFN status); Jiang-Schuergen, supra note 27, at 1322 n.7 (noting House vote against ending China's MFN status).
39. "Fast track" is the statutory authority that allows the President to negotiate trade agreements, which Congress approves on a strictly up-or-down basis, without amendments. Tiefer, Alongside the Fast Track, supra note 19, at 329.
41. See generally China's Trade Status, supra note 2.
B. The Section 301 System and the Previous MOUs with China

The Section 301 system arose through several evolutionary stages. Only in the past decade has it had significant impact on trade relations with China. Like the previously-described framework that gave rise to the annual MFN review, the Section 301 system, too, reflects how Congress historically served as the nation's forum for trade debate.

After World War II, the United States opened its markets to its non-Communist allies, including its former wartime enemies, Germany and Japan, both of which revived as global economic engines. Initially, the United States accepted the GATT as the chief means of ensuring that these countries reciprocated U.S. openness. However, by 1962, Congress began to reflect a domestic political conviction that other countries, particularly Japan and members of the European Economic Community (EEC), had not honored U.S. rights. In response, it enacted Section 252 of the 1962 Act authorizing retaliation against other countries' import restrictions of either illegal or "unreasonable" nature. In the 1974 Act, Congress further followed these domestic political convictions, exacerbated by a sense of the shortcomings of the GATT itself and the Kennedy Round agreement. Specifically, Congress created Section 301, allowing measures to be taken against countries that maintained unreasonable barriers to U.S. trade.

In 1988, Congress expanded the Section 301 system significantly. In response to the persistent foreign infringement on intellectual property rights, the 1988 Act added the "Special 301" provision. It provided for identification of countries that infringed on intellectual property rights and imposed unilateral U.S. trade sanctions if those countries did not mend their ways. U.S. sanctions could take the form of suspension of trade agreement benefits or an increase in tariffs or non-tariff barriers against imports from the violating countries. Also, the 1988 Act added the "Super 301" provision, which allowed the USTR to identify foreign country practices that blocked U.S. exports and designate them as priori-

---

42. JACKSON ET AL., supra note 5, at 294-95.
43. Id. at 140
44. Hudec, supra note 11, at 510-13.
45. JACKSON ET AL., supra note 5, at 141, 817-18 (discussing developments, including the Kennedy Round agreement that reduced international trade barriers and strengthened the GATT).
50. Id.
51. 19 U.S.C. § 2411(c)(1)(A)-(B); see also § 2416(b).
ties.\(^{52}\) The Super 301 provision remains the backbone of unilateral U.S. efforts to force trade liberalization on foreign countries.\(^{53}\)

The U.S. application of Section 301 to China led to a Memorandum of Understanding (MOU) in 1992, which recognized the significance of Beijing's movement toward freer trade.\(^{54}\) Interestingly, the United States implemented Special 301 against China in successive stages, providing an example for how the Section 301 system can work in the future in Sino-American trade relations. In 1989, the USTR placed China on the "Priority Watch" list it maintains for countries warranting special monitoring to determine whether to take additional Special 301 steps against them. The likelihood of sanctions increased following the 1991 designation of China as a "priority foreign country."\(^{55}\) Under this pressure, China negotiated and signed an intellectual property MOU in 1992.\(^{56}\)

It became evident by 1994 that China did not implement these protections effectively. The U.S. experience with market access in China in the early 1990s may be indicative of China's ability to implement the WTO Accession Agreement. It shows how Congressional enactments (in that instance, Special 301) can presage the U.S. reaction to China's later nonfulfillment of a trade agreement (in that instance, the 1992 MOU). This serves as a model of how a Sino 301 enactment may well predetermine Chinese-American trade relations under the 1999 WTO Accession Agreement.

Chinese behavior after the 1992 MOU should neither be seen as outright recalcitrance, nor as bad faith on the government's part. China attempted to protect foreign intellectual property after the 1992 MOU. It acceded to international conventions and adopted its own laws and regulations.\(^{57}\) A single sentence in the 1992 MOU captured the agreement of the two countries to "provide effective procedures and remedies to prevent or stop, internally and at their borders, infringement of intellectual property rights and to deter further infringement."\(^{58}\) China could argue that it attempted action, but its efforts took place against a backdrop of system limitations, which, for the most part, impeded its ability to truly curb abuses. Indeed, with only one sentence of guidance using the general words "effective procedures and remedies," the Chinese government had not committed itself in detail to what it would do.\(^{59}\) As with other transitional aspects of a previously-Communist state and particularly one with a

---

52. 19 U.S.C. § 2420.
58. Id. at 1060.
59. Id. at 1062.
developing economy, China simply lacked the pre-existing practical tools for carrying out the 1992 MOU’s commitments effectively enforcing intellectual property rights. Furthermore, the 1992 MOU and the implementing measures occurred at a time when China had a long way to go before it could curb intellectual property abuses.

As with the 1992 MOU, China may attempt to follow the accession agreement in good faith but, given the context of structural limitations, the terms of the deal provide little guidance for implementation. The issue is not whether recalcitrance or bad faith will impede the effort to implement the accession agreement—Beijing is trying, and will try, to comply. However, the limited guidance China has from the agreement, together with China’s perennial difficulty (that is, its lack of “practical tools”) in implementing such agreements, lead to the expectation that China will fall short of full and smooth compliance.

The Special 301 legislation directed U.S. reaction to China's behavior subsequent to the 1992 MOU. In 1993, the USTR again elevated China to the priority watch list and, in 1994, the USTR named China as a priority foreign country. Interestingly, Congress also followed China’s problems with implementation of the 1992 MOU closely. In January 1995, the General Accounting Office, Congress’s auditing arm, published an impressive study of the problem, which concluded that though China had attempted to comply with the MOUs on market access and intellectual property rights, U.S. business interests were still unprotected and improvements were only predicted in the long term. In 1995, the USTR estimated “that the damage caused by China’s failure to provide adequate intellectual property protection or market access for persons who rely on intellectual property protection is at least $1.08 billion on an annual basis.” This conclusion served as a justification for the imposition of hundred percent tariffs on Chinese imports worth $1.08 billion. China then took bold enforcement steps by conducting a dramatic raid on a copyright-infringing (the usual term is “pirating”) factory, promising additional similar steps, and adopting a new 1995 MOU spelling out its commitments in greater detail. Ultimately, the United States did not impose sanctions.

It should be noted that the United States followed a similar pattern in the context of national security considerations. In an attempt to minimize missile proliferation, the United States joined with other nations in a Mis-

60. Zhou, supra note 5.
62. BHALA, supra note 55, at 1063.
63. UNITED STATES GENERAL ACCOUNTING OFFICE, IMPLEMENTATION OF AGREEMENTS ON MARKET ACCESS AND INTELLECTUAL PROPERTY (1995).
64. BHALA, supra note 55, at 1072.
66. See BHALA, supra note 55, at 1072-74.
67. Id.
sile Technology Control Regime (MTCR) to prevent the export of missile
technology to problematic countries.  

69. Id.
70. Id.
71. Id. at 24.
73. Ross, supra note 68, at 22-24.
However, it is debatable whether these measures actually reduced the shipment of such goods to the United States. In the broad sense especially, nothing in this sequence has brought an end to the Chinese prison labor system in its existing form and the problem remains one of the most important human rights causes for the United States. In sum, while sequences in the past suggest that the Section 301 system can foster effective interactions with China, free traders and China-critics alike have doubts about relying heavily on the Section 301 system.

C. The WTO and the Accession Agreement

By “WTO,” this article means both the substantive law and the procedural and institutional mechanisms ensuing from the Uruguay Round, which both China and the United States can invoke and must follow. Substantively, these start with tariff concessions and restrictions on non-tariff barriers. More generally, two principles apply. First is the principle of “most favored nation” treatment, whereby whatever benefits a country grants to any other exporting country it must grant to all. Second is the principle of “national” treatment, whereby a country must treat domestic and imported products alike.

In procedural and institutional terms, accession to the WTO gives China membership in the body which will conduct future world trade negotiations. Trade disputes between China and the United States will now follow the process established by the WTO Dispute Settlement Understanding (DSU). The DSU, absent consensual settlement, mandates that disputes be resolved initially by a panel report, subject to appellate proceedings. In a notable advance beyond the pre-Uruguay Round GATT, the DSU aims at a “rule-oriented” process, rather than mere diplomacy, and provides elaborate arrangements for enforcement of outcomes rather than dependence on voluntary compliance.

The WTO provides a system for world trade at a high level of generality. China’s agreement with the United States for accession to the WTO
provides a much more specific system for Sino-American trade relations. Through its agreement with the United States, China cut tariffs and eliminated various barriers to U.S. exports at specific levels in specific sectors, such as agriculture, industrial products, services, telecommunications, insurance, banking, securities, professional services, audiovisual (that is, entertainment), travel, and tourism. China also agreed to eliminate import quotas generally by 2002, but no later than 2005; to phase in trading and distribution rights and auxiliary services for most products over a three- to four-year period; and to implement rules regarding investment measures.

Of particular pertinence to this article, the accession agreement allowed the United States to maintain key aspects of antidumping and countervailing duty law, the safeguard system, and voluntary restraint agreements. Together, these mechanisms maintain the existing system by which U.S. trade law had dealt with China. The accession agreement provided that the United States could maintain current antidumping methodology and countervailing duty law, which treat China as a nonmarket economy, for fifteen years after China's accession. For the "safeguard mechanism," it provided a special mechanism for twelve years after China accedes. Additionally, it kept the bilateral textile agreement in effect until 2008 and provided for application of WTO disciplines, such as national treatment, to state-owned and state-invested enterprises.

Thus, the negotiators of the accession agreement sought to allow Congressional involvement in China's trade status much as it had in the past. They established an extended period of at least until 2008, or until twelve or even fifteen years after China's WTO accession, varying with the provision for the operation of the existing, or an enhanced, Section 301 system. This was not done lightly. Beijing was angered at the increasingly strong operation of the U.S. antidumping provision regarding Chinese exports, and sought to weaken or eliminate it. Instead, the USTR made a particular point of extracting a full right for that system to continue treating China as a nonmarket economy for fifteen more years. The accession agreement

84. Bacon, supra note 8, at 387-95 (describing China's current noncompliance with the general WTO regime and the new, detailed commitments in the accession agreement).
86. Id. The agreement regarding investment measures as part of the Uruguay Round, entitled the Agreement on Trade Related Aspects of Investment Measures, is discussed in BHALA, supra note 55, at 1384; Robert H. Edwards, Jr., & Simon N. Lester, Towards a More Comprehensive World Trade Organization Agreement on Trade Related Investment Measures, 33 STAN. J. INT'L L. 169, 171 (1997).
87. China-U.S. WTO Accession Agreement, supra note 1 (section on "Protocol Language," subsection on "Price Comparability in Determining Dumping and Subsidization").
88. China-U.S. WTO Accession Agreement, supra note 1 ("Summary of U.S. China Bilateral WTO Agreement," at 6 (itself describing the safeguard arrangement as a "special mechanism") and section on "Protocol Language," subsection on "Product-Specific Safeguard" (describing the mechanism that will operate for twelve years)).
89. Id.
thus fully empowers the United States, and in this context, Congress, to impose potent sanctions on Chinese trade, provided the sanctions have a trade-related justification as required by the accession agreement and the WTO.\footnote{China-U.S. WTO Accession Agreement, \textit{supra} note 1 (section on “Protocol Language,” subsection on “Price Comparability in Determining Dumping and Subsidization”).}

The preservation of these unilateral features of the Sino-American trade relationship invites an analysis of the similarities of the annual MFN review process and a new Sino 301. Congress still will be able to impose sanctions on Chinese trade provided it has a trade-related justification. The following Part will consider the extent to which China’s problems with compliance will furnish this trade-related justification.

II. How a Sino 301 Would Continue the Central Aspects of the Annual MFN Review

This Part begins with a discussion of the problems likely to arise with Chinese attempts at compliance with its trade liberalization undertakings. It then examines particular remedial actions that international trade law has allowed, and would allow, the United States to take regarding Chinese trade.

A. Likely Problems With China’s Trade Liberalization

Chinese trade problems likely to occur belong to several general categories. The key lies in recognizing the lesson provided by the 1992 MOU regarding intellectual property and the 1992 MOU’s aftermath, in which problems could have justified massive U.S. sanctions under Special 301 had they not been forestalled by the 1995 MOU. As previously described, those problems occurred despite Beijing’s attempt to carry out the 1992 MOU. Rather, the nature of the existing Chinese governmental and economic system made it likely that implementation would be problematic. Similarly, serious problems will occur during Beijing’s attempts at compliance with the rules of the WTO and the 1999 accession agreement.

1. Local Chinese Protectionism

The problem of Chinese protectionism does not lie fully in the control of China’s national government. Beijing does not run all levels of government in China, and the national government faces an entrenched system oriented away from compliance with undertakings against protectionism.\footnote{Trish Saywell, \textit{China’s City Limits}, \textit{FAR E. Econ. Rev.}, Oct. 14, 1999, at 58 (illustrating the reality of local protectionism).}

To illustrate, a giant construction company located in Shanghai submitted a reasonable bid for a warehouse construction contract in another province but lost.\footnote{\textit{Id.}}
Unfortunately the customer, a city government, had other ideas . . . [and] chose a small local firm . . . . "When a local enterprise is desperate for orders," [said an executive of the Shanghai company], "the local government will naturally give it priority . . . . As a nonlocal company, our chances of winning a public bid are very small.

. . . . Free-market reforms seem not to have made much of a dent in local favoritism.\textsuperscript{93}

This story showcases the differences between China and the United States or European countries. From the outset, Western countries possessed largely unified and free internal markets in which enterprises in all localities competed on a comparatively non-protectionist, profit- and price-oriented basis.\textsuperscript{94} Thus the West had a head start complying with non-protectionist rules of the world trading system. While local protectionism is not unknown in the West (until recently, U.S. local entry barriers in fields such as banking were an excellent example), collectively, Western countries do not face entrenched, officially-built-up internal barriers to commerce.\textsuperscript{95}

In China, the opposite is true. During the decades under Mao, industrial development policy did not necessarily plan industrial growth on the basis of efficiency. Heavy industry was located throughout the country and not in efficient locations.\textsuperscript{96} From the 1950s through the 1970s this was justified primarily as a national defense measure to assure production in the event of invasion, somewhat the way rear-area industrial production helped the Soviet Union survive the attack by Nazi Germany in 1941.\textsuperscript{97} As a result, China has a system of elaborate inefficient duplication and fragmentation of production. This "backward specialization" has not been cured by the export-oriented economic growth of the past twenty years.\textsuperscript{98} After a half-century of such inefficient siting and subsidization—not to mention elaborate trade protections to counterbalance inefficiencies—local protectionism is entrenched in China in a way not found in the comparatively unified Western nations' internal markets.\textsuperscript{99} The WTO rules penalize countries with systems that prevent them from letting go of internal protectionist barriers.\textsuperscript{100}

\textsuperscript{93} Id.
\textsuperscript{94} Tiefer, Free Trade Agreements, supra note 15 (contrasting general absence of local protectionism with the particular protectionism possible in local government procurement).
\textsuperscript{95} Id.
\textsuperscript{96} Dali L. Yang, Beyond Beijing: Liberalization and the Regions in China 19 (1997).
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 72.
\textsuperscript{99} "[I]nternal trade barriers between provinces or even towns have been a problem throughout China since reform began, and in many instances they persist." Daniel H. Rosen, Behind the Open Door: Foreign Enterprises in the Chinese Marketplace 136 (1999).
\textsuperscript{100} Tiefer, Free Trade Agreements, supra note 15, at 66 (discussing, in connection with the Agreement on Government Procurement, how American state governments cannot have in-state preferences vis-à-vis foreign suppliers). The problem exists for China
Second, while Beijing could sign a 1999 accession agreement premised on opening up those protected local markets, Beijing simply does not have the ability to smoothly overcome deeply entrenched local protectionism. Due to a deficit problem, the government cannot buy off local officials. As a leading expert summarized, "the broader public sector nonfinancial deficit by the mid-1990s had been running at an unsustainable level of over 10 percent of gross domestic output for almost a decade." Moreover, Beijing typically leaves and supplements revenue at the local level, due in part to the central government's superior revenue-raising capabilities. Therefore, much of the limited power of the government purse continues in local, protection-oriented hands.

Beijing's limited power to break down local protectionist barriers only starts with the national budget. A recent study examining China's ability to comply with WTO rules noted that "[a] major feature of economic reform has been the decentralization of authority to the provincial government level in a variety of areas including enterprise ownership, taxation, foreign trade management, investment project approval, and credit allocation." As the authors observed, "[t]he provinces have vigorously used these policies to reinforce regional development and the protectionist policies that had already been in place."

A free-trade enthusiast might well question why local protectionism should be so much of an American concern. After all, the main losers are the Chinese themselves since both the efficient producers in some regions of China are kept from competing with the inefficient producers elsewhere, and the Chinese citizens and businesses in the protectionist regions are kept from buying advantageously from elsewhere. American business may simply first attempt to trade and invest in the more open regions and sectors, and allow for the slow process of overcoming protectionism in the more closed regions and sectors. This may well prove to be the manner in which U.S. business reacts to China's problems of compliance with its trade undertakings. For our purposes, however, the issue is the extent to which Congress could trigger, if it were to so choose, trade-curbing remedies as the result of an annual review. China's extensive, deeply-rooted local protectionism amounts to a Chinese production subsidy that Congress could seize upon as justification for remedies triggered in an annual vote.

under other agreements even without its committing to the government procurement agreement. Id.


102. Id.

103. Id.


105. Id.
2. State-Owned Enterprises

China's single biggest economic problem, looming as a major obstacle to WTO compliance, consists of its state-owned enterprises (SOEs). SOEs are typically relatively large enterprises, controlled and subsidized by the state since Mao due to their tremendous inefficiencies. Although SOEs produce a shrinking portion of China's gross domestic product (GDP) (down to one-third in 1995) they employ 110 million workers, about two-thirds of the urban labor force, and own about two-thirds of the nation's entire stock of productive assets.

In 1998, when Zhu Rongji became Premier, he made a much-publicized promise to revitalize the SOEs in three years. However, as the press has noticed, "in reforming the state sector, China's leaders have run up against a brick wall." Previous attempts to liquidate money-losing SOEs through bankruptcy proceedings have not worked. In addition to paying employees, SOEs also provide basic services to workers' families. As a result, it is estimated that SOEs affect over 300 million people in China's cities.

China's attempt to minimize SOEs to meet WTO requirements resulted in unemployment in the tens of millions beginning in 1998. Workers dismissed following bankruptcies held demonstrations suggesting broad scale disturbances if the liquidation effort continued. Today, the government continues to subsidize the SOEs, either directly or by requiring banks to make compulsory loans which will not be repaid. As a result, China's leading state banks are technically insolvent with some $1.2 trillion in bad loans on their books that turned sour before 1995.

The enormous SOE sector poses many problems to China's WTO and accession agreement compliance efforts. China's state banks' SOE sector subsidization amounts to an effective state subsidy for enterprises that compete with foreign business or with new business that foreign investment might create. SOEs predominate in economic sectors such as heavy industry, wholesale, and retail trade, with which the accession agreement

106. LARDY, supra note 101, at 26-29.
107. Id.
111. "It is well recognized that SOEs in China function as the social safety net for much of the citizenry." GROOMBRIDGE & BARFIELD, supra note 16, at 27.
112. "Beijing has ordered state-owned enterprises to shed another 10 million employees this year, in addition to the 30 million already axed since 1998." Clay Chandler, WTO Membership Imperils China's Industrial Dinosaurs, WASH. POST, Mar. 30, 2000, at A1, A17.
115. Id.
expressly anticipates that U.S. business will compete.\footnote{\textit{China-U.S. WTO Accession Agreement, supra} note 1.} At best, it will take time for China to withdraw the subsidies from the SOEs and liquidate those which could not compete; at worst, this process will proceed as slowly as it has for the past decade. Either way, China will not end its WTO-violating state subsidies anytime soon.

The accession agreement classified SOEs as entities which must interact with U.S. businesses like commercial enterprises—that is, they are subject to stringent WTO requirements and remedies.\footnote{\textit{Id.}} This may have solved an oft-disputed legal point, but it virtually ensures China will not be able to comply with the WTO and accession agreement requirements. For example, the state-owned system of wholesale and retail businesses is not structured in a manner that will allow it to quickly start competing, or contracting, with distribution systems set up by U.S. businesses. China’s state-owned distribution system lacks the management and accounting systems compatible with the global economy.

Again, a free-trade enthusiast might well ask why the United States should complain so much about China’s slowness in solving the subsidized-SOE problem. The gigantic problem of the unproductive state-owned sector imposes far worse burdens on the Chinese themselves than on U.S. businesses. Indeed, it is entirely possible that in the not-too-distant future China’s state banking system might actually collapse from the burden of its non-performing SOE loans.\footnote{“Beyond three years or so, however, only fundamental reform can avert a systemic banking crisis.” \textit{Problems Left Over from History, supra} note 114.} The volume of non-performing loans translate into bank losses equal to about twenty percent of China’s GDP, against bank capital of less than two percent of GDP.\footnote{Gary Hufbauer, \textit{China as an Economic Actor on the World Stage: An Overview}, in \textit{China in the World Trading System} 47, 49 (Frederick M. Abbott ed., 1998).} These statistics suggest a problem reminiscent of the savings and loan crisis experienced in the United States a decade ago, but the eventual collapse will be far worse for China as state banks there are proportionately much more important than the savings and loan institutions were in the United States. Such a collapse, and even the threat of it, poses a far greater problem for the Chinese, whose savings are in those banks and whose very economic life is at issue, than for foreign business with its reliance on overseas financial institutions.\footnote{\textit{Problems Left Over from History, supra} note 114.}

In fact, U.S. business will likely attempt to steer clear of the SOEs and the state banking system, preferring instead China’s slow reform to deal with the problems between the two. U.S. business should concern itself with other commitments much more central to its own trade and investment prospects, rather than involve itself with the dismantling of the SOEs. For our purposes, however, the issue is the extent to which Congress could trigger, if it were to choose, trade-curbing remedies as the result of an annual review. Nonetheless, China’s SOE problem, like its local protection-
ism, amounts to a subsidy of Chinese production that Congress could seize upon as justification for remedies triggered in a Sino 301 vote.

3. Nontransparent, Arbitrary, and Sometimes Corrupt Administration

The WTO rules put a premium on transparent trade regulations. As a result, China must address the highly opaque nature of its system; this should prove a virtual impossibility in the short run. A European Union study found that in nearly all areas of economic administration, Chinese trade regulations are nontransparent: "There is a clear lack of written rules, and where they exist they are subject to change and interpretation by numerous government and provincial agencies and officials." Paradoxically, the study also suggested that some U.S. businesses expect to benefit from trade with China while these barriers still exist. From this perspective, the nontransparent "policies make China virtually impenetrable to all but the largest multinational corporations that are able to make substantial investments at considerable risk." 

The weak Chinese legal system is a particular obstacle to WTO accession. Grouped together, the problems include the absence of the concept of supremacy of law due to the superior power of the bureaucracy and of the Communist Party; ambiguity in the law; shortage of trained lawyers; and the significance, much greater than official law, of guanxi (relationships, or connections) in everyday commercial activities. Concretely, in an annual inventory of trade barriers, the USTR recited such problems as the unpredictable application of tariffs, lack of uniformity in customs valuation practices, and lack of a clear consistent framework of laws and regulations as some of China's most significant obstacles.

A 1998 study concluded that "[w]hen China finally gains admission to the WTO, the world is not likely to see China adjust its behavior as readily as any agreement requires." The study noted that the "practices of concern to the WTO are deeply embedded in institutional conditions that . . . will significantly retard the actual implementation of WTO terms." Another author commented that: "Real adherence and compliance with procedural and structural obligations relating to the rule of law is likely to take time and need to evolve over many years." A press report drawing on a previously-quoted European Union study described the practical impact of corruption in customs administration on trade:

123. David Biederman, Slow Boat to China, TRAFFIC WORLD, Apr. 19, 1999, at 29 (quoting "the European Union's Trade Barriers Database").
124. Id. (quoting "the European Union's Trade Barriers Database").
128. Id.
Customs valuation was cited as a nontransparent, arbitrary process in China. The same product may be subject to different rates of duty at different entry points. There is often discretion at the local level as to whether to charge exporters the official rate of duty for goods, resulting in frequent bribes . . .

Like many other nations, China uses product standards and certification as a significant nontariff trade barrier. Obtaining a quality license, according to the EU study, is a "time-consuming and expensive process." Foreign goods are often subject to higher standards than domestic goods. The standards themselves are often unavailable to the exporter for review and are applied arbitrarily.\(^1\)

Corruption in Chinese business is a serious problem. One study observed that "kickbacks, bribes, favors, rough collection tactics, and other irregularities are ubiquitous."\(^2\) Foreign businesses in China often complain of "tax authorities who find 'irregularities' that portend serious fines and penalties unless the [foreign enterprise] agrees to use specific 'tax consultancies' to assess the situation, at a fee . . . [e.g.,] a retired local government official[,] . . . [is] today a very common means of extracting payoffs."\(^3\)

Again, a free-trade enthusiast may ask why the United States would focus on the nontransparency problem. While U.S. business does not like the problem, large U.S. multinational corporations know how to deal with it. "American firms in particular are well versed in skirting legality" in China by making payments through local partners or agents.\(^4\) These activities are handled this way because violations of "the Foreign Corrupt Practices Act (FCPA) can cause them trouble at home."\(^5\)

The weakness of the Chinese legal system has special significance in considering a Congressional enactment like Sino 301. Some aspects of the Chinese situation may elicit relatively greater sympathy or tolerance among members of Congress.\(^6\) Americans may feel either sympathy for or, at worst, indifference toward China's slowness in solving its SOE problem, regarding such slowness as merciful toward the tens of millions of Chinese families whose lives would be disrupted by a rapid change.

Conversely, the arbitrariness and corruption in the Chinese legal system does not elicit sympathy from the American public or its political leaders. Arbitrariness and corruption were difficult for Americans to accept even when it was deemed necessary for national security, such as when the regimes of which they were a feature were deemed vital Cold War allies (for instance, the Marcos regime in the Philippines or the successive regimes in South Vietnam during the Vietnam War). The slowness of change in the

---

130. Biederman, supra note 123.
131. ROSEN, supra note 99, at 111.
132. Id. at 147.
133. Id. at 220.
134. Id.
135. From the post-World War II Marshall plan that spurred European economic recovery to the Brady-bond reorganization that lightened the 1980s debt burden of Latin America, the United States has supported the efforts of other nations to lift themselves out of economic problems.
arbitrary or corrupt workings of a non-democratic Communist regime will be particularly difficult for Americans to tolerate, as illustrated by the extreme reaction to the 1996 campaign finance matter, in which Chinese figures allegedly contributed indirectly to U.S. campaign funds. As an aspect of noncompliance with WTO rules and the accession agreement, nontransparency illustrates the type of issues which the United States may typically allow to be worked out slowly through ordinary channels of discussion, but which could provide a basis for a Congressional trigger in an annual review.

B. Tools and Remedies that a Sino 301 Could Trigger

The parts of a Sino 301 process that resemble the annual MFN process—Executive findings, Congressional debates, potential Congressional votes—need the least explanation since their mechanics would follow existing law. The remedies controlled by the new trigger merit the most explanation. These are the tools and remedies that the WTO and the accession agreement allow and, in key respects, even encourage for the specific problem of China as a transitional nonmarket economy. Such tools and remedies include enhanced use of antidumping and countervailing duties and import surge safeguards, "benchmarking" Chinese progress in fulfilling trade commitments, and negotiation of Chinese-American trade restraint agreements.

1. Enhanced Antidumping and Countervailing Duty Remedies

This section presents the history of antidumping and countervailing duty remedies for imports from nonmarket economies, and particularly, in recent years, from China. The section then turns to a discussion of potent remedies that could underlie a Sino 301 trigger.

The United States first enacted antidumping laws in 1916 and 1921; both of these laws continue in effect today. Further, both the GATT and the WTO recognized the right of countries to enforce antidumping laws. Antidumping laws have the basic purpose of maintaining fair pricing of imports to level the playing field between foreign and U.S. producers. Dumping occurs when an exporter sells merchandise in the importing country at less than fair value or below the price of production. When this causes or threatens injury in an importing country, that country can impose an antidumping duty in the amount of the dumping margin.

Application of antidumping law to nonmarket economies (NMEs) poses unique problems. A dumping case in a market economy may depend on the home market prices for the exported products and the factors of their production; a dumping case for a nonmarket economy cannot, because of the absence of the usual market-disciplined significance of the

---

138. BHALA, supra note 55, at 603.
139. Id.
home prices of products and production factors, depend on such factors.\textsuperscript{140} After the Executive Branch and Congress made various attempts in the 1960s and 1970s to deal with such problems in dumping investigations from Communist countries,\textsuperscript{141} the 1988 Trade Act chose the “factors of production approach” as the preferred approach.\textsuperscript{142} This method simulates or “constructs” the fair price from factor input prices in some other “surrogate” country.\textsuperscript{143}

This use of “constructed” or “surrogate”-based prices shows the potential for triggering a particularly potent antidumping remedy. The United States has considerable discretion, by its choice of surrogate countries, in constructing either a high or a low “fair” price.\textsuperscript{144} Other aspects, such as the flawed nature of data from the chosen surrogate countries, increase the discretion involved.\textsuperscript{145} Effectively, for a nonmarket economy like China, the United States comes close to being able to set tariff levels based on what it would take some competing country—one with higher costs than China—to produce the product. This remedy, much-criticized in its application as to China by free-trade enthusiasts,\textsuperscript{146} potentially puts a great amount of unilaterally invokable power in Congress’ hands. Congress’ ability to take a proactive stance on antidumping further adds to the potential for a powerful antidumping remedy. Congress may direct the Administration, in a triggered situation, not to await industry complaints, but to survey important industries and proceed with antidumping remedies even without the industry asking for such an action.

Similarly, Congress enacted the first general countervailing duty (CVD) statute in 1897,\textsuperscript{147} and both the GATT and the WTO recognized the right of countries to enforce such laws. When a foreign government subsidizes a specific exporting industry, the United States will impose a countervailing duty.\textsuperscript{148} In 1986, the Federal Circuit found that the CVD statute did not apply in general to nonmarket economies, as those economies possess so many distortions that a specific subsidy could not be discerned; therefore, only antidumping laws could be applied in such circumstances.\textsuperscript{149} For NMEs in transition to capitalism, the Commerce Depart-

\begin{flushleft}
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} 19 U.S.C. § 1677b (c).
\textsuperscript{144} Alford, supra note 12, at 90-95.
\textsuperscript{149} Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).
\end{flushleft}
ment thereafter developed the Market Oriented Industry (MOI) approach. This approach applied not to the economy as a whole, but only to specific sectors within the economy for which the factor inputs had market-determined prices.\textsuperscript{150} In that case, the CVD statute applies and factor input pricing sometimes can be used in such antidumping cases.\textsuperscript{151}

The emerging law regarding NMEs had a practical as well as theoretical interest with respect to China. In the 1990s, the number of antidumping cases involving China increased dramatically, with China taking Japan's place after 1994 as the leading respondent country under U.S. laws.\textsuperscript{152} From 1987 through 1996, the United States initiated 45 antidumping actions against China.\textsuperscript{153} Greg Mastel summarized the basic reasons for this growth: “The combination of no clear cost structure, pressure to export, and a demand for hard currency creates a powerful incentive to dump exports in foreign markets.”\textsuperscript{154} Intriguingly, China is also the most frequently cited NME respondent country in Europe, despite the proximity and significance of Russia and the former Soviet bloc.\textsuperscript{155}

Chinese officials claim that $10 billion of China's $70 billion worth of exports a year to the United States are goods that fall under U.S. antidumping orders—such as steel, bicycles, honey, and mushrooms.\textsuperscript{156} China's opposition to the operation of the antidumping statute was one of the last and most serious disagreements in the WTO Accession Agreement negotiations.\textsuperscript{157} When Chinese Premier Zhu Rongji stepped in at the last moment and dramatically compromised the points necessary for agreement, he conceded that U.S. NME antidumping procedures could continue to apply to China for fifteen more years; this was cited by National Security Adviser Sandy Berger as a major selling point for the agreement.\textsuperscript{158}

With the WTO's antidumping article, the United States has flexibility in the methodology it employs when handling dumping cases. With China accepting, in the accession agreement, the continuation of its status as an NME, the United States can determine a fair price for Chinese products based on the prices of factor inputs of that product in another country.\textsuperscript{159} Moreover, Congress may facilitate the application of CVD law to Chinese imports by finding the pertinent production subsidies—like SOE subsidiza-

---

\textsuperscript{150} For a fuller description of the MOI approach, see Lantz, supra note 140, at 1042-48. The Uruguay Round produced a change in the international subsidy law, recognized by Congress in replacing section 303 in the prior CVD statute with section 262 of the Uruguay Round Agreements Act, which requires an injury test along with the previous criteria. \textit{Id.} at 1019, 1029.

\textsuperscript{151} Laroski, supra note 137, at 378-79.


\textsuperscript{154} \textit{Greg Mastel, Antidumping Laws And The U.S. Economy} 58 (1998).

\textsuperscript{155} \textit{Id.} at 118.

\textsuperscript{156} Pomfret, supra note 152, at A25.

\textsuperscript{157} Id.

\textsuperscript{158} Id. at A23.

\textsuperscript{159} See Lantz, supra note 140.
...tion—sufficiently isolatable to furnish a basis for a CVD remedy.\textsuperscript{160}

If left to private parties to initiate, the antidumping provision and CVD law may not affect trade with China more than past law has done so.\textsuperscript{161} However, in a Sino 301 provision, Congress could mandate that if its future review of trade and other relations with China warrants a triggering of potent tools and remedies, the antidumping provision and CVD law could be triggered in a wholesale way. That is, the law could require USTR to list all products that are domestically produced for which Chinese imports are priced above the levels in some comparable third country, with a presumptive finding that the Chinese imports are priced so as to justify an antidumping remedy. Sino 301 could also require USTR to establish a basis for a CVD remedy for Chinese subsidies, with a presumptive finding that subsidies, as in the case of SOEs, justify a CVD remedy. The combination of USTR proactive action and justifiable presumptions with regard to the Chinese economy, would make the enactment of a Congressional trigger a matter of considerable importance while staying within the law of the WTO and the 1999 accession agreement.

2. Import Surge Safeguards

The China-U.S. WTO Accession Agreement contains a major Chinese concession for another potentially potent American trade tool: a "safeguard" against import surges apparently intended to be exceptionally available.\textsuperscript{162} Appreciating the provision's potential as a trade tool requires tracing the history of the import surge "safeguard," also known as the "escape clause" and "Section 201."\textsuperscript{163}

In the 1940s, the wave of U.S. commitment to trade agreements, among other international commitments, contained a reservation of political importance in securing Congress' agreement.\textsuperscript{164} Leading up to Article XIX of the GATT in 1947, the United States insisted on the ability to withdraw or modify trade barrier concessions that led to products being imported in increased quantities that in turn caused or threatened serious injury to domestic producers.\textsuperscript{165} American trade law enshrined this protection in what became Section 201, with amendments in 1962, 1974, 1984, 1988, and 1994.\textsuperscript{166} Section 201 goes beyond antidumping relief in nominal availability, for it requires no showing that any exporting country or countries have engaged in "unfair" pricing, only that their exports have

\begin{itemize}
\item \textsuperscript{160} See generally id. at 1049-57 (reviewing a diverse array of potential approaches for the application of CVD law to nonmarket economies in transition such as China).
\item \textsuperscript{161} See Pomfret, supra note 152 (noting that Chinese exports to the United States have grown despite U.S. law such as antidumping remedies); MASTEL, supra note 154 (same).
\item \textsuperscript{162} China-U.S. WTO Accession Agreement, supra note 1.
\item \textsuperscript{163} 19 U.S.C. §§ 2251-53; BHALA, supra note 55, at 905 (providing a description of, and synonyms for, section 201).
\item \textsuperscript{164} BHALA, supra note 55, at 883-84.
\item \textsuperscript{165} For the 1940s history leading up to Article XIX of GATT 1947, see id.
\item \textsuperscript{166} Id. at 884; Paul C. Rosenthal & Robin H. Gilbert, The 1988 Amendments to Section 201: It Isn't Just for Import Relief Anymore, 20 LAW & Pol'y Int'l Bus. 403 (1989).
\end{itemize}
the specified untoward effect.\textsuperscript{167}

In practice, the United States has made little use of safeguard actions.\textsuperscript{168} Accordingly, in the Uruguay Round, the United States pressed for, and obtained, significant narrowing of the use of safeguards for imports from market countries.\textsuperscript{169} The Agreement sets a high threshold: the domestic industry must face "serious injury"; procedural limits must exist in the form of cooling-off periods and sunsets for safeguard actions; and cut-backs on restraint agreements that have become the bi- or multilateral alter egos of the unilateral safeguard action must be present.\textsuperscript{170}

Meanwhile, however, both international trading law and Congress have long established models for product-specific safeguards vis-à-vis China. In the 1950s and 1960s, when Poland, Romania, and Hungary sought membership in the world trading system, the United States had political reasons to support them, but Europe and other GATT members feared a deluge of subsidized exports.\textsuperscript{171} As a solution, their accession agreements had low thresholds for safeguard actions that effectively allowed temporary import limits upon their exports if those disrupted or threatened to disrupt the markets for those products in the importing nations.\textsuperscript{172}

Congress codified such an arrangement in the Trade Act of 1974, enacted in the expectation of a major trade opening with the Soviet Union. Section 406 provides relief from imports from Communist countries based only on a determination that the imports are disrupting the U.S. market.\textsuperscript{173} It requires only a showing of "material" injury (rather than the "serious" injury of Section 201) and the market disruption need only be a

\textsuperscript{167} Thus, for running counter to trade liberalization, Section 201 had both economic and political justifications. In economics terms, import surge relief allows domestic industries to either adjust to regain competitiveness or to adjust to a shrinking market share in an orderly manner. Politically, import surge relief both allows the United States, like other cautious countries, to enter into otherwise worrisomely rigid trade liberalization undertakings. If such undertakings produce a protectionist backlash, section 201 provides a unilateral safety valve. Sykes, supra note 14, at 273 (proposing the "Safety Valve Hypothesis").

\textsuperscript{168} During the period from the Tokyo Round (1979) to the Uruguay Round (1994), the United States used safeguards only four times, while the European Communities used them eighteen times (of which thirteen involved processed foodstuffs, clearly a sensitive point for the EC). Bhala, supra note 55, at 890.

\textsuperscript{169} Notably, the Uruguay Round "Agreement on Safeguards" provides that safeguard actions must be applied against imports of the particular product from all sources, meaning that safeguards affect imports on a nonselective or "most favored nation" basis, rather than being directed only against selected countries as are antidumping remedies. See sources cited supra note 15 (particularly Article 2(2) of the Agreement on Safeguards).


\textsuperscript{171} MASTEL, supra note 121, at 182-85 (1997).

\textsuperscript{172} Id.

\textsuperscript{173} 19 U.S.C. §§ 2436, 2251.
Observers have long anticipated the safeguard issue to be one of the major final questions in China’s WTO accession. China had to make commitments to the U.S. textile and steel industries precisely on this subject. The system created by the China-U.S. WTO Accession Agreement, as does Congress’s NTR legislation, implements Section 201 in a forceful way. It allows a “provisional” safeguard pursuant to a “preliminary” determination, for a period of up to 200 days. This is a rare instance of U.S. summary power to utilize a tool against Chinese imports. The provision makes apparent the expectation that the safeguard measure can result from Chinese imports that increase on either a relative or an absolute basis. China can retaliate only if the measure remains in effect for more than two to three years.

If left to private parties to initiate, the safeguard provision may not have much impact on trade with China. However, in a Sino 301 provision, Congress could provide that if its future review of trade and other relations with China warrants a triggering of potent tools and remedies, the safeguard provision could be triggered in a wholesale way. That is, USTR could be required to list all products that are domestically produced for which Chinese imports have recently increased, with a presumptive finding that the Chinese imports have done so in ways justifying a safeguard action. The special importance of the safeguard action lies in its express linkage both with a summary provisional remedy and with encouragement for China to enter a bilateral restraint agreement in response to safeguard actions.

3. Retaliation for Chinese Failures to Achieve Trade Liberalization Benchmarks

Traditionally, the various Section 301 mechanisms—regular, special, and super—retaliate against other nations for their failures in trade liberalization. They differ from antidumping and safeguard remedies, which empha-
size the effects of foreign exports on the open U.S. market, by focusing on the effects of closed foreign markets on U.S. exports.

By analogy, a Sino 301 provision could provide for trade remedies against China for its failure to open its markets by fulfilling trade liberalization obligations, such as an end to local protectionism. In the simplest and least debatable way, Congress could provide that if China violates the express terms of its 1999 WTO Accession Agreement, and the United States takes the proper steps under the WTO's dispute settlement rules, the USTR could find China noncompliant. Congress might provide the formulae for determining appropriate retaliatory sanctions, such as mechanisms for quantifying retaliatory import quotas or tariffs for Chinese imports (withdrawal of previous trade concessions toward China by the United States). If, within fifteen months, China does not correct the noncompliance, the USTR may administer those sanctions, again assuming the proper steps under the WTO's dispute settlement rules are taken.180

The problem comes in the set-up of an enhanced retaliatory system as a Sino 301. Serious questions begin to arise as Congress moves beyond the express terms of the 1999 WTO Accession Agreement or beyond what is procedurally clearly acceptable to the WTO. As discussed below, Congress might include in a Sino 301 provision establishing benchmarks how much progress China should make each year toward compliance with each major category of undertakings in the accession agreement. However, complications may arise. China might disagree with those benchmarks. Congress might frame the retaliation provisions in ways that make it difficult, although not impossible, for the Administration both to implement them and to follow all the timing and procedural steps of the WTO's dispute settlement rules. Further, China might seize on, and disagree with, those aspects.

In dimensions such as these, the Congressional framers of a Sino 301 provision must accommodate these problems by inserting some flexibility, particularly at the beginning of the U.S. experience with China's WTO accession. The history of the existing 301 system teaches that it is valuable to have a system in place, even if imperfect, and then to learn from experience and take advantage of periodic opportunities to amend the Section 301 provision. It may be impossible to predict in advance which is better: for Congress to pin down both USTR and China with specificity without discretion and with maximal requirements and sanctions, or for Congress to leave more room for USTR and China, somewhat diluting the threat of the annual review to increase its compatibility with the WTO system. Successive statutes over the years have refined the 301 system, including arranging its accommodation with the Uruguay Round Agreements in 1994.181 Flexibility in the first enactment of a Sino 301 would not pre-


clude tightening and toughening it if future experience should call for such changes.

4. Encouraged Negotiation of Sino-American Restraint Agreements

The availability of potent tools—the antidumping, CVD, and safeguard actions, and retaliation for trade liberalization shortcomings in opening China's own market—sets the stage for the mechanism that would make the Sino 301 system most practical. In past decades, high-level trade disputes, such as between the United States and Japan or the United States and the European Community, have often resulted not in sanction wars but in restraint agreements.\textsuperscript{182} Congress has encouraged this development, for example, by ending an antidumping case with a suspension agreement.\textsuperscript{183}

As previously described, the two Special 301 proceedings against China for intellectual property issues ended in the creation of 1992 and 1995 MOUs.\textsuperscript{184} Moreover, not only is China a party to perhaps one of the most important multilateral restraint agreements, the Textile Agreement,\textsuperscript{185} but the China-U.S. WTO Accession Agreement expressly preserves and maintains China's place in that restraint agreement until 2008.\textsuperscript{186} In sum, China and the USTR have demonstrated they can negotiate an agreement under pressure from the U.S. Congress.

If Congress ever appeared close to triggering a Sino 301 provision, China would have a host of reasons to negotiate a bilateral trade restraint agreement with the United States rather than either challenge the United States before the WTO, or unilaterally retaliate. First, the Sino 301 provision focuses on China's own shortcomings in trade liberalization. This is the weakest ground for China to attack. China's own acceptance (in the 1999 accession agreement) of such provisions as the continuation of its NME status for antidumping and import surge safeguard purposes would undermine such an attack. The preceding discussion shows how unlikely it is that China can quickly and smoothly accomplish the hardest parts of trade liberalization.\textsuperscript{187} And, for purposes of appeals to various watching publics—the Chinese people, third countries, and the American people, to name a few—China's government cannot contend that trade liberalization obligations are imposed upon it in the same manner as it contends human rights obligations are. China's government can hardly contend trade liberalization has been thrust upon it when it has vigorously sought entry into the WTO; its trade liberalization commitments to enter the WTO, and their related problems, are perhaps even less of a secret within China than abroad.

Second, by negotiating a bilateral trade restraint agreement, Beijing keeps control of the form of trade imposition. It can seek to reconcile U.S.

\textsuperscript{182} GROOMBRIDGE \& BARFIELD, supra note 16, at 55-56.
\textsuperscript{183} 19 U.S.C. § 2411(c)(1)(D); Cooper, supra note 53, at 1005.
\textsuperscript{184} See supra note 56 and accompanying text.
\textsuperscript{185} JACKSON ET AL., supra note 5, at 1184-90.
\textsuperscript{186} China-U.S. WTO Accession Agreement, supra note 1.
\textsuperscript{187} See supra notes 91-135 and accompanying text.
demands with its own plans. If it must accept trade curbs, it can negotiate them in the form in which it can best handle them.

Third, the same powerful inducements exist for this as for all other suspension agreements. If the United States unilaterally imposes remedies, tariffs, or their equivalents on Chinese exports to the United States, the U.S. government pockets the resulting price increases faced by U.S. customers. In contrast, if China negotiates a bilateral trade restraint regime that it itself administers, it can either ration the profitable sales quotas among its own producers or rake off the surpluses with an export tax. Either way, it can render the U.S. trade imposition less intolerable.

C. Sino 301 Triggering Processes

In setting up a Sino 301 process, there are a number of goals. The provision should assign orderly roles to the USTR and to Congress. A large role for the USTR in determining where China has fallen short in trade liberalization, and what could appropriately occur in response, should harmonize the operation of the process with the WTO rules in much the same way as does the existing 301 system. The significant role played by Congress should bring about the virtues of the annual MFN debate on trade and other relations with China, namely, a focus for a national U.S. debate at all levels with hearings, press coverage, and Congressional votes.

1. Initial Tasking of USTR

A Sino 301 provision would set a large initial (or "first round") task for USTR. Initially, USTR should develop benchmarks for China’s annual or periodic progress toward fulfillment of each of its major categories of trade liberalization commitments. Congressional authors of a Sino 301 could adumbrate such benchmarks in their legislative history. Some long-term commitments obligate China to make interim progress. For example, one major sector covered by the China-U.S. WTO Accession Agreement consists of insurance. China committed itself to expanding the scope of activities for foreign insurers to include group, health, and pension lines of insurance, to be phased in over a five year period. Industry observers expressed skepticism, anticipating unchanged Chinese attitudes of resistance against allowing foreign insurers.

Pursuant to the Sino 301 provision, USTR would assign a set of benchmarks for assessing Chinese progress toward full opening of group, health, and pension lines of insurance. While not requiring excessive progress from the outset, it would also not leave the United States watching in frustration four years into the accession period while little or no Chinese progress occurs. To the extent that the Chinese themselves announce effec-

188. China-U.S. WTO Accession Agreement, supra note 1 (section entitled “Insurance”). For a discussion of the subject of benchmarking for China’s accession to the WTO, see Alexandroff, supra note 18.
tive plans for stepwise fulfillment of their pledges, weight and deference would be given to the Chinese plans, but if the Chinese remain vague about how they will fulfill their pledges, benchmarking would prevent this from becoming a device for simple delay and evasion of responsibility by the Chinese during the next few years. The government would have to establish an on-going network of commercial information analysis for assessing Chinese progress in each subsector, and not merely passively await industry complaints.\textsuperscript{191}

Taking long-term commitments and establishing benchmarks presents subtle challenges with regard to China's other commitments. How, for example, does one benchmark China's obligation to achieve transparency in its trade-related regulating? Quantification of future progress is not easy. A concept worth exploring is that of finding "yardsticks"—comparisons—both in China itself and in other countries.\textsuperscript{192}

Besides benchmarking, the U.S. government would have to take steps to become more proactive in its assessment of the potential for antidumping, countervailing duty, and safeguard actions. Just as it should assess Chinese progress in each subsector, so it should have the rudiments of an overall assessment for each sector of the potential for such actions. Worth considering is the concept of "indicators"—average or significant products that give an indication of how the sector is doing.\textsuperscript{193}

2. Annual Review

The Sino 301 provision would arrange an annual cycle starting with the USTR's report on Chinese progress and problems. The report would compare progress in trade liberalization with the previously established benchmarks. It would also report on the potential for antidumping, countervailing duty, and safeguard problems.

\textsuperscript{191} The Clinton Administration had already asked for funding to assign trade compliance personnel to China. Gary G. Yerkey & Rossella Brevetti, \textit{Administration Asks for $21.2 Million for New Trade Compliance Initiative}, 17 Int'l Trade Rep. (BNA) 229 (Feb. 10, 2000). In fact, something of a network might develop of American-employed China-based consultants, much as large-scale regulatory initiatives of the past, for example, the devising of air and water pollution standards, have depended upon rapid assembly of economy-wide information by such networks domestically.

\textsuperscript{192} At one end of the spectrum, the ultimate goal could consist of the degree of transparency found in European Union trade regulation; at the other end of the spectrum, China has itself made limited progress in some spheres, such as in the promulgation of codes; and in the middle, Hong Kong and the nearby regions it influences represent a valuable yardstick, since trade between them has flourished—albeit with some nontransparency, arbitrariness, and corruption on the Chinese side in matters such as customs valuation. \textit{See generally} Ostry, \textit{supra} note 17 (analyzing the transparency issue with regard to China).

\textsuperscript{193} For such indicators, comparisons of available Chinese and American data, with data from suitable third countries, should allow an assessment of whether Chinese export prices are reasonable, the significance of lingering subsidies such as the state-owned industry system, and its commercially unjustified bank loans, and the impact on domestic American production. \textit{See generally} Lantz, \textit{supra} note 140, at 1038-59 (discussing the comparisons of available data that allow an assessment of Chinese progress in each sector in the current processes regarding antidumping and countervailing duty laws).
The annual report would initiate lines of activity by the Administration and in Congress. For its part, the Administration would follow the established lines of the Section 301 system by gathering information for an annual report. It would discuss tentative findings about problems with China, conduct further investigations preliminary to U.S. action, and prepare to initiate WTO dispute settlement proceedings. Besides the greater pressure from benchmarking and evaluating the previous years' accumulated record, the Administration would find reason for these steps beyond the 301 system as it would look over its shoulder at Congressional activity, hoping to head off any extreme Congressional backlash.

For its part, Congress would follow a process similar to its annual MFN review. That is, Congressional committees would hold hearings on trade and other relations with China. Far from focusing purely, as the USTR would, on the trade issues with China, these hearings, and related debates in committees, in the press, and on the legislative floor, might well focus largely on other relations with China. It would not be surprising for human rights issues ranging from prison labor to Tibet and religious freedom to press censorship to receive prominent attention. So, too, whatever international relations issues between China and the United States capture attention generally, from Taiwan to proliferation of weapons of mass destruction, and from alleged espionage to Pacific security, would receive prominent attention.

At a culminating point each year, the House and Senate would have a "fast track" opportunity to adopt a joint resolution on Chinese failure to fulfill trade liberalization pledges. Congressional sponsors of the resolution would restrict its provisions solely to the trade problems of the kind discussed in the USTR report. The resolution would, if enacted, declare China in substantial noncompliance with its trade liberalization obligations. It would trigger, in a binding way, the maximum resort to the previously discussed remedies: antidumping, countervailing duty, safeguard actions, and retaliation of the traditional Section 301 kind consistent with the WTO. The resolution might also provide that the Administration could negotiate for China voluntarily to agree to impose curbs on its own trade in an amount corresponding to these remedies, subject perhaps to an early second vote in Congress to reinstate the Sino 301 remedies if Congress were unsatisfied by the voluntary restraint agreement.

Quite likely, just as Congress never did use the annual MFN review to take away China's MFN status, so Congress would experience much political pressure not to vote a Sino 301 resolution. The likelihood of Congress not passing a triggering resolution would depend on the sound judgment of a majority of the House of Representatives and the Senate. This is why coupling a vote on a very strong trade remedies resolution with hearings and debates on other relations with China is not problematic. Invocation of maximum trade remedies against China is a step that Congress would not, and should not, take merely because of dissatisfaction with China for lack of prompt and smooth fulfillment of its trade liberalization promises. The United States has too much of a stake in free trade, and too much
sympathy for the Chinese people's striving to overcome their legacy of underdevelopment and Maoist misguidance, to invoke its maximum trade remedies for the minimum possible reason under international economic law. Rather, only if events that forfeit U.S. domestic support on other issues—such as international relations and human rights—occur, should so potent a step be considered.

III. The Upholding of a Sino 301 Provision Based on the WTO "301 Panel" Decision

If Congress enacts a Sino 301 provision, China could take its opposition to that mechanism to the WTO. China would contend, in a form of a challenge which the WTO finds understandable and cognizable, that the United States enacted a law inconsistent with recognition of China's rights pursuant to the WTO rules. Analyzing what the WTO would decide in such a case allows us to decide whether the United States would violate its undertakings with respect to China and the world trading community by enacting such a provision. This is the proper question, rather than whether the United States should make use of such a provision after enactment. All the good reasons that free-trade enthusiasts could enunciate—legal, economic, political, and diplomatic—not to trigger a Sino 301 provision properly come before Congress during such a mechanism's annual review, and appropriately receive consideration in that forum and at that time. At this point, the question is not whether it is wise to trigger a Sino 301 provision, but whether it violates the WTO rules to have such a mechanism at all.

The WTO panel that addressed the EU complaint against Section 301 provides an invaluable route through the issues that the WTO would address regarding a Sino 301 provision. In that case, the EU asked for a WTO panel in January 1999. Although it was the banana dispute in particular that drove the EU to file such a complaint, the EU challenged the Section 301 system broadly rather than focusing on the banana dispute or any other particular instance of the Section 301 system operation.

In its complaint, the EU challenged that the Section 301 system imposes "strict time limits within which unilateral determinations must be made and trade sanctions must be taken." The Section 301 system's time limits for unilateral U.S. determinations and actions assertedly did not allow compliance with the WTO DSU rules and procedures. DSU must make multilateral findings and follow procedures for suspensions of concessions before the United States may properly take action. Presented differently, the EU argued that the historical deal between the EU (and others) and the United States that underlies the Uruguay Round resulted in the United States receiving a stronger WTO dispute resolution system in

194. WTO 301 Panel Decision, supra note 20, at 4.
195. Id.
196. Id.
197. Id. Of course, the argument includes much more than this one sentence conveys. For the panel's outline of the EC's arguments and the United States' counterarguments, see id. at 9-223.
return for the EU obtaining an abandonment by the United States of its Section 301 approach of unilateral action.\textsuperscript{198}

China would have a similar challenge to a Sino 301 available to it. A Sino 301 provision would time Congress’ adoption of a triggering resolution, finding violation of U.S. rights and setting in motion the actions against trade with China fairly quickly. China would argue that Congress would thereby preclude compliance with the DSU rules and procedures, by which the DSU must make multilateral findings before the United States may do so unilaterally, and the DSU must seek and fail to obtain compliance before the United States may properly take retaliatory actions. Presented differently, China would say that it made major commitments in its accession agreement with the United States, and accepted WTO disciplines, in return for the United States no longer treating disputes using means outside the WTO system, that is, with such unilateral mechanisms as a Sino 301.

The WTO 301 Panel Decision gave serious consideration to the EU argument. In a much-quoted interim analytic step, it noted that “[u]nder [the DSU’s] Article 23 the US promised . . . specifically not to resort to unilateral measures,” while in the section 301 system, “in contrast, the US statutorily reserves the right to do so.”\textsuperscript{199} Hence, “because of that, the statutory language of Section 304 constitutes a prima facie violation of [WTO] Article 23.2(a).”\textsuperscript{200} What saved the 301 system, the WTO panel went on to say, consisted of the undertakings by the Administration in 1994—in the Statement of Administrative Action, accepted by the Congress as binding—and afterwards.\textsuperscript{201}

WTO panel took as key Administration statements that emphasized the existence of “broad discretion”\textsuperscript{202} under the Section 301 system. This discretionary aspect permits abstention from reaching findings about other countries’ violations prior to commencement of multilateral proceedings under the DSU.\textsuperscript{203} Similarly, the Administration stressed the existence of “wide discretion” under the Section 301 system, even after such findings, permitting the 301 system not to reach the point of retaliatory action for other countries’ failure to come into compliance prior to further multilateral authorization under the DSU. Based on this discretion to await the workings of the DSU, the panel “conclude[d] that those aspects of Sections 301-310 of the US Trade Act brought before us in this dispute are not inconsistent with US obligations under the WTO.”\textsuperscript{204}

The panel’s ultimate rejection of the EU challenge to Section 301 suggests that, similarly, a Sino 301 provision would survive a challenge by China. This would hold true so long as the Sino 301 provision, like Section

\textsuperscript{198} Id. at 292.
\textsuperscript{199} Id. at 311.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 318.
\textsuperscript{203} Id. at 314-18.
\textsuperscript{204} Id. at 330.
301, left open, by elements of procedural timing discretion at some stages, the possibility that the United States would present in a WTO forum, and win, its contentions about Chinese violations and noncompliance and that the United States would leave time for this to occur before taking retaliatory actions.

For several reasons, a Sino 301 provision could leave these possibilities open without losing its potency as a Congressionally-invoked tool. First, the antidumping, countervailing duty, and safeguard actions follow their own procedures, without having to wait for DSU's more complex multilateral processes. The 1990s have shown the enormous potential for such actions, and the China-U.S. WTO Accession Agreement confirmed, if not enhanced, that potential for the next dozen or fifteen years. Until now, USTR has employed those remedies in a reactive way, in response to prompting by affected domestic industries. A Sino 301 statute, which would pave the way for a proactive, maximum use of those remedies, would provide many options to the United States following a Congressional signal. This would result in multilateral steps with a less delayed impact upon Chinese trade.

Second, a Sino 301 provision could serve as a strong threat, backed by a strong impact, even if it were to leave certain matters open or to leave some discretion to the USTR. So long as China anticipates—and as described previously, this is likely—that it cannot fully and smoothly comply with its international obligations, then once Congress enacted a Sino 301 triggering resolution, the imposition of fully authorized sanctions would be only a matter of time. China simply cannot cure such monumental problems as its local protectionism, its SOEs, and its legal procedures' lack of transparency, in the relatively short time between when the United States files a complaint and when the multilateral process is complete. The critical point, on which the WTO does not take away from Congress the initiative on unilateral decision-making, lies in the twin decisions to invoke maximum remedies at the start and to set the level of retaliation at the end. For example, if China falls short of achieving transparency, and Congress triggers a full U.S. response, the United States would both initiate the multilateral processes and, upon their completion, decide the matching retaliation level. Unless China succeeds in complying with its obligations so completely as to avoid this outcome, this fate of its trading relationship with the United States will be inevitable and difficult to accept, notwithstanding any delays.


206. See sources cited supra note 15 (particularly Dispute Settlement Understanding, art. 22.4). Article 22 of the Dispute Settlement Understanding puts down a few principles and procedures, but little more that matters than that "[t]he level of the suspension of concessions or other obligations [i.e., the level of retaliation] authorized by the DSB shall be equivalent to the level of the nullification or impairment." Id.
Third, to close out a repeat theme of this article, it is simply not expected that the outcome of this sequence would be either a unilaterally- or multilaterally-authorized sanction. Rather, faced with either the prospect or reality of a Congressional triggering resolution, China would negotiate a bilateral trade restraint agreement with the United States. In effect, it would admit that there are limits to how quickly it can comply with its WTO and accession agreement obligations, and that if the United States wishes to use those limits as a ground to curb trade with China, China knows its interests lie in negotiating the sectors, scale, and method of the curbing, rather than simply resisting and absorbing the trade blows inflicted by the United States.

For example, suppose that early in the year 2005, Beijing were to take some action with respect to human rights that had an even greater negative effect on world and U.S. opinion than Tienanmen Square. When the annual USTR report, laying out the current level of Chinese trade obligation compliance problems, came before Congress that year, suppose Congress this time felt angry enough to adopt a Sino 301 triggering resolution. This is what almost happened in 1989 when the House (but not the Senate) adopted the Jackson-Vanik Amendment. In short order, the Congressional vote of 2005 would trigger increased antidumping, countervailing duty, and safeguard actions, as well as the commencement of proceedings before WTO panels regarding each U.S. allegation of Chinese failure to come into compliance with agreement obligations.

Rather than have to absorb a series of blows over which it would have relatively little control, Beijing would find it better to negotiate an agreement. Under such a bilateral trade restraint agreement, China would accept a sizable curb in trade between the United States and itself—say, a reduction of a substantial percentage from the level in 2004, to last some definite but fixed time period. China would administer this curb itself, allocating internally the trade reduction.

For all the controversy it engenders both abroad and within U.S. domestic political pro-free-trade circles, the 301 system does serve as a major part of the structure and process for American debate over trade relations with other nations. The question is whether an extension of the 301 system could provide adequate structure to the U.S. debate over trade and other relations with China. The answer is yes.

207. See supra note 6 and accompanying text.

208. As a commentator analyzed the 1999 prospect of suspension agreements on steel: "suspension agreements replace duties . . . with negotiated quotas . . . . . . If tariffs are imposed, the U.S. treasury captures those [economic] rents. If, however, quotas are used, the foreign companies that raise their prices capture them." Greg Mastel, Foreign Aid in the Guise of Steel Pacts, J. Com., July 23, 1999, at 6.
Conclusion

A. Relations with China

The ultimate question is whether having an annual Sino 301 process in the United States helps, or hurts, relations with China. From the perspective of Beijing's leaders, annual Congressional debates are trouble, plain and simple. Such debates trap Beijing in the uncomfortable position of being subjected to periodic criticism and stirring-up of antagonism. Beijing gains nothing by remaining, year after year, a target of attack in U.S. politics. On the other hand, China-critics avow that their criticisms, and the need for U.S. review of trade and other relations with China, derive from the faults of the Beijing regime, and that such international attention is for the benefit, not the harm, of the Chinese people. For China-critics, criticism of the regime is not a criticism of the nation, and provides the only possible substitute for the domestic democratic forum denied by the regime.

From the U.S. side, the picture is somewhat clearer. It is the larger set of issues regarding relations, which transcend trade, that most justify a Sino 301 process. U.S. relations with China involve very large elements both of hope and of peril in the coming years. On the side of hope, China's fast-growing economy offers the prospect of valuable trade and investment. China can become a source of stability in Asian and Pacific affairs, for China has not historically sought to project power far from its homeland.

On the other hand, the experience of trade dealings with China for the past two decades shows that America must press hard for favorable terms, or else it will end up with unfavorable ones. While the accession agreement was beneficial for the United States, as discussed above, China will face difficulties in fulfilling its accession agreement commitments. More importantly, beyond purely economic considerations, fueling China's growth may well produce strategic national security problems with respect to the stability of Asian and Pacific affairs. With growing industrial might and technological sophistication, China will have more power than its many weaker neighbors. China's view of what adjustments should follow accordingly may clash with that of the rest of the world, particularly the United States.

While this is an extremely abbreviated statement about an enormous subject, no matter how briefly or fully one explores the matter, in the end, the issue is reduced to a debate regarding the appropriate course the

209. Mastel, supra note 121, at 156-59.
212. For a particularly strong treatment of this side, see generally Richard Bernstein, The Coming Conflict with China (1997).
United States should follow with China.\textsuperscript{213} In American politics, there can be error in Congressional debate. For example, there was, in retrospect, more hysteria than substance in the temporary "surge in anti-Chinese sentiment in Congress"\textsuperscript{214} in April 1999 that delayed the China-U.S. WTO Accession Agreement until year's end.\textsuperscript{215} However, a nation can only learn of its mistakes by holding such debates, not by doing without them. If the only U.S. interests in China concerned trade, the United States might conduct its discussions on this matter through the same channels that handle other trade issues. But China matters too much to limit such debate to ordinary trade matters alone. For all the pitfalls of the annual review process, the United States allocates a generous portion of a precious commodity—serious public and political attention—to relations with China. The importance of those relations makes the allocation of that special attention worthwhile.\textsuperscript{216}

B. The American Balance in Trade Relations

In the past half-century, through international agreements and through its own national policy, the United States, as much or more than any other nation, has helped to develop the present system of legal management of international trade. The United States has maintained a balance, albeit one constantly in flux, between multilateral and unilateral approaches. On the one hand, the United States helped establish the original GATT, led the decades of successive rounds of negotiations that refined it, and helped to culminate that half-century of evolution with the Uruguay Round agreements and the creation of the WTO. All of this, not to mention the creation of the regional trade pact of North American Free Trade Agreement (NAFTA), shows a powerful and effective spirit of multilateralism.\textsuperscript{217} China's inclusion in the WTO eliminates one of the major remaining obstacles to knitting the world economy together in a multilateral agreement system.

On the other hand, U.S. own politics necessitate that it exhibit a contrasting element of unilateralism. This article discussed previously how this meshes with a general contemporary balance in many contexts of international relations between (Executive-led) engagement and commit-

\textsuperscript{213} For two of the many surveys in recent years, see China Joins the World: Progress and Prospects (Elizabeth Economy & Michael Oksenberg eds., 1999); Living with China: U.S.-China Relations in the Twenty-First Century (Ezra F. Vogel ed., 1997).

\textsuperscript{214} Steven Mufson & Robert G. Kaiser, Missed U.S.-China Deal Looms Large: Near-Agreement in April May Prove Pivotal in WTO Talks, WASH. POST, Nov. 10, 1999, at A1; see generally William V. Roth, Jr., Let China Join the WTO, WASH. POST, Apr. 19, 1999, at A19 (chair of Senate Finance Committee disputing his party's criticisms of an accession agreement with China even at the moment they proved temporarily decisive).

\textsuperscript{215} Bacon, supra note 8, at 370-73 (describing in retrospect the friction in 1999 in Sino-U.S. trade relations and why the accession agreement at 1999's end was a positive development).


ment to international organizations and undertakings, and (Congressionally-voiced) skepticism about those commitments.\textsuperscript{218} The rise of the Section 301 system demonstrates the force of U.S. skepticism about the adequacy of trade multilateralism. In the past decade, the 301 system persevered over strong foreign opposition in the Uruguay Round negotiations, the Helms-Burton (as to Cuba) and the Iran/Libya Sanctions acts—two 1996 acts unilaterally threatening interference with other countries' trade,\textsuperscript{219} the 1997 refusal to extend the "fast track" route to future trade agreements, and the 1999 demonstrations in Seattle.\textsuperscript{220} Annual MFN review of China, and the controversy over Chinese accession to the WTO, applied this streak of skepticism about multilateralism in the specific context of trade with China.

A serious record of misguided past unilateral American trade actions, particularly in the context of China pursuant to the MFN review mechanism, would support an effective argument against unilateralism in much the same way that free-trade enthusiasts point to the Hawley-Smoot Tariff of 1930 as an effective argument against protectionism. However, there is no such record of misguided U.S. action regarding trade with China. Shriп, sometimes ineffective, occasionally even hysterical debates have produced no irreversible, mistaken actions. Thus trade debate, without trade mistakes, has been the rule. The annual MFN debates have drawn meaning from having the potential to trigger a serious threat, and yet have not triggered it or otherwise caused any serious disruption to the steady progress in U.S.-China trade relations. This record of debate without mistakes greatly undermines the case against finding a replacement mechanism for giving meaning to the annual debates. A Sino 301 mechanism will allow debate in a way that respects both the importance and controversiality of trade relations with China and the newly-applicable international trade law of the WTO rules and the accession agreement. Few subjects are worthier of receiving such a share of U.S. public attention.

\textsuperscript{218} Tiefer, Adjusting Sovereignty, supra note 10.
\textsuperscript{220} For a reconceptualization and defense of such unilateralism in international economic law, see Alan C. Swan, "Fairness" and "Reciprocity" in International Trade Section 301 and the Rule of Law, 16 ARIZ. J. INT'L & COMP. L. 37 (1999).