

## Chinese Views on Modern Marco Polos: New Foreign Trade Amendments after WTO Accession

Heng Wang

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# Chinese Views on Modern Marco Polos: New Foreign Trade Amendments After WTO Accession†

Heng Wang††

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## Introduction

Since China's accession to the World Trade Organization (WTO) at the end of 2001,<sup>1</sup> it has made substantial, even heroic, efforts to change its laws and regulations. WTO accession has brought not only amendments to formal written laws, but greater transparency in government administration, enhanced opportunities for Chinese entrepreneurs, and more equal treatment between foreign and domestic business organizations. One crucial step forward is the *Duiwai Maoyi Fa* 2004 [Foreign Trade Act 2004] ("FTA 2004"),<sup>2</sup> which amended the *Duiwai Maoyi Fa* 1994 [Foreign Trade Act 1994] ("FTA 1994").<sup>3</sup> With just over one year's experience operating under this new foreign trade regime, a detailed consideration of its strengths and weaknesses is needed.

The issues to be considered in this article include the nature of the changes made by the 2004 amendments, the sufficiency of these changes, what the changes mean for the future of China's foreign trade regime, and the challenges China will face in the new century. Following an overview of the history of China's foreign trade regime, the article examines the positive changes made in the 2004 amendments to the FTA 1994. The article will then analyze several areas which have not been addressed sufficiently in the FTA 2004 amendments. To further analyze the post-WTO-accession foreign trade regulation of China, the author examines the most recent and sensitive 2005 Interim Textile Exportation Regulation as an illustration of China's efforts to regulate specific industries. Finally, based on the previous analysis of China's trade laws in general (FTA) and in specific (Interim Textile Exportation Regulation), the Article will assess the larger legal challenges facing China as it moves toward a market economy, which will likely impact China's trade policy in the future.

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1. The WTO's Ministerial Conference approved the text of the agreement for China's entry into the WTO on November 10, 2001. Press Release, World Trade Organization, WTO Ministerial Conference Approves China's Accession (Nov. 10, 2001), available at [http://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr252_e.htm). China became a member of the WTO on December 11, 2001. See NOTIFICATION OF ACCEPTANCE AND ENTRY INTO FORCE ON THE PROTOCOL ON THE ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA, COMPILATION OF THE LEGAL INSTRUMENTS ON CHINA'S ACCESSION TO THE WORLD TRADE ORGANIZATION (2002).

2. *Duiwai maoyi fa* 2004 [Foreign Trade Act 2004] (adopted at the Eighth Sess. of the Tenth Nat'l People's Cong. Standing Comm., Apr. 6, 2004, effective July 1, 2004), translation available at <http://english.mofcom.gov.cn/aarticle/policyrelease/domesticpolicy/200406/20040600229060.html> [hereinafter FTA 2004]. The English term for this statute is usually the Foreign Trade Law. However, in this Article I refer to it as the Foreign Trade Act so as to distinguish it from the overall area of foreign trade law.

3. *Duiwai maoyi fa* 1994 [Foreign Trade Act 1994] (adopted at the Seventh Sess. of the Eighth Nat'l People's Cong. Standing Comm., May 12, 1994, effective July 1, 1994), translation available at <http://english.mofcom.gov.cn/article/topic/lawsdata/chinese-law/200211/20021100053224.html> [hereinafter FTA 1994].

## I. China's Foreign Trade Regime: A Brief Overview

### A. History of China's Trade Laws and Administration

Since 1952, China has separated its domestic and foreign trade sectors by creating two separate regulatory systems, one for domestic trade and another for foreign trade. Prior to that, an attempt was made to unify the two sectors by establishing the Central Ministry of Trade on November 2, 1949.<sup>4</sup> This short-lived experiment was abandoned on September 3, 1952, when it was replaced by the Ministry of Business (Shang Ye Bu) and the Ministry of Foreign Trade, reinstating two different systems for domestic and foreign trade.<sup>5</sup> In March 1982, the Ministry of Foreign Economic Affairs and Trade was established. Its primary responsibility was the administration of foreign trade and foreign economic cooperation.<sup>6</sup> In 1993, the Ministry of Foreign Economic Affairs and Trade was renamed the Ministry of Foreign Trade and Economic Cooperation.<sup>7</sup> Then, in March 2003, the Ministry of Commerce (MOFCOM), which now governs both domestic trade and foreign trade, was established to integrate the administration of the Ministry of Foreign Trade and Economic Cooperation, as well as certain functions of the former National Planning Commission, and those of the National Economic and Trade Commission.<sup>8</sup> The birth of MOFCOM marked the beginning of a new epoch—the half-century separation between domestic and foreign trade was finally abolished.

Though deeply rooted in the planned economy, the separation between domestic and foreign trade was inefficient and expensive. For example, on average, the operating costs of foreign trade corporations in China reached ten percent of the corporation's total worth, much higher

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4. Zhonghua renmin gongheguo zhongyang renmin zhengfu zuzhi fa [Organic Law of the Central People's Government of the People's Republic of China] (effective, Sept. 27, 1949), art. 18; Zhengwuyuan zhengmi zi yihao ling [Decree No. 1 of the Government Administration Council]; see Ministry of Commerce of the People's Republic of China, Shangwu Bu Jigou Yangge [The History of Ministry of Commerce], <http://www.mofcom.gov.cn/mofcom/yange.shtml> (last visited Feb. 3, 2006) [hereinafter *The History of Ministry of Commerce*].

5. Guanyu tiaozheng zhongyang renmin zhengfu jigou de jue ding [Decision on the Adjustment of Agencies of the Central People's Government] (promulgated by the Seventeenth Meeting of the Central People's Gov't Comm., Aug. 7, 1952), art. 2; see *The History of Ministry of Commerce*, *supra* note 4; see also Chinese National People's Congress Government Chronicle, <http://www.china.org.cn/chinese/zhuant/273561.htm> (last visited Feb. 25, 2006).

6. In March 1982, the resolution, adopted at the 22nd Session of the Fifth National People's Congress Standing Committee, established the Ministry of Foreign Economic Affairs and Trade. See *The History of Ministry of Commerce*, *supra* note 4.

7. In accordance with the resolution adopted on March 16, 1993 at the First Plenary Session of the Eighth National People's Congress, the Ministry of Foreign Economic Affairs and Trade was renamed the Ministry of Foreign Trade and Economic Cooperation. See *id.*

8. The MOFCOM is established in accordance with the Guowuyuan jigou gaige fangan [Structural Reform Plan of State Council], approved by the First Plenary Session of the Tenth National People's Congress and Guowuyuan guanyu jigou shezhi de tongzhi [Notice on the Structural Establishment of the State Council]. The MOFCOM is responsible for the regulation of domestic and foreign trade, as well as international economic cooperation. See *id.*

than the brokers' rate of commission of two to three percent.<sup>9</sup> Furthermore, the former trade regulation regime was opposed to the trend toward international trade regulation.<sup>10</sup> Globalization and fierce trade competition created the need for a uniform administration system.

## B. Structure of China's Foreign Trade Laws

Prior to the FTA 1994, China had no special law enacted by National People's Congress which comprehensively deals with international trade.<sup>11</sup> When the FTA 1994 was adopted, it was clearly the most important foreign trade regulation of its time. However, after ten years in operation, it seemed incapable of adequately handling foreign trade issues.<sup>12</sup> The 2004 amendments to the FTA 1994 dramatically changed China's trade laws, and more importantly, fulfilled China's WTO obligations. Besides the 2004 amendments, China has developed a network of foreign trade laws and administrative regulations,<sup>13</sup> many of which regulate international trade in more detail. Such regulations include Huowu jinchukou guanli tiaoli [Regulation on the Administration of the Import and Export of Goods, RAIEG],<sup>14</sup> Duiwai maoyi jingyingzhe beian dengji banfa [Measures for Registration for the Record of Foreign Trade Operators, MRRFTO],<sup>15</sup> Jinchukou guanshui tiaoli [Regulations on Import and Export Duties],<sup>16</sup>

9. ZHONGHUA RENMIN GONGHEGUO DUIWAI MAOYI FA: TIAOWEN JINGSHI JI GUOJI GUIZE [UNDERSTANDING FOREIGN TRADE LAW OF PRC AND RELATED INTERNATIONAL RULES] 10 (Huang Dongli & Wang Zhenmin eds., 2004).

10. See Edward John Ray, *Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariff Barriers*, 8 NW. J. INT'L L. & BUS. 285, 293-94 (1987) (describing the shift away from protectionism in the United States trade policy).

11. The National People's Congress is "the highest organ of state power" and in effect, the legislature of the People's Republic of China. See XIAN FA arts. 57, 58 (1982) (P.R.C.), translation available at <http://english.peopledaily.com.cn/constitution/constitution.html> (Mar. 22, 2004).

12. Che Yuming et. al., *Xiugai waimaofa youliyu zhongguo waimao jiankang fazhand* [MOFCOM: Amendment of Foreign Trade Law to Promote the Healthy Development of China's Foreign Trade], XINHUA NEWS, Apr. 6, 2004, available at [http://news.xinhuanet.com/newscenter/2004-04/06/content\\_1404484.htm](http://news.xinhuanet.com/newscenter/2004-04/06/content_1404484.htm).

13. See Li Gaozhao, *Yiju rushi chengnuo wanshan fazhi, zhongguo shangwu falv chengsan da liangdian* [Perfection of Laws According to WTO Accession Commitment, Three Points Highlighted in China's Trade Laws], INT'L BUS. DAILY, available at <http://www.chinanews.com.cn/news/2005/2005-01-10/26/526574.shtml> (last visited Feb. 3, 2006).

14. Huowu jinchukou guanli tiaoli [Regulation on the Administration of the Import and Export of Goods] (promulgated by the State Council, Dec. 10, 2001), available at [http://en.ec.com.cn/pubnews/2003\\_02\\_16/200604/1000888.jsp](http://en.ec.com.cn/pubnews/2003_02_16/200604/1000888.jsp) [hereinafter RAIEG].

15. Duiwai maoyi jingyingzhe beian dengji banfa [Measures for Registration for the Record of Foreign Trade Operators] (promulgated by the Ministry of Commerce, June 19, 2004), available at <http://www.mofcom.gov.cn/aarticle/a/200406/20040600239262.html> [hereinafter MRRFTO]. For a brief introduction to the MRRFTO, see China: Registration of Foreign Trade Operators, [http://www.hg.org/articles/article\\_451.html](http://www.hg.org/articles/article_451.html) (last visited Feb. 3, 2006).

16. Jinchukou guanshui tiaoli [Regulations on Import and Export Duties] (promulgated by the State Council, Nov. 23, 2003), translation available at <http://english.mofcom.gov.cn/aarticle/topic/lawsdata/chineselaw/200411/20041100311020.html>.

Fanbutie tiaoli [Countervailing Regulation],<sup>17</sup> Fanqingxiao tiaoli [Anti-dumping Regulation],<sup>18</sup> Baozhang cuoshi tiaoli [Regulation on Safeguard Measures],<sup>19</sup> and Jinchukou huowu yuanchandi tiaoli [Regulations on Rules of Origin of Import and Export Commodities],<sup>20</sup> among others. Related rules include Haiguan fa [Customs Law],<sup>21</sup> Hetong fa [Contract Law],<sup>22</sup> Zhongwai hezuo jingying qiye fa [Law on Sino-foreign Cooperative Joint Ventures],<sup>23</sup> Zhongwai hezi jingying qiye fa [Law on Sino-foreign Equity Joint Ventures],<sup>24</sup> and Waizi qiye fa [Law on Wholly Foreign-Owned Enterprises].<sup>25</sup>

## II. New Amendments to China's Foreign Trade Act

The 2004 amendments made a number of significant changes to the FTA 1994. First, the National People's Congress adjusted those FTA 1994 provisions which were inconsistent with China's commitments to the WTO.<sup>26</sup> Second, the FTA 2004 provided for implementation mechanisms

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17. Fanbutie tiaoli [Countervailing Regulation], (promulgated by the State Council, Nov. 26, 2001) (amended 2004), *translation available at* [http://en.ec.com.cn/pubnews/2003\\_02\\_16/200678/1000045.jsp](http://en.ec.com.cn/pubnews/2003_02_16/200678/1000045.jsp).

18. Fanqingxiao tiaoli [Anti-dumping Regulation] (promulgated by the State Council, Nov. 26, 2001) (amended 2004), *translation available at* [http://en.ec.com.cn/pubnews/2003\\_02\\_16/200678/1000059.jsp](http://en.ec.com.cn/pubnews/2003_02_16/200678/1000059.jsp).

19. Baozhang cuoshi tiaoli [Regulation on Safeguard Measures] (promulgated by the State Council, Nov. 26, 2001) (amended 2004), *translation available at* <http://www.sccietac.org/cietac/en/content/content.jsp?id=921>.

20. Jinchukou huowu yuanchandi tiaoli [Regulations on Rules of Origin of Import and Export Commodities] (promulgated by the State Council, Sept. 3, 2004), *translation available at* [http://www.tdctrade.com/report/reg/reg\\_050103.htm](http://www.tdctrade.com/report/reg/reg_050103.htm).

21. Haiguan fa [Customs Law], *available at* <http://www.bjcustoms.gov.cn/flgd/lawdata/hgfg/customslaw.htm> (last visited July 29, 2005).

22. Hetong fa [Contract Law], *translation available at* <http://english.mofcom.gov.cn/aarticle/topic/lawsdata/chineselaw/200301/20030100064766.html> (last visited July 29, 2005).

23. Zhongwai hezuo jingying qiye fa [Law on Sino-foreign Cooperative Joint Ventures], *translation available at* <http://english.mofcom.gov.cn/aarticle/topic/lawsdata/chineselaw/200301/20030100065891.html> (last visited July 29, 2005).

24. Zhongwai hezi jingying qiye fa [Law on Sino-Foreign Equity Joint Ventures], *translation available at* <http://english.mofcom.gov.cn/aarticle/topic/lawsdata/chineselaw/200301/20030100062855.html> (last visited July 29, 2005).

25. Waizi qiye fa [Law on Wholly Foreign-Owned Enterprises], *translation available at* <http://english.mofcom.gov.cn/aarticle/topic/lawsdata/chineselaw/200301/20030100062858.html> (last visited July 29, 2005).

26. An example of such an inconsistency is the requirement in article 9 of the FTA 1994 that a foreign trade dealer shall "acquire the permit from the authority responsible for foreign trade and economic relations under the State Council." FTA 1994, *supra* note 3, art. 9. This provision is not entirely consistent with both § 5(1) of China's Protocol on the Accession of the People's Republic of China and the Working Party Report on China's WTO Accession. See World Trade Organization, China's Protocol on the Accession of the People's Republic of China § 5(1), WT/L/432 (Nov. 23, 2001), *available at* [http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm#chn](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#chn) [hereinafter China Protocol]; Working Party on the Accession of China, *Report of the Working Party on the Accession of China* ¶ 84, WT/ACC/CHN/49 (Oct. 1, 2001), *available at* <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002144.pdf> [hereinafter Working Party Report]. Section 5(1) of the China Protocol provides that "China shall progressively liberalize the availability and scope of the right to trade, so that,

and procedures to exercise China's rights as a WTO member in accordance with China's commitments and the WTO Agreements.<sup>27</sup> Third, the legislature passed amendments responding to numerous issues, including intellectual property, administrative efficiency, and external trade barriers.<sup>28</sup> These issues were not sufficiently addressed under the FTA 1994.<sup>29</sup> As MOFCOM stated, the 2004 amendments have taken into consideration "the general situation since 1994 and the needs in the promotion of . . . international trade."<sup>30</sup>

The 2004 amendment converted the FTA from protection-oriented legislation to action-oriented legislation. The latter approach has been adopted by major trading countries such as the United States and Japan.<sup>31</sup> Certain unfair trade barriers and protectionism that China has encountered contribute to this change as well, and this proactive approach may be helpful in establishing a more fair international trade environment for China.

## A. Accomplishments of the Recent FTA Amendments

### 1. Procedural Reform

Under the FTA 1994, foreign trade operations were required to either

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within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China." China Protocol, *supra*, § 5(1). Paragraph 84(a) of the *Working Party Report* specifies that "China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods." *Working Party Report*, *supra*, ¶ 84(a).

27. All texts of the WTO Agreements are available at <http://www.wto.org>.

28. See FTA 2004, *supra* note 2, arts. 29–31 (providing for the protection of trade-related aspects of intellectual property rights), 37(2) (enabling the foreign trade authorities to conduct investigations related to "trade barriers of relevant countries or regions"). Certain procedural reforms under the FTA 2004 could also enhance administrative efficiency. For example, the new registration requirement under article 9 of the FTA 2004, replacing the special permit requirement on foreign trade operations under article 9 of the FTA 1994, might contribute to more efficiency within the foreign trade administration.

29. See FTA 1994, *supra* note 3; FTA 2004, *supra* note 2, arts. 29–31 (providing for the protection of trade-related aspects of intellectual property rights), 37(2) (enabling the foreign trade authorities to conduct investigations related to "trade barriers of relevant countries or regions").

30. MOFCOM, Waimao fa xiugai de zhuyao neirong jiqi yiyi [The Major Content and Significance of Amendment to the FTA 1994], Apr. 7, 2004, <http://www.mofcom.gov.cn/aarticle/a/200404/20040400205975.html> [hereinafter Major Content and Significance].

31. The United States is "pursuing a proactive trade strategy." Geza Feketekuty, *An American Trade Strategy for the 21st Century*, in *TRADE STRATEGIES FOR A NEW ERA: ENSURING U.S. LEADERSHIP IN A GLOBAL ECONOMY* (Geza Feketekuty ed., 1997), available at <http://www.ciaonet.org/book/feg01/> (last visited Apr. 12, 2006).

Japan should "pursue proactive trade policies that are consistent with [Japan's] current domestic economic agenda for structural reform." MITI Minister's Remarks on the "New Economy Initiative," 1, available at <http://www.meti.go.jp/english/topic/data/eUS001208e.pdf> (last visited Feb. 25, 2006).



obtain special permits<sup>32</sup> or to engage a foreign trade dealer as its agent to conduct foreign trade on its behalf.<sup>33</sup> A Chinese importer must therefore have held a permit to conduct business with imported and exported products or must have entrusted a Chinese foreign trade operator<sup>34</sup> with the handling of the business. The FTA 2004 has abolished this special permit requirement and replaced it with registration procedures,<sup>35</sup> a great breakthrough in the trade administration system, which facilitates the development of international trade. To understand how this procedure works, suppose that a foreign company has obtained an export license in its home country and would like to sell its products to a Chinese company. Suppose further that these products are neither prohibited nor restricted by China's foreign trade laws.<sup>36</sup> Under the FTA 1994, the Chinese company would either need a permit to conduct business with the importer or must entrust a Chinese foreign trade operator with the handling of the business. Because the latter method is usually the faster way to transact the business, the foreign trade operator would conclude a commission agreement with the Chinese company. Under the 2004 amendments, in contrast, the Chinese company must register with the authority responsible for foreign trade or its authorized bodies unless specific laws, regulations, or the authority do not so require;<sup>37</sup> the same is true if the Chinese company hopes to engage in the import and export of technology.<sup>38</sup> The old procedure meant higher costs and lower efficiency for Chinese foreign trade businesses, especially for small dealers, which hampered their development. Undoubtedly the new registration requirement is more transparent and helps promote international trade with the world's large trading powers.<sup>39</sup>

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32. Article 9 of the FTA 1994 requires that a foreign trade dealer shall "acquire the permit from the authority responsible for foreign trade and economic relations under the State Council." FTA 1994, *supra* note 3, art. 9.

33. *Id.* art. 13 ("Any organization or individual without foreign trade operation permit may entrust a foreign trade dealer located in China as its agent to conduct its foreign trade business within the business scope of the latter.").

34. It is, to certain degree, similar to an import broker.

35. FTA 2004, article 9 states:

Foreign trade dealers engaged in import and export of goods or technologies shall register with the authority responsible for foreign trade under the State Council or its authorized bodies unless laws, regulations, and the authority responsible for foreign trade under the State Council do not so require.

FTA 2004, *supra* note 2, art. 9.

36. For the rules regarding restriction or prohibition on the importation or exportation of goods, see *id.* arts. 11 (state trade control), 14 (free trade), 15 (automatic licensing), 16 (restrictions or prohibitions), 18 (means of limitation); see also relevant administrative regulations such as the RAIEG, *supra* note 14, art. 22 (automatic licensing). All these rules might be invoked to determine whether a company's goods are restricted or prohibited under China's foreign trade laws.

37. According to the MRRFTO, foreign trade operators are required to go through registration and record-making formalities at MOFCOM or with its agents. See MRRFTO, *supra* note 15, art. 2.

38. Article 9 of the FTA 2004, *supra* note 2, applies to foreign trade dealers engaged in import and export of goods or technologies.

39. In 2003, China ranked as the fourth largest exporter and third largest importer in world merchandise trade. See WTO, INTERNATIONAL TRADE STATISTICS 2004, at 19 (2004) available at [http://www.wto.org/english/res\\_e/statis\\_e/its2004\\_e/its2004\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2004_e/its2004_e.pdf).

## 2. Access for Individuals

In accordance with the FTA 1994, "foreign trade dealers" referred to "legal entities or other organizations" that engage in foreign trade dealings.<sup>40</sup> After the 2004 amendments, the term "foreign trade dealers" now includes individuals within the group authorized to enter the import and export business.<sup>41</sup> Only those individuals who have fulfilled the industrial and commercial registration requirements or other practicing procedures and engage in foreign trade dealings in accordance with the law<sup>42</sup> may be competent to enter into foreign trade.<sup>43</sup> Previously, these individuals had no access to international trade transactions. The 2004 amendments greatly facilitate international trade transactions carried out by individuals in China.

## 3. Principle of Quota Distribution

The 2004 amendments also made changes to the principle of quota distribution. Under the former trade administration regime, quotas were distributed based on principles of "efficiency, impartiality, transparency and fair competition" according to the performance and abilities of the applicants.<sup>44</sup> There are two changes in the 2004 amendments. First, the performance and capacity of the applicants will no longer be considered in the distribution of quotas.<sup>45</sup> Second, the principle of equity has been incorporated into the distribution of quotas, and the principle of fair competition has been eliminated from the text of the quota allocation provision. The new law has established new principles of "transparency, equity, impartiality and efficiency" for the distribution of quotas.<sup>46</sup> This development is partially due to China's commitment to the China Protocol on the Accession of the People's Republic of China ("China Protocol"),<sup>47</sup> which primarily requires that the allocation of quotas and other related approvals not be conditioned on export performance.<sup>48</sup> Thus, the FTA 2004 highlights key principles of the WTO—transparency and non-discrimination.

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40. FTA 1994, *supra* note 3, art. 8.

41. In the FTA 2004, "foreign trade dealers" refers to "legal persons, other organizations or individuals that have fulfilled the industrial and commercial registration or other practicing procedures in accordance with laws and engage in foreign trade dealings in compliance with this Law and other relevant laws and administrative regulations." FTA 2004, *supra* note 2, art. 8.

42. *Id.*

43. *Id.*

44. FTA 1994, *supra* note 3, art. 20(1).

45. Article 20(1) of the FTA 1994 specifies that "import and export quotas of goods shall be distributed on the basis of the conditions including but not limited to the actual import or export performance and capability of the applicants in foreign trade dealings . . . ." *Id.*

46. FTA 2004, *supra* note 2, art. 20.

47. See China Protocol, *supra* note 26.

48. See *id.* Part I, ¶ 7(3). The China Protocol requires that:

[D]istribution of import licences, quotas, tariff-rate quotas, or any other means of approval for importation, the right of importation or investment by national and sub-national authorities, is not conditioned on: whether competing domestic suppliers of such products exist; or performance requirements of any kind,

#### 4. Expanded Coverage

The FTA 2004 adds some new provisions on state trading,<sup>49</sup> automatic licensing,<sup>50</sup> the protection of trade-related aspects of intellectual property rights,<sup>51</sup> foreign trade investigation,<sup>52</sup> and foreign trade remedies,<sup>53</sup> addressing numerous issues previously left open under national law.

#### 5. Free Imports and Exceptions

In the FTA 1994, imports of goods were in principle free, but subject to a system of restrictions and prohibitions. This principle remained in the 2004 amendments. The difference is that the 2004 amendment try to further improve the exceptional provisions to free trade in a clearer way. Under the 2004 amendments, in principle, the import of goods is free,<sup>54</sup> but subject to a system of restrictions and prohibitions.<sup>55</sup> The restrictions and prohibitions are applicable to imports and exports, and also delineate eleven conditions under which restriction is possible, five of which where

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such as local content, offsets, the transfer of technology, export performance or the conduct of research and development in China.

*Id.*

49. FTA 2004, *supra* note 2, art. 11.

50. *Id.* art. 15.

51. *Id.* arts. 29-31.

52. *Id.* arts. 37-39.

53. *Id.* arts. 40-50.

54. *Id.* art. 14.

55. *Id.* art 16. Article 16 provides:

The State may restrict or prohibit the import or export of relevant goods and technologies for the following reasons that:

- (1) the import or export needs to be restricted or prohibited in order to safeguard the state security, public interests or public morals,
- (2) the import or export needs to be restricted or prohibited in order to protect the human health or security, the animals and plants life or health or the environment,
- (3) the import or export needs to be restricted or prohibited in order to implement the measures relating to the importations and exportations of gold or silver,
- (4) the export needs to be restricted or prohibited in the case of domestic shortage in supply or the effective protection of exhaustible natural resources,
- (5) the export needs to be restricted in the case of the limited market capacity of the importing country or region,
- (6) the export needs to be restricted in the case of the occurrence of serious confusion in the export operation order,
- (7) the import needs to be restricted in order to establish or accelerate the establishment of a particular domestic industry,
- (8) the restriction on the import of agricultural, animal husbandry or fishery products in any form is necessary,
- (9) the import needs to be restricted in order to maintain the State's international financial status and the balance of international payment,
- (10) the import or export needs to be restricted or prohibited as laws and administrative regulations so provide, or
- (11) the import or export needs to be restricted or prohibited as the international treaties or agreements to which the state is a contracting party or a participating party so require.

import and export can be prohibited.<sup>56</sup> In addition, some conditions empower the State to take “any measures” with respect to the import or export of goods and technologies.<sup>57</sup> The tenth condition provides that exports or imports can be restricted or prohibited if the “laws and administrative regulations so provide.”<sup>58</sup> This requires further clarification. Since it is fairly difficult for the list of eleven conditions to cover all the concrete situations individually, the FTA 2004 uses the phrase “as laws and administrative regulations so provide.” However, this primarily means that China would be able to cope with international trade problems that do not fall within the other ten categories. This is not without any limitation, however, as China must comply with its WTO commitments and obligations. It is important to note that the provisions for trade in services differ. In six situations, trade in services may be restricted or prohibited.<sup>59</sup>

Even if a particular import or export trade transaction were not prohibited or restricted under the FTA 2004, it still might be subject to automatic licensing.<sup>60</sup> For some goods under free import it is necessary for monitoring purposes to apply for an automatic import license.<sup>61</sup> This is permissible under the China Protocol.<sup>62</sup>

Another field that may involve foreign trade with China is state trad-

*Id.* art. 16.

56. *Id.*

57. For instance, article 17 of the FTA 2004 stipulates that:

[I]n the case of the import or export of the goods and technologies relating to fissionable and fissionable materials or the materials from which they are derived as well as the import or export relating to arms, ammunition and implements for war, [the State may] take any measures as necessary to safeguard the state security. The State may, in the time of war or for the protection of international peace and security, take any measures as necessary in respect of import or export of goods and technologies.

*Id.* art. 17. Article 27 of the FTA 2004, which has similar provisions, applies to international trade in services related to state security. *Id.* art. 27.

58. *Id.* art. 16(10).

59. Under article 26 of the FTA 2004, these six situations are:

- (1) restrictions or prohibitions are needed to safeguard the state security, public interests or public morals,
- (2) restrictions or prohibitions are needed to protect the human health or security, the animals and plants life or health or the environment,
- (3) restrictions are needed to establish or accelerate the establishment of a particular domestic service industry,
- (4) restrictions are needed to maintain the balance of international payment of the state,
- (5) restrictions or prohibitions are needed as laws and administrative regulations so provide, or
- (6) restrictions or prohibitions are needed as the international treaties or agreements to which the state is a contracting party or a participating party so require.

*Id.* art. 26.

60. *Id.* art. 15.

61. *Id.* art. 15; see also RAIEG, *supra* note 14, art. 22.

62. “China shall report annually to the Committee on Import Licensing on its automatic import licensing procedures, explaining the circumstances which give rise to these requirements and justifying the need for their continuation.” See China Protocol, *supra* note 26, § 8(1)(c).

ing.<sup>63</sup> Some goods are subject to state trade control, under which the State handles foreign trade with certain goods through state-run enterprises.<sup>64</sup> The State could also permit non-state enterprises to engage in the import and export of such goods, though other enterprises are not allowed to engage in such transactions.<sup>65</sup>

How could China carry out the aforementioned limitation? The importation of goods is not automatically restricted, prohibited, or subject to licensing or state trading in case the goods fall into one of the aforementioned categories. On one hand, restrictions or prohibitions are usually made by MOFCOM pursuant to article 18 of the FTA 2004, which formulates, readjusts, and publicizes a category of goods whose import is restricted or prohibited.<sup>66</sup> This is also the case for automatic licensing and state trading.<sup>67</sup> On the other hand, MOFCOM can, independently or in conjunction with other relevant authorities under the State Council, specifically decide to restrict or prohibit the import of certain goods.<sup>68</sup> In the latter case, in accordance with the requirements of articles 16 and 17 of FTA 2004, MOFCOM must obtain the approval of the State Council and decide, on a temporary basis, whether to impose restrictions or prohibitions on the import and export of goods and technologies not included under article 18 of the FTA 2004.<sup>69</sup> This means that the importation of goods is free as long as MOFCOM has not declared otherwise. If the products are not listed in a catalogue pursuant to article 11(1) of the FTA 2004 and articles 22 and 45 of the RAIEG, or subject to a special decision of MOFCOM in accordance with article 18(2) of the FTA 2004, the import transaction should be approved.<sup>70</sup>

With regards to trade in services, the determination and adjustment of the market access list of international trade in services is quite similar to that of exported and imported goods and technology.<sup>71</sup> The difference is that the FTA 2004 does not expressly authorize competent authorities to impose restrictions and prohibitions on trade in services not already listed.

## 6. Foreign Trade Remedies

Because the FTA 1994 included few stipulations on foreign trade remedies, rules related to such remedies have been incorporated into the FTA 2004. The rules on foreign trade remedies cover a number of new fields,

63. FTA 2004, *supra* note 2, art. 11.

64. *Id.* art. 11; RAIEG, *supra* note 14, arts. 45-52.

65. RAIEG, *supra* note 14, arts. 47, 51.

66. FTA 2004, *supra* note 2, art. 18.

67. RAIEG, *supra* note 14, arts. 22, 45.

68. FTA 2004, *supra* note 2, art. 18(2).

69. *Id.* art. 18.

70. This conclusion necessarily flows from the statutory structure.

71. Compare FTA 2004, *supra* note 2, art. 28 ("The authority responsible for foreign trade under the State Council . . . shall . . . determine, adjust and publish the market access list of international trade in services.") with FTA 2004, *supra* note 2, art. 18 ("The authority responsible for foreign trade under the State Council . . . shall . . . establish, adjust and publish the list of goods and technologies of which the import or export is subject to restrictions or prohibitions.").

including import-export pre-warning and emergency systems<sup>72</sup> and anti-circumvention measures.<sup>73</sup> Further, the FTA 2004 expanded upon certain relevant stipulations in the FTA 1994.<sup>74</sup> The major changes in this respect are as follows.

a) Anti-dumping, Safeguards, and Countervailing Measures

Both the FTA 1994 and the 2004 amendments have nearly identical provisions on anti-dumping,<sup>75</sup> except for some minor changes in terminology. Moreover, the FTA 2004 has incorporated a rule<sup>76</sup> which essentially mirrors the anti-dumping rule related to third parties in the Agreement on Implementation of Article VI of the 1994 General Agreement on Tariffs and Trade.<sup>77</sup>

With regard to safeguards,<sup>78</sup> the FTA 2004 has changed some important terminology. First, referring to increases in imports, the wording has changed from "increased quantities"<sup>79</sup> to "substantially increased quantities."<sup>80</sup> Second, the term "domestic producers"<sup>81</sup> in FTA 1994 has been changed to "domestic industry."<sup>82</sup>

The change from "increased quantities" to "substantially increased quantities" sets a higher threshold for the initiation of a safeguard measure, and thus would more significantly limit the availability of safeguard mea-

72. *Id.* art. 49.

73. *Id.* art. 50.

74. These provisions involve anti-dumping, countervailing measures, and safeguards.

75. Compare FTA 1994, *supra* note 3, art. 30, with FTA 2004, *supra* note 2, art. 41.

76. Article 42 of the FTA 2004 stipulates that:

Where the export of a product from other countries or regions to the market of a third country causes or threatens to cause material injury to the established domestic industries, or materially retards the establishment of domestic industries, the authority responsible for foreign trade under the State Council may, on the request of the domestic industries, carry out consultations with the government of that third country and require it to take appropriate measures.

FTA 2004, *supra* note 2, art. 42.

77. World Trade Organization, The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 14, WT/MIN(01)/17.

78. See FTA 2004, *supra* note 2, art. 44; FTA 1994, *supra* note 3, art. 29.

79. According to article 29 of the FTA 1994, one of the preconditions for safeguard measures is that the product at issue must be imported in "such increased quantities . . ." FTA 1994, *supra* note 3, art. 29 (emphasis added).

80. Under article 44 of the FTA 2004, safeguards can be imposed only when a "product is being imported in substantially increased quantities . . ." FTA 2004, *supra* note 2, art. 44 (emphasis added).

81. Article 29 of the FTA 1994 stipulates that "[w]here a product is imported in such increased quantities as to cause or threaten to cause serious injury to domestic producers of like or directly competitive products, the State may take necessary safeguard measures to remove or ease such injury or threat of injury." FTA 1994, *supra* note 3, art. 29.

82. Article 44 of the FTA 2004 provides that "[w]here a product is being imported in substantially increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products, the State may take safeguard measures as necessary to eliminate or mitigate such injury or threat of injury and provide the industry concerned with necessary support." FTA 2004, *supra* note 2, art. 44.

asures. The change from “domestic producers” to “domestic industry” is meant to adopt the terminology used in the Agreement on Safeguards<sup>83</sup> and to avoid possible ambiguity in the future. Another notable development in the stipulation of safeguards is that if the conditions for safeguard measures are met, the State may not only take safeguard measures, but also provide the affected industry “necessary support”<sup>84</sup> which is not stipulated in the FTA 1994. The provision of “necessary support” might be, to a certain degree, similar to the trade adjustment assistance in the United States.

Regarding countervailing measures,<sup>85</sup> the FTA 2004 substitutes “specific subsidy” for “subsidy.” This change makes the countervailing stipulation of the FTA 2004 consistent with the Agreement on Subsidies and Countervailing Measures.<sup>86</sup>

Given the changes discussed above, it is apparent that Chinese laws seek to incorporate rules consistent with those of the WTO. In certain situations, the Chinese laws even set a standard higher than the WTO obligations require.

#### b) Emergency Safeguard Measures for Services

For international trade in services, the FTA 2004 has adopted a special provision for emergency safeguard measures.<sup>87</sup> The General Agreement on Trade in Services (GATS) provides for a stipulation on emergency safeguard measures,<sup>88</sup> which calls for multilateral negotiations on the question of emergency measures. In practice, such negotiations have rarely occurred within the WTO. Therefore, China wanted to adopt rules necessary to handle the possible injuries which its relatively less competitive service industry might suffer after WTO accession. This FTA 2004 stipulation differs from those for safeguards applicable to goods,<sup>89</sup> because the former requires “increase of services” that “causes or threatens to cause injury to the domestic industries”<sup>90</sup> while the latter requires “substantially increased quantities” that “cause or threaten to cause serious injury to the domestic industry.”<sup>91</sup> Given this terminology, it is easier under the FTA

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83. Agreement on Safeguards art. 2(1), Apr. 15, 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/25-safeg.pdf](http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf) (“A Member may apply a safeguard measure to a product only if . . . such product is being imported into its territory . . . under such conditions as to cause or threaten to cause serious injury to the domestic industry . . . .”) (emphasis added) [hereinafter Safeguards Agreement].

84. FTA 2004, *supra* note 2, art. 44.

85. See *id.* art. 43; FTA 1994, *supra* note 3, art. 31.

86. Agreement on Subsidies and Countervailing Measures arts. 1.2, 2, Apr. 15, 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](http://www.wto.org/english/docs_e/legal_e/24-scm.pdf).

87. Under article 45 of the FTA 2004, if the increase of services provided to China by outside service suppliers causes or threatens to cause injury to the domestic industries that provide like or directly competitive services, the State may take necessary remedies to “eliminate or mitigate such injury or threat of injury and provide such industry with necessary support.” FTA 2004, *supra* note 2, art. 45.

88. General Agreement on Trade in Services art. 10, *opened for signature* Apr. 15, 1994, 33 I.L.M. 1167 (1994).

89. FTA 2004, *supra* note 2, art. 44.

90. *Id.* art. 45 (emphasis added).

91. *Id.* art. 44 (emphasis added).

2004 to adopt the emergency safeguard measures for services than those for products. There are two main reasons for this. First, services are intangible and thus harder to regulate. With the development of technology, it becomes increasingly difficult to identify and regulate the online provision of professional services such as counseling and legal services. Given this, it would be unreasonable and impractical to require that the emergency safeguard measures for services could only be taken once there is a substantial increase of services provided to China. Second, China's service industries are generally less competitive, and therefore are vulnerable to a sudden increase of services from other countries or regions, thus necessitating special safeguard measures.

#### d) Diversions of Trade

A new stipulation has been incorporated into the FTA 2004 to handle diversions of trade. The stipulation enables China to take measures to restrict the import of certain products.<sup>92</sup> Three conditions must be met before such a remedy can be lawfully applied. First, the restriction must be imposed by a third country on the import of a certain product. Second, this restriction must cause the increase in imports of the product. Finally, the increase must cause or threaten to cause injury to the established domestic industry, or materially retards the establishment of related domestic industries.<sup>93</sup> It is important to note that China itself is subject to similar provisions under the China Protocol.<sup>94</sup>

#### 7. Improved Provisions of Legal Liability

The FTA 1994 contained only four articles related to legal liability.<sup>95</sup> All of the provisions were quite general ones. The punishments for violations were insufficient in their limited methods, which heavily relied on criminal penalties, administrative sanctions, and fines.<sup>96</sup> Since these punishments were insufficient to deal with violations of trade laws, the FTA 2004 has nearly doubled the stipulations on legal liability.<sup>97</sup> First, the FTA 2004 has increased the varieties of punishments available. Specifically, the government is now able to reject foreign trade applications from those traders who have violated trade laws,<sup>98</sup> to issue rectification orders to lawbreakers,<sup>99</sup> to confiscate illegal proceeds,<sup>100</sup> and to prohibit lawbreakers from engaging in certain foreign transactions within a stipulated period.<sup>101</sup>

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92. *Id.* art. 46.

93. *Id.*

94. China Protocol, *supra* note 26, § 16.8.

95. FTA 1994, *supra* note 3, arts. 38-41.

96. Criminal punishments have been incorporated into all four articles relating to legal liabilities in the FTA 1994.

97. Chapter 10 of the FTA 2004, consisting of seven articles, specifically deals with legal liabilities. See FTA 2004, *supra* note 2, arts. 60-66.

98. *Id.* arts. 60, 61(3).

99. *Id.* arts. 61(2), 62.

100. *Id.*

101. *Id.* arts. 61(3), 62(2), 63. Under article 64 of the FTA 2004:



Second, the FTA 2004 incorporates the penalties available for the violation of rules on international trade in services.<sup>102</sup> Finally, the FTA 2004 provides for access to judicial review of specific administrative acts.<sup>103</sup> This change is obviously closely connected to China's commitment to WTO Accession.<sup>104</sup> All of these new rules will help China fight against potential violations of foreign trade laws.

## B. Critique of the FTA 2004

There are seven specific criticisms of the FTA 2004 which this Article will address: (1) the vagueness of the stipulations; (2) the weakness of Chinese trade associations; (3) the issue of tax reimbursements for newly-established small foreign trade enterprises; (4) the harmonization of rules for domestic and foreign trade; (5) MOFCOM's increased role in dispute settlements; (6) rules to handle dislocations resulting from China's WTO accession; and (7) flawed rules on the issue of agency in foreign trade. While there are other potential problems with the 2004 amendments, these seven issues appear to be the most pressing.

### 1. Vagueness of Stipulations

The vague and very general provisions of the FTA 2004 leave considerable room for administrative agencies. The imprecision of FTA 2004 provisions makes it difficult for authorities to effectively handle the challenges they encounter in the fast paced world of international trade. For example, the lack of clear guidelines for investigation and response hinders the Chinese administrative agencies' ability to respond effectively to unfair trade barriers imposed by foreign trade partners, the abuse of intellectual property rights (IPRs), or other such problems. It would be better if the FTA 2004 had more detailed provisions. Moreover, as compared to similar trade regulations in the United States, European Union, Japan, and Canada, several of the FTA 2004 provisions are less detailed. For instance, the FTA 2004 has specifically tried to protect trade-related aspects of IPRs. However, with only a very short stipulation addressing IPRs,<sup>105</sup> the FTA

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[W]ithin the period of prohibition the Customs authority shall not grant release to the relevant imported or exported goods of that foreign trade dealer in accordance with the decision made by the authority responsible under the State Council, and the foreign exchange administration or designated foreign exchange banks shall not process the procedures of selling and purchasing foreign exchange.

*Id.* art. 64.

102. *Id.* art. 62.

103. *Id.* art. 66.

104. See China Protocol, *supra* note 26, § 2(D)(1). China is obliged to:

[E]stablish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in article X:1 of the GATT 1994, article VI of the GATS and the relevant provisions of the TRIPS Agreement.

*Id.*

105. Under article 29 of the FTA 2004:

2004 fails to include detailed and effective remedy provisions available when Chinese industries encounter imported goods that infringe patents, trademarks, and copyrights. In contrast, section 337 of the United States Tariff Act of 1930<sup>106</sup> is much more detailed, and “is a remedy that has been immensely popular as a vehicle for aiding U.S. industries faced with imported goods that infringe patents, trademarks and copyrights.”<sup>107</sup> It might be a wise choice to further improve the FTA 2004 by providing more trade remedies under such circumstances.

## 2. Weakness of Trade Associations

It has long been a concern that trade associations, councils of commerce, and other such organizations fail to operate effectively inside China.<sup>108</sup> Since “government functions should be strictly separated from enterprise management,”<sup>109</sup> many powers originally controlled by the government have been conferred to trade associations since China’s accession to the WTO. However, because of the influence of the former planned economy, many trade associations have failed to enhance self-disciplinary procedures or provide services to members towards protecting their legitimate rights; they still resemble government agencies<sup>110</sup> rather than market-oriented organizations. Unfortunately, the FTA 2004 fails to provide a workable solution to this problem. In practice, a major issue complicating anti-dumping settlement negotiations is maintaining a unified position among the various Chinese enterprises (who are of course competitors with each other) inside the Chinese trade associations assisting those enterprises responding to potential or actual anti-dumping charges.<sup>111</sup> Engendering cooperation among competitors presents some very interest-

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The State shall, in accordance with laws and administrative regulations relevant to intellectual property rights, protect trade-related aspects of intellectual property rights. Where the imported goods infringe intellectual property rights and impair foreign trade order, the authority responsible for foreign trade under the State Council may take such measures as prohibiting the import of the relevant goods from being produced or sold by the infringer [sic] within a certain period.

FTA 2004, *supra* note 2, art. 29.

106. 19 U.S.C. § 1337 (2000) (dealing with unfair trade practices and methods of competition in the importation of products into the United States.).

107. Leslie Alan Glick, *Section 337 of the Tariff Act of 1930 (Unfair Trade Practices and Methods of Competition in the Importation of Products into the United States)*, in *MANUAL FOR THE PRACTICE OF U.S. INTERNATIONAL TRADE LAW 6* (William Kitchell Ince & Leslie Alan Glick eds., 2001).

108. Zhang Jin, *Promoting International Dialogue*, CHINA DAILY, Aug. 19, 2004, at 11.

109. Meng Yan, *Premier Demands Licensing Reforms*, CHINA DAILY, Jan. 7, 2004, at 1.

110. In the 1990s “the government restructured some of its departments and ministries into associations.” Zhang Jin, *Promoting International Dialogue*, CHINA DAILY, Aug. 19, 2004, at 11.

111. Similar problems existed in recent collective iron ore negotiation between China and Australia, where two Chinese enterprises agreed with Australia to purchase iron ore at higher prices at a tough stage of the negotiation. See Suo Hanxue, *Tiekuangshi tanpan jinru jianfeng shike, panbianzhe renu shangwubu* [Iron Ore Negotiation at its Crucial Stage, “Ratters” Roil Ministry of Commerce], ZHONGGUO JINGYING BAO (CHINA BUSINESS), Feb. 18, 2006, available at <http://finance.sina.com.cn/g/20060218/08372353628.shtml>.

ing theoretical challenges in the anti-dumping context. More importantly, the 2004 amendments fail to address how Chinese trade associations could be more effective in encouraging competitors facing anti-dumping trade cases to cooperate. Although it is not all that difficult to obtain information regarding individual enterprises which are not complying with the self regulatory arrangements made by Chinese trade associations, there are significant problems in enforcing sanctions on such noncomplying enterprises. This long-standing problem remains unresolved.

Developing stronger trade associations for Chinese enterprises would also greatly help protect their legitimate rights under the WTO, especially in persuading the Chinese government to initiate complaints against other members that violate WTO rules. In order to challenge practices inconsistent with WTO rules by recourse to the Dispute Settlement Body, a Member may request conciliation<sup>112</sup> and use the dispute settlement procedures.<sup>113</sup> Where settlement of the dispute is not feasible, Chinese enterprises must persuade the Chinese government to bring a case before the Dispute Settlement Body. A single enterprise is not normally sufficiently strong to persuade the government to launch such an effort, so trade associations become important. Because of China's recent accession to the WTO, it is unclear how this problem will develop.

One approach for Chinese companies facing transitional product-specific safeguard measures<sup>114</sup> might be to better coordinate among the producers through chambers of commerce or trade associations. Strengthened Chinese trade associations would be able to coordinate Chinese exporters in a cooperative way before any market disruption occurs. However, it is very difficult to facilitate cooperation among competitors prior to any actual complaints and it appears unfair to limit competition in this way. For the development of stronger trade associations and the solution to the problems plaguing these trade associations,<sup>115</sup> a proper legal framework such as the Trade Association Act should be established and effectively implemented.

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112. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 4, Apr. 15, 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm).

113. *Id.* art. 6.

114. For transitional product-specific safeguard, see the China Protocol, *supra* note 26, § 16.

115. Besides the problems above, other problems include that a number of trade associations lack sufficient authority, and enterprises sometimes do not have full confidence in trade associations. For problems trade associations face, see, for example, Wang yiwei, *zhongguo zhengfu jingli jiannan zhuanxing* [Chinese Government Undergoing Hard Transformation], *ZHONGHUA GONGSHANG SHIBAO* [CHINA BUSINESS TIMES], Nov. 24, 2004, available at <http://www.cbt.com.cn/cbtnews/frontend/news.asp?ID=74319> (arguing for the transformation of China's trade associations); Zhang, *Promoting International Dialogue*, *supra* note 108 (pointing out it that China only released a few ministerial-level regulations in guiding association development).

### 3. Tax Reimbursements for Newly-Established Small Foreign Trade Enterprises

Enterprises which qualify as ordinary taxpayers are entitled to tax reimbursements for exports, and usually have to obtain a special invoice for value-added taxes (VAT). This special invoice is one of the major documents used by the tax administration to check for tax reimbursements for exports.<sup>116</sup> Because of the serious problems that result from cheating on VAT special invoices for tax reimbursements by virtue of newly-established enterprises, the State Administration of Taxation issued an urgent notice in 2004, which set a higher standard for ordinary VAT taxpayers' status.<sup>117</sup> But there were some tax reimbursement problems for small businesses engaged in foreign trade. Larger- and medium-sized enterprises would be regarded as ordinary taxpayers and could therefore get tax reimbursement for export costs.<sup>118</sup> However, newly-established small foreign trade enterprises frequently could not get these tax reimbursements because they did not qualify as ordinary taxpayers.<sup>119</sup> This presents a dilemma: If smaller foreign trade operators were to qualify as ordinary taxpayers (and tax reimbursements for export were made available to smaller foreign trade enterprises) the potential for abuse remains high as enforcement resources would be insufficient to monitor potential fraud. If, however, tax reimbursements are denied to smaller, newly-established foreign trade enterprises, this will unfairly hamper economic growth in that crucial sector of the Chinese economy by creating disadvantages for smaller enterprises when they conduct international business transactions with foreign partners. Subsequently, the State Administration of Taxation has taken measures hoping to strike a proper balance between the two sides.<sup>120</sup> Under these new rules, the newly-established commercial and trade wholesale

116. State Administration of Taxation, Chukou huowu tui(mian)shui guanli banfa (shixing) [(Tentative) Regulation for Tax Reimbursement (Exemption) for Exported Goods] (effective Mar. 16, 2005), art. 12(3)(3), available at <http://www.chinatax.gov.cn/view.jsp?code=200506091225452937> (last visited July 27, 2005).

117. Guanyu jiaqiang xinban shangmao qiye zengzhishui zhengshou guanli youguan wenti de jingji tongzhi [Urgent Notice of Certain Issues of Strengthening Collection and Management of Value-added Tax on Newly-established Commercial and Trade Enterprises] (effective July 1, 2004), available at <http://www.chinatax.gov.cn/view.jsp?code=200408131413452015> (last visited July 27, 2005) [hereinafter Urgent Notice]. Under article 1 of the Urgent Notice, only those newly-established commercial and trade enterprises whose annual effective sales amount reaches 1,800,000 renminbi after the tax registration date are qualified for ordinary taxpayer status recognition. All the newly-established small commercial and trade enterprises are subject to management as small-scale taxpayers, which means that it would be much more difficult for these small businesses to get tax reimbursements for exports.

118. *Id.* art. 1(2). Under article 1(2) of the Urgent Notice, newly established large and medium sized commercial and trade enterprises could directly be subject to the administration as the ordinary taxpayers, provided that they have large-scale business, a fixed place of business, stable buying and selling channels of commodities, as well as complete management and business accounting systems.

119. *Id.*

120. Guanyu jiaqiang xinban shangmao qiye zengzhishui zhengshou guanli youguan wenti de buchong tongzhi [Supplementary Notice of Certain Issues of Strengthening Collection and Management of Value-added Tax on Newly-established Commercial and

enterprises may enjoy ordinary taxpayer status and get tax reimbursements for export if they meet several conditions.<sup>121</sup> They cannot, however, get special invoices for VAT so as to prevent potential abuse. Unfortunately, the aforementioned measures adopted by the State Administration of Taxation cannot resolve the problem completely. For instance, non-wholesale enterprises have not been included in the new rule. If newly-established commercial and trade wholesale enterprises choose to conduct import activities or hope to get the VAT special invoices, they have to reapply for ordinary taxpayer status and are subject to the examination and verification of the competent taxation agency.<sup>122</sup>

#### 4. *Harmonized Rules for Domestic and Foreign Trade*

While China has a network of rules for foreign trade, this is not true for domestic trade. Except for several vague administrative regulations, no such satisfactory law has been adopted by the National People's Congress. One of the first priorities for MOFCOM and other government agencies should be the establishment of uniform domestic trade rules to ensure their consistency with China's foreign trade rules. As stipulated by the FTA 2004,<sup>123</sup> China should provide national treatment under certain circumstances. The problem is that if there is no uniform treatment for Chinese citizens and entities in China, it would be difficult for China to provide national treatment for foreign entities. With such uniformity, the foreign and domestic trade regimes would be able to interact harmoniously.

#### 5. *MOFCOM's Role in Dispute Settlements*

Finally, it would be very helpful for Chinese companies' anti-dumping compromise strategies if MOFCOM could provide more specific and detailed assistance in structuring discussions. For example, MOFCOM could organize more opportunities for settlement discussions, perhaps with a MOFCOM official serving as the moderator for the meetings. This would facilitate settlements of many anti-dumping disputes. Unfortunately, the 2004 amendments do not provide detailed guidance for MOFCOM.<sup>124</sup>

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Trade Enterprises] (effective Dec. 1, 2004), available at <http://www.chinatax.gov.cn/view.jsp?code=200412081609156310> (last visited Jul. 27, 2005).

121. See *id.* art. 2. To sum up, these conditions are: (i) the enterprises apply for ordinary taxpayer status to deal with tax reimbursements for exports; (ii) the enterprises only carry out export activities for goods; (iii) the enterprises need not use the special invoices for VAT; (iv) the application documents should be subject to examination and verification by the competent taxation administration; and (v) there is a sales contract or an intent to transact evidenced in writing, as well as clear buying and selling channels certified by suppliers.

122. *Id.*

123. FTA 2004, *supra* note 2, art. 6. Article 6 states:

The People's Republic of China shall, in accordance with the international treaties and agreements to which it is a contracting party or a participating party grant the other contracting parties or participating parties, or on the principle of reciprocity grant the other party most-favored-nation treatment or national treatment in the field of foreign trade.

*Id.*

124. FTA 2004, *supra* note 2.

When encountering anti-dumping charges from other WTO Members, it is sometimes wise for Chinese enterprises to negotiate with the investigating authorities and adopt a flexible strategy to make compromises that are less severe than potential anti-dumping duties. Compromise strategies have the advantage of reducing the risk of anti-dumping duties, while enabling the enterprise to minimize its potential loss of market share. Chinese enterprises also prefer to cooperate with relevant parties, including downstream producers, nongovernmental organizations (NGOs), and importers. Chinese culture generally favors harmonious discussions rather than sharply adversarial hard bargaining. Such compromises with investigating authorities, as well as negotiations and cooperation with NGOs, downstream producers, and importers in the importing country, would help settle anti-dumping suits in a more favorable way for Chinese enterprises. Such alternative strategies may also be beneficial to the importing country because they maximize the potential for smooth cooperation on overall trade relations. Settling disputes assists all parties in that the potential loss of market share can be minimized, and the downstream producers and customers will continue to have access to a full and vigorous market. Thus, settlement by virtue of strengthened negotiation based on experience would be of great value.

A single Chinese enterprise, however much it may wish to negotiate, simply does not at the present time have the expertise or resources to conduct such negotiations against very sophisticated foreign counterparts, with sophisticated legal teams. Probably only MOFCOM is in the best position at this time to develop, collect experience, and optimize negotiation practices. MOFCOM can collect specific data, amass experience on negotiating strategies, and maximize the usage, providing suggestions and guidance to relatively inexperienced Chinese enterprises facing anti-dumping complaints from sophisticated foreign challengers regarding their strategies for negotiation and settlement.

#### 6. *Rules to Handle Dislocations Resulting from the WTO Accession*

Current rules should be further developed in order to better cope with the possible dislocations arising out of China's WTO accession. China has made substantial commitments for WTO entry, and the liberalization of international trade will undoubtedly cause negative effects for China's relevant industries. Such effects may include decreased earnings, plant closings, higher skill levels for workers, and layoffs. The FTA 2004 has certain rules which focus on these eventualities. Specifically, the State may provide the concerned domestic industry with necessary support in case the conditions of the safeguard measures are met.<sup>125</sup> These costs would be

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125. *Id.* art. 44. Article 44 states:

Where a product is being imported in substantially increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products, the State may take safeguard measures as necessary to eliminate or mitigate such injury or threat of injury and provide the industry concerned with necessary support.

very real for China. However, this general rule is not sufficient to deal with all of the issues presented. How to provide the necessary help? Will it include income maintenance, training, job search assistance, and relocation assistance? If so, how and what amount of funds should be provided? These issues should be addressed in the FTA 2004.

### 7. *Flawed Rules on the Issue of Agency in Foreign Trade*

Finally, the stipulation on agency in foreign trade operation must be improved. As discussed above, the FTA 2004 has made a significant breakthrough by replacing the traditional special permission regime with the registration procedure.<sup>126</sup> Unless exempted by laws, regulations or responsible authorities,<sup>127</sup> foreign trade operators are required to register with the competent agencies. If they fail to do so, the Customs authority can refuse to process the procedures of declaration, examination, and release for the imported and exported goods.<sup>128</sup> In practice, a great number of Chinese businesses fail to register, and hence they cannot conduct foreign trade transactions. This is because a number of domestic enterprises are not capable of handling international trade due to shortage of experience, qualified personnel, or funding. These unregistered enterprises still have to rely on agents to carry international trade dealings.

In the FTA 2004, the one-sentence rule on agency in foreign trade provides "[f]oreign trade dealers may accept the authorization of others and conduct foreign trade as an agent within its scope of business."<sup>129</sup> Although it specifies the right of the agent in foreign trade, it leaves several questions unanswered: who is qualified to be the principal under the FTA 2004? Is it without any limitation or are only registered foreign trade operators qualified? What are the rights of the principal? What are the consequences for a violation of the rule of agency in international trade? In practice, legal practitioners for agents and principals in foreign trade would invoke relevant provisions of Contract Law<sup>130</sup> and General Principles of Civil Law<sup>131</sup> when they address the issue of agency in China's foreign trade. However, these provisions in the above two statutes could hardly answer all possible questions arising out of agency in foreign trade, particularly the issues discussed above. Therefore, the uncertainty in these aspects might, at least to a certain degree, hinder the smooth operation of the agency system in foreign trade. It is thus necessary to further improve the rule of agency in foreign trade.

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*Id.*

126. Compare *id.* art. 9, with FTA 1994, *supra* note 3, art. 9.

127. FTA 2004, *supra* note 2, art. 9.

128. *Id.*

129. *Id.* art. 12.

130. For information on contracts for mandate, see generally Zhonghua Renmin Gongheguo Hetong Fa [People's Republic of China Contract Law], ch. 21.

131. Section 2 of Chapter 4 of Zhonghua Renmin Gongheguo Minfa Tongze [People's Republic of China General Principles of Civil Law] governs the issue of agency.

### III. The Reform of Foreign Trade Regulation in Specific Industries: The Case of Textile Exportation

In addition to the FTA 2004 as the general law governing foreign trade, China has developed a network of largely administrative regulations dealing with specific foreign trade issues. One prominent example is textile exportation regulations. As a labor-intensive industry, textile has been the traditional strength among China's exporters. Textile exportation has been a very heated issue particularly after the abolishment of quotas on textile product. Presently, Chinese textile exporters are facing a serious threat regarding the imposition of safeguard measures from China's trading partners, with which China has been actively negotiating. Additionally, China has been active in making domestic adjustments. One typical example is the recent enactment of the PMGET, which repealed a prior interim measure.<sup>132</sup> Although it is relatively short, the PMGET strongly pushes forward the smooth operation of China's textile exportation after its entry into the WTO. The PMGET clearly indicates that the Chinese government is trying its utmost to deal with this issue quickly.

#### A. Objective of Interim Textile Exportation Regulation

The PMGET aims to reform the development pattern of China's textile exportation from the sole increase of quantity to that of quality, and to stabilize the exportation order of textile.<sup>133</sup> Moreover, the PMGET would greatly contribute to a stable and foreseeable system, and further help domestic textile industries properly arrange the production and exportation following the latest agreement on textiles between China and the EU. It would also, to certain degree, help Chinese enterprises increase the added value and quality of textile products rather than endure a price war which would lead to a race to the bottom. This would benefit the world market as a whole since it is expected to reduce the impact of irrational Chinese textile export on the world market by virtue of proper self-adjustments.

#### B. Two Essential Points in the Interim Textile Exportation Regulation

Under the new textile exportation regulation regime,<sup>134</sup> the MOFCOM is responsible for the interim regulation of textile exportation. The MOFCOM would work jointly with China Customs and General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) to promulgate and adjust the Commodity List for Interim Regulation of Textile Exportation (List for Interim Regulation) which would be publicized.<sup>135</sup>

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132. Provisional Measures Governing Exportation of Textiles (Interim) (promulgated by the Ministry of Commerce, June 19, 2005, effective July 20, 2005), *translation available at* [http://www.tdctrade.com/report/reg/reg\\_050802.htm](http://www.tdctrade.com/report/reg/reg_050802.htm) (last visited Feb. 10, 2006).

133. Provisional Measures Governing Exportation of Textiles (promulgated by the Ministry of Commerce, Sept. 16, 2005, effective Sept. 22, 2005), art. 1, *translation available at* [http://www.tdctrade.com/report/reg/reg\\_051102.htm](http://www.tdctrade.com/report/reg/reg_051102.htm) [hereinafter PMGET].

134. *Id.* art. 2(1).

135. *Id.* art. 3.



If certain textile products are incorporated in the List for Interim Regulation, they would be subject to interim exportation regulation.<sup>136</sup> In respect of these commodities, foreign trade operators are obliged to go through approval formalities for interim exportation licenses before the exportation.<sup>137</sup> The licensed amounts of textile commodities are allowed to be transferred,<sup>138</sup> and the transferee should be registered with the appropriate government authorities.<sup>139</sup> This stipulation did not exist in the Interim PMGET. This change indicates that more attention is given to the market-oriented rule. It would improve the efficiency of exportation as much as possible.

### C. Major Accomplishments of Interim Textile Exportation Regulation

In the past, China has mainly implemented the regulation of textiles through quotas, which is a rather passive measure. The PMGET has made substantial developments in this area. Several of these developments are discussed below.

#### 1. Reform of Regulation Pattern

Under the former quota-oriented textile exportation, the administration of textile exports has been largely, if not entirely, determined by the importing countries in terms of the amount, increase, and other like aspects of the quota. Because of this, China has been left in a rather disadvantaged position. Under the PMGET, the Chinese government would have a bigger say in the regulation of textile exports. In practice, China would negotiate with the importing countries, and then determine the commodity, amount, terms, and other matters under the interim textile exportation regulation. For example, China has recently negotiated an agreement with the EU on the subject of textile exportation to Europe. The agreement would be implemented, *inter alia*, by the interim textile exportation regulation. This greatly differs from the previous "one-sided" quota determined by the importing country or area.

#### 2. Narrowed Scope of Products Under the Interim Textile Exportation Regulation

In the traditional quota system, China's textile commodities were under a very broad range of quotas. The United States, EU, Canada, and Turkey have imposed quotas on several kinds of Chinese products.<sup>140</sup> Some importing countries occasionally tried to set overly strict quotas for

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136. *Id.* art. 6.

137. *Id.* art. 7.

138. *Id.* art. 14.

139. *Id.* The registration procedure for foreign trade operators has been discussed in Section 3(1)(1) of this article.

140. MOFCOM, Shangwubu jiu fangzhipin chukou linshi guanli bangfa da jizhe wen [MOFCOM Press Conference on the PMGET] (June 22, 2005), available at <http://www.china.org.cn/chinese/zhuanti/fzpd/896470.htm> (last visited Jan. 28, 2005) [hereinafter MOFCOM Press Conference on the PMGET].

Chinese textile products. Now, under only two circumstances would textiles be incorporated into the List for Interim Regulation and be subject to quantitative regulation. Specifically, this would occur in relation to textile products, which are subject to limitations imposed by relevant countries or regions and for textile products which should be subject to temporary quantitative regulation pursuant to a bilateral agreement.<sup>141</sup> The new interim exportation regulation governing export to the EU applies to only ten kinds of products, which account for thirty-six percent of China's total textile exportation to the EU.<sup>142</sup>

### 3. *Strengthened Punishments against Illegal Practices*

As opposed to the former vague and relatively general principles in the legal liability provisions, the PMGET vows to combat behavior which disrupts the market. One typical example is the penalties for possible evasion of regulations. If Chinese textile products under the List for Interim Regulation have been exported to stipulated countries or regions by first being sent to third countries, the identities of the lawbreaking operators would be made public, and they would be prevented from exporting their products for one year.<sup>143</sup> Because this punishment includes both economic and moral consequences, it will likely serve as a better deterrent.

### 4. *Increased Transparency and Just Administration*

The PMGET seems to attach greater importance to both the transparency and equality of textile regulation. Under the new rule, the category and quantity of commodities that every operator can apply for is identified and the list is published on the MOFCOM website within thirty days after the disclosure of the List for Interim Regulation.<sup>144</sup> A certain proportion of interim licensed exports is determined by bidding, and the remainder is allocated in accordance with export performance. The formula that is used to determine the amount for which operators can apply has also been clearly specified.<sup>145</sup> Moreover, the regime treats all enterprises equally regardless of their ownership. This mechanism encourages competition and enables competent enterprises to export their products.

In respect of the change from passive to positive regulation and increased transparency, the PMGET follows the provisions of the FTA 2004. Moreover, the PMGET permits the transfer of licensed export amount and further develops the market-oriented spirit, which would in turn affect the FTA 2004. It shows the possible interaction between the general and specific foreign trade regulations.

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141. PMGET, *supra* note 133, arts. 8(1), 8(2).

142. MOFCOM Press Conference on the PMGET, *supra* note 140.

143. PMGET, *supra* note 133, art. 27.

144. *Id.* art. 11.

145. *Id.* art. 9.

#### IV. Challenges Remaining for China

China's adjustment to WTO rules has been reflected in amendments to laws, regulations, and rules pursuant to the obligations imposed upon China by WTO accession. As a result of accession, China faces a number of serious challenges. When it comes to China's commitment to the WTO, some commitments seem to go further, and China has fulfilled some obligations ahead of schedule. This section analyzes several of the challenges facing China, and proposes some realistic solutions.

##### A. The Nonmarket Economy Issue in the Anti-dumping Cases Against China

Under China's commitment to the WTO, China may theoretically be treated as a nonmarket economy for up to fifteen years after the date of accession.<sup>146</sup> The importing WTO member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that "market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."<sup>147</sup> With respect to many trading partners, such as the U.S., China is unlikely to obtain market economy status in the next ten years. China has become a very popular target of anti-dumping measures.<sup>148</sup> The anti-dumping measures against China, in many cases, have been abused and constitute a non-tariff trade barrier.<sup>149</sup> That might be part of the reason that some critics are working toward the abolishment of undeserved anti-dumping measures.

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146. Section 15(a)(ii) of the China Protocol stipulates that an importing Member could use a "methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product." Further, section 15(d) specifies that the provisions of subparagraph (a)(ii) shall expire "15 years after the date of accession." China Protocol, *supra* note 26, §§ 15(a)(ii), 15(d).

147. *Id.* § 15(a)(ii).

148. One report states:

The [European] Community has currently 32 definitive anti-dumping measures in force and 22 ongoing anti-dumping investigations (6 new cases and 16 reviews) against China. The most important products by import volume subject to measures are bicycles and their parts, fluorescent lamps, dead-burned magnesium and fluorspar.

The US has currently 52 anti-dumping measures in force against China on products such as chemicals, non-iron and steel products (e.g. potassium permanganate, pure magnesium, steel concrete reinforcing bars).

Bilateral Trade Relations: China - Market Economy Status in Trade Defence Investigations, Jun. 28 2004, [http://europa.eu.int/comm/trade/issues/bilateral/countries/china/pr280604\\_en.htm](http://europa.eu.int/comm/trade/issues/bilateral/countries/china/pr280604_en.htm).

149. See, e.g., MOFCOM, FOREIGN MARKET ACCESS REPORT 2005, at 128-31 (2005), available at <http://gpj.mofcom.gov.cn/table/2005en.pdf> (identifying factors such as improper choice of surrogate country, inconsistency in considering factors of production and selection of surrogate price) [hereinafter FOREIGN MARKET ACCESS REPORT].

The reasons for the abuse of anti-dumping measures are evident. Anti-dumping measures help protect the domestic industries of importing WTO members.<sup>150</sup> The nonmarket economy status provisions make it even easier to protect these markets. In one recent case in which the EU took anti-dumping measures against China,<sup>151</sup> the EU Council stated that all criteria of market economy treatment must "be applied to each undertaking individually."<sup>152</sup> The EU Court of First Instance agreed with this viewpoint,<sup>153</sup> referring to the obligation to show that market-economy conditions prevail for "this producer or [these] producers."<sup>154</sup> If Chinese producers wish to avail themselves of "the possibility to have normal value determined on the basis of rules applicable to market-economy countries," they shall fulfill the said obligation.<sup>155</sup> Council Regulation (EC) No 384/96, as amended,<sup>156</sup> still requires a showing that market-economy conditions prevail for "this producer or producers" with respect to the manufacture and sale of the product at issue, as a precondition to a normal valuation of Chinese products determined on the basis of rules applicable to market-economy countries.<sup>157</sup> The China Protocol explicitly stipulates that if the "producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability."<sup>158</sup> Further, the term "industry" has been used three times in the China Protocol with regard to price comparability in determining subsidies and dumping.<sup>159</sup> It seems that the terms "producer" or "producers" are different from the term "industry," the term repeatedly used in the China Protocol. Focusing on a

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150. See, e.g., Understanding the WTO: The Agreements—Anti-Dumping, Subsidies, Safeguards, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) (last visited Feb. 10, 2006).

151. Case T-255/01, *Changzhou Hailong Electronics & Light Fixtures Co. Ltd., Zhejiang Yankon Group Co. Ltd v. Council*, para. 9, judgment of Oct. 23, 2003, available at <http://europa.eu.int/cj/en/actu/activites/act03/0328en.htm>.

152. *Id.* para. 35.

153. *Id.* para. 40 ("The Community legislature . . . clearly intended the application of the rules relating to market-economy countries to products from the PRC to be dependent on the presentation [by those concerned] of a properly substantiated claim in accordance with the criteria and procedures set out in [the relevant regulation].")

154. *Id.*

155. *Id.*

156. Council Regulation 384/96, 1995 O.J. (L 056) 1 (EC), amended by Council Regulation 2331/96, 1996 O.J. (L 317) 1 (EC); Council Regulation 905/98, 1998 O.J. (L 128) 18 (EC); Council Regulation 2238/2000, 2000 O.J. (L 305) 1 (EC); Council Regulation 461/2004, 2004 O.J. (L 77) 12 (EC) [hereinafter Basic Regulation].

157. *Id.* art 2(7)(b); see also Case T-255/01, *Changzhou Hailong Electronics & Light Fixtures Co. Ltd., Zhejiang Yankon Group Co. Ltd v. Council*, para. 5, judgment of Oct. 23, 2003, available at <http://europa.eu.int/cj/en/actu/activites/act03/0328en.htm>.

158. China Protocol, *supra* note 26, § 15(a)(i).

159. Sections 15(a)(i), 15(a)(ii), 15(d) of the China Protocol use terms that clearly show that market economy conditions prevail in the "industry" (producing the like product with regard to the manufacture, production and sale of that product). *Id.* §§ 15(a)(i), 15(a)(ii), 15(d).

single "producer" or just a few "producers" is certainly substantially different than focusing on an entire "industry," and it seems the "producer" or "producers" standard is not consistent with the WTO rules for Chinese accession.<sup>160</sup>

How can China approach this problem? It is very important for Chinese enterprises to bear in mind that it is vital to operate consistently inside of the WTO Agreement and other international rules, which are of great importance in terms of the accounting records. The failure to comply with international and domestic accounting requirements would probably lead to unfavorable results. Moreover, the coordination and self-discipline amongst producers and manufacturers should be strengthened, in order to avoid the "race to the bottom" phenomenon in the prices of exported products. This would help prevent a price war that may occur in the importing country or region, which often triggers anti-dumping measures.

In addition, China has gained the recognition of Market Economy Status (MES) from many WTO members around the world.<sup>161</sup> China lodged its request for MES on June 1, 2003, and subsequently provided supporting documentation.<sup>162</sup> This request was denied by the EU in 2004.<sup>163</sup> The EU denied MES to China because China failed to satisfy the criteria for market economy treatment in several ways. Given the deficiencies, the EU made the following recommendations: (1) decisions about prices, costs and inputs should be made in response to market signals and without significant state interference, with costs of inputs substantially reflecting market values; (2) one set of basic accounting records consistent with the requirements should be implemented; (3) firms should be subject to bankruptcy

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160. See Wang Heng, *What is the Way Out for China in the Antidumping Cases?*, in EU ANTI-DUMPING LAW: THEORY AND PRACTICE 492-93 (Francis Snyder & Tang Qingyang eds., 2005).

161. As of the end of 2005, over fifty countries have recognized China's market economy status, and the EU was actively considering doing so. See Toh Han Shih, *EU Ready to Grant China Key Economic Status: Austria; Anti-dumping Charges Less Likely with Change*, SOUTH CHINA MORNING POST., Dec. 18, 2005, at 4.

Up to Jun. 28, 2004, there are eight countries which have recognized the market economy status of China. Up to Jan. 28, 2005, fifty-one countries have recognized the market economy status of China, of which New Zealand was the first one to recognize China's market economy status in April, 2004. In 2005, thirteen countries accepted China's full market economy status, including Australia, Belarus, Israel, Kazakhstan, Republic of Korea, and Ukraine. Among China's trade partners whose trade volume exceeds one hundred billion US dollars, Republic of Korea is the first to recognize the full market status of China. Zhang Yi, *Shangwubu cheng yiyao wushiyige guojia chengren zhongguo wanquan shichang jingji diwei*, [MOFCOM Said that Fifty-One Countries Recognized China's Full Market Economy Status], XINHUA NEWS AGENCY, Jan. 29, 2006, available at <http://business.sohu.com/20060129/n241642452.shtml>.

162. Yang Liming, *Oumeng jujue chengren zhongguo wanquan shichang jingji diwei* [European Union Refuse to Recognize China's Full Market Economy Status], SOHU, June 29, 2004, available at <http://business.sohu.com/2004/06/29/98/article220759843.shtml>. For the European Commission conclusion on China's market economy status, see Qi Hua & Dai Yan, *EU Ruling on China's Market Status 'Unfair'*, CHINA DAILY, June 30, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-06/30/content\\_344132.htm](http://www.chinadaily.com.cn/english/doc/2004-06/30/content_344132.htm).

163. *EU Set to Refuse China Full Market Economy Status*, DAILY STAR, June 29, 2004, available at <http://www.thedailystar.net/2004/06/29/d40629051262.htm>.

and property laws guaranteeing legal certainty and stability; and (4) the financial sector should be fully independent.<sup>164</sup>

The recommendations made by the EU present fundamental economic, legal, and social challenges to China, and would involve systematic reform efforts. While it would be unwise for China not to make efforts to improve in these areas, setting the standards for MES so unreasonably high in the short term might create a potentially unstable social situation inside China in which the social costs of MES compliance outweigh the potential benefits of WTO participation. Furthermore, allowing Russia<sup>165</sup> and Ukraine<sup>166</sup> MES while denying it to China seems deeply unfair and economically indefensible to many Chinese.<sup>167</sup> The issue of MES is not just a legal question, but a political one as well. The EU needs to develop and articulate consistent and transparent standards applied evenhandedly to all MES applicant countries in order to maintain its credibility and legitimacy. Differing standards and differing treatment leave some Chinese disappointed and cynical about objective and consistent market regulations.<sup>168</sup>

While the EU's four recommendations are difficult to address immediately, some of them could be met in the near future. Even though the efforts inside China may be substantial, reforming China's bankruptcy law and enactment of property law,<sup>169</sup> for instance, seem pressing priorities in establishing a market system in China. Moreover, the political relationship and dialogue with all of China's trade partners should be enhanced to solve problems in bilateral trade relations.<sup>170</sup> Current Chinese and EU methods,

164. Liming, *supra* note 162. For instance, the EU believes that China has taken non-market control over the import and export of resources like Coca-Cola, and China's financial sector fails to operate in accordance with market economy rule, which leads to a great amount of bad debts.

165. EU Announces Formal Recognition of Russia as "Market Economy" in Major Milestone on Road to WTO Membership (May 22, 2002), [http://europa.eu.int/comm/external\\_relations/russia/summit\\_05\\_02/ip02\\_775.htm](http://europa.eu.int/comm/external_relations/russia/summit_05_02/ip02_775.htm).

166. *EU Sees Ukraine as Market Economy*, BBC NEWS, Dec. 1, 2005, available at <http://news.bbc.co.uk/1/hi/world/europe/4486642.stm>.

167. Hua & Yan, *supra* note 162.

168. *Market Economy Status on Agenda*, CHINA DAILY, Apr. 21, 2004, <http://www.china.org.cn/english/BAT/93536.htm>.

169. On July 10, 2005, the Chinese legislature released its draft law on property rights in full text to the general public, in order to solicit opinions for revisions. The Commission of Legislative Affairs of the Standing Committee of the Tenth National People's Congress will revise the draft law based on public opinions and submit the revised draft law to the National People's Congress Standing Committee for a fourth deliberation. Then, the draft law will be submitted to the fourth plenary session of the Tenth National People's Congress, which will be held in March 2006, for a fifth deliberation. An adoption vote will occur at this session. See, e.g., *Public Opinions Solicited on Property Law*, CHINA DAILY, July 11, 2005, available at [http://www.chinadaily.com.cn/english/doc/2005-07/11/content\\_459072.htm](http://www.chinadaily.com.cn/english/doc/2005-07/11/content_459072.htm).

170. *Bilateral Trade Relations (China)*, [http://europa.eu.int/comm/trade/issues/bilateral/countries/china/index\\_en.htm](http://europa.eu.int/comm/trade/issues/bilateral/countries/china/index_en.htm) (last visited Jul. 28, 2005). For instance:

Ensuring full and timely implementation of WTO commitments is one of the European Commission's key priorities in its bilateral trade and economic relationship with China. The main issues identified so far by the EU side include inadequate enforcement of intellectual property rights, the definition of multi-faceted industrial policies which might discriminate against foreign companies

for example, of conducting trade policy dialogues are helpful.<sup>171</sup> Recently, both sides consulted to resolve issues relating to the special safeguard measures on textile products.<sup>172</sup> Such dialogues would be more productive if they were more frequent and if an early warning alert system were created.

If China succeeded in obtaining MES, it would face a possible increase in allegations of granting subsidies from other WTO members.<sup>173</sup> Thus, China is left with two rather unattractive options. In order to avoid this dilemma, the Chinese economy must be given time to develop further.

## B. Transitional Product-Specific Safeguard Mechanism

If importation of Chinese products into a WTO Member increases and causes, or threaten to cause, "market disruption" to the domestic producers of like or directly competitive products, the WTO Member may consult with China; if such consultation fails, the WTO Member affected could, with respect to such products, "withdraw concessions or otherwise . . . limit imports only to the extent necessary to prevent or remedy such market disruption."<sup>174</sup> This approach is not novel in the history of GATT and the WTO, and though many Contracting Parties have these safeguard mechanisms, they are rarely, if ever, invoked.<sup>175</sup>

The use of the product-specific safeguard mechanism was included in the Chinese WTO obligations.<sup>176</sup> The Chinese impression at the time was that such measures were very seldom invoked. Much to the surprise and consternation of the Chinese, such measures have been threatened frequently by the United States. and EU.<sup>177</sup> The U.S. threats are more fre-

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(e.g. in the automobile sector), the barriers to market access in a number of services sectors (e.g. construction, banking, telecommunications, express courier). Access to raw materials has recently been identified as a major trade issue. During the last EU-China summit in December 2004, the two parties set the objective to actively explore the feasibility of concluding a new framework agreement.

*Id.*

171. *Zhongguo yu oumeng jianli maoyi zhengce duihua jizhi* [China and European Union Establish Trade Policy Dialogue Mechanism], PHOENIXTV.COM, Oct. 30, 2003, available at <http://www.phoenixtv.com/home/news/Inland/200310/30/128796.html>; see also Press Release, MOFCOM, The Second China-EU Trade Policy Dialogue is Held in Beijing (July 15, 2005), available at <http://www.mofcom.gov.cn/aarticle/a/200507/20050700168364.html>.

172. China and the EU have reached a textile agreement, negotiated by EU Trade Commissioner Peter Mandelson and MOFCOM Minister Bo Xilai on June 10, 2005 in Shanghai. For the full text of this agreement, see EU-China Textile Agreement, June 10, 2005, available at <http://www.delchn.cec.eu.int/en/whatsnew/pre140605.htm>.

173. If China obtains MES, imposition of anti-dumping measures by other WTO members would be much more difficult. Other non-tariff measures, such as subsidy allegation, will likely be used against China in the future.

174. See China Protocol, *supra* note 26, § 16.

175. See, e.g., Understanding the WTO: The Agreements—Anti-Dumping, Subsidies, Safeguards, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) (last visited Feb. 10, 2006).

176. See *supra* note 174 and accompanying text.

177. For instance, the United States initiated six new anti-dumping investigations against imports from China and twelve special safeguard investigations against Chinese textiles in 2004. FOREIGN MARKET ACCESS REPORT, *supra* note 149, at 127.

quent in number as well as more offensive in tone, and some Chinese feel that they were misled during the WTO negotiations regarding the significance of the special-product safeguard measures.

If we take into consideration the great trade volume<sup>178</sup> and high levels of protectionism,<sup>179</sup> this problem becomes even more significant. Compared with the term "serious injury" in the Agreement on Safeguards,<sup>180</sup> the wording "market disruption" is certainly easier for a member state to invoke.

Because of the commitments made during WTO accession, China has little room for interpretation of the above-mentioned term of "market disruption." That does not mean there is no way out. One approach for Chinese exporters facing product-specific safeguard measures might be better coordination among the producers through chambers of commerce and other organizations, such as trade associations. However, the coordination of Chinese exporters through trade associations prior to any potential market disruption, as discussed above, is difficult to execute and sometimes seems unfair.<sup>181</sup> The other solution might be a political one. For example, meetings between high-ranking officials seems to aid the Sino-United States relationship. However, the problem is significant for Chinese enterprises because once the product-specific safeguard mechanism is invoked, Chinese enterprises are in a defensive position. Because these special safeguard measures are fairly easy to invoke and even abuse, the potential for dispute is significant.<sup>182</sup> Further, such special safeguard measures could spread like the plague, with numerous other Members initiating similar complaints.<sup>183</sup>

### C. The Unsatisfactory Performance of China's Financial Sector

No one would deny that China's accession to the WTO has brought great changes and fresh blood into the Chinese financial industry. As of the end of October 2004, 62 foreign banks from 19 nations and regions have established 204 operating institutions in China, 105 of which have

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178. China is becoming an increasingly important country in terms of its international trade volume.

179. See, e.g., The Prevalence of Anti-dumping Action, <http://www.cbo.gov/showdoc.cfm?index=439&sequence=3> (last visited Feb. 12, 2006) (providing statistics the use of anti-dumping actions by certain countries).

180. Safeguards Agreement, *supra* note 83, art. 2(1). The article states:

A Member may apply a safeguard measure to a product only if that Member has determined . . . that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

*Id.*

181. See *supra* note 173 and accompanying text.

182. See *supra* note 177 and accompanying text.

183. For example, if the United States takes special safeguard measures, it would be possible that other WTO Members, such as European countries and Japan, would consider imposing similar measures.



been permitted to conduct business in renminbi<sup>184</sup> in China.<sup>185</sup> Nine Chinese banks are allowed to attract foreign shareholders.<sup>186</sup> Foreign participation in China's financial sector greatly facilitates the development of the Chinese financial industry. This section of the Article discusses the problems in China's financial sector. Because of the complexity of financial services, the discussions focus on the banking and securities field in the Chinese domestic market.

Generally speaking, Chinese banks fail to perform well in the international market.<sup>187</sup> Because of the limited competitive power of Chinese banks and the stringent restrictions on the market network and business scope of foreign banks imposed by host countries, few Chinese banks and other financial institutions have branches in the EU, Japan, or the United States.<sup>188</sup> This makes it difficult for Chinese financial institutions to compete with other banks and brokers in the international financial market. There are other problems that deserve further attention from China and its main trade partners in order to promote the international trade in services. For instance, China had imposed relatively high capital requirements on the subsidiaries of European banks in China, restricting market access for foreign banks. Recently, these seem to have decreased.<sup>189</sup> On the other hand, pursuant to German law, the capital of bank head offices cannot be counted into that of its German subsidiaries unless the bank's headquarters are in the EU, Japan or the United States.<sup>190</sup> This stipulation puts Chinese commercial banks at a disadvantage in terms of capital requirement when they establish subsidiaries in Germany.

In the domestic market, Chinese banks also encounter numerous challenges. However, this does not mean that China has been hesitant to open

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184. Renminbi is the local currency of China.

185. China Banking Regulatory Commission, *Zhongguo yinhangye maichu xin bufa* [China's Banking Sector is on the March] (Dec. 1, 2004), <http://www.cbrc.gov.cn/chinese/module/viewinfo.jsp?infoID=1021> [hereinafter China's Banking Sector is on the March].

186. *Id.*

187. Maria Tombly, *Another Barrier Falls in China*, SECURITIES INDUSTRIES NEWS, Mar. 28, 2005.

188. For instance, as of September 30, 2004, only three Chinese banks, namely, Bank of China, Bank of Communication, and CITIC Bank have set up branches in the U.S. FOREIGN MARKET ACCESS REPORT, *supra* note 149, at 136.

189. The Chinese Securities Regulatory Commission (CSRC) issued the Rules for Implementing the Regulation of the People's Republic of China Governing Foreign-funded Financial Institutions (New Rules) on August 2004 which replaced the Rules for the Regulation of the People's Republic of China Governing Foreign-funded Financial Institutions promulgated on January 25, 2002. The New Rules have "reduced the registered capital requirement for foreign-funded institutions when they enlarge the business scope." Zhang Jianpin, *Woguo jiang fangkuan waizi yinhang he caiwu gongsi shichang zhunru biao zhun* [China Lowers Market Access Standards for Foreign-funded Banks and Finance Corporations], XINHUA NET, Aug. 4, 2004, available at [http://news.xinhuanet.com/stock/2004-08/04/content\\_1706954.htm](http://news.xinhuanet.com/stock/2004-08/04/content_1706954.htm).

190. German banking legislation provides that "apart from the EU, Japanese and U.S. banks, the capital of head offices of other foreign commercial banks cannot be counted as the capital of their subsidiaries in Germany." FOREIGN MARKET ACCESS REPORT, *supra* note 149, at 192.

its financial sector. On the contrary, two Chinese cities, Shenyang and Xi'an, were opened to foreign financial institutions in 2004 in order to engage in renminbi business one year ahead of schedule.<sup>191</sup> This change will help facilitate the development of western and northeastern China. Within five years of China's accession into the WTO, "all geographic restrictions will be removed" for renminbi business,<sup>192</sup> and foreign banks will conduct foreign and local currency business in China without geographic restrictions after the end of 2006.<sup>193</sup> This will provide more opportunities for foreign institutions. In contrast, domestic banks that grew because of geographic restrictions and other protections will have to make some changes.

However there are two sides to every coin. Though the non-performing loans (NPLs) seem to have decreased, they remain a heavy burden on China's banks.<sup>194</sup> The situation is even more challenging for China's rural financial cooperatives, which historically provided financial services to their members.<sup>195</sup> Due to poor management and other factors, the NPLs are a big problem and China's banks have to cope with them so as to satisfactorily maintain capital.<sup>196</sup> It will not be easy to compete with foreign financial conglomerates carrying such a heavy load. Further, China failed to predict the effects of the opening up of its financial market. Originally, China was proud of its vast network of financial institutions' offices throughout its territory, and was confident that foreign counterparts could hardly compete with China's financial institutions in this field.<sup>197</sup> How-

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191. China's Banking Sector is on the March, *supra* note 185. For renminbi business, the geographic restriction will be phased out "[w]ithin four years after accession . . . [for] Shenyang and Xi'an . . . ." See Working Party on the Accession of China, *Report of the Working Party on the Accession of China add., Schedule of Specific Commitments on Services*, WT/ACC/CHN/49/Add.2, 33 (Oct. 1, 2001).

192. *Id.*

193. With regard to foreign currency business, "there will be no geographic restriction upon accession." *Id.*

194. David Lague, *If China Economy Dips, Loans Could Turn Sour*, INT'L HERALD TRIBUNE, June 4, 2005, available at [http://www.ihf.com/bin/print\\_ipub.php?file=/articles/2005/06/03/business/loans.php](http://www.ihf.com/bin/print_ipub.php?file=/articles/2005/06/03/business/loans.php).

195. *Economy to Maintain Fast, Stable Momentum*, CHINA DAILY, Dec. 4, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-12/04/content\\_397271.htm](http://www.chinadaily.com.cn/english/doc/2004-12/04/content_397271.htm).

196. In accordance with the statistics as of March 31, 2005 provided by the China Banking Regulatory Commission, the Outstanding Balance of NPLs of State-Owned Commercial Banks (SOCBs) in the first quarter of 2005 is 1,567,050 renminbi, which accounts for fifteen percent in total loans. See NPLs of Commercial Banks as of Sep. 30, 2005, <http://www.cbrc.gov.cn/english/module/viewinfo.jsp?infoID=1392> (last visited June 18, 2005).

197. Some believed that because the four state-owned banks of China (Bank of China, Industrial and Commercial Bank of China, China Construction Bank, and Agricultural Bank of China) "have more than ten thousand operational establishments all over China . . . it would be completely impossible for foreign banks to set up such a huge amount of establishments in China." *Financial Market Should be Opened to Both Insiders and Outsiders*, 21ST CENTURY ECONOMIC REPORT, Nov. 23, 2000, available at <http://www.sinoliberal.net/private/private%20bank%2002.htm>. After the WTO accession, one banker thought that Chinese-funded banks have "the advantage of business office network throughout China . . . it is very difficult for foreign banks to catch up in short time." *Opening up in the Process of Competition to Competition in the Process of Opening*

ever, after three years, foreign financial institutions have successfully attracted the best customers,<sup>198</sup> and Chinese financial operators have had difficulty competing in services and returns.<sup>199</sup> The vast network of state-owned Chinese bank offices is not economically efficient; on the contrary, they bring great problems, such as excessive overhead costs and excessive management levels, thereby reducing central management control.<sup>200</sup> Some Chinese financial institutions, such as banks, have begun to close those offices which fail to turn a profit.<sup>201</sup> In the field of international financial business, quite a number of Chinese banks still fail to provide customers with credit cards which can be used overseas. For example, the Agricultural Bank of China has closed a number of economically inefficient branches.<sup>202</sup> Consequently, the agricultural industry's financial needs are not being adequately met. This presents a dilemma for Chinese policy makers who face a severe shortage of financing for the crucial development of rural areas.<sup>203</sup>

Developing highly profitable business in the domestic market is of major concern for China's banks. Few foreign banks provide comprehensive services inside China.<sup>204</sup> In many cases, foreign financial institutions are very interested in providing investment banking services to their domestic corporations doing business in China. On many occasions foreign banks would like to provide loans to foreign enterprises or enterprises with foreign investment.<sup>205</sup> There are not many foreign banks which will provide loans in the Chinese domestic economy, even if they are willing to collect commissions from Chinese enterprises to list their company in foreign stock markets. *This means that foreign institutions are not very active in China's loan-giving though they seem to prefer that to some investment bank-*

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Up, BEIJING BUSINESS TODAY, Dec. 2, 2004, available at <http://www.bjbusiness.com.cn/20041202/yaowen4.htm>.

198. Foreign banks are starting to pose strong competition to Chinese banks in the pursuit of top corporate customers, such as Ericsson. See, e.g., *All Uphill for Foreign Banks*, FIN. TIMES BUS. LTD, Dec. 8, 2003, available at [http://www.fdimagazine.com/news/fullstory.php/aid/455/All\\_uphill\\_for\\_foreign\\_banks\\_.html](http://www.fdimagazine.com/news/fullstory.php/aid/455/All_uphill_for_foreign_banks_.html).

199. *Id.*

200. For example, the four big state-owned commercial banks have made substantial efforts in "closing and merging low-efficient operational establishments . . . which greatly improves the income per capita, profit per capita, as well as revenue and profits level of operational establishments." *Review and Recommendations to Operational Outcome of Four Big State-owned Commercial Banks*, SHENZHEN FINANCE, Nov. 2, 2003, available at [http://www.szjr.net/szjr/control/ProcessServlet?eventId=240&article\\_id=346&source=1](http://www.szjr.net/szjr/control/ProcessServlet?eventId=240&article_id=346&source=1).

201. *Id.*

202. The Agricultural Bank of China closed 1,700 branches in 2001. Ning Nan & Ren Xuesong, *Zhengjiu yinhang [Save the Banks]*, SOHU.COM (China), Apr. 16, 2002, available at <http://business.sohu.com/61/86/article200508661.shtml>.

203. *China Reshuffles Rural Financial Service System*, PEOPLE'S DAILY ONLINE, June 24, 2004, available at [http://english.people.com.cn/200406/24/eng20040624\\_147351.html](http://english.people.com.cn/200406/24/eng20040624_147351.html).

204. For instance, "only a few global giants, like HSBC and Citibank, and strong regional banks, like Hang Seng and Bank of East Asia, have the ambition and resources" to join consumer banking in China. *All Uphill for Foreign Banks*, *supra* note 198.

205. *Id.*

ing services. Foreign financial institutions have also begun to take the leading role in highly technical services like portfolio management, services such as listing abroad, and other services that Chinese banks cannot provide.<sup>206</sup>

Another noteworthy issue is the pricing of shares of China's financial institutions. To expand business in China, many foreign banks consider partnering with Chinese banks by buying stakes in domestic banks<sup>207</sup> in accordance with relevant rules.<sup>208</sup> If even one good Chinese financial institution sets its price very low, this will have a detrimental effect on other Chinese banks interested in attracting foreign strategic investors, setting off a race to the bottom. This is a short-sighted strategy for China's banking sector. Once more, it is clear how important chambers of commerce and self-regulatory organizations are to maintaining a robust Chinese economy over the long term.

Although some Chinese financial institutions are doing a better job, it is clear that more challenges lie ahead for the Chinese financial sector. In addition to legal solutions, nonlegal solutions need to be considered as well. For example, the establishment of a credit rating and reference system throughout China would be helpful in reducing the risk financial institutions face. One other solution may be the engagement of excellent financial professionals, with better control of risks, and provision of better services, which may take a long time.

If there is severe crisis in services, especially financial services, China has at least two safety valves. First, imports and exports can be restricted in order to "maintain the State's international financial status and the balance of international payment."<sup>209</sup> Second, in the event that the increase of services provided to China by "service suppliers from other countries or regions causes or threatens to cause injury" to Chinese service suppliers providing like or directly competitive services, China may take measures necessary to handle the injury or threat of injury.<sup>210</sup> This resembles the safeguard measures for trade in services.<sup>211</sup> The problems of how and

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206. Shortly after China's accession into the WTO, a joint-venture subsidiary of Ericsson, the global mobile phone company left its mainland banker, the Bank of Communications, for Citibank, because the local bank simply could not provide a service involving account receivables. "The so-called 'Ericsson incident' was a wake-up call to the local banking industry." *Id.*

207. "As foreign banks double their efforts to court partners in China, the country's banking industry, scheduled to be fully open by 2006, has been thrust into a heated battle." *Sino-foreign Bank Collaboration Heats up Competition*, PEOPLE'S DAILY ONLINE, July 19, 2005, available at [http://english.people.com.cn/200507/19/eng20050719\\_196845.html](http://english.people.com.cn/200507/19/eng20050719_196845.html).

208. See Administrative Rules Governing the Equity Investment in Chinese Financial Institutions by Overseas Financial Institutions (promulgated by China Banking Regulatory Commission, Dec. 8, 2003), available at [http://www.cbrc.gov.cn/mod\\_en00/jsp/en004002.jsp?infoID=552&type=1](http://www.cbrc.gov.cn/mod_en00/jsp/en004002.jsp?infoID=552&type=1) (last visited Feb. 3, 2006).

209. FTA 2004, *supra* note 2, art. 16(9).

210. *Id.* art. 45.

211. With regard to the safeguard mechanisms for trade in services, see, for example, Yong-Shik Lee, *Safeguard Mechanisms for Trade in Services*, in *WTO AND CHINA: THE ROAD TO FREE TRADE* 144-81 (Wang Guiguo & David Smith, eds., 2002).

when to invoke these provisions still remains unclear, as there are no detailed rules concerning these measures. Undoubtedly, these provisions would rarely be available under normal conditions. The serious problems of the Chinese service industry, particularly the financial sector, remain.

#### D. Unfair Agricultural Subsidies by Some Members

The agricultural industry faces major developmental challenges. Unlike the EU and the United States, which, because of their wealth, are able to provide very generous subsidies to their agricultural sectors, China cannot offer export subsidies for agricultural products because of its WTO accession commitment.<sup>212</sup> China cannot afford to give as much financial support to its agricultural sector as other advanced WTO members can. The EU and U.S. subsidies often go to large agri-businesses.<sup>213</sup> In contrast, Chinese subsidies go to peasants that tend to be more numerous, much poorer, less educated, more remotely located, with very low quality land, and have less access to sophisticated farming technology than their European or American counterparts.<sup>214</sup> Although Chinese citizens have to make substantial sacrifices in order to fulfill China's WTO commitments, it seems unfair to ask impoverished Chinese peasants to bear a heavier relative burden than those receiving agricultural subsidies in the United States and EU. The subsidies appear to be a game mostly for wealthy players.

This problem is not unique to China. The vast amounts of agricultural subsidies provided by the United States and EU have terribly distorted the international agricultural market, undermining the free trade policies espoused by these WTO Members. This is also of great concern to other WTO Members who are not in a position to provide similar agricultural subsidies and therefore are placed in a disadvantageous position in the international agriculture trading system. This issue should be addressed even though it may be bad news to those in the United States and EU who receive subsidies.

#### E. Other Challenges

In addition to the problems discussed above, China faces several other challenges. While it is difficult to discuss all the problems here, several of the significant challenges are addressed below.

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212. Section 12(1) of the China Protocol states that "China shall implement the provisions contained in China's Schedule of Concessions and Commitments on Goods and, as specifically provided in this Protocol, those of the Agreement on Agriculture. In this context, China shall not maintain or introduce any export subsidies on agricultural products." China Protocol, *supra* note 26, § 12(1).

213. See, e.g., Marcela Valente, *End to Subsidies would not end Rural Poverty*, INTER PRESS SERVICE, Dec. 2, 2005, available at <http://www.ipsnews.net/news.asp?idnews=31280>.

214. *Focus: Peasants Bear Brunt of China's WTO Reforms*, ASIAN ECONOMIC NEWS (Beijing), Mar. 11, 2002, available at [http://www.findarticles.com/p/articles/mi\\_m0WDP/is\\_2002\\_March\\_11/ai\\_84335990](http://www.findarticles.com/p/articles/mi_m0WDP/is_2002_March_11/ai_84335990).

### 1. Proper Usage of Safeguard Measures

According to the figures provided by the National Bureau of Statistics, China's industrial output fell below expectations in the first half of 2004.<sup>215</sup> This situation continued in October 2004.<sup>216</sup> Notably, China has recently controlled investing and lending in an effort to cool certain overheated economic sectors, including steel, coal, and housing.<sup>217</sup> Imposing safeguard measures on imported steel in China has contributed to the problem of price increases overheating this sector. Safeguard measures often provide short term benefits, but exacerbate the underlying problems in the long term.<sup>218</sup> Before any safeguard measures are undertaken, thorough statistical analysis is needed. This is not easy, however, because of the obvious need for speed when a sudden surge of imports floods the market.<sup>219</sup>

### 2. Structure and Growth Mode

Other problems that may curb China's economic growth still exist, including the fact that China's current structure and economic growth mode do not fully accord with market economy rules. For instance, reductions in the scale of fixed-asset investment to avoid inflation still could see possible rebounds. Furthermore, the government's strategies to successfully "cope with the situation after China's World Trade Organization grace period" remain to be seen.<sup>220</sup>

### 3. Competition Law

To contend with anticompetitive activities in international trade, the Antimonopoly Act has been proposed, and is expected to be enacted in the

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215. Figures released by the National Bureau of Statistics showed that "industrial added value rose 17.7 per cent [sic] in the first half year, compared with a 17% growth for 2003." *China's Industrial Output Slows Down*, CHINA DAILY, July 9, 2004, available at [http://www2.chinadaily.com.cn/english/doc/2004-07/09/content\\_347128.htm](http://www2.chinadaily.com.cn/english/doc/2004-07/09/content_347128.htm).

216. Liang Li, *China's Industrial Output Slows Slightly*, BEIJING PORTAL, Nov. 11, 2004, available at <http://www.beijingportal.com.cn/7838/2004/11/11/1380@2367839.htm> ("China's industrial output growth in October has slowed to 15.7 percent compared to the same period last year, after a 16.1 percent gain in September, suggesting government lending curbs are cooling the economy.")

217. The Chinese government's efforts to cool down over-heating investment have had contracted effects on related industrial sectors, which in turn dragged down the production of heavy industries. For instance, the growth of cement output slowed by 3.9% from May to June 2004, while steel production dropped 3.3% during that period. *China's Industrial Output Slows Down*, *supra* note 215.

218. This observation is, of course, not unique to China.

219. According to article 2(1) of the WTO Agreement on Safeguards:

A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

Safeguards Agreement, *supra* note 83, art. 2(1).

220. *Economy to Maintain Fast, Stable Momentum*, CHINA DAILY, Dec. 4, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-12/04/content\\_397271.htm](http://www.chinadaily.com.cn/english/doc/2004-12/04/content_397271.htm).

first half of 2006.<sup>221</sup> There is a longstanding concern that the competitiveness of China's domestic corporations will be negatively affected.<sup>222</sup> In fact, there is an urgent need to regulate anticompetitive conduct in the market, some of which has been carried out by foreign businesses.

In order to be successful, Chinese anti-trust legislation must provide some exceptions. For example, the United States<sup>223</sup> and a number of other WTO Members have successfully designed provisions to help small and medium-sized enterprises export their products.<sup>224</sup> China has enacted the Anti-Unfair Competition Law,<sup>225</sup> which is expected to be amended soon. China is also working towards regulation of anticompetitive behaviors through bilateral agreements. One such bilateral agreement, between the EU and China,<sup>226</sup> attempts to establish a permanent consultation framework in order to promote greater transparency in a number of areas.<sup>227</sup>

All of these measures constitute a good start, but more is needed. A greater effort is required to establish specific, practical, down-to-earth rules applicable to international trade. Moreover, this type of negotiation will contribute to China's ability to choose an appropriate strategy on trade and competition policy within the WTO framework. These types of dialogue are especially important given the lack of specificity in current WTO arrangements on trade and competition.

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221. Wang Yu, *China Speeds up Legislation of Antimonopoly Law*, XINHUANET.COM, June 27, 2005, available at [http://www.legalinfo.gov.cn/english/News/2005-07/INFO\\_20050707.htm](http://www.legalinfo.gov.cn/english/News/2005-07/INFO_20050707.htm) (reporting that the preparation of the Antimonopoly Law has been completed and the legislative process is accelerating).

222. See Youngjin Jung & Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 Nw. J. INT'L L. & BUS. 107, 112-13 (2003).

223. See, e.g., MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER: A GUIDE TO THE OPERATION OF UNITED STATES, EUROPEAN UNION AND OTHER KEY COMPETITION LAWS IN THE GLOBAL ECONOMY 25-26, 198-99, 205, 212, 319, 375-76 (2d ed. 2001) (reviewing legislation from the United States, EU, Canada, and Japan).

224. For example, in the United States:

[T]he enforcement of competition laws has increasingly focused on consumer welfare and economic efficiency. However, this has not always been the case. When the Sherman Act was enacted in 1890 (and for much of the twentieth century), there was an explicit preference for "pluralism" in terms of diffusion of economic power. There was also a tendency towards protection of small business and local economies.

U.N. Conference on Trade and Development, *Application of Competition Law: Exemptions and Exceptions*, at 8, U.N. Doc. UNCTAD/DITC/CLP/Misc.25 (2002) (prepared by R. Shyam Khemani), available at [http://www.unctad.org/EN/docs/ditcclpmisc25\\_en.pdf](http://www.unctad.org/EN/docs/ditcclpmisc25_en.pdf) (last visited Feb. 26, 2006) (emphasis added). With regard to Japan, "there are provisions for exempting cartels for exports, depressed industries, and small and medium-sized enterprises." *Id.* at 22.

225. Law Against Unfair Competition of the People's Republic of China (adopted Sept. 2, 1993, effective Dec. 1, 1993), translation available at <http://www.colaw.cn/fin-dlaw/ip/competition.htm> (last visited Feb. 3, 2006).

226. Terms of Reference of the EU-China Competition Policy Dialogue, available at [http://europa.eu.int/comm/competition/international/bilateral/extracts/cn2b\\_en.pdf](http://europa.eu.int/comm/competition/international/bilateral/extracts/cn2b_en.pdf) (last visited Feb. 3, 2006).

227. Among other things, these matters include: (i) rules and infringement of rules related to cartels and abuse of dominant positions; (ii) controls of mergers in a global economy; (iii) liberalization of public services or public utility sectors; and (iv) technical assistance to China in those sectors. *Id.*

#### 4. Unfair Treatment

The protection and promotion of China's exports as well as resistance against unfair treatment have been incorporated into the FTA 2004, and should be further studied. In practice, unfair trade barriers and protectionism have impeded and distorted international trade involving China. One example is that while the EU granted Russia<sup>228</sup> and Ukraine<sup>229</sup> market economy status recently, it still refuses to recognize China as a market economy. Though China has recently promulgated relevant rules,<sup>230</sup> the effect remains to be seen.

#### 5. Currency Valuation

For quite a long time, China has been under great pressure to improve its foreign exchange mechanism, which closely relates to foreign trade.<sup>231</sup> These pressures probably contributed to the recent two percent appreciation of the renminbi.<sup>232</sup> China plans to take a pragmatic, step-by-step approach to liberalize its foreign exchange gradually, and to ensure that it has the competent regulatory capacity in order to avoid potential problems. This approach is meant to avoid a repeat of the South-East Asian financial crisis of the late 1990s, where, many scholars believe, the lack of effective financial regulations left many countries unprotected against currency attacks.<sup>233</sup> More importantly, the value of renminbi must be considered

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228. EU Announces Formal Recognition of Russia as "Market Economy" in Major Milestone on Road to WTO Membership (May 29, 2002), available at [http://europa.eu.int/comm/external\\_relations/russia/summit\\_05\\_02/ip02\\_775.htm](http://europa.eu.int/comm/external_relations/russia/summit_05_02/ip02_775.htm) (last visited Feb. 26, 2006).

229. *EU Sees Ukraine as Market Economy*, BBC NEWS, Dec. 1, 2005, available at <http://news.bbc.co.uk/1/hi/world/europe/4486642.stm>.

230. *Duiwai maoyi bilei diaocha guize* [Regulation on Foreign Trade Barrier Investigation] (promulgated by the Ministry of Commerce, Feb. 2, 2005), available at <http://www.shcs.com.cn/cn/laws/> (last visited Feb. 3, 2006).

231. *See RMB Revaluation Unexpected but Just Right: Economists*, PEOPLE'S DAILY ONLINE, July 23, 2005, available at [http://english.people.com.cn/200507/23/eng20050723\\_197848.html](http://english.people.com.cn/200507/23/eng20050723_197848.html) ("[I]n the past couple of years, China has been under continued pressure from the outside world, which puts it into a dilemma as to when to adjust the RMB exchange rate."). One report states:

A strong wind calling for the revaluation of the Renminbi has been blowing hard overseas since the beginning of this year. First of all, Japanese finance minister, at the seven-nation finance ministers conference, submitted a document similar to the "plaza agreement" directed against yen in 1985, which called for the appreciation of the Renminbi. Later, US Treasury Secretary Snow also indicated that the Renminbi should be revalued. Because the US dollar is going down, some European and East Asian countries, worried about the competitive impact generated by China's exported commodities, have, to different extents, also joined the ranks demanding the appreciation of the Renminbi. As a result, there has appeared a strong force pressing the revaluation of the Renminbi.

*Who Is Boosting a Revaluation of RMB?*, PEOPLE'S DAILY ONLINE, July 23, 2003, available at [http://english.people.com.cn/200307/23/eng20030723\\_120865.shtml](http://english.people.com.cn/200307/23/eng20030723_120865.shtml).

232. Xu Binglan, *China Abolishes Yuan-Dollar Peg*, CHINA DAILY, July 22, 2005, available at [http://www.chinadaily.com.cn/english/doc/2005-07/22/content\\_462411.htm](http://www.chinadaily.com.cn/english/doc/2005-07/22/content_462411.htm).

233. See David T. Llewellyn, *Some Lessons for Regulation from Recent Bank Crises* (Oct. 15, 1999) (working paper presented at the Second International Conference on The New Architecture of International Monetary System, Florence), available at <http://>



closely with the poverty alleviation efforts in China. The reason is plain, since the poverty alleviation would undoubtedly be of great significance not only to China, but also to China's trading partners in terms of maintaining China as a prosperous and leading market in the world. The appreciation of the renminbi would necessarily bring serious negative effects on China's poverty alleviation, and could lower China's importation and consumption whole. Such an outcome would not be good news, in the long term, even for proponents of renminbi appreciation.

## Conclusion

The implementation of the FTA 2004 is supposed to attain three objectives. First, the law would provide equal conditions for various foreign trade operators in China, speed up the integration of domestic and foreign trade, and further facilitate free trade. Second, it will help create a fair and predictable foreign trade environment for Chinese and foreign entities, helping realize a win-win outcome in the development of both China and the world community. Third, the FTA 2004 is of great significance to the establishment and perfection of foreign trade monitoring systems and balance-of-payments early-warning mechanisms under common international practices. This will work to reasonably protect the domestic markets and industries and safeguard national economic security.<sup>234</sup>

The very positive changes made by the new amendments to the FTA 1994 include the virtual elimination of regulatory barriers for individuals conducting foreign trade. In addition to the new right of foreign trade for individuals, China promises to establish a mechanism under which individuals and enterprises can "bring to the attention of the national authorities cases of nonuniform application of the trade regime."<sup>235</sup> The FTA 2004 now allows individuals and enterprises to play an increasingly important role in international trade administration. Chinese foreign trade dealers are able to report any trade barriers they encounter to MOFCOM, and seek help in promoting free international trade.

Another positive development is the changed priorities for the distribution principles of quotas, improving the transparency and non-discrimination principles. In addition, under the FTA 2004, the import of goods is now free, with some relatively minor restrictions and prohibitions. Perhaps most important from the Chinese perspective is that the 2004 amendments shift from a passive to a more proactive policy, bringing China's policies in line with some of the more advanced WTO Members.

In seven specific areas, the FTA 2004 should be improved. First, vague, imprecise provisions must be changed because they may allow

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[www.devinit.org/findev/Working%20paper%2011.htm](http://www.devinit.org/findev/Working%20paper%2011.htm) ("We find that the recent distress of banks in South East Asia is a product of a volatile economy (with strong speculative elements) combined with . . . weak regulation, ineffective supervision both by the official agencies and the market . . .").

234. For the content and significance of the FTA 1994 amendment, see Major Content and Significance, *supra* note 30.

235. See China Protocol, *supra* note 26, § 2(A)(4).

administrative agencies to exceed their jurisdiction and may also limit the agencies' ability to respond effectively to trade barriers. Second, the problem of the relative weakness of the Chinese trade associations was not addressed by the FTA 2004. The lack of available sanctions for non-complying trade association members will hamper efforts to forestall or respond effectively to foreign trade competitors' challenges. A third problem is tax reimbursements for export to newly-established small foreign trade businesses, which presents considerable enforcement difficulties in order to prevent fraud. Fourth, China still lacks uniform, harmonized rules for domestic trade that can operate smoothly with the foreign trade regime. Fifth, China needs to improve foreign trade practices by developing more detailed guidance and procedures, especially with respect to MOFCOM's role in assisting Chinese enterprises that are involved in disputes. Sixth, there is need for more rules to handle dislocations arising out of China's WTO accession, which would help China to further contribute to world economy. Finally, certain problems remain in current rules on the issue of agency in foreign trade, which deserve further clarification and improvement.

Despite these improvements in areas needing development under the FTA 2004, even larger challenges remain. There are two major tasks for China. The first is compliance with its WTO obligations. On this point, China seems to have done well. The second, and probably more challenging, task is to establish rules that will aid in China's transition to a market economy. Making the transition requires combined efforts from domestic, bilateral, and multilateral sources, as well as legal and nonlegal efforts. To a certain degree, the WTO has put China on the fast track to a market economy that is transparent and nondiscriminatory.

Given its vast market and its own economic development, China should, if it can get its policies and strategies right, improve its performance and contribute more to international trade. Therefore, the 2004 amendments to the FTA 1994 are just a starting point for China, rather than a final destination. This is not only a task for the administrative authorities, but also for scholars, business organizations, and foreign traders. Welcome back Marco Polo, we are happy to see you again.

