National Legal Restructuring in Accordance with International Norms: GATT/WTO and China's Trade Reform

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The world in which we are living is rapidly shrinking in terms of the increasing interconnectedness and interdependence in economic life among different national economies. In response to this fundamental change, more and more nation-states have adopted internationally recognized and institutionalized principles and practices in conducting their economic activities. By no means is this trend limited solely to the developed, mostly Western, countries. It also has spread to those newly industrializing countries (NICs), and more recently, to the developing world as well. In order to fully participate in international economic exchanges, these developing and newly developed countries find it necessary to play by the rules formulated by the leading industrialized countries and manifested in the legal framework of major international economic organizations. By adopting the normative international practice to facilitate national legal restructuring, these countries have strengthened the tendency toward the globalization of law, which, among
other traits, is characterized by the phenomenon that international norms and practices—forces outside the control of national legislative decisionmakers—have informed and defined the lawmaking process of nation-states.²

In this connection, this paper explores the dynamic interplay between national legal construction and normative international practice by using China as a case study. Specifically, it examines China's on-going efforts to reform its foreign trade laws in order to obtain admission to the established international trade community embodied in the framework of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). Part I will set forth the context—international as well as domestic—within which China's application to GATT/WTO has taken place. Part II will identify the major obstacles to China's admission to GATT/WTO in terms of the incompatibility between the pre-reform Chinese foreign trade legal regime and the GATT/WTO framework. Part III will examine China's reform efforts in its foreign trade legal regime since its application to the GATT in 1986 and assess the influence of the GATT/WTO principles and practices on the emerging new Chinese foreign trade legal framework. Part IV will view China's experience in a larger context of the globalization of law and reflect on the relationship between national legal restructuring and international norms. Part V will conclude this study by offering some preliminary thoughts on the role of the nation-state in the process of globalization.

I. MISSION UNACCOMPLISHED: CHINA'S APPLICATION TO JOIN GATT/WTO

One fundamental objective of China's economic reform and openness policy pursued in the past fifteen years has been full participation in the international economic community by joining major international organizations of finance and trade. After more than thirty years of isolation and self-sufficiency, China's admission to the International Monetary Fund (IMF) and the World Bank in 1980 signified the beginning of China's return to the world economic community.³ Since then, China has joined many

². There is no universally accepted definition of the concept “globalization” of law. For some recent efforts to delineate important aspects of this concept, especially its connection with and distinctions from "internationalization," see id. at 1-5 and the articles included in the inaugural issue of the INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, which grew out of a symposium entitled “The Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform.” 1 IND. J. GLOBAL LEGAL STUD. (1993).

international and regional economic organizations. One conspicuous exception, however, is China’s hitherto unsuccessful effort to gain admission to the GATT and its newly-born successor, the WTO.

As one of the three international institutions formed in the aftermath of the Second World War constituting the postwar world economic order, the GATT was an international treaty with its central mission promoting free trade among the contracting parties. During the forty-seven years of its existence (1947-1994), the GATT provided a legal framework within which most international trade was conducted. On January 1, 1995, the WTO was established in accordance with the results of the Uruguay Round of Multilateral Negotiations under the auspices of the GATT. The replacement of the GATT by an institutional body, the WTO, ushered in a new era in the international trade system.

Because China was among the original twenty-three signatories to the GATT in 1947, it is a founding member of the GATT. After the establishment of the People’s Republic of China (PRC) in October 1949, the Nationalist government withdrew to Taiwan but continued to occupy the “China seat” in most international organizations, including the GATT and the United Nations. In March 1950, the Nationalist regime in Taiwan unilaterally withdrew from the GATT. The PRC government has obtained membership in most

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5. The IMF, founded at the Bretton Woods Conference in 1944, was designed to deal with the cooperation and regulation of the monetary aspects of international economic exchanges. The International Bank for Reconstruction and Development (World Bank), also founded at the Bretton Woods Conference, was originally devised to provide funds for the rebuilding of Western Europe and has since evolved into the primary world economic organization under the auspices of the United Nations. See Richard N. Gardner, Sterling-Dollar Diplomacy in Current Perspective (1980); Edward S. Mason and Robert E. Asher, The World Bank since Bretton Woods (1973).


8. Communication from Secretary-General of United Nations Regarding China, GATT
international organizations as the sole representative of China since its return to the United Nations in 1971. It argues that the withdrawal by the Taiwanese authorities from the GATT was null and void because the Nationalist regime in Taiwan ceased to be the legitimate government of China in 1949 and the PRC government has never consented to the withdrawal. Therefore, China has continued to be a contracting party\(^9\) and merely needs to "resume" its original position in the GATT rather than apply for a new membership.\(^{10}\)

In 1982 China was granted observer status in the GATT. Four years later, in July 1986, China officially notified the GATT Director-General of its intention to resume its membership in the treaty. Since then China has made continuous efforts to obtain approval of its application from the CONTRACTING PARTIES. Although China, as a non-contracting party, participated fully in the Uruguay Round negotiations and signed the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act) and the Agreement Establishing the Multilateral Trade Organization (MTO Agreement) in Morocco on April 16, 1994,\(^{11}\) it failed to gain admission to the GATT during the Uruguay Round as it had expected. China's subsequent efforts to rejoin GATT during the remainder of 1994, and thus to become a founding member of the WTO, also proved ineffective. When the WTO came into existence on January 1, 1995, China was not included in its membership.\(^{12}\) Although the WTO granted China observer status on July 11, 1995,\(^{13}\) the eleventh largest trading nation in today's world\(^{14}\) is still excluded from the principal international trade organization.

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9. Following the usage of terms in GATT documents, this paper uses "CONTRACTING PARTIES" (with capitalization) to signify the signatories to the GATT acting jointly as a body and "contracting party(ies)" (without capitalization) to designate signatory(ies) acting in its(their) own capacity.


11. When the Uruguay Round was formally launched at Punta del Este, Uruguay, in September 1986, the Ministers of CONTRACTING PARTIES gave special permission to allow China to take part in the negotiations by adopting a provision in the Ministerial Declaration which states that the "[n]egotiations will be open to . . . countries that have already informed the CONTRACTING PARTIES, at a regular meeting of the Council of Representatives, of their intention to negotiate the terms of their membership as a contracting party." Ministerial Declaration on the Uruguay Round. Declaration of 20 September 1986, Part I, para. F(a)(iv), GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 33rd Supp. 1985-86, at 27.

12. For a list of WTO Members (1 January 1995), see WTO, supra note 7, at 5.


As a major event in the restructuring of the post-Cold War international trade framework,\(^{15}\) China’s application to join GATT/WTO presents a number of difficult problems in international law, world politics, and the global economic order. It has generated a great deal of not only multilateral and bilateral negotiations between concerned nations but also scholarly attention around the world.\(^{16}\)

This paper does not intend to take part in the current debate on the question of China’s accession from the perspective of international law or world politics nor does it purport to evaluate the merits and deficiencies of China’s application. Rather, it intends to examine the impact of the GATT/WTO system on China’s legal reform in general, and its foreign trade legal regime in particular. By so doing, it seeks to demonstrate the dynamics of interaction between international norms and national legal restructuring in the context of the globalization of law in the post-Cold War era.

II. MAJOR OBSTACLES TO CHINA’S ADMISSION TO GATT/WTO

When China began to seek resumption of its GATT membership, it had just started to transform its largely nonmarket economy into a market-oriented economy. Between 1949 and 1978, China maintained a Soviet-style command economic system characterized by State ownership, central planning, and total government control over every aspect of the production and distribution of goods and services. As an integral part of this command economy, foreign

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15. For a general analysis of this process, see John H. Jackson, Restructuring the GATT System (1990).

trade was placed under direct control of the central government which pursued an “inward-oriented strategy.” Its purpose was designed not to gain profits from the exchanges of goods, but strictly limited to realize the ultimate goal of import substitution.\(^{17}\) The economic reform, which was officially set into motion in 1978, injected fundamental changes to this command economic system. To implement its policy of reform and openness to the outside world, China realized the importance of absorbing foreign capital and advanced technology and the need to participate fully in international trade. Spurred by this new desire to develop an outward looking economy, China became very eager to join various major multinational organizations that serve as forums for international cooperation and economic development. By rejoining GATT, China expects to acquire the benefits conferred upon each contracting nation, benefits it deems essential to the promotion of its rapidly growing foreign trade. These prospective benefits include the entitlement to Most Favored Nation (MFN) status, the right to participate in future multinational trade negotiations, and possibly the entitlement to the Generalized System of Preferences (GSP) status.\(^{18}\)

However, the GATT and WTO contracting parties, especially the United States and other developed countries, maintain that although China has made substantial progress in transforming its previously command economic system into an increasingly market-oriented economy, considerable obstacles to China’s accession to GATT/WTO remain. The fundamental difficulty lies in the fact that China has inherited from the pre-reform era a nonmarket foreign trade legal regime which in most respects is incompatible with the market-based principles of GATT.

First, the foundation of all GATT agreements between contracting nations—multilateral or bilateral—is the principle of nondiscrimination. Although no clause in the GATT text specifies this principle, nondiscrimination is embodied in the principles of reciprocity, MFN, and national treatment.\(^{19}\) It ensures that all benefits conferred upon any contracting party through multinational or bilateral negotiations should be automatically available to

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18. GSP provides developing countries with superior non-reciprocal tariff benefits for certain exports extended by developed countries. For an elaboration of the possible benefits accorded by the admission to GATT by Chinese commentators, see Liming et al., supra note 4, at 64-66.
other contracting parties. By contrast, the pre-reform foreign trade regime of China was highly discriminatory. Because the State monopolized all trade activities, the central government directed foreign trade not for the purpose of exchanging goods but for the government procurement of necessary merchandise and foreign currency. It used foreign trade planning to arbitrarily set up trade policies and regulations that totally disregarded the principle of equal treatment. By manipulating the rate of tariff, currency exchange rate, and import/export quotas and licenses, the State was able not only to treat foreign trading entities differently from domestic enterprises, but also to render distinctive treatment to different industries according to its policy needs.20

Secondly, based on the principle of nondiscrimination, the GATT framework is built upon the premise that trade levels can be increased, and trade wars avoided, through multilateral tariff reductions. In market economies, tariff cuts are presumed to have a direct effect on prices and thereby have an influence on the decisions of consumers and the incentive structure of industry. In a nonmarket economy, however, the effect of tariff cuts are extremely difficult, if not impossible, to gauge. If China retains its pre-reform nonmarket economic system, any reduction in tariffs would only have a marginal effect on its economic mechanism. In addition, China’s tariffs were very high, averaging 44 percent in the mid-1980s,21 as opposed to an average of less than 10 percent imposed by major Western contracting parties to GATT.22

Thirdly, the pervasive use of non-tariff barriers (NTBs) to trade, which is a distinctive character of all foreign trade regimes subject to tight government control and planning, comes into direct conflict with the GATT principle of free trade and fair competition based on each nation’s comparative advantage. Prior to the mid-1980s, the Chinese government employed numerous NTBs to maintain absolute control over foreign trade. Those devices included, but by no means were limited to, government subsidies, import/export quotas and licenses, exchange rate control, and various forms of administrative regulations. To join GATT/WTO, China must substantially reduce and eventually eliminate those NTBs.

21. JACOBSON & OKSENBERG, supra note 3, at 90.
22. As a result of the Tokyo Round of Multinational Negotiations which concluded in 1979, average tariff rates on dutiable manufactured imports were set at 5.6% in the U.S., 7.2% in the EC, 4.9% in Japan, and 8.9% in Canada. JACKSON, RESTRUCTURING THE GATT SYSTEM, supra note 15, at 36-38.
Finally, transparency is another fundamental principle of GATT. It requires that all government regulations and dispute resolution procedures on foreign trade be openly available to all concerned parties, whether domestic or foreign.\textsuperscript{23} In sharp contrast, the pre-reform Chinese government executed its trade policy by strictly following the State foreign plan and “internal documents,” which were treated as “State secrets.” Virtually no laws and regulations were published or easily available to foreign companies. Lack of transparency became a distinctive feature of China’s foreign trade regime and thus a central concern for the contracting parties of GATT.\textsuperscript{24}

China was not unaware of these inconsistencies between its foreign trade legal regime and the GATT framework. Scholars and government officials alike openly acknowledged these inconsistencies.\textsuperscript{25} They also maintain that recognizing these inconsistencies does not mean that China should stay outside GATT/WTO. Instead, the Chinese government, especially those reform-minded members of the Communist Party leadership, hopes to use the opportunity of accession as an impetus to accelerate the restructuring of China’s foreign trade legal regime. For them, the GATT framework provides a ready reference and established model of international practice that can be emulated.\textsuperscript{26} This emulation has resulted in remarkable progress in transforming China’s foreign trade legal regime.

III. RESTRUCTURING CHINA’S FOREIGN TRADE LEGAL REGIME, 1986-1995

A few months after the submission of its application to resume its GATT membership in October 1986, China presented a memorandum on its foreign trade regime to the CONTRACTING PARTIES of GATT.\textsuperscript{27} On March 4, 1987, the

\begin{itemize}
\item \textsuperscript{23} GATT, supra note 19, Article X, at 16-17.
\item \textsuperscript{24} See James McGregor, Chinese Talks on GATT Stall over Basic Issues, ASIAN WALL ST. J., Mar. 3, 1993, at 1, available in 1993 WL-WSJA 2033496.
\item \textsuperscript{25} See LIMING ET AL., supra note 4, at 81-82.
\item \textsuperscript{26} For instance, one recent report in the official newspaper of the Chinese Communist Party wrote, "since the [beginning] of the reform and openness policy in 1978, China has always treated the conformation with international practice as one of the important goals of its legal restructuring." According to the same report, a high official on the Working Committee on Law of the National People’s Congress Standing Committee, which is in charge of initiating and drafting laws and legislation, said that: “reform and openness [to the outside world] requires common language [in international exchange]. While the conformity with international practice in economic matters comes along, it naturally demands conformity in legal system . . . . It has become a common practice,” he added, “to use broadly the successful law-making experience from abroad in formulating laws of China.” RENMIN RIBAO [THE PEOPLE’S DAILY] (Overseas Edition), Dec. 13, 1995, at 4.
\item \textsuperscript{27} China’s Status as a Contracting Party, GATT Doc. No. L/6125, (Feb. 18, 1987). The Chinese
\end{itemize}
GATT Secretariat appointed a Working Party to consider China's accession. Since then, substantial negotiations between China and some GATT contracting parties, such as the United States, the European Economic Community, and Japan, have taken place under the auspices of the Working Party except during a short period of interruption after the Tiananmen event in June 1989. The process of negotiation has been extremely complicated. On the one hand, the GATT contracting parties (and the WTO Member States since January 1995), especially the Western countries, realize that it is necessary and beneficial to the world economic order to include China in the GATT/WTO framework in light of China's present and potential economic importance. On the other hand, they claim that China's accession must be approached from a pure business basis that, in their perception, will ensure the integrity of GATT/WTO system and protect the economic interests of their respective countries.

As of the end of 1996, it seemed this lengthy and cumbersome negotiation had yet to yield any definite result as to China's accession to WTO. But it is a misperception to suggest that the ten years of negotiations have been wasted. On the contrary, this process has exerted profound impact on China's on-going foreign trade legal reform. In response to the questions and suggestions posed by the Working Party and other contracting parties, China has introduced a series of reforms which have fundamentally transformed its foreign trade system from a closed nonmarket model to a considerably open and increasingly market-driven system.

At the heart of this transformation is the official recognition that the ultimate goal of China's economic reform is to establish a "socialist market economy" (emphasis added). This recognition was declared to the world in March 1993 in Article 7 of the Amendments to the Constitution of the People's Republic of China. Before this amendment, China had always

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28. For instance, by mid-1988 alone, China was asked more than 1,200 questions, a record number in GATT history. JACOBSON & OKSENBERG, supra note 3, at 96.

29. On many occasions, several Western representatives to GATT in Geneva have said, "[i]t is impossible to envisage the international trade system of the early twenty-first century without China being part of it." Id. at 88. In May 1994, Mr. Peter Sutherland, then GATT Director-General, remarked: "I do not think that any GATT member doubts the importance of China becoming a full and active participant in the multilateral system—the GATT as it is now, and in the future, the WTO." WORLD TRADE ORGANIZATION, GATT ACTIVITIES, 1994-1995 at 113 (1996).

30. The original version of Article 15 of the Constitution of the People's Republic of China states:

The State implements planned economy on the basis of socialist public ownership.
insisted on the official line of establishing a "socialist planned economy with Chinese characters," which was interpreted and applied in such a way that various reform measures and experiments that contain market elements were permitted in practice, but precluded in theory the possibility of developing a market economy. In accordance with this insistence on a "planned economy," the pre-amendment Constitution stipulated that the State shall use "the comprehensive balance of the economic plan" to manage the economy. The 1993 amendment eliminates the State’s power in making and implementing "the economic plan," and changes the role of the State from micro-control to macro-management through the making and enforcement of laws and regulations. Notwithstanding the preservation of the conditioning term "socialist" in the terminology of the 1993 amendment, the recognition that a "market economy" is the ultimate solution for China represents a decisive theoretical shift in China’s economic reform rationale. This shift entails profound ramifications for China’s relationship with such international organizations as GATT/WTO.31

In accordance with this subtle yet crucial shift of reform policy toward market economy, China also adopted concrete measures to change major areas of its foreign trade system, effectively transforming the landscape of its foreign trade legal regime.

The State uses the comprehensive balance of the economic plan and the supplementary effect of market conditioning to guarantee the harmonized development of the national economy in appropriate proportions.

This article was amended by Article 7 of the Amendments to the Constitution of the People’s Republic of China enacted on March 29, 1993:

The State implements socialist market economy.
The State shall strengthen economic law making and refine macro-management and control.
The State prohibits in accordance with law any organization or individual from disturbing social economic order.

A. Toward Free Trade: Reducing Tariffs and Phasing Out Non-Tariff Barriers

Before the mid-1980s, tariffs played only a marginal, if not entirely negligible, role in China's foreign trade regime. Under the highly centralized foreign trade system based on central planning and controlled by administrative directives, tariffs were simply regarded as one of several sources of government revenues. For over thirty years, they were collected by the Ministry of Foreign Trade (MOFT) based on tariff rates that were almost never adjusted. By virtue of the heavy use of government subsidies for imports and exports in accordance with the arbitrary national plan, tariff rates were totally divorced from the actual value of the goods in the world market. Under the national plan, government subsidies for imports and exports were pervasive. Tariff rates did not reflect the actual value of the goods in the world market because prices paid by domestic end users of imported goods were not tied to the international price adjusted for tariffs but to the price of domestic substitute goods.\(^ {32}\) Therefore, just as in other centrally planned economies, the role of tariffs was redundant and had virtually no impact on either the volume of trade or the import and export decisions. Based on the policy of self-sufficiency and protection of national industries, the tariff rates were prohibitively high, which in effect stifled the growth of China's foreign trade. Between 1956 and 1977, China's foreign trade amounted to less than 4 percent of national product, a trade-national-product ratio well below those of not only developed countries but also other large developing countries such as Brazil and India.\(^ {33}\)

Under this central planning system, various related ministries and administrative commissions directly under the central government managed China's foreign trade. These ministries and commissions combined business and administrative functions. They had full discretion to translate any administrative objectives directly into business decisions. Therefore, there was practically no need to enact laws and regulations to legalize the foreign trade management.\(^ {34}\)

\(^ {32}\) LARDY, supra note 17, at 47.

\(^ {33}\) In 1970, the trade-national-product ratio for Brazil and India were 13.6 percent and 8.7 percent respectively. IMF, INTERNATIONAL FINANCIAL STATISTICS, August 1975. See JOHN C. Hsu, CHINA'S FOREIGN TRADE REFORM: IMPACT ON GROWTH AND STABILITY 1 (1989).

\(^ {34}\) ZHONGGUO DUWIAI JINGJI MAOYI ZHINAN [AN INTRODUCTION TO CHINA'S FOREIGN ECONOMIC AND TRADE POLICIES] 35-36, 97-99 (Liu Xiangdong et al. eds., 1992) [hereinafter CHINA'S FOREIGN
One of the central promises of China’s economic reform was to reduce the role of the centralized economic plan and to introduce market mechanisms into the Chinese economy. As part of this undertaking, the scope of foreign trade planning was diminished in an effort to decentralize the foreign trade management. In the early 1980s, the State began to make more active use of tariffs and taxes as trade policy instruments. Reflecting the heightened status of tariffs in the foreign trade system, China streamlined the bureaucratic structure of the foreign trade management in the central government. As early as 1980, the former Customs Bureau of the Ministry of Foreign Trade was elevated to a ministerial level entity, the General Administration of Customs. The new agency, directly under the State Council, became responsible for formulation and administration of policies, laws, and regulations concerning tariffs. In 1987, the Customs Tariff Rate Commission, an organ under the Ministry of Finance, was abolished and replaced with a new Customs Tariff Commission. Chaired by the Ministry of Finance, the Commission operated as a highly-powered body directly under the State Council. The membership consisted of the chief of the General Administration of Customs and a vice-minister of the Ministry of Foreign Economic Relations and Trade.

At the same time, China stepped up its effort to promulgate laws and tariff schedules in order to make the foreign trade administration more transparent. In 1987, The National People’s Congress enacted a comprehensive customs law to replace the interim law that had governed customs since 1951. The new Customs Law stipulated that all “customs schedules shall be published.” In 1985 the various import and export tariffs that had been announced in the previous five years were published in the first comprehensive tariff schedule released since 1951. Since then, any changes in tariff rates have been announced in the monthly publication of the General Customs Administration, Zhongguo Haiguan (Chinese Customs) and in the IMF’s annual reports.

China also tried to make its tariff system congruent with the standard international practice by reducing tariffs and assuming more and more obligations embodied in various international organizations and conventions.

35. Id. at 37.
36. LARDY, supra note 17, at 47.
37. PRC LAWS ANNOTATED, supra note 30, at 1330-1358.
38. Id. at 1332.
39. LARDY, supra note 17, at 47.
In 1983, China joined the Customs Cooperation Council. But its efforts to reduce tariffs have not been as successful as its efforts to reform the foreign trade management system. The concern of protecting its national industries, especially those technology intensive industries such as automobile, machinery, and electronics, from being destroyed by the sudden influx of imported goods underscored the cautious course taken by China to reduce the general level of its tariff rates. By 1987, the weighted average tariff rate was reduced to 39 percent. Five years later, however, the unweighted average tariff rate was increased to 42.8 percent. When weighted by the value of trade in each category (at world price), the average tariff rate was 31.9 percent. Compared with other large developing countries, this rate was compatible with those of Brazil (31.9 percent) and Pakistan (35.9 percent), higher than those of Argentina (17.1 percent) and Colombia (15.1 percent), but much lower than that of India (54.8 percent). It was not until the end of 1995 that China decided to reduce its general tariff rate to 23 percent, effective April 1, 1996. This drastic reduction makes China’s average tariff rate one of the lowest among major developing countries.

While the role of tariffs became more and more important in China’s foreign trade regime, the significance of various NTBs gradually diminished. When China began to reform its foreign trade regime, a wide range of NTBs had been developed. These NTBs comprised a variety of administrative instruments including the mandatory import plan, canalization of imports through designated National Foreign Trade Corporations (NFTCs), import licensing, quotas, and import controls. By one estimation, in 1992 all non-overlapping NTBs (not including mechanisms to control access to foreign exchange) taken together applied to 17.5 percent of the total number of lines of the Harmonized Tariff Schedule, and during the first quarter of that year, they accounted for 51.4 percent of total imports. This practice is clearly not in conformity with the GATT principle against NTBs.

At the heart of those NTBs designed for the purpose of controlling imports was the mandatory import plan and canalization of imports. Goods subject to

43. WORLD BANK, supra note 41, at 62.
44. JACKSON, RESTRUCTURING THE GATT SYSTEM, supra note 15, art. XI.
import planning were regarded as essential either for the people's livelihood or for national economic development. They were subject to State pricing at levels substantially out of line with world prices, thus requiring an import subsidy. Although the importance of the import plan had been declining over time, by 1992 it still applied to eleven broad product groups including commodities such as grain, fertilizers, iron ore, cotton, wood, plastic sheeting and wood pulp. Together these commodities constituted 9.1 percent of all Harmonized Customs Tariff Schedule lines and 18.5 percent of total imports.45

The imports of all commodities under the import plan were also canalized. They were limited to designated NFTCs for the purpose of facilitating the administration of subsidies needed to control the price of mandatory plan commodities.46 In 1992, 32 percent of total imports were estimated to be subject to control through canalization. Of these, about two-thirds were imports under the mandatory plan.47

With the gradual dismantling of the mandatory foreign trade plan and the decentralization of foreign trade management, the central government relinquished, step by step, its monopoly over foreign trade through a few centrally controlled NFTCs and gave provinces and certain larger enterprises the right to handle foreign trade for their respective regions or industries.48 By 1991, the government subsidies to exports were abolished and each NFTC became responsible for the economic benefits of its own operation.49

Import and export licensing is another NTB widely used by China to control its foreign trade. It is interesting to note that China restored the use of licensing in foreign trade in the early 1980s as a measure to reduce the scope of the mandatory import and export plan. When the People's Republic of China was founded in 1949, it adopted the policy of using licensing to control all imports and exports. But this policy was abandoned in the mid-1950s when the centralized foreign trade system based upon the mandatory national plan was firmly established.50 After the economic reform began, the licensing system was re instituted as a means to displace the function of the mandatory plan as well as to serve the purpose of balance of payments and protecting

45. WORLD BANK, supra note 41, at 63.
46. Id.
47. Id. at 64.
48. CHINA'S FOREIGN POLICIES, supra note 34, at 37; LARDY, supra note 17, at 39.
49. CHINA'S FOREIGN POLICIES, supra note 34, at 38.
50. Id. at 97-99.
domestic industries.\textsuperscript{51} As of 1992, 53 goods were subject to import licensing.\textsuperscript{52} Since then, China has reduced the number of goods subject to import licensing on several occasions.\textsuperscript{53} As a result, the effective application of licensing in China has been limited to a scope essentially compatible with most countries who have GATT/WTO membership.\textsuperscript{54}

As for the use of another NTB, import and export quotas, China’s practice has never been too much out of step with that of the Western free trade nations.\textsuperscript{55} In fact, the import and export quota system, especially those for exported goods, was originally adopted to ensure effective utilization of quotas imposed on China’s textile exports by the Western countries, (mainly the United States and the European Economic Community). Consequently it was basically passive in nature.\textsuperscript{56} Only a few import quotas are actively imposed for the purposes of protecting China’s machinery and electronic industries and maintaining the balance of payments. In 1992, import quotas applied to only 7.7 percent of total imports, and export quotas covered 15 percent of total exports.\textsuperscript{57} Apparently, the current quota system has not been used to impede


\textsuperscript{52} CHINA’S FOREIGN POLICIES, supra note 34, at 100, 183-186.


\textsuperscript{54} Despite the continuous efforts by GATT members to eliminate the use of quotas and licensing in their respective foreign trade regimes, these efforts have yet to achieve the proclaimed goal of eradicating licensing and quotas in the world trade system. See JACKSON, \textit{THE WORLD TRADING SYSTEM}, supra note 6, at 129.

\textsuperscript{55} For instance, quotas are widely used by the United States to afford protection to domestic production of agricultural products, clothing and textiles, steel and certain electronic products. 19 \textit{C.F.R.} § 132 (1993). By comparison, China’s import licenses and controls are concentrated in three broad groups of similar nature: (a) agricultural raw materials subject to price controls and import planning (rubber, cork and timber, wood pulp and textile fibers such as wool and cotton); (b) critical manufacturing sectors such as iron and steel products, textile yarns and machinery where domestic production is significant; and (c) nonessential consumer items such as beverages and tobacco. WORLD BANK, supra note 41, at 66.

\textsuperscript{56} CHINA’S FOREIGN POLICIES, supra note 34, at 103-107.

\textsuperscript{57} WORLD BANK, supra note 41, at xx-xxi.
the process of trade liberalization and thus should not be a formidable obstacle to China’s GATT/WTO membership.

B. Toward National Treatment: Tax Reform

Based on the general principle of nondiscrimination, GATT requires that each contracting party grant other contracting parties not only equal tariff treatment and MFN trading status, but also national treatment. Recognizing that internal taxation, if discriminatorily applied to foreign businesses or imported goods, may work as disguised protection against imports, Article III of GATT specifically establishes the principle that internal taxes and regulations “should not be applied to imported or domestic products so as to afford protection to domestic production.” Under this principle of national treatment, internal taxes and other charges, laws, regulations, and other requirements affecting business transactions must be applied on an equal basis to domestic entities or domestically produced goods and foreign entities or imported goods.

Before 1990, China had an extremely complex tax structure characterized by unequal treatment not only among domestic enterprises, foreign companies, and enterprises with foreign investment, but also among domestic enterprises under different forms of ownership. Within domestic enterprises, the government set up distinctive tax rates for enterprises according to the nature of their ownership, i.e., State-owned, collectively owned, or privately owned. In the pre-reform era, the State-owned enterprises had no tax liability; they simply turned their profits over to the State. Beginning in the mid-1980s, enterprise profit taxes were introduced with varying rates ranging from 55 to 68.5 percent. Collectively owned enterprises were taxed at progressive rates up to 55 percent. They were not required to give part of their profits directly to the government.

Unlike domestic enterprises, enterprises with foreign participation were subject to entirely different tax treatment. These enterprises were grouped into two categories, foreign enterprises and enterprises with foreign investment. According to the legal definitions under Chinese law, “foreign enterprises”

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58. GATT, supra note 19, art. III.
59. Id. at 7.
meant the foreign companies, enterprises, or other economic organizations that either have business places within or have no business places within China but derive income from China. "Enterprises with foreign investment" meant those companies established in China with foreign investment. The major difference in legal status is that foreign enterprises are not Chinese legal persons while enterprises with foreign investment are Chinese legal persons and therefore subject to the jurisdiction of Chinese law. Depending on the mode and proportion of foreign investment, the latter were further divided into three types: Chinese-foreign equity joint ventures (EJV), Chinese-foreign contractual joint ventures (CJV), and wholly foreign-owned enterprises (WFOE).

Under this dual tax system, where one applies to domestic enterprises and the other applies to enterprises with foreign interests, the tax rates for the two enterprises were by no means compatible. To be sure, this practice did not discriminate against foreign enterprises or enterprises with foreign investment. Instead, the Chinese government granted preferential tax treatment to enterprises with foreign participation in an effort to attract foreign investment. Therefore, while enterprises with foreign investment and foreign enterprises pay a 33 percent income tax (30 percent national income tax plus 3 percent local income tax), both State-owned enterprises and collectively owned domestic enterprises were required to pay enterprise income tax at a progressive rate up to 55 percent.

Despite the fact that hardly any discrimination against enterprises with foreign participation existed, this dual tax system created numerous problems for foreign investors because of its complexity. First, besides enterprise income tax, enterprises with foreign investment were also required to pay the consolidated industrial and commercial tax. Initially introduced in 1958, the consolidated industrial and commercial tax was an extremely complicated tax system with forty-two rates for different enterprises, products, and transactions. This tax subjected enterprises with foreign participation to different rates of tax responsibility according to type of industry, products and

62. Id.
63. Id. at 350.
transactions. Second, even within a Chinese-foreign contractual joint venture, while the Chinese party to the joint venture was required to pay taxes in accordance with laws and regulations for domestic enterprise, the foreign party had to pay taxes in accordance with another set of laws and regulations specifically made for foreign enterprises. Understandably, this complicated dual system created unnecessary confusion among foreign investors who were usually unfamiliar with the Chinese legal regime.

More importantly, this dual system contradicted the GATT principle of national treatment. To bring it closer to the established international norms, China began to draft a new tax code in 1990 and enacted the Income Tax Law of the People's Republic of China on Enterprise with Foreign Investment and Foreign Enterprises (EFIFEITL) in April 1991, which took effect on July 1 of the same year. EFIFEITL imposes a uniform tax rate for three kinds of enterprises with foreign investment, although foreign enterprises are taxed at different rates depending on the nature of the income. Under this legislation, all three types of enterprises with foreign investment are subject to a flat tax: profits are taxed 30 percent. In addition, a local income tax at the rate of 3 percent is levied on the taxable income. Taken together, the flat tax and the local income tax equal a tax rate of 33 percent—a much lower rate than the usual 40 to 50 percent rate imposed by other countries on foreign corporations.

By the end of 1993, similar measures were taken to unify the tax legal framework relating to domestic companies with the promulgation of a series of tax laws and regulations. A uniform enterprise tax applicable to all

64. COLLECTION OF LAWS AND REGULATIONS, supra note 51, at 700-711. See also YAO MEIZHEN, ET AL., WAISHANG TOUZI QIYEFA JIAOCHENG [A COURSE ON ENTERPRISES WITH FOREIGN INVESTMENT]161 (1989).

65. MEIZHEN ET AL., supra note 64, at 157.

66. HANDBOOK OF LAWS AND REGULATIONS, supra note 61, at 349-353.

67. Guiguo Wang, China's Return to GATT: Legal and Economic Implications, J. WORLD TRADE, June 1994, at 51, 57-58, 58 n.35.


69. Id. at 3 n.1.

domestic enterprises regardless of their ownership was established. It is not a coincidence that the tax rate was set at 33 percent.\textsuperscript{71} As a result, the tax rate applicable to State-owned companies, collectively owned enterprises, and privately owned enterprises, as well as other domestic entities, was brought in line with the rate for enterprises with foreign investment. In the same period, China also reformed its turnover tax system by abolishing the industrial and commercial tax applicable to foreign enterprises and enterprises with foreign investment, and applying value-added tax, consumption tax, and business tax, which had previously been established for domestic enterprises, equally to enterprises with foreign participation.\textsuperscript{72}

Whereas various preferential tax treatments are retained for enterprises with foreign participation, these new laws and regulations have placed different types of domestic enterprises, foreign enterprises, and enterprises with foreign investment on the same footing with respect to taxation. The unification of the tax system, an important step toward establishing a market economy, has brought China’s tax law regime into compliance with GATT’s national treatment requirement.

\textbf{C. Toward Marketization: The Foreign Exchange Reform}

As indicated by the concluding remarks of the GATT Working Party on China’s application on March 22, 1993, China’s dual-rate currency mechanism emerged as one of the key obstacles to China’s bid, especially when the Uruguay Round of Negotiations drew to its conclusion.\textsuperscript{73}

Before the economic reform started in 1979, control of Chinese foreign exchange was wholly concentrated in the hands of the central government. In accordance with a structure that employed planned directives for managing the economy and a State monopoly of foreign trade, the central government used administrative instrumentalities to manage foreign exchange.\textsuperscript{74} With the coming of the economic reform, an increasing number of foreign enterprises and businessmen came to China to make investment or conduct business

\textsuperscript{71} Id. The last six regulations all came into effect on January 1, 1994. For the text of these regulations, see id.
\textsuperscript{72} id. at 429.
\textsuperscript{73} HANDBOOK OF LAWS AND REGULATIONS, supra note 61, at 397-398.
\textsuperscript{74} Talks on China’s GATT Membership End; Questions Raised on Currency Proposal, 10 Int’l Trade Rep. (BNA) 490 (Mar. 24, 1993).

Chen Quangeng, \textit{Foreign Exchange Control in China}, in \textit{CHINA FOREIGN ECONOMIC LAW: ANALYSIS AND COMMENTARY}, supra note 4, 4-5.
operations. To meet the demand of this new development, it soon became necessary to reform the foreign exchange system. Thus, when China's foreign trade experienced rapid growth in the 1980s, the central government also relaxed State control over foreign exchange by decentralizing the management of foreign exchange. Following the same pattern of reform in the foreign trade management area, the responsibilities for the administration of and the business operation of foreign exchange were separated. Under the direction of the People's Bank of China, which exercises the function of the central bank, the State Administration of Exchange Control performs the administration of foreign exchange, and the Bank of China, China's specialized bank for foreign exchange, manages the business side of foreign exchange.  

Beginning in the mid-1980s, China carefully constructed a dual-rate currency mechanism, administering foreign exchange rates through a loose network of exchange centers or swap centers. By 1989, about eighty swap centers existed throughout China; they became the only channel through which foreign enterprises, enterprises with foreign investment, foreign businessmen, and foreign tourists could make currency conversion in China. The enterprises with foreign investment relied on these centers to acquire RENMINBI (RMB, the Chinese currency) in order to pay local costs, and to exchange their domestic earnings into hard currency for repatriation. All enterprises, domestic as well as foreign, acquired their hard currency from these centers to pay for imported goods. By 1993, the swap centers handled about 80 percent of all current account transactions within China.

Under this dual-rate system, the People's Bank of China administered two exchange rates. First, it set an official rate for RMB, which was used by tourists and for priority imports under the State plan. Second, the bank allowed the swap center administrators to peg a daily swap center rate, which was allowed to float within a limited range. This rate was allowed to depreciate relative to the official rate, and thus accurately reflect supply and demand.

Although it was first introduced as a reform measure to decentralize China's foreign currency management, this dual-rate system soon became a

75. Id. at 18-19.
76. LARDY, supra note 17, at 61.
78. LARDY, supra note 17, at 62.
target of international criticism as being inconsistent with international practice under the GATT. The United States’ Department of Treasury first cited China for “manipulating” its currency in November 1992, and continued to make this claim throughout 1993. Within the GATT Working Party, the representatives from the European Community and other developed countries echoed the U.S. complaints.79

These criticisms focused on two aspects of the dual-rate exchange system. Both cast the system as erecting a prohibitive NTB for China’s foreign trade. First, it was alleged that the dual-rate worked as a device of government subsidy to a selected number of Chinese enterprises conducting imports. While the GATT charter and the GATT rulings do not specifically outlaw dual-rate currency regimes, they do limit a nation’s ability to restrict imports for the purpose of protecting its balance of payment.80 By maintaining the artificially imposed difference between the official exchange rate and the floating swap center rate, it was alleged that the central government was able to protect certain industries by allowing them to pay for imported commodities at the overvalued official rate. The military and some selected State-owned enterprises reaped benefit from this system by paying less than the actual price to purchase imported goods at a currency loss to be absorbed by the central bank.81

Secondly, the dual-rate system was described as a hidden tax on currency trades. The central bank could target foreigners by forcing them to register their earnings in China at the official rate, which was artificially kept at a much lower ratio than the swap center rate, but repatriate profits at the swap center rate. Tourists also had to use the official rate to buy local currency. Foreign investors made their earnings in local currency and had little or no foreign currency earnings to help pay for needed imports, and thus had no way to acquire hard currency for repatriation.82

Thus, during the last three years of continuous talks between China and the GATT Working Party on China’s application before the conclusion of the Uruguay Round, currency controls became a conspicuous point of contention.83

80. GATT, supra note 19, art. XVII.
83. Talks on China’s GATT Membership End, Questions Raised on Currency Proposal, 10 Int’l Trade
In direct response to these criticisms, China's delegates promised in the summer of 1993 that China would achieve a single exchange rate within five years, and convertibility shortly thereafter.  

But the action turned out to be more swift than the promise. Reflecting the sense of urgency that mounted as the Uruguay Round drew to a close, China moved quickly at the end of 1993. Only days after the conclusion of the Uruguay Round in December 1993, China made the surprising announcement that it was abolishing the dual-rate exchange system and implementing a unified foreign exchange rate, to come into effect on January 1, 1994. The new unified exchange rate adopted the former swap center rate of RMB 8.7 yuan (Chinese dollar) per U.S. dollar, thus in effect eliminating the former official rate of exchange. In the meantime, China abandoned the retention system that allowed certain enterprises to keep up to 50 percent of their foreign exchange earnings and established an interbank foreign exchange market, in which domestic enterprises are allowed to acquire hard currency as long as they have the proper import licenses. Several months later, China opened a national foreign exchange center in Shanghai which, as the hub of China's interbank market, is linked to trading centers in other major cities.

The unification of foreign exchange rates effectively eliminated the government subsidy to selected industries in buying imported commodities. Despite lingering concerns about the performance of the newly-erected interbank exchange mechanism, China clearly made a major move toward conforming its foreign exchange structure with international norms. But for the sense of urgency to enter the GATT before the WTO was officially formed, it is hard to imagine that China would have given up its dual-rate exchange system in such a dramatic fashion and as early as 1994. In fact, the unification of the foreign exchange rates came as a surprise to most observers and commentators of the Chinese economy, for in April 1993 China had just

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84. Brown, supra note 79, at 74.
88. Brown, supra note 79, at 95.
89. For instance, a commentator wrote in May 1993 that the promulgation of the Regulations on the Foreign Exchange Swap Market indicates that "within a number of years China will not open up its foreign currency free [exchange] market." Bi Kexi, Waihui, Fengxian, & Baozhi [FOREIGN CURRENCY, RISK, AND
institutionalized its dual-rate system by promulgating comprehensive administrative regulations on the swap market.\footnote{HEDGE\textsuperscript{49} (1993).}

\textbf{D. Toward Legalization: The Foreign Trade Law of 1994}

Before 1994, no national legislation on foreign trade was ever made in China which was applicable throughout the country. The Chinese government relied solely on administrative regulations and directives to exert total control over foreign trade. Most of these administrative regulations and directives were never openly published and made known to the outside world. For one and a half decades after the beginning of foreign trade reform in 1979, the legal framework was based on half a dozen administrative regulations.\footnote{\textit{Waihui Tiaoji Shichang Guanli Tiaoli} \[Regulations on Foreign Currency Swap Market], FAGUI HUIBAN (April 15, 1993) (P.R.C.).} This practice directly conflicted with international norms and GATT practices that favor published laws over discrete administrative regulations. Before long, the void of national legislation which created lack of unity and transparency in China’s foreign trade legal framework caused widespread concerns in China’s trading partners and became a major obstacle to China’s accession to the GATT. To dispel this concern, the Chinese government accelerated the pace to enact a foreign trade law with the advent of the 1990s.

May 12, 1994 marked a watershed occasion in China’s foreign trade law reform. That day, the Standing Committee of the 8th National People’s Congress passed the first comprehensive foreign legislation in modern Chinese history, the Foreign Trade Law of the People’s Republic of China (FTL).\footnote{\textit{CHINA’S FOREIGN POLICIES.}, supra note 34, at 108, 1337. These administrative regulations include the following: the Provisional Measures for the Management of Imports in Foreign Trade; the Interim Regulations of the People’s Republic of China on the Licensing System for Imported Goods; and the Detailed Implementing Rules for the Interim Regulations of the People’s Republic of China on the Licensing System for Imported Goods. \textit{Id.}} With the FTL coming into effect the following July 1, China’s foreign trade legal regime finally took shape, after more than fifteen years of continuous reform and the promulgation of hundreds of laws and regulations governing

\footnote{\textit{HANDBOOK OF LAWS AND REGULATIONS}, supra note 61, at 248-254.}
various aspects of foreign economic relations. More than anything else, the FTL symbolizes the legalization of China’s foreign trade legal regime.

The drafters of the FTL followed three proclaimed principles in drafting this legislation. All of them bear clear indications of the molding influence of GATT principles and practices:

First, China’s foreign trade policies and regulations must conform to the basic principles laid out in the FTL and must be openly published and freely available. Second, bans or restrictions on imports and exports must conform to GATT rules and must be transparent. Third, domestic industries must be protected through legal proceedings against unfair imports and not by administrative measures.

For the first time in China’s foreign trade legal history, the FTL established comprehensive and legally defined principles for China’s foreign trade policies and practice. At the outset, it underscores the fundamental principle established in the 1993 amendment to the Constitution and declares that the promotion of a “socialist market economy” is the ultimate goal for China’s foreign trade. Next, it defines the term “foreign trade” as including “import and export of goods, import and export of technology, and international service trade.” Confirming China’s readiness to assume all obligations under such international treaties and organizations as GATT and WTO, Article 6 states:

With respect to foreign trade, the People’s Republic of China shall, in accordance with international treaties or agreements which it has concluded or is a participant in, or based on the

93. Liu Yue, Strengthening Foreign Trade Administration to Serve the Development of Our Foreign Trade, in 1986 ZHONGGUO DUIWAIMAOYINIANJIAN, [1986 CHINA FOREIGN TRADE YEARBOOK] 492 (1987). According to one estimate, between 1979 and 1986, China enacted over 300 economic laws and regulations, half of which were related to foreign economic relations. Id.
94. Bing Wang, China’s New Foreign Trade Law: Analysis and Implications for China’s GATT Bid, 28 J. MARSHALL L. REV. 495, at 521. This article is a thorough and penetrating analysis of the 1994 Foreign Trade Law, which I have relied heavily upon with respect to this legislation.
95. See PRC LAWS ANNOTATED, supra note 30, at 5, 54.
97. Id. at art. 2.
principles of reciprocity and equity, grant other signatories or participants the most favored nation status and national treatment.\textsuperscript{98}

Based on these general principles, the FTL emphatically addresses the issues of unified national trade policy, transparency, and conformity with GATT principles and international practices with respect to NTBs, market access, anti-dumping, subsidies, and safeguard measures.

China’s foreign trade reform started with the decentralization of foreign trade management. Prior to 1979, all major trade decisions were made by the Ministry of Foreign Trade (MOFT) under the central government, and all foreign trade transactions were carried out by a dozen Foreign Trade Companies under MOFT’s direct control.\textsuperscript{99} Between 1979 and 1987, China decentralized its foreign trade management by granting foreign trade rights to other ministries of the central government besides MOFT,\textsuperscript{100} provinces and municipalities, and a growing number of production enterprises.\textsuperscript{101} By the mid-1980s, several hundred foreign trade companies were established as production enterprises under the auspices of various ministries of the central government, provinces, and municipalities. In 1987, their number reached 1,500 and increased to 5,000 by 1990.\textsuperscript{102} As of 1994, China’s foreign trade was run by 9,000 foreign trade companies, manufacturing enterprises, scientific research institutes, and industrial trade companies, as well as 190,000 foreign-funded enterprises engaged in foreign trade operation.\textsuperscript{103} These newly created NFTCs and other organizations with foreign trade authorization acquired the right to handle all export commodities, except for sixteen kinds of important export commodities which are still centralized under the National Foreign Trade Company.\textsuperscript{104}

\textsuperscript{98} Id. at art. 6.

\textsuperscript{99} Wang, \textit{supra} note 94, at 497.

\textsuperscript{100} In 1982, MOFT was combined with the Ministry of Foreign Economic Relations, the Foreign Investment Control Commission, and the Import-Export Commission into the Ministry of Foreign Economic Relations and Trade (MOFERT). Eleven years later, MOFERT acquired the present name the Ministry of Foreign Trade and Economic Cooperations (MOFTEC).

\textsuperscript{101} \textit{China’s Foreign Policies}, \textit{supra} note 34, at 37.

\textsuperscript{102} \textit{Lardy, supra} note 17, at 39; \textit{World Bank, China: External Trade and Capital} 21 (1988).


\textsuperscript{104} Measures on the Control of Export Commodities, Art. 3 §2, Act of Dec. 30, 1992, 1 China Laws for Foreign Bus. (CCH) P 50,708, at 66,663; \textit{Lardy, supra} note 17, at 39.
Decentralization injected energy and economic incentives into China’s foreign trade system. It served as the major driving force responsible for the phenomenal growth of China’s foreign trade in recent years. However, the benefits of decentralization had not been achieved without accompanying problems, of which the most prominent was the lack of unity and consistency in trade policy implementation throughout the country and loss of supervisory control by the central government. Local authorities and various ministries under the central government often made regulations and rules that were inconsistent with the national policies. They gave different, sometimes conflicting, interpretations to the national laws and regulations. As a result, national foreign trade policies and regulations were not uniformly enforced, which not only caused confusion among China’s trading partners but also concern of the GATT contracting parties.\footnote{105}

To remedy this problem of lack of unity, the FTL specifically affirms that “The state shall implement a unified foreign trade system in order to safeguard according to law a fair and free trade order.”\footnote{106} It vests “the department in charge of foreign trade and economic cooperations under the State Council” (presently MOFTEC) with the sole power to direct “foreign trade matters throughout China in accordance with this Law.”\footnote{107} While the FTL brings back unity into China’s foreign trade management, it does not restore the highly centralized structure which characterized the pre-reform foreign trade system. Instead, it strikes a balance between unity of policy and decentralization of operation in foreign trade by defining the role of MOFTEC as one of macro-management in setting up broad policies, developing general goals, and supervising the implementation of laws and regulations. Under the FTL, this macro-management is to be exercised through the promulgation and implementation of laws and regulations, and increasingly, through economic means such as tariffs, interest rates, exchange rates, and loans.\footnote{108}

As a distinctive feature of a planned economy, lack of transparency was preeminent in China’s pre-reform foreign trade regime, which naturally aroused concern by the GATT contracting parties over the incompatibility of China’s trade regime with the international practice of transparency in foreign

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105. Wang, supra note 94, at 522.
107. Id. at art. 3.
trade policies.\footnote{James McGregor, Chinese Talks on GATT Stall over Basic Issues, Asian Wall St. J., Mar. 3, 1993, at 1.} In particular, the contracting parties voiced displeasure over China's pervasive use of internal directives, commonly referred to as "internal documents," which were available only to a very limited number of government officials involved in foreign trade. Under this practice, "the annual imports and exports plan was classified as top 'business secrets' of the state."\footnote{Wang, supra note 94, at 523.}

Since the early 1980s, China has taken steps to improve the transparency of its foreign trade regime. The promulgation of laws and regulations, especially the FTL itself, has gradually yet decisively moved its foreign trade regime away from total administrative control. In response to the GATT contracting parties' requests to halt the use of "internal documents," China published a significant number of previously unavailable decrees, rules, and regulations. It also made further commitments not to enforce any law, rule, regulation, administrative guidance, or policy measure governing trade unless it was published.\footnote{Edward Balls, Survey of China, Fin. Times, November 18, 1993, at 7, China to Make Trade Regulations Transparent, U.S. Official Says, Asian Wall St. J., July 20, 1992, at 3.} The FTL's enactment represents a major step toward greater transparency. It sets up a uniform legal framework for foreign trade that can be followed by foreign trade partners. It clearly defines MOFTEC's jurisdiction, authority, and relation to other governmental agencies involved in foreign trade activities, and thus makes it much easier for foreign trade partners to conduct their business within the jurisdiction of these agencies.\footnote{See Wang, supra note 94, at 524.}

With respect to those major issues in international trade such as NTBs, market access, government subsidies, anti-dumping, and safeguards, the FTL closely follows the practices prescribed in the GATT charter and other documents. Without entirely eliminating all kinds of NTBs in China's foreign trade system, the FTL nevertheless has made the best effort possible under current circumstances to reduce NTBs. The most striking progress occurred with regard to the foreign trade planning practice. For more than thirty years, foreign trade planning had been the most effective non-tariff device employed by the central government to exert total control on foreign trade. It sets the figures for the import and export of each product, the source of import and export, and the allocation of foreign exchange. Once the plan is in place, the State will allocate foreign exchange responsibilities to NFTCs to enable them...
to import the products covered under the import plan and to cover the losses suffered by NFTCs in carrying out the export plan. The trade-restrictive effect of foreign trade planning is that it prevents the market forces from playing a role in directing imports and exports. During the 1980s, China gradually reduced the role of foreign trade planning. In addition to the outright abandonment of the mandatory export plan, the mandatory import plan, which constituted 40 percent of China’s imports in 1986, was reduced to cover only 18.5 percent of all imports in 1992. Reflecting its drafters’ determination to eventually abolish all mandatory foreign trade plans, the FTL is conspicuously silent on foreign trade planning in its text—a clear indication that it perceives no place for foreign trade planning within the new foreign trade regime.

In dealing with another NTB, the licensing system, the FTL adopts a pragmatic approach. On the one hand, the drafters of the FTL realize the impossibility at this time of eradicating this practice. Thus, the FTL retains the licensing system for the import and export of selected commodities and technologies. On the other hand, China treats licensing as a temporary necessity to maintain continuity in its foreign trade practice, not as a central piece of administrative control, and indicates its determination to eliminate licensing in phases.

Although the FTL falls shy of abolishing the use of quotas in foreign trade, it requires the publication of the list of commodities under quotas and the identification of the government department in charge of making the list, thus introducing transparency and market mechanism into the administration of quotas distribution. It is significant that, following the enactment of the FTL, China published the rules for export quota bidding and conducted public bidding for four agricultural products subject to export quotas.

In prescribing the measures dealing with trade surge, dumping, and subsidies, the FTL directly borrows the solutions provided by GATT. Articles 29 (on safeguards), 30 (on dumping), and 31 (on subsidies) of the FTL parallel

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114. Id. at 28.
115. Wang, supra note 94, at 525.
117. Wang, supra note 94, at 525.
the language used in Articles XIX (escape clause), VI (anti-dumping), and XVI (subsidies) of GATT. This shows that the FTL resembles the GATT charter almost verbatim and draws China's foreign trade legal regime even closer to the international practice.

IV. IMPLICATIONS: FROM THE PERSPECTIVE OF THE GLOBALIZATION OF LAW

As demonstrated by its reform measures in tariff reduction, NTB elimination, tax collection, foreign currency exchange management, and the promulgation of the FTL, China has made serious efforts during the last decade to move its foreign trade regime toward the international system represented by GATT/WTO. The State's control of foreign trade has been transformed from micro-control to macro-management. When the State increasingly uses economic means to regulate foreign trade, the scope of various NTBs has been significantly reduced. To be sure, there are still some visible gaps between the current foreign trade regime under continuous reform and the expectations of the GATT/WTO contracting parties. These gaps are embodied in the retaining of a great deal of administrative control and in such NTBs as commodities licensing and quotas. While China acknowledges these lingering inconsistencies in its foreign trade regime, it argues, quite persuasively, that their continued existence is not the result of lack of sincerity or effort on the Chinese part, but the product of the transitional nature of the Chinese economic and legal system under current circumstances. In addition, China has made firm commitments to close these gaps within a reasonable period of time. In March 1994, China submitted to the GATT a proposal for tariff reduction, which committed it to maintain a ceiling of a forty percent tariff rate on industrial products. This rate would be reduced further to 35 percent by 1998 and to 30 percent within five years of China's entry of GATT/WTO. With regard to NTBs, China committed to the gradual elimination of import quotas and licenses and to the reduction of quantitative restrictions on imports from the current 1,247 tariff categories to

120. The Foreign Trade Law of the People's Republic of China, arts. 29-31, in HANDBOOK OF LAWS AND REGULATIONS, supra note 61, at 252. For art. XIX, VI, and XVI of GATT, see GATT, supra note 19, at 8-9, 19-20, 24-25.
121. Wang, supra note 94, at 531.
122. See generally id. at 523-524 (describing changes in China's Foreign Trade Practices).
240 by the year 2000. These objectives have been substantially achieved through the reduction of average tariff rates to 23 percent on April 1, 1996. Once these proposed changes take place, China's foreign trade regime will be very much like most other market economy countries. Even at the present stage, China's foreign trade regime under the 1994 FTL is more liberalized than was the case with such centrally planned economies as Romania, Hungary, and Poland when they were admitted into GATT during the 1960s and 1970s. This fact enables China to substantiate its contention that, contrary to their rhetoric, Western developed countries maintain a double standard and obstruct China's accession to GATT/WTO not based on economic reasons alone but on political considerations.

It is not the purpose of this paper to evaluate the merit of the arguments in this ongoing debate. In fact, no one now contends that China should be kept outside WTO for too long, particularly in light of China's drastic tariff reductions implemented in April 1996. The only question that remains is timing. Moreover, no matter at what time China's accession to WTO eventually materializes, the fundamental changes brought about by the application process have had, and will continue to have, lasting impact not only on China's foreign trade system but on the world economic order as well.

First, China's experience furnishes a good example of national legal restructuring according to the norms of established international practice. In an era of international economic integration, the molding impact of international practices upon the legal restructuring of nation-states represents the most important aspect of the process of globalization of law, which is far more powerful and influential than the countervailing aspect of national resistance to globalization. China's case provides strong empirical evidence for the observation that the making of "domestic law" may "be affected significantly by a variety of forces outside the control of any of the local"—and national, I may add—"decision-makers involved." It also supports the argument that "[g]lobal forces may encourage new forms of economic and legal integration or harmonization across legal and economic systems."

124. Id. at 8-9.
125. For a general discussion of the accession of other socialist countries to GATT, see K. Grzybowski, Socialist Countries in GATT, 29 Am. J. Compar. L. 539, 547-49 (1980).
126. Economic Integration, supra note 123, at 24-25.
128. Id.
Without the influence of the GATT/WTO framework, it is impossible to imagine that China's foreign trade regime could have achieved such a level of liberalization towards free trade and market determination. This influence has taken mainly two forms. The first form is achieved by passive response to international norms, which is characterized by a certain degree of initial unwillingness on the part of the nation-state. China's elimination of the dual-rate foreign currency system in late 1993 offers a good illustration of this type of passive acceptance. The second form is characterized by the nation-state's active adoption of international norms. Most reform measures in its foreign trade regime have been implemented by China on its own initiative. This fact demonstrates China's willingness to use international norms as foundations of national legal reform.

Facilitating national legal reform by the adoption of international practices has special significance to the success of legal restructuring in a country like China. After the collapse of the Soviet Union and the communist eastern bloc, China became one of a few former communist/socialist countries which still adheres to socialism in the present world. As long as the Communist Party is still in power, it is unforeseeable that China will completely abandon its adherence to socialism. This adherence in turn has prevented, and will continue to prevent, the Chinese leaders from openly adopting the economic, political, and legal systems of the Western capitalist countries, especially when one particular system is so closely associated with the practice of one country that it carries the name of that country. Handy examples are the American constitutional principles of federalism, separation of powers, and the two-party system.129 This conviction, of course, has created seemingly irreconcilable

129. The Chinese Communist Party (CCP) has repeatedly declared that it will never adopt in entirety the Western-style market system, the American-style federalism, separation of powers and the two-party system, or the Western value of human rights. It is worthwhile to note that during the entire period of economic reform and trade liberalization, the CCP has continued its political campaign against the so-called "Total Westernization" and demonstrated intolerance of pro-democracy activists. In a recent speech published in the Party's official newspaper, Jiang Zemin, General Secretary of CCP and President of China, reiterated this official line against the Western-style political system. He wrote:

Our socialist democratic system represents the democracy for the people on the widest basis and is most suitable to our country's conditions. It is therefore the best democratic system. Some people in the United States and other Western countries have always wanted to spread their type of parliamentary democracy to the whole world and make it the generally adopted model. This is only a fantasy. In the West, there are such systems as an upper house and a lower house [in the legislature]. But the highest power institution of ours is only one, that is the National People's Congress . . . . We are fully justified to proclaim that our system of the National
tension between "economic marketization" and political and ideological adherence to socialism. Without being able to follow, at least openly, the practices of Western countries, the reform-minded Chinese leaders turn to international organizations for guiding principles and practices in their effort to introduce market reform to the Chinese economy. This approach has the benefit of avoiding inconsistency or conflict with the official ideology. Thus, international norms in trade and economic cooperation have received wide attention in China and are enthusiastically advocated as models worth emulating by government officials and scholars. This advocacy has created an exceptionally benign environment for the acceptance of GATT principles and practices in China.

Second, the molding power of GATT/WTO is by no means limited only to the Chinese foreign trade legal regime. It has also reached other parts of China's foreign economic legal regime, and indeed, the entire economic legal system. Viewed in the larger context of China's economic reform, the implementation of major legislation regulating foreign investment and economic exchange in the late 1970s and early 1980s spearheaded the

People's Congress is both much more democratic than and superior to the system of 'separation of powers' adopted in the Western countries.


131. In resolving conflict of laws problems in international transactions, China has upheld the applicability of both international treaties and international custom. For instance, Article 142 of the General Principles of the Civil Code of the People's Republic of China, April 12, 1986, declares the following:

To the extent that an international treaty in which the People's Republic of China is a contracting party or participant conflicts with the civil law of the People's Republic of China, the international treaty shall apply, except for those clauses the People's Republic of China has made express reservations.

To the extent that the law of the People's Republic of China and the international treaties in which the People's Republic of China is a contracting party or participant are devoid of regulation, international custom may apply.


132. This legislation includes mainly the Law of the People's Republic of China on Chinese-Foreign Equity Joint-Ventures (July 1979), in PRC LAWS ANNOTATED, supra note 30, at 1152-5; the Foreign Economic Contract Law of the People's Republic of China (March 1985), id. at 1234-135; the Law of the People's Republic of China on Wholly Foreign Owned Enterprises (April 1986), id. at 1444-45; the Law
establishment of a new economic legal system. Indeed, "[o]f all the legal institutions that have appeared since the reforms began in the 1980s, those concerned with foreign investment have developed the fastest." 3 Many practices were first introduced in foreign-related economic activities and then applied to domestic enterprises and economic activities as well. For instance, the unification of tax rates levied on enterprise was first introduced in 1991 for enterprises with foreign concerns only. By the end of 1993, however, similar measures were taken to unify the tax law relating to domestic enterprises. In fact, many reform-minded leaders within the Chinese Communist Party have long realized the far-reaching impact of international norms on China's economic and legal restructuring as a whole. They have intentionally utilized the process of China's application to GATT/WTO as a vehicle to promote system-wide reform. As acutely pointed out by Donald C. Clarke, the reformers' "principal concern is not trade at all; it is to use the GATT as stalking horse to dismantle the institutions that they feel stand in the way of domestic reform." 3 For example, an article published in a widely circulated business newspaper in China notes that once China joins the GATT,

"the market mechanism will touch the deep-level defects of the planned economy that have never been touched upon by reforms in our country. . . . The GATT's impact on the current structure will not be limited only to stimulating enterprises to acquire dynamism. The high efficiency will be accompanied by the disappearance of the planning and approval-giving [administrative] organs, the closure of enterprises failing to adapt themselves to the new environment, and the equal opportunities of selecting jobs and being selected for workers." 135

Third, to adopt GATT/WTO practice at the beginning stage of its economic legal restructuring has enabled China to establish a legal system based on the commonly accepted international norms in the present world.

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That practice will have lasting positive impact on China’s economic development in the next century. When China first implemented its policy of openness to the outside world in the late 1970s, there was hardly a legal system to speak of with respect to economic exchanges because administrative control had been imposed for the previous thirty years. Fortunately, the void of legal framework in the economic system has made it easier for China to adopt the most up-to-date international practices without much constraint from traditional legal structure or customs. As a result, the contemporary Chinese framework of economic law, though far from being complete or satisfactory, in most part contains the best regarded principles and practices in the Western world. In addition, the FTL was drafted by closely following the principles and practices of GATT. The law governing foreign-related economic contracts contains strong influence from the United Nations Convention on the International Sale of Goods. The reformed tax system evinces many important attributes of the tax laws of the Western countries, especially the United States. The laws on protecting intellectual and industrial properties closely resemble those of the European countries, especially the German system. The Corporation Law, promulgated in December 1993, adopts a combination of the Anglo-American and European Continental systems. By adopting internationally recognized principles and practices to construct its economic law, China has successfully established a rudimentary legal framework which is capable of allowing China to play a meaningful role in an age of international economic integration. With this development in mind, it is hard to agree with the observation that China presents a major “exception” to the world trend of globalization of law. In light of the progress China has made so far in its legal reform, it is quite likely that China will be able to “enter global markets” without “shielding most of its population from the globalization of law.”

In the final analysis, one cannot accurately assess the implications of China’s use of GATT/WTO principles and practices to reform its legal system without realizing that the international norms represented by GATT/WTO are


also experiencing significant changes themselves. By any standard, the WTO is far from being identical with the GATT at the time of its inception in 1947 or even at the time of China’s initial application in 1986. In view of the profound changes in the world economic structure, many proposals have been put forward to make corresponding revisions in GATT/WTO. The changing attitude of the United States toward GATT/WTO is clearly indicative of this change of tide. As the principal driving force behind the formation of GATT in the aftermath of World War II, the United States continued to be the leading proponent of the GATT principle of free trade throughout much of the first thirty years of GATT’s existence. From the mid-1980s on, however, the United States, under the unprecedented pressure of a growing trade deficit, began to reevaluate the usefulness of unilateralism and even protectionist measures in international trade, which led it to question the merit of many GATT principles. It was at this juncture that China started to reform its economic and legal systems according to such established international norms as GATT/WTO principles. As observed by Jack N. Behrman, “China today faces a world economy already shaped by prior players; and the United States faces a world that is significantly altering the rules it had promulgated.” To a considerable extent, China and the United States are representatives of two basic forces in contemporary world economic order. Although it is still too early to predict with precision the outcome of role-shifting and adaptation on both sides, it is almost certain that the convergence of these two countervailing forces will in large part determine the direction of not only further international economic integration, but also increasing globalization of law in the century to come.

V. CONCLUSION

In many respects, China’s experience in reforming its foreign trade legal regime in accordance with the normative GATT/WTO principles demonstrates the dynamics of interaction between international norms and national legal restructuring in the age of the globalization of law. In particular, it affords a

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138. See generally JACKSON, supra note 15, at 91-103.
139. See generally id. at 110.
unique opportunity to illustrate the role played by and the impact upon the nation-state in the process of globalization.

From its emergence in the mid-seventeenth century until the mid-twentieth century, the nation-state was always regarded as the dominant actor in international economic relationships; the world economy was accordingly conceptualized as a set of interlocking national economies.\footnote{141} Since the Second World War, the globalization of markets, especially the rise of the transnational corporations as a rival to the nation-state in economic activities, has altered the traditional role of the nation-state in the world economy to such an extent that, according to one viewpoint, it “makes most nation states [sic] relatively insignificant elements within the operation of the world economy.”\footnote{142} However, this change does not mean that the nation-state has ceased to be an important factor in the increasingly globalized world economy. On the contrary, as asserted by Peter Dicken, “the political institution of the nation state [sic] remains a most significant force in shaping the world economy.”\footnote{143}

While both views can find support in empirical evidence, they in fact emphasize different aspects of the same process. On the one hand, the increasing globalization of markets has the effect of diminishing national boundaries in economic exchange and thereby reducing the importance of the nation-state in its traditional role as the basic economic unit in the world economy. On the other hand, this globalization of markets compels each country to restructure its legal framework in order to enhance the competitiveness of its national economy in the global market. The nation-state assumes the task of directing the process of national legal restructuring. In executing this historical task, the nation-state, as demonstrated by the experience of China, realizes that the best way to strengthen its national economy is to adopt the established international principles and practices. Thus, by utilizing international norms to formulate its national policies and legal regime, the nation-state has effectively championed the globalization of law, which in turn furthers the globalization of markets and economic activities. In this sense, the nation-state, despite the fact that it is in many ways an antithesis to the trend toward globalization and its traditional prominence in economic life is under serious challenge from such new forces

\footnote{143} DICKEN, *supra* note 1, at 148.
as transnational corporations, still plays a uniquely important role in the promotion of further globalization.