

## China's Post-WTO Goods and Technology Import and Export Legal System

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In September 1986, participants at the General Agreement on Tariffs and Trade (GATT) Eighth Round of Multilateral Trade Negotiations which began in Uruguay (the Uruguay Round) finally produced a draft agreement to establish the World Trade Organisation (WTO). On 15 April 1994, the Marrakesh Agreement Establishing the WTO (the WTO Agreement) was signed.<sup>1</sup> As a result of this Agreement, the WTO was formally established on 1 January 1995 to replace GATT, established in 1947 as an interim measure in the wake of the Second World War.<sup>2</sup>

The WTO Agreement is the constitutional document of the WTO; it consists of the main body of the Agreement and four Annexes. The main body consists of 16 articles which set out the aims and principles of the WTO, its scope of activities, functions, structure, rules of policy-making, criteria for membership, legal status, budget and allocation of membership fees, relations with other international organisations,

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1 Representatives from 124 Governments and the European Communities participated in the Uruguay Round of Multilateral Trade Negotiations. The final session of the Trade Negotiations Committee at Ministerial level was held at Marrakesh, Morocco from 12 to 15 April 1994. The participants agreed that the *Agreement Establishing the World Trade Organization (WTO Agreement)*, the *Ministerial Declarations and Decisions*, and the *Understanding on Commitments in Financial Services*, embody the results of their negotiations and formed an integral part of *Final Act*.

*The Legal Texts – The Results of the Uruguay Round of Multilateral Trade Negotiations* (China: Law Press, 2000) at 2.

2 See *Marrakesh Declaration of 15 April 1994*, Article 6 states 'Ministers declare that their signature of the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" and their adoption of associated Ministerial Decisions initiates the transition from the GATT to the WTO. They have in particular established a Preparatory Committee to lay the ground for the entry into force of the WTO Agreement and commit themselves to seek to complete all steps necessary to ratify the WTO Agreement so that it can enter into force by 1 January 1995 or as early as possible thereafter.'

*The Legal Texts – The Results of the Uruguay Round of Multilateral Trade Negotiations*, (China: Law Press, 2000) at iv.

amendment provisions and other matters.<sup>3</sup> The substantive provisions are contained in the four Annexes of the Agreements. The first three have the characteristics of a Multilateral Trade Agreement, and are binding on all the members. The fourth, on Plurilateral Trade Agreements, is only binding on the members who have acceded to it.<sup>4</sup>

The world trade management framework and the entire multilateral discipline established by the WTO rules comprise a most effective leading world trade system. Building upon the foundation of the Multilateral Trading System that was originally set up under GATT, its scope has now expanded to include services trade, trade-related investment and intellectual property rights.<sup>5</sup> The WTO rules are voluminous and complex and include detailed analyses of the spirit and intent as well as the contents of the WTO rules and its various systems. They are likely to have a significant impact on China's internal trade system.

#### I. THE ISSUE OF THE APPLICABILITY OF THE WTO RULES IN CHINA

Articles 16(4) and (5) of the WTO Agreement state that 'Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements'.<sup>6</sup> Countries and regions that apply to be a part of the WTO

3 See *Marrakesh Agreement Establishing the World Trade Organization. The Legal Texts—The Result of the Uruguay Round of Multilateral Trade Negotiations* (China: Law Press, 2000) at 4–14.

4 See *Marrakesh Agreement Establishing the World Trade Organization*, Article II (3). Annex I contains three sub-Annexes, e.g. Annex 1A, Annex 1B, and Annex 1C. *Annex 1A: Multilateral Agreement on Trade in Goods* and there are 21 separate agreements under it. *Annex 1B: General Agreement on Trade in Service*, and *Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights*. *Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes*. *Annex 3: Trade Policy Review Mechanism*.

5 See *Marrakesh Agreement Establishing the World Trade Organization, Article IV Structure of the WTO* (5). It states "There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex IA. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council." *The Legal Texts—The Result of the Uruguay Round of Multilateral Trade Negotiations* (China: Law Press, 2000) at 6.

6 See *Marrakesh Agreement Establishing the World Trade Organization, Article XVI Miscellaneous Provisions* (4).

are left with no choice but to accept unreservedly the WTO Agreement in its entirety. Reservations as to specific articles are dealt with by exceptions and elastic rules in the Annexes.<sup>7</sup> The articles state explicitly firstly, that if the laws of any members are inconsistent with WTO rules, the members must amend their laws, to bring them in line with WTO rules. Secondly, certain Annexes provide for differential treatment for member states that are classified as 'developing countries' and 'least-developed countries'.<sup>8</sup> China, as one of the developing countries, can determine the best ways towards reform in the light of importance and urgency, and carry out various legal changes at different times, but observing the general undertaking that she has given to the international community.

What will these changes cover? The Multilateral Trade System does not affect certain areas, such as national defence, foreign relations, ideology, public morals and human rights. These items are not within the scope of the changes. Even trade-related income tax laws, direct taxation laws, and laws on corporate governance do not fall under its jurisdiction. Items that do properly fall within its scope include: laws and regulations related to trade, service trade, intellectual property rights, foreign investment, as well as customs, commodity inspection and zoology and botany health quarantines.<sup>9</sup>

Although the WTO rules are currently concerned only with the area of trade and trade-related investments etc, its rules will possibly later widen to involve areas such as labour, environmental protection and so on.

The rules concerning each area have a different range, and their targets have different characteristics. This does not mean that the rules are fragmented and isolated from one another: the WTO rules are in fact harmonised. This unifying characteristic is not only evident in the fact that each rule furthers the same principle, but in the fact that there cannot be conflicting understandings and interpretations of the WTO rules. This principle is explicitly stated in Article 16(3) of the WTO Agreement, which provides that 'in the event of a conflict between a

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*The Legal Texts—The Result of the Uruguay Round of Multilateral Trade Negotiations* (China: Law Press, 2000) at 13.

7 See *Marrakesh Agreement Establishing the World Trade Organization, Article XVI (5) and Article XIII (5)*.

*The Legal Texts—The Result of the Uruguay Round of Multilateral Trade Negotiations* (China: Law Press, 2000) at 4 and 12.

8 The related provisions can be found in several agreements. For example, *General Agreement on Tariff and Trade 1994 (GATT 1994)* and *Agreement on Agriculture, Part IX and Part X* all contain such provisions.

9 See *Marrakesh Agreement Establishing the World Trade Organization, Article II (1) (2)*.  
*The Legal Texts—The Result of the Uruguay Round of Multilateral Trade Negotiations* (China: Law Press, 2000) at 4.

provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict'.<sup>10</sup> Importantly, two effective mechanisms have been established to ensure the effective implementation of the rules: the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB). If a member contravenes the WTO rules governing a certain area, the member prejudiced may, within the same area, take retaliatory measures, or take cross-retaliatory measures within another area.<sup>11</sup>

Nevertheless, the WTO rules are limited to a certain extent. The WTO Agreement, in particular its Annexes, inherited the characteristic of the GATT regime in which 'there are exceptions within the principles, and there are principles within the exceptions'.<sup>12</sup> Almost every agreement will contain excepting provisions, especially when it relates to certain trade rules. Many excepting provisions of a 'grey nature' result in circumvention of the restrictions imposed by the WTO rules. The integration of various regions, and the development of free trade zones, as well as the longer transition periods that are implemented under certain agreements, are affected and there is a possibility that the effective operation of the Multilateral Trade System will be severely prejudiced.<sup>13</sup>

The question of how Chinese domestic courts should apply WTO rules and regulations has become a real and pressing problem. Chinese courts will increasingly be involved in legal issues relating to international trade, and will have to adjudicate on trade disputes which involve WTO rules. An essential matter that the Chinese courts are bound to be concerned with is which WTO rules should the Chinese courts apply when they adjudicate on a case, and the manner in which they should be applied.

This question has already raised heated debates among experts and scholars in China. Some are of the opinion that, since the WTO Agreement is an international treaty to which China is a signatory; it should be given direct legal effect in the domestic courts.<sup>14</sup> But there is

10 At 14, n 9.

11 See Annex 2: *Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 22—Compensation and the Suspension of Concession. The Legal Texts—The Result of the Uruguay Round of Multilateral Trade Negotiations* (China: Law Press, 2000) at 370.

12 Liu Guanxi, *Ru Shi Yu Wo Guo Fa Lü Tong WTO Xie Yi De Tiao Zheng Shi Yong: Accession to WTO and Adjustment of Chinese Law to Comply with WTO Rule*, (2001) 5 *Journal of Shanghai Institute of Foreign Trade (WTO Focus)*, at 7–9.

13 Zhao Weitian, *Shi Mao Zu Zhi (WTO) De Fa Lü Zhi Du: The Legal System of WTO* (China, Jilin People's Publishing House, 2000) at 228–232.

14 See Wan Erxiang, *Ru Shi Yu Wo Guo De Si Fa Gai Ge: Accession to WTO and the Reform Chinese Judicial System*, (2001) 7 *Journal of Shanghai Institute of Foreign Trade (WTO*

a different school of thought which dissent that the WTO Agreement should have direct legal effect in China. To vest a claimant with a direct right to invoke an international treaty in the domestic courts would, in their opinion, involve issues relating to China's national sovereignty.<sup>15</sup> The WTO Agreement is a political treaty, and is the result of a compromise between various parties.<sup>16</sup> Moreover, the WTO has numerous member states and each has its own economic system; the levels of economic development between them differ as well. Since complex international factors are involved, Chinese judges lack the competence to apply these rules in an appropriate manner. Thus, it is difficult to assert that the WTO Agreement and its related rules have direct applicability.<sup>17</sup> The crux of the issue is whether it is permissible for the claimant to invoke directly the WTO Agreement in a dispute in the Chinese courts where China's internal legislation is silent on the issues at hand or China's internal legislation is inconsistent with the WTO rules.

In one of his opinions, the Vice-President of the Supreme People's Court Mr. Cao Jianmin said: 'The best solution to the problem of the application of the WTO rules is to amend or transform the laws of China within the transition period, so that China's laws will be consistent with the rules of the WTO.'<sup>18</sup> This is because 'Firstly, there is a difference between the courts directly applying international treaties such as the United Nations Convention on Contracts for the International Sale of Goods, and applying the WTO Agreements. In the former, the international treaties expressly stipulate the rights and obligations of the parties concerned, whereas the WTO Agreements restrain the governments of the members in relation to their respective rights and obligations. This is an obvious difference between these international treaties and the WTO Agreements. Secondly, indirect application and transformative application of the WTO rules do not contravene the WTO Agreement itself. Members are free to decide on the appropriate methods to implement the WTO rules into their respective internal systems. Thirdly, there is the issue of the reciprocity principle in law. The direct application of the WTO Agreement by the

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Focus) at 5.

See also, Cao Jian Min *Ru Shi Yu Wo Guo She Wai Jing Mao Fa Zhi Ti Zhi De Gai Ge Yu Wan Shan: Accession to WTO and Perfection of Chinese Legal System on Foreign Economic & Trade*, (2002) 3 Journal of Shanghai Institute of Foreign Trade (WTO Focus) at 7.

15 Kong Xiangjun, *WTO Fa Lü De Guo Nei Shi Yong: Application of WTO Rules in China*, [http://www.legaldaily.com.cn/gb/content/2001-12/16/content\\_29014.htm](http://www.legaldaily.com.cn/gb/content/2001-12/16/content_29014.htm)

16 *Ibid.*

17 *Supra* note 14 (the second), at 6.

18 Cao Jian Min, *Ru Shi Yu Wo Guo She Wai Jing Mao Fa Zhi Ti Zhi De Gai Ge Yu Wan Shan: Accession to WTO and Perfection of Chinese Legal System on Foreign Economic & Trade*, (2002) 3 Journal of Shanghai Institute of Foreign Trade (WTO Focus) at 7.

Chinese courts may erode the lawful rights which confer protection on the Chinese subject of action under the reciprocity principle. Fourthly, we have to consider the complex nature of the WTO's legal structure and the innumerable rules related to it, and the qualifications of the Chinese courts in directly applying these rules. With regard to all the factors mentioned above, it would seem that the "transformative application" is the most viable solution. But this will not imply that China does not intend to carry out her obligations under the WTO or renege on the undertakings that her government has made. Rather, China ought to further refine her internal legislation and advance her construction of the rule of law'.<sup>19</sup> This view represents the more widely held opinion on the 'indirect application or transformative application' debate. It is the approach that China will adopt in her efforts to apply the rules of the WTO.

As early as mid-1999, after both the American and Chinese sides reached an agreement in their negotiations, the Chinese government had already embarked on the project to 'transform' her laws and bring them into conformity with the WTO rules.<sup>20</sup> The project involved the 25 departments and committees under the State Council, all provinces, autonomous regions, municipalities directly under the central government and their respective cities and municipalities.<sup>21</sup> At the opening of their first convention, the Bureau of Legislative Affairs of the State Council announced that a first requirement for amending the laws of China was to carry out a 'spring cleaning' of China's domestic legislation. The applicable principle is that 'the party who brings forth bears the responsibility'—this is to say, if the rules and regulations were laid down by a certain department, that particular department would be responsible for putting them in order.<sup>22</sup> The Law Working Committee of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC, one of the ministries under the State Council in charge of foreign trade and economic co-operation), broadly divided the laws and regulations to be put into order into 'two levels and four species'. The 'two levels' are laws enacted at national level and at local levels. The 'four species' are the basic laws enacted by the National People's Congress, administrative regulations

<sup>19</sup> *Ibid.*

<sup>20</sup> See Zhang Yuqing, *Ru Shi Yu She Wai Jing Mao Fa Gui De Tiao Zheng: Accession WTO and Adjustment of Regulations on Foreign Economic and Trade*, (2001) 7, *Journal of Shanghai Institute of Foreign Trade (WTO Focus)* at 8.

<sup>21</sup> Zhang Yuqing, *Ji Ji Kai Zhan Qing Li, Xiu Gai He Zhi Ding Zhong Guo Wai Jing Mao Fa Gui Gong Zuo: China has undertaken the Job of Cleaning, Amending and Setting up Laws and Regulation on Foreign Economic and Trade*, at 1–3, conference paper issued on May 18 2001, on the conference of 'Round-table Discussion on China's WTO Accession by International WTO Experts'.

<sup>22</sup> *Supra* note 20, at 9.

promulgated by the State Council, departmental rules laid down by the various ministries and committees under the State Council, and local regulations laid down by the Local People's Congresses and local governments.<sup>23</sup>

According to rough statistics compiled by experts in the area, the National People's Congress has only enacted approximately 200 basic laws.<sup>24</sup> But administrative regulations promulgated by the State Council total more than 2300, and the number of departmental rules laid down by the various ministries and committees (as well as local regulations) add up to more than 40,000.<sup>25</sup> In addition, there also exist numerous 'red letter' (confidential) documents, internal documents, notices, opinions, decisions, speeches, instructions, reports and so on, which are not in themselves laws or regulations, but have legal force nonetheless. These documents cover many areas, including foreign trade, finance, tax laws, intellectual property etc. This arduous task of cleaning up China's domestic legislation took one year and three months.<sup>26</sup> In March 2001, the Director of the National People's Congress External Affairs Committee, Mr. Cao Jianhui, announced to the foreign and local media that the process of putting China's domestic legislation in order had finally come to an end.<sup>27</sup> Using MOFTEC as an illustration from 16 November 2001 to 21 March 2002, a total of 380 departmental rules were split into four batches and abolished.<sup>28</sup>

The number of new laws that the National People's Congress and the Standing Committee of the National People's Congress need to enact is much more than the number of laws that need to be amended. For example, in the area of the trade of goods, new laws needing enactment include anti-dumping laws, anti-subsidy laws, anti-monopoly laws and electronic commerce laws. In the area of service trade, new laws needing enactment include foreign exchange control laws, trust company management laws, investment funds laws, and tourism laws. Last but not least, in the domain of trade-related intellectual property, the new laws that need enactment include those to protecting integrated circuit design and trade secrets.

The abolition of a number of laws and regulations and judicial interpretations has already been announced over various times

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23 See PRC, Law of Legislation, from Part I to Part IV,

<http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=26942>

24 See an interview with Mr. Li Cheng who is the Deputy-Director of Economic Studies under the Standing Committee of National People's Congress by respondent Cui Huaning, on 'Chinese Youth Daily', Nov. 15, 2001.

25 See Liu Junwu, 'Accession to WTO and Starting the Era of Legislations', [www.CHINESELAWYER.com.cn](http://www.CHINESELAWYER.com.cn), 2002-02-26

26 *Supra* note 24.

27 *Ibid.*

28 *Supra* note 20, at 9.

and in different batches and further progress in continually being announced. It is not an exaggeration to say that China's legal landscape is changing by the day. If one wishes to keep abreast of the latest legal developments, it is essential to obtain the latest information.

## II. CHINA'S PRESENT IMPORT AND EXPORT TRADE LEGAL SYSTEM

In the past, China's foreign trade system was characterised by monopolies, communalist and financial subsidies, and plagued by malpractices of all sorts.<sup>29</sup> Since 1979, China has carried out a series of reforms to this system, and has gradually progressed from a foreign trade system monopolised by the state to one of market economy. These reforms occurred broadly in 4 phases.<sup>30</sup> The first phase, which took place from 1979 to 1987, can be called the 'Searching Phase'. The focus of this phase was to reform the high-level centralised management system, whereby instructions were taken from a sole authority. Specific measures undertaken were to de-centralise the right to engage in foreign trade to lower levels.<sup>31</sup> The second phase, which took place from 1988 to 1990, can be called the 'Full Advancement Phase'. The focus of this phase was to implement the contractual management responsibility system in all trades and professions. At the same time, the state made several adjustments using economic measures such as prices, foreign exchange, interest rates, tax rates etc, to form a rudimentary macroeconomic control structure of foreign trade.<sup>32</sup> The third phase, which took place 1991 to 1993, can be called the 'Fortification Phase'. The main focus of this phase was to abolish financial subsidies for foreign trade exports. Starting from the establishment of a mechanism whereby enterprises are responsible for their own profits and losses, reforms will cause foreign trade to move gradually along the path of 'unified policy, fair competition, responsibility for one's own profits and losses, amalgamation of industry and trade, and promoting agency'.<sup>33</sup> The fourth phase, which runs from 1994 to the present, can be referred to as the 'Deepening Phase'. The main focus of this phase is to deepen the reforms to the foreign trade system already set in motion.<sup>34</sup>

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29 Cao Jianmin, eds., *WTO Yu Zhong Guo De Si Fa Shen Pan: WTO and Court Trial in China*, at 101–102, (China, Law Press, 2001).

30 Liu Sun eds., *Guo Ji Mao Yi Fa: International Trade Law*, at 241, (China, Chinese Legal Publishing House, 2000).

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*



A fundamental transformation has thus been achieved in China's foreign trade system following 20 years of reform. Direct administrative intervention is greatly diminished, and macro-control has gradually given way to the use of economic and legal measures as the main tools of adjustment. A varied foreign trade administration system has already been established.<sup>35</sup> Management mechanism characterised by 'self-management, responsibility for one's own profits and losses, self-restraint and self-development' has achieved a lot.<sup>36</sup> However, there is no need for self-satisfaction. There is still a huge disparity between the WTO rules and China's current foreign trade system, despite the system having gone through these reforms. After China's accession to the WTO, the reforms that she needs to undertake are more urgent and would to be thorough. As China's present foreign trade legal structure is relatively complex and the contents complicated, the following part of the essay aims at proving an introduction certain aspects of the structure.

### 1. Right to Trade

The practice of WTO members is to allow enterprises to sell their goods in the internal market, and to engage in import and export business subsequent to being registered according to law.<sup>37</sup> However, China's Foreign Trade Law has yet to be amended. Articles 8, 9 and 13 in Chapter 2 of the Foreign Trade Law still stipulate that parties wishing to engage in foreign trade must fulfill the conditions set out by the Law and obtain a licence from the competent authority under the State Council before they can do so. Only enterprises who have applied to, and been examined and approved by, authority (usually MOFTEC) can engage in the business of foreign trade. These provisions are inconsistent with the WTO rules.<sup>38</sup>

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35 See Wang Chuanli, eds., *Guo Ji Mao Yi Fa: International Trade Law*, at 296–298, (China, Law Press, 1999).

36 *Ibid.*

37 See General Agreement on Tariffs And Trade (GATT 1947) Part II, Article III & Article IV. Also Article XVII at [http://docsonline.wto.org/GEN\\_searchResult.asp](http://docsonline.wto.org/GEN_searchResult.asp)

38 *PRC, Foreign Trade Law*, adopted at the 7th meeting of the Standing Committee of the 8th National People's Congress on 12 May 1994, promulgated by Order No. 22 of the President of the People's Republic of China on 12 May 1994 and effective from 1 July 1994.

Article 8 provides 'Foreign trade operators as used in this Law refer to the legal persons or other organizations engaged in the operative activities of foreign trade in accordance with the provisions of this Law.'

Article 9 is as follow:

'Foreign trade operators handling the import and export of goods or technologies must satisfy the following conditions, and obtain the permission from the competent department in charge of foreign economic relations and trade under the State

However, a look back at the historical development may provide a better understanding of the current situation.

For a considerable length of time before China's accession to the WTO, there were four systems which co-existed and operated side by side and governed the right to engage in foreign trade. They are the licensing system,<sup>39</sup> the registration system, the automatic acquisition system and the agency system. The right to trade is further divided into two sub-categories: (1) The right to engage in general foreign trade, and (2) the self-managed import and export right for manufacturing enterprises.<sup>40</sup> The former enjoys the right to engage in the import and export of all categories of goods and technology (with the exception of goods and technology). The latter can only engage in the export of goods produced by the enterprise itself, and in the import of machinery and equipment, spare parts and raw materials that the enterprise requires in its production.<sup>41</sup>

At present, China is giving more enterprises and research institutes the right to trade, and also broadening a pilot project for the automatic

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Council:

- (1) having their own names and organizational structures;
- (2) having clear-cut business scopes of foreign trade;
- (3) having premises, funds and professionals needed for the foreign trade business they are engaged in;
- (4) Having fulfilled the required performance or having necessary sources of goods for import and export in the case of entrusting others to handle imports and exports; and
- (5) other conditions provided by laws and administrative rules and regulations.

The measures for the implementation of the provisions of the preceding paragraph shall be formulated by the State Council.

Enterprises with foreign investment shall be free from obtaining the permission as stipulated in the first paragraph of this Article, if they in accordance with the laws and administrative rules and regulations governing enterprises with foreign investment import non-productive goods for their own uses, or necessary equipment, raw materials and other goods for their production, or export their own products.'

Article 13 provides 'Organizations or individuals without permits for foreign trade business may entrust foreign trade operators within China to conduct foreign trade businesses on their behalf within the business scope of the trustees.

The foreign trade operators who are entrusted to conduct foreign trade business shall truthfully provide the trustors with market information, commodity prices, information about clients and other relevant business information. The trustors and trustees shall conclude a trusteeship contract in which the rights and obligations of both parties shall be specified.'

This translation can be found:

[http://www.isinolaw.com/jsp/law/LAW\\_Chapters.jsp?LangID=0&StatutesID=11837&CatID=303](http://www.isinolaw.com/jsp/law/LAW_Chapters.jsp?LangID=0&StatutesID=11837&CatID=303)

39 *Ibid.* See also *Supra* note 35 at 306–317.

40 *Supra* note 35, at 317–318.

41 Liu Jian Wen eds, *WTO Yu Zhong Guo Fa Lü Gai Ge: WTO and Reforms of Chinese Legal System*, at 153–155 (China, Xi Yuan Publish House, 2001). See also *Protocol on the Accession of the People's Republic of China (5) Right to Trade. Compilation of the Legal Instruments on China's Accession to the World Trade Organization* (China: Law Press, 2001) at 5.

registration of the right of production enterprises to engage in foreign trade. All this is being done in order that China may successfully fulfill her pledge to abolish the foreign trade licensing system within three years of her accession to the WTO.<sup>42</sup> The aim is full implementation of a registration system for the right to trade across the board.

On 10 July 2001, MOFTEC issued the Notice concerning the Relevant Rules on Management over Import and Export Operations Qualifications (hereinafter the 'Notice').<sup>43</sup> This is an important step in the reform of the right to trade. The Notice contains new provisions which partially amend the present procedures for obtaining the right to trade. Based on the existing foreign trade system, these amendments combine and alter the approval and the registration systems, and relax restrictions in order that more enterprises can enjoy import and export rights. The Notice implements a system of unified classification management over import and export qualifications, and adopts the registration and ratification system. Within the scope of the import and export operations of firms which have been registered or rectified, there are no longer restrictions on trading methods. They may, subject to national regulations, employ a variety of trading methods. The scope of the Notice, however, does not extend to the other two types of systems, (1) the automatic acquisition system for enterprises with foreign investment, etc. and (2) the foreign trade agency system for organizations and individuals who do not enjoy the right to trade.<sup>44</sup> It is believed that these two systems will remain in their current form. Below is a brief introduction to the current system of the right to trade.

#### (1) *Registration and Ratification System*

Article 1 of the Notice states that: 'The registration and ratification system shall be implemented for import and export operations qualifications. The principles of autonomous registration, openness and transparency, unified standards and supervision according to law shall be adhered to. Unified standards and management measures for import and export operations shall apply to each and every enterprise that falls under this system.'<sup>45</sup> The specific way of doing so is

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42 *Protocol on the Accession of the People's Republic of China (5) Right to Trade. Compilation of the Legal Instruments on China's Accession to the World Trade Organization* (China: Law Press, 2001) at 5.

43 The Ministry of Foreign Trade and Economic Cooperation (MOFTEC) promulgated *Notice concerning the Relevant Rules on Management over Import and Export Operations Qualifications* on 10 July 2001 and became effective on the same day.

44 *Ibid.* See Art. II.

45 *Supra* note 43, art 1. This is with the exception of enterprises with foreign investment, co-operative enterprises that engage in the supply and sale of industrial materials,

to divide the qualified enterprises into two categories: for the right to trade in general, and for the right of manufacturing enterprises to import and export on a Self-Managed basis. These two rights will be regulated accordingly.

- **The Right To Trade In General**

Enterprises which have obtained the right to trade in general enjoy the right to engage in the import and export of all categories of goods and technology, with the exception of trading in goods and technology restricted or prohibited by the State.<sup>46</sup>

- **The Right to Trade on a Self-Managed base for a Manufacturing Enterprise**

A manufacturing enterprise that has obtained this right can only engage in the export of goods produced by the enterprise itself, and the import of machinery and equipment, spare parts and raw materials that the enterprise requires for its own production.<sup>47</sup> The scope of this right is greatly restricted as compared to the right to trade in general.

- **Qualifications on the Right to Trade in General<sup>48</sup>**

- (a) The enterprise must be a legal entity which has been established for at least one year, and has obtained the 'Business Licence For Businesses with Legal Personality' after being registered with the Administration of Industry and Commerce. It must also have carried out and passed the annual industrial and commercial review required under national regulations;
- (b) The registered capital of the enterprise must not be lower than 5 million renminbi (in the case of enterprises located in the mid-western areas, not lower than 3 million renminbi);
- (c) The enterprises must be registered for tax and have paid the relevant taxes. It must also have carried out and passed the annual tax inspections required under national regulations;
- (d) The legal representative or person-in-charge of the said enterprise must not, within the last three years, have been the legal representative or person-in-charge of an enterprise that has had its foreign trade licence revoked.

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trade enterprises with small trade volumes located at the borders, enterprises located in Special Economic Zones and enterprises located in Pudong New District.

46 *Supra* note 43, art 2(1).

47 *Ibid.* Art 2 (2).

48 *Ibid.* Art 3 (1.1).

• **Qualifications on the Right to Trade for Manufacturing Enterprises on a Self-Managed Base**<sup>49</sup>

- (a) The enterprise must be a legal entity or a sole proprietorship or partnership (hereinafter collectively termed 'enterprises') that has been established according to law, obtained the 'Business Licence For Businesses With Legal Personality' or 'Business Licence' after being registered with the Administrative Department for Industry and Commerce;
- (b) In general, the registered share capital (funds) of the enterprise must not be lower than 3 million renminbi, but for enterprises located in mid-western areas and ethnic minority areas, must not be lower than 2 million renminbi. Research centres, high and new technology enterprises and enterprises engaged in the production of machinery and electronic goods must have not be lower than 1 million renminbi.
- (c) The enterprise must be registered for tax and have paid the relevant taxes.
- (d) The legal representative or person-in-charge of the said enterprise must not, within the last three years, have been the legal representative or person-in-charge of an enterprise that had its foreign trade license revoked.

It does not seem likely this licenced system will be changed.

(2) *The Automatic Acquisition System*

This system applies to enterprises with foreign investment.<sup>50</sup> China encourages these enterprises sell goods they have produced outside the country. Normally, the enterprises are required to achieve a balance in their foreign exchange income and expenses. They not only enjoy the right to export the goods they have produced, but have the right to import equipment and raw materials that they require to engage in production activities without the need to carry out the usual licensing procedures.<sup>51</sup> Previously they could not purchase goods for export, or exceed the approved scope of business, without prior authorisation. Recently, there have been changes to the situation.

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49 *Ibid.* Art 3 (2.1).

50 *Ibid.* Art 1.

51 For example, Article 10 of *Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures* provides 'The raw materials, fuelling, and other materials necessary for equity joint ventures in the approved business scope may be procured in domestic or international market.

An equity joint venture shall be encouraged to market its products outside China. It may sell its export products on foreign markets directly or through associated agencies or China's foreign trade agencies. Its products may also be sold on the Chinese market.'

Enterprises with foreign investment located in Shenzhen, can not only import and export goods they have produced, they can also import and export other goods that have not been produced by them. These enterprises seem to enjoy an absolute right to engage in import and export trade, and not merely self-manage trading rights.<sup>52</sup>

### (3) *The Foreign Trade Agency System*

China's foreign trade agency system is a product of the foreign trade licensing system. Only legal persons and organisations which have obtained a foreign trade licence can engage in the import and export of goods and technology. Others including individuals who do not have this right to trade can only import and export the goods they require through existing foreign trade companies. This is the so-called 'foreign trade agency system'.<sup>53</sup>

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See also, *Implementing Regulations of the Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures*. Article 54: 'Equity joint ventures shall have the right to export their products of own accord, or may consign sales agencies of foreign parties to these equity joint ventures or Chinese foreign trade companies to sell on a commission basis or distribute their products.'

Article 55: 'When an equity joint venture, within the business scope as stipulated by the contract of joint venture, imports its needed machinery equipment, parts, components, raw materials, and fuels under the system of import license of this country, it shall compile a plan one a year and draw the license once half a year. The import of machines and other materials that foreign joint ventures make part of its investment may be allowed after directly issue of import license on the strength of approved documents from examining and approving authorities. For the materials the import of which is beyond the scope specified in the contract and needs import license according to the state provisions, separate application shall be required.'

An equity joint venture may export products manufactured by it independently. Where the export license should be drawn for import of products manufactured by it according to the relevant provisions of this country, the equity joint venture shall apply to draw such license once half a year in accordance with the annual export plan of its own.'

52 See *Notice on Some Relevant Issues Concerning Expanding Foreign Investment Enterprises' Trading Right over Import and Export Businesses* (Promulgated on 18 July 2001 by MOFTEC). Art 1 states, 'To expand foreign investment production-oriented enterprises' power of management over import and export businesses.

In accordance with the following conditions, any foreign investment production-oriented enterprises shall be allowed to engage in purchase and export of commodities under non-quota license management or nonexclusive commodities, and may take part in public bids for export quota of their self-manufactured products . . .'

53 The legal basis for the implementation of this foreign trade agency system is *Interim Regulations Relating to the Foreign Trade Agency System*, which was promulgated by MOFTEC on 29 August 1991. The basic features of the Regulations are that organisations or individuals without the right to engage in foreign trade may commission foreign trade operators within China to deal with the import and export of their goods on their behalf within the business scope of the latter.

Article 13 of the Foreign Trade Law 1994 re-enacts this stipulation. In reality, this provision gives legal recognition to the establishment of the Chinese foreign trade agency system. In addition, foreign trade enterprises which engage in the business of import and export within bonded zones may, after their establishment has been authorised

The characteristic of this system is that the foreign trading companies who act as agents carry out the foreign transaction in their own name, entering into the contract as a party. The party acting as principal cannot engage more directly. This type of agency system is an 'indirect agency system'. The agent bears all legal responsibilities for such actions within his authority.

Following accession to the WTO, China has had to increase the pace of reforms to its system. Laws and regulations concerning the equal legal status of enterprises engaged in foreign trade must gradually close up with international practices. China has promised to abolish the foreign trade licensing system within 3 years of her accession to the WTO. Thereafter, all enterprises lawfully registered in China will enjoy the right to engage in foreign trade, except for dealings in certain specified products.<sup>54</sup> From a foreign trade management system under which wholly state-owned foreign trade companies were the main participants in the system, there will be a gradual widening to include forms of ownership such as state-owned, joint, and foreign ventures, companies limited by shares, associations, private limited companies etc. A transition stage is needed while the administrative system is reformed.

#### A. *The Administration of Import and Export of Goods System*

On 10 December 2001, former Premier Zhu Rongji gave assent to PRC Regulations on Administration of Product Imports and Exports (hereinafter the 'Regulations') promulgated by the State Council.<sup>55</sup> It ensured China's observance to the WTO rules, and the reform of her foreign trade system. Article 5 stipulates: 'The People's Republic of China shall provide the most favoured nation treatment, national

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by the state department responsible for the work, engage in foreign trade. They may import commodities which the administrative organisations and principal enterprises operating within bonded zones require for their own use on their behalf, and import raw materials and spare parts and export products on behalf of the principal enterprises operating within bonded zones. However, foreign trade enterprises operating within bonded zones cannot act as agents for the import of goods on behalf of enterprises which do not operate within the area, neither may they procure goods that are produced by enterprises not operating within bonded zones for export. Despite the fact that the current foreign trade system still contains numerous flaws, this is the system that is being implemented at present.

<sup>54</sup> See *Protocol on the Accession of the People's Republic of China (5) Right to Trade. Compilation of the Legal Instruments on China's Accession to the World Trade Organization* (China: Law Press, 2001) at 5.

<sup>55</sup> *Regulations on Administration of Product Imports and Exports*, promulgated by the State Council on 10 December 2001, and these Regulations came into effect on 1 January 2002.

treatment or the most favoured nation treatment or national treatment to parties or participants to international treaties or agreements it has signed according to the principal of mutual benefit and reciprocity with regard to import and export of goods.<sup>56</sup> This is the first time that the Chinese government has explicitly and comprehensively enacted such a stipulation in a law relating to the import and export of goods. Of course, this type of undertaking also carries with it certain conditions. China may take out corresponding measures against countries and districts which practice discriminatory prohibition, restriction or other similar measures against China in the area.<sup>57</sup> The Regulations provide the legal basis for doing so.

It will be simpler to discuss the provisions separately.

#### (1) *Administration of the Import of Goods*

The administration of the import of goods is broadly divided into three categories: goods banned for import, goods restricted for import, and goods free for import.<sup>58</sup>

##### **A. Goods Banned for Import**

The list of goods banned for import is compiled, adjusted and published by the competent authority under the State Council.<sup>59</sup> More specifically, goods are banned for import in situations:

- Where national security or public interests are jeopardised;
- Where it is necessary to prohibit imports and exports in order to protect the lives or health of the people;
- Where the ecological environment will be damaged; or
- Where it is necessary to prohibit imports or exports under international treaties or agreements concluded or acceded to by the People's Republic of China.<sup>60</sup>

##### **B. Goods Restricted For Import**

For goods restricted for import, two factors are relevant: one is that the State implements a quota with quantitative restrictions, and the other is the licence administration system.<sup>61</sup> They mainly involve situations:

<sup>56</sup> *Ibid.*, art. 5.

<sup>57</sup> *Ibid.*, art. 6. It provides 'If any country or region adopts discriminatory prohibitive, restrictive, or other similar measures against the People's Republic of China in respect of the good import and export trade, the People's Republic of China may adopt corresponding measures against such country or region, as the case may be.'

<sup>58</sup> *Supra* note 55, art 8 & 21.

<sup>59</sup> *Ibid.*, art. 33–34.

<sup>60</sup> *Ibid.*, art. 35. See also *Supra* note 38, art.17.

<sup>61</sup> *Supra* note 55, art. 35–44.



- Where it is necessary to restrict imports to maintain national security or public interests;
- Where it is necessary to restrict imports in order to establish or accelerate the establishment of specific domestic industries;
- Where it is necessary to restrict imports of agricultural, animal husbandry or fishery products in any form;
- Where it is necessary to restrict imports in order to safeguard the State's international financial position and balance of income and expenditure or
- Where it is necessary to restrict imports under international treaties or agreements concluded or acceded to by the People's Republic of China.<sup>62</sup>

It can be seen that the scope of goods falling into the category restricted for import is wider, and the definition of such goods is more abstract and flexible. If goods fall into this category, the importer must apply for and obtain a licence or quota allocation. The import and export company must pay close attention to changes in the list of goods restricted for import, which should be available at least 21 days ahead of implementation.<sup>63</sup>

### C. Goods for Free Import

Goods that do not fall into any of the two categories can be imported without restrictions. However, due to the need to monitor the import situation, the State Council may, impose an automatic import licence requirement on some goods normally free to import. The list of such goods should be made available at least 21 days ahead of implementation.<sup>64</sup>

## (2) Administration of the Export of Goods

The Regulations similarly distinguish goods banned for export and goods restricted for export.<sup>65</sup>

### A. Goods Banned for Export

Export is banned for any goods listed in Article 17 of the Foreign Trade Law.<sup>66</sup>

### B. Goods Restricted For Export

Among the goods restricted for export, the State implements a

<sup>62</sup> *Supra* note 38, art. 16.

<sup>63</sup> *Supra* note 55, art. 35. The list of goods restricted for import will be compiled, adjusted and published by the competent authority under the State Council.

<sup>64</sup> *Supra* note 38, art. 21–23.

<sup>65</sup> *Supra* note 55, art. 33. See also, *Ibid.*, art. 17.

<sup>66</sup> *Ibid.*

quota and a licence administration system. This mainly involves situations:

- Where it is necessary to restrict exports to maintain national security or public interests;
- Where it is necessary to restrict exports due to a shortage of domestic supplies in order to effectively protect non-renewable domestic resources;
- Where it is necessary to restrict exports due to the limited market capacity of the importing country or region; or
- Where it is necessary to restrict exports under international treaties or agreements concluded or acceded to by the People's Republic of China.<sup>67</sup>

(3) *Regulations where Govern Trade Operated by the State*

Article 45 of the Regulations states specifically that 'the state shall exercise state administration over part of imports and exports', and Article 47 states that 'the state shall allow non-state trading enterprises to engage in the import and export of certain quantities of goods subject to state operated trade'.<sup>68</sup> The competent authority under the State Council may carry out some operations within a certain time limit and based on need.

For those enterprises can engage in trade operated by the state, the competent authority under the State Council determines a catalogue of state trading enterprises and publish it according to division of responsibilities provided by the State Council.<sup>69</sup>

On 20 December 2001, ten days after the Regulations were promulgated, MOFTEC promulgated 11 new rules. These rules were enacted to complement the Regulations, and they set out a series of concrete measures to be implemented. The new rules include:

- Measures on Tendering for Export Quotas;
- Management Measures for the Import of Designated Goods;
- Administrative Measures on Quotas for Export Commodities;
- Administrative Regulations for Export License;
- 2002 Table of Commodities under Import License Management;
- Table of Prohibited Imports (1st);
- 2002 Table of Commodities under Export License Management;
- Table of Prohibited Exports (1st) etc.

All of them came into effect on January 2002.<sup>70</sup>

67 *Supra* note 55, art. 35–38. See also *Supra* note 38, art. 24.

68 *Supra* note 55, art. 45 & 47.

69 *Supra* note 55, art. 45–49.

70 See list at <<http://law.chinalawinfo.com>>.

### B. *The Administration of Import and Export of Technology*

Following accession to the WTO, China made a number of changes affecting the import and export of technology, especially with regard to inspection procedures and restrictive clauses. The State Council promulgated the '*Regulations of the People's Republic of China on Administration of Import and Export of Technologies*' (hereafter referred as '*Regulations on Technology*') on 10 December 2001, and it came into effect on 1 January 2002.<sup>71</sup> These regulations introduce a unified foreign trade administration system. The import and export of certain products are subject to quotas decided by the government. Licences are required to do so. Import or export of forbidden or restricted products without the appropriate licence or approval will constitute the crime of smuggling.<sup>72</sup>

Following the Regulations on Technology, certain departments and committees such as MOFTEC promulgated Administrative Measures on Prohibited and Restricted Technology Imports. The regulations came into effect on 1 January 2002.<sup>73</sup> Compared to the original legislation related to the import and export of technology, these new regulations contain many radical changes, and it is worthwhile to focus on and examine them.

#### (1) *The Administration of Technology Imports*

As with goods, technology imports and exports are divided into those banned, those restricted, and those for free import and export.<sup>74</sup>

The Regulations on Technology, created a licencing system. But a contract registration system was adopted for technology that may be freely imported or exported. This is a dramatic departure from the original legislation regulates the import and export of technology.<sup>75</sup>

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71 *Regulations of the People's Republic of China on Administration of Import and Export of Technologies* was promulgated by the State Council on December 10 2001 and became effective on Jan. 1, 2002. At <<http://www.chnlaw.com/DataBase/LawRegulation/ShowContent.asp?ID=2251&TitleContent=Title&Word>>.

72 *Ibid*, see art. 5, 8–11 & 46.

73 *Administrative Measures on Prohibited and Restricted Technology Imports* was promulgated by MOFTEC on December 30 2001 and became effective on Jan. 1, 2002. At <<http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=38060>>.

74 *Supra* note 72.

75 Before, each transaction of technology import needs to be approval by the competent dept. of the State Council.

There are now two separate procedures:

#### **A. Technology Import Application and Agreement; Examination and Approval in Two Separate Steps**

There are two steps to complete the application. The first step is the application for importing technology. The importing party needs to apply to the competent authority under the State Council. Upon receipt of an application, the authority will examine the application and decide whether to approve the application, within 30 working days from the receipt of the application.<sup>76</sup> This procedure includes the two components of trade examination and technology examination. If the application is successful, there is a second step.<sup>77</sup>

The second step is to apply for a technology import licence. Applicants who have obtained an approval from the relevant authority will receive a letter of intent, which enables the import operator (the applicant) to sign a technology import contract with the foreign party. The importer submits a duplicate copy of the contract and other relevant documents to the authority to secure a technology import licence. If it is agreed to, the licence will be issued. With the licence, the applicant is able to complete the formalities in respect of foreign exchange, banking, taxation, customs etc.<sup>78</sup>

#### **B. Technology Import Application and Contracts; Examination and Approval in One Step**

The applicant may enter into a contract to import restricted technology prior to obtaining the letter of intent. The applicant is then able to submit the application and the duplicate copy of the signed

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<sup>76</sup> *Supra* note 71, art. 13–15.

<sup>77</sup> The contents of the trade review include:

- Whether it satisfies China's foreign trade policies, and whether it is beneficial to the development of foreign economic and technology cooperation;
- Whether it satisfies China's foreign obligations.

The contents of the technology review include:

- Whether it endangers national security and public interest;
- Whether it endangers human life and health;
- Whether it is damaging to the ecological environment;
- Whether it satisfies state production policies and socio-economic development strategies, whether it is beneficial to the advancement of our country's technology and the upgrading of production, and whether it is beneficial to the protection of our country's economic and technology benefits and interests.

<sup>78</sup> *Supra* note 71, art. 13 & 14.

technology import contract to the competent authority at the same time.<sup>79</sup>

However, an awkward situation may arise. Failure to obtain approval to import the technology results in the contract being frustrated and rendered void. The danger in doing things this way is that the party which entered into the contract may be liable for breach of contract. Thus, in order to avoid unnecessary disputes, parties to the contract should expressly provide in the contract that, in the event that the applicant fails to obtain approval to import the technology, both parties should bear responsibility for the breach.

The maximum period for examination and approval as described in the two preceding paragraphs is 40 working days.<sup>80</sup> This is a significant reduction compared to the 60 days previously required.

#### (2) *Administration of Technology Export*

Compared with restricted import technology, there are two distinct points to be noted. The first is that the application for the export of technology and the examination of the contract need to be carried out separately, i.e. it is only upon obtaining the letter of intent that the applicant can carry out the substantive negotiations and sign the export contract. The second is examining technology for export is the joint responsibilities of the science and technology and the foreign trade administrative departments.

#### (3) *Registration of Contract for Technology Free to Import and Export*

In order to reflect the principle of freedom to import and export technology, the Regulations on Technology create a contract registration system for technology that is freely imported and exported; the previous system of examination and approval is abolished.<sup>81</sup> However, this system is not equivalent to the simple act of filing the contract with the relevant authorities. Only when the contract is registered and a certificate obtained, can the contract be carried out and the applicant complete formalities in respect of foreign exchange, banking, taxation, customs etc.<sup>82</sup> Failure by the party under the obligation to register the contract results in the contract being rendered void, and the defaulting party becomes liable for breach.

Compared with the old Regulations, the new Regulations on Technology ensure that China's foreign technology trade system is

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<sup>79</sup> *Ibid.*, art. 15.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Supra* note 71, art. 17–19.

<sup>82</sup> *Ibid.*, art. 18–21.

gradually moving into line with the global trend of trade liberalization. At the same time, the protection of the rights of intellectual property owners is strengthened. In relation to technology import contracts, restrictive clauses are now closer to stipulations contained in some foreign countries' competition laws, which are thought by many to be more reasonable. These changes result in a balance of bargaining power between the transferor and the transferee, and will promote the introduction of foreign technology into China.

### III. CONCLUSION

The WTO, the world's biggest international trade organisation, plays a significant role in international trade. The Organisation has laid down a structure consisting of a complete set of rules and principles, it influences international trade trends, and can also be seen as a 'market'. Within the 'market', members have made compromises in order to gain entry, and at the same time have abided by the operative rules laid down. The WTO requires each and every member to achieve non-discrimination in their trade policies to a large extent, and also transparency in their trade rules and enforcement procedures. The WTO has established a legal mechanism for enforcement and improved procedures to eliminate clashes and resolve disputes between members. A critical question is not whether free trade can help a country in transition bring foreign laws into operation for their own sake, but whether it can stimulate the introduction of specific rules of law, thereby helping to create a revised legal system which is in line with the rest of the world.

The WTO Agreement explicitly states that 'a Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force'.<sup>83</sup> It also stipulates that 'each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'.<sup>84</sup>

There is thus a legal duty on the various members to ensure compliance themselves. The object of the WTO legal system is to gradually reduce and eliminate trade barriers such as customs duties, quantitative restrictions, legislative controls and other internal legislation,

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83 *Supra*, note 1, Article XIV (2).

*The Legal Texts—The Results of the Uruguay Round of Multilateral Trade Negotiations* (China: Law Press, 2000) at 13.

84 *Ibid*, Article XVI (4).

and also administrative measures that governments have adopted to hinder international trade and distort international free trade competition. The acceptable level of free trade and internal protection measures that a member can adopt is clearly stipulated by the rules. The importance of these rules is that they require governments to conform to approve internal protection measures. The most important obligation for all members, as well as for nations who are applying to join the WTO, is to accept the restraints and supervision imposed on their government's administration of trade activities, and accept WTO rules affecting their internal trade activities. The method of doing so is through the mechanisms of the Dispute Settlement Body and the Trade Policy Review Body.

Due to space constraints, this article has only focused on two areas in China's Foreign Trade legal system, the import and export of goods, and technology. Issues relating to trade service, protection of trade related intellectual property rights, and trade barriers such as non-customs duties, are not touched upon. The author has mentioned in the opening paragraph that ever since her accession to the WTO, China has put enormous efforts into putting in order, and amending and abolishing, her domestic laws and regulations. Nevertheless, it is not hard to discern that a considerable discrepancy remaining between her laws and WTO rules.

China's former strict procedures for obtaining approval for the right to trade are a legacy of the past. Under a planned economy structure, specialised state-owned foreign trade enterprises enjoyed a monopoly of power over the country's foreign trade industry. Governmental interference in the market using administrative laws and regulations was severe. As early as the mid-1980s, China had carried out some reforms to her foreign trade enterprises, and attempted to decentralise to local authorities the right to trade previously held solely by the central government. A vicious price war broke out in respect of certain goods between the various districts and enterprises engaged in the same business, in an attempt to obtain more exports and increase foreign exchange income.<sup>85</sup> This not only led to a serious confusion in foreign trade, but also affected the prices of similar goods in the international marketplace.<sup>86</sup> The level of local protectionism in China was high, and was made worse China being itself a large marketplace in which market rules are not fully developed. So it is easier said than done to implement the right to trade freely. The situation was

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85 Wang Chuanli eds, *Guo Ji Mao Yi Fa – Zheng Fu Guan Li Mao Yi De Fa Lü Yu Zhi Du: International Trade Law-Law and Legal System for Government to Administrate Trade*, (China University of Politics and Law Press, 2002) at 86–87.

86 *Ibid.*, at 89–90.

such that “everything came to an end once it is taken, and everything became a mess once it is released”.<sup>87</sup> In such circumstances, the central government had no choice but to implement a strict approval of the right to engage in foreign trade in order to rectify and standardise foreign trade.

After accession to the WTO, China faced two particular problems with regard to imports and exports. The first is how to enable enterprises and individuals with the right to trade to comply with the requirements of the WTO. They should enjoy equal rights with state-owned enterprises, and freely engage in the import and export of goods and technology. Giving state-owned enterprises the same status as private enterprises and allowing them to engage in fair competition will minimise or eliminate the unfair advantage enjoyed previously through governmental manipulation and protection. Doing this will allow China to reap the various benefits of a free market mechanism, and achieve the greater goals of mutual benefits, efficient allocation of resources, and overall prosperity for every citizen, that is envisaged under the WTO Agreement.

The second problem is that there is a need for China to carry out major reforms to her foreign trade system, to tailor-make and formulate an efficient administrative system, so that there can be healthy market competition for imports and exports. This will not only affect the entire country, but also the world trade market order.

These two points lie at the heart of free trade. The newly promulgated Regulation Concerning the Relevant Rules on Management over Import and Export Operation Qualifications is not a total departure from the old system of the right to trade. The current registration and approval system allows more enterprises to engage in import and export, but it is realised that this only benefits certain large-scale companies. Middle and small-scale enterprises, which form the majority of enterprises in China, and individuals, are excluded from this regime. This is still a far cry from the “National Trade Unit” stipulated in Article 17 of GATT.<sup>88</sup>

China has undertaken to gradually liberalise her retail sector. With the exception of the 8 staple products of crude oil, refined petroleum, chemical fertilizers, grains, cotton, vegetable oil, sugar and tobacco, which only a few government-appointed companies can engage in, the import and export of other products will open up by the end of 2004. State-operated trade will no longer to be the main means through

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<sup>87</sup> *Ibid.*, at 90–91.

<sup>88</sup> See General Agreement on Tariffs And Trade (GATT 1947) Article XVII at <[http://docsonline.wto.org/GEN\\_searchResult.asp](http://docsonline.wto.org/GEN_searchResult.asp)>.



which the State will control imports and exports.<sup>89</sup> As the right to trade for enterprises gradually moves from a licensing to a registration system, the foreign trade agency system will change from a mandatory system to one of equality and voluntariness. The foreign trade agency right will no longer be valid only after it has been approved by the State Council, but will be valid on the mutual agreement of both parties. China will, according to the ideology of the gradual liberalisation of the right to trade, and in accordance with fair, open and peaceful rules of competition, abolish the monopolistic or mandatory type of stipulations contained in the original “interim regulations”<sup>90</sup> and amend the stipulations that cause disparities between the rights and obligations of principals and agents. By enacting legislation to standardise the foreign trade agency system, China can bring her foreign trade activities into good order, so that a flourishing foreign trade system can be brought into being.

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89 *Supra* note 54, art 5 & 6, at 5–6. See also *Protocol on the Accession of the People’s Republic of China-Annex IA (9)*, at 20 and *Annex 2B: Products Subject to Designated Trading*, at 35–51.

90 *Supra* note 54, art 3 & 5, at 5.