
The House of GATT: Will WTO Open the Door for China?

Alex Low*

Introduction

Whilst many of the western industrialised economies stagnated in the late 1980's and early 1990's, the economy of the Peoples' Republic of China (China) grew at tremendous rates. In fact the World Bank named China as "the world's fastest growing country and its exports have increased ninefold and imports more than sevenfold".

Gross Domestic Product (GDP) grew by 12.8 per cent in 1992 and 7 per cent in 1991. Despite measures to control growth, GDP grew by 13.4 per cent in 1993 against the 1992 figure. The 1994 growth rate was projected to be at 9 per cent.¹

In its pursuit of economic development, China's government has made moves to reform its economy so that it becomes more responsive to market forces.² The obvious implications of this growth for world trade are great, yet China is not a party to the GATT which represents the most comprehensive multilateral treaty between countries. However, China at present does have observer status and attends all meetings of GATT Council and committees. It can participate in deliberations but not vote.

The reasons for China seeking membership of the GATT have been the subject of numerous Articles.³

* Alex Low, BEc Syd, MEc Syd, LLB(Hons) UTS, Dip Lab Rel & the Law Syd, Lecturer, Business Law Department, School of Economic and Financial Studies, Macquarie University, Sydney.

1 See Jian Fu Chen 'China: Constitutional Changes and Legal Developments' Professor A Tay and Conita Leung (ed) *Greater China* Law Book Co, 1995, p.139.

2 See generally, World Bank 'The East Asian Miracle' Report No. 144, 1993.

3 The arguments advanced in favour of GATT membership are:

- a) Most favoured nation treatment is more attractive than relying on numerous bilateral agreements. Additional China would have access to a whole framework of preferences available to developing countries.
- b) China is a major world trading power and if China expects to play a major role in world trade,

This paper proposes to look at the other side of the coin, looking at why the world trading community led by the USA, opines that China is not ready for membership.

In particular, the paper will examine the obstacles of China's socialist economy and the main efforts made by China in the areas of trade and enterprise reform; the opaqueness of the Chinese legal system, especially in its trade and investment laws; the problem of corruption, the rule of law; regional decentralisation and dispute resolution.

Foundations of the GATT

Originally conceived as a temporary trade agreement to aid in the establishment of the International Trade Organisation, the General Agreement on Tariffs and Trade (GATT) has become the most important international trade agreement and institution in the postwar period.

The GATT's general objective is to ensure that its contracting parties (hereinafter 'CP') conduct economic relations "with a view to raising standards of living, ensuring full employment and a large and steady growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods ...".⁴

it should also have an interest in shaping the rules in which other nations will expect China to operate.

- c) GATT provides information to members on how other members are formulating policy, what their disputes are, what actions they will react to and not react to.
- d) GATT membership would bring China's trade into a set of international rules to which all its members are committed. A bilateral agreement only applies between China and another country.
- e) GATT is a forum for members to consult and resolve trade disputes.
- f) China is currently engaging in economic reforms via its domestic market economy. GATT membership would be an indicia of China's commitment to external market principles and thus reinforce the view that China is serious in its progress towards domestic market reform.
- g) GATT membership will reassure Hong Kong investors that after 1997 China will have a stable market oriented economy and not be antagonistic to Hong Kong.

All these arguments and other issues are dealt with by many commentators. The following are just some examples: Wenguo Cai, 'China's GATT Membership: Selected Legal and Political Issues' 26 *Journal of World Trade (Law-Economics-Public Policy)* 35-61 February 1992. Thomas C W Chiu 'China and GATT: Implications of International Norms for China' Vol. 26 (1992) 6 *Journal of World Trade* December 1992 5-18. Kent Chen 'Yuan Float a Bid to Join GATT' 5-6 June 1993 *South China Morning Post* 1. Lori Fidler Darnosch 'GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics' (Forum: Taiwan and the GATT) 1992 *Colombia Business Law Review* 19-38 Winter 1992. *James v Feinerman* 'The Quest for GATT Membership' 1992 (May-June) *The China Business Review* 24. Lei Wang 'Separate Customs Territory in GATT and Taiwan's Request for GATT Membership' 25 *Journal of World Trade (Law-Economics-Public Policy)* 5-19 October 1992. Ya Qin 'China and GATT: Accession Instead of Resumption' Vol. 27 (1993) 2 *Journal of World Trade* 83. Feng Yu-Shu 'China's Membership of GATT: A Practical Proposal' Vol. 22 (1988) 6 *Journal of World Trade Law* 59.

4 GATT, Article 11.

To achieve this objective, CPs have committed themselves to the liberalisation of international trade through “substantial reduction of tariffs and other barriers to trade and ... the elimination of discriminatory treatment in international commerce”.⁵

The GATT furthers its goal of freer international trade with two non-discrimination principles that facilitate the exploitation of comparative advantages.⁶ The most favoured nation (‘MFN’) principle, codified in Article 1, requires that any GATT CP granting an advantage to any other country must grant it to all CPs.⁷ The GATT in effect utilises a multilateral approach to reduce trade barriers.⁸

The second principle, national treatment, is codified in Article III and requires that imported goods, once past customs and border procedures, be accorded the same treatment as goods of local origin with respect to taxation and regulation.⁹

Rights and Responsibilities of a GATT Contracting Country

The obligations of a GATT contracting country (which also serve as the rights of other contracting countries) include Most Favoured Nation (MFN) treatment, national treatment, tariff concessions and restrictions in respect of non-tariff measures.

As mentioned earlier, one of the requirements of GATT is that a contracting country must grant other contracting countries equal tariff treatment of MFN trading status automatically;¹⁰ national treatment must also be given. This requires that internal taxes and other charges, laws, regulations and other requirements affecting business transactions must be applied to domestic entities and foreign concerns on an equal basis.¹¹ GATT contracting countries must also observe the rules with regard to the elimination and reduction of non-tariff barriers such as subsidies, dumping and quantitative restrictions. These rules set out a mechanism for the contracting countries to file their complaints and for the determination of damages.

Every GATT Protocol has its own tariff schedules that bind the applicant to a duty to limit tariffs imposed on imports from other GATT contracting countries. GATT contracting countries also have an obligation not to impose any non-tariff measures on imports from other contracting countries.

Transparency of the laws and regulations in respect of trade is another requirement of the GATT.¹² Under Article X, the contracting countries must make known,

5 *Ibid.*

6 The GATT assumes that business entities conduct trade based on commercial considerations and that comparative advantages encourage them to expand their international trade in order to gain the same economic benefits that expanded domestic trade affords.

7 GATT, Article 1.

8 For an explanation of the origins of this bilateral-multilateral negotiation approach, see Kock, Karin, *International Trade Policy and the GATT, 1947-1967*, Stockholm Economic Studies, New Series 11, Stockholm, Almqvist & Wiksell, 1969 at 62-70.

9 See Jackson ‘The World Trade and the Law of GATT’ at 273.

10 GATT, Article 1.

11 *Ibid* Article III.

12 This will be detailed further on in this paper.

among other things, their trade policies and law, import and export systems, and domestic regulations in respect of trade.

It suffices at this stage to say that since October 1993 China's MOFTEC Gazette publishes all new trade laws and regulations, thus making a gesture towards the GATT transparency requirement.

Last but not least, on assuming the role of a contracting country, a country may not raise its tariffs for a period of three years.¹³ After this period, any move to modify or raise tariffs must be discussed with the other contracting countries. Should a country increase its tariff rates in one category of products, it may be required to reduce the rates in another category or categories.¹⁴

The Move for Re-admission

Introduction

China was an original signatory to GATT way back on 30 October 1947 and became a Contracting Party in May 1948 as the Chinese Nationalist (Koumintang) Government.

With the founding of the Peoples' Republic of China in 1949 by the Communist Government, the Nationalists moved to Taiwan and withdrew their GATT membership in 1950.¹⁵ This meant China was no longer a contracting country.

Taiwan was granted GATT observer status from 1965-71 and China observer status from 1982 onwards.¹⁶

It is beyond the brief of this paper to examine China's participation at GATT during each Round. Suffice to begin with the Uruguay Round at Punta de Este, Uruguay in September 1986, where China although a non-contracting party was allowed to participate.

This was made possible under a Ministerial Declaration that "the negotiations will be open to countries that have already informed the Contracting Parties, at a regular meeting of their intention to negotiate the terms of their membership as a Contracting Party".¹⁷

13 Article XXVIII of the GATT, para 2, with regard to negotiations of tariffs, provides: "In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations".

14 Since the institution of GATT in 1947, the average tariff rates on finished products imposed by industrialised countries have been reduced from 40 percent to a mere 5 percent. This has been considered as one of the main factors for the development of world trade. See the Department of International Liaison of the Ministry of Foreign Economic Relations and Trade of China (eds.), *GATT: A Handbook* Economic Administration Press Beijing, 1991 at 2.

15 GATT Doc. GATT/CP/54, 8 March 1950.

16 GATT Doc. SR/23/3, 16 March 1965 at 21-23.

17 Ministerial Declaration on the Uruguay Round. Declaration of 3 September 1986, Part 1 para F(a)(iv) GATT Basic Instruments and Selected Documents (BISD) 33 Supp. 1985-86 at 27.

According to China, Taiwan could not withdraw from GATT, as the Nationalist Government has not been the legal government of China since 1949 and so China continues to be a contracting country. Furthermore, international organisations including the United Nations recognised the PRC as the proper representative of China in 1971.¹⁸

China's arguments, based on its original membership, fell on deaf ears in the 1986 Round. In March 1987 China's working party under the leadership of Chung-Chau Li was given the task of negotiating China's GATT application for re-entry and these negotiations have been happening ever since.¹⁹

The latest meeting was held on 20-21 September 1990 to examine China's proposed re-entry. The Chinese delegation was asked to provide more information on China's economic reform and at the same time told that due to GATT workload no more time could be devoted to China's application.²⁰

It would appear GATT deferred the request for a number of reasons, the main reasons being:²¹

- (1) the Tiananmen Square episode of June 1989 and the uncertainty this raised in regard to policy reform.
- (2) China's historical link with GATT.
- (3) China's relations with Taiwan.
- (4) China's economy which can be classified as a non-market economy²² or a low income developing economy.²³

The matter of China's admission was further raised in December 1995 but was deferred again, the reasons being unclear, but no doubt related to China's economy.²⁴

Of course the status of Hong Kong (to be returned to China in July 1997), Macau (to be returned to China in January 1999) and Taiwan are present barriers. Hong Kong became a Contracting Party in April 1986, Macau in January 1991 and Taiwan made application in January 1990.

Professor Jackson²⁵ states there are three ways a government can become a Contracting Party;

18 General Assembly Resolution 2758, 27 U.N. GAOR Supplement (No. 29) at 2 U.N. Document A/8429 (1972).

19 Li, Chung-Chau 'Resumption of China's GATT Membership' 21 *Journal of World Trade Law* 4 (1987).

20 'GATT Rejects New Chinese Membership Bid, Requests for More Data on Trade Liberalisation' *International Trade Reporter* (BNA) Vol. 7 at 1477, 26 September 1990.

21 The question of how the international community views China's admission is tied up with a country's domestic policy in relation to these and other matters.

22 See J H Jackson, 'The World Trading System: Law and Policy of International Relations', The MIT Press Cambridge USA 1991 Chapter 13 at 283-298.

23 If we use GNP per capital as the criteria, China is a low income country. See World Bank, World Development Report 1991 which states China's per capita income was US\$350 in 1989.

24 Department of Foreign Affairs and Trade *Asialine* Volume 4, No. 1, 1996

25 John H Jackson, *supra* n.22 at 45-47.

- (a) original membership
- (b) accession under Article XXXIII
- (c) accession through sponsorship under Article XXXVI:5(c)

It seems that China's initial arguments for retaining its original membership have all but failed. Now China is seeking an accession under Article XXXIII as a new member.

Member countries, particularly the United States, may prefer that China join the GATT under the accession procedures laid out in Article XXXIII. That Article provides that a country may accede to the GATT "on terms to be agreed upon between such government and the contracting parties".

It was designed to permit individualised contractual arrangements with nations entering the GATT system, in order to take account of specific questions raised by the new relationship. The member countries may feel that the Article XXXIII procedure would enable them to address the special problems resulting from the central planning, non-market nature of China's economy, which cannot be resolved effectively through a contractual pledge by China or reservations of rights by contracting members.

Returning to the original membership argument, China pointed out that it was one of the twenty-three original members of the GATT and China argued that it was still a member but had not participated in GATT since 1949.

From a legal and political perspective this argument affirms the "one China view" which states Beijing is the sole legal government of China and so represents China and Taiwan, for Taiwan is merely a province of China. Both the communists and the nationalists believe in one China, but they differ obviously in who represents China in GATT.

If the "one China" argument was accepted, it would allow China to argue for grandfather rights which belong to original contracting countries. This simply means original members have the right to have pre-existing legislation in force despite the fact that it is inconsistent with GATT rules.

However, contracting countries have argued that resumption of China's original membership would make it impossible for them to use Article XXXV,²⁶ the non-application clause, against China with regard to Most Favoured Nation (MFN) treatment if they are dissatisfied with the terms and conditions of China's re-entry.

Finally, it would not be necessary for China to re-negotiate the concessions and commitments that a new GATT member needs to make during the negotiation of

26 Article XXXV states:

"1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

- (a) the two contracting parties have not entered into tariff negotiations with each other, and
- (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

2 The Contracting Parties may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations."

its admission to GATT in order to take advantage of tariffs negotiated at earlier GATT rounds.

However, in practice, resumption as an original member is not viable as China has had no real input in GATT for over thirty years and GATT and China have both undergone dramatic changes. Tariff barriers have been lowered among members and China's economic and political landscapes have changed.

Furthermore it is difficult to argue that China should be allowed to enter without paying all its back dues to GATT.

It seems that China recognises this²⁷ and China is willing to negotiate a new protocol and go the way of new membership under Article XXXIII.²⁸ Thus the working party has taken this approach in its negotiations.²⁹

A problem for China in relation to grandfather rights is that, if China was allowed to resume its old seat, then all Nationalist Government legislation would be applicable. This clearly is untenable for China. If it accedes as a new contracting country then past statutes can be negotiated and put in a Protocol of Accession. However, one could argue that China is not entitled to any grandfather rights. Three conditions apply if grandfather clauses are to apply:

- (1) the legislation must be in existence prior to GATT formation (prior to October 1947).
- (2) the legislation has been continuously in force.
- (3) the legislation is of a mandatory character.

On a strict legal basis, China has no grandfather rights, as all China's statutes currently in force were passed after 1949.

Therefore, the best approach is the approach adopted by the negotiating party: to do so as a new applicant and to specify mandatory legislation in a Protocol of Resumption.³⁰ Note that in its regime of legislation China has included all laws dealing with foreign trade and presumably all the latest legislation, examined below, is or will be included. Clearly, it is an indication that China is doing all it can to please the contracting countries and is indicative of China's desire to be a leading player in the international trading community.

China's resumption of original membership would also lead to another problem. Article XXV allows contracting countries to opt out of the agreement if they

27 See Li Article *supra* n.19.

28 Article XXXIII, The Accession clause states:

'A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.'

29 Discussed in Li Article, *supra* n.27.

30 GATT 'China's Status as a Contracting Party: Memorandum of China's Foreign Trade Regime'.

are dissatisfied with each other. This Article only applies at the time a new country enters GATT and cannot be invoked against existing members. It also requires the satisfaction of two other conditions, viz the two countries have not entered tariff negotiations with each other, and the contracting countries at the time of becoming a contracting country oppose the application.

Obviously some contracting countries would wish to invoke Article XXXV against China, for its low labour costs would be a threat to their domestic industries.

The USA has a particular problem, for its domestic legislation prevents it from applying free and unfettered MFN status to communist countries.³¹

Evaluation

One should not be too legalistic when tackling the accession problem. In practice, even if China resumes its old seat, it is a different economic and political entity from what it was in 1948. Thus, China will still be a "new" member de facto even if, de jure, it is considered an old one.

China's argument that it is legally entitled to the "old China seat" is more important in principle than in practice. The primary concern of the currently active GATT members will be that China's laws and practices be altered sufficiently to afford access to its market roughly equivalent to that which China will enjoy in their markets.

If this can be achieved, it could be done equally well through a protocol of accession of China as a new member under Article XXXIII, or through an ad hoc agreement upon GATT recognition of China's "old" membership. The ad hoc agreement could contain essentially the same provisions as a protocol of accession executed upon China's entry under the normal accession procedures.

If the necessary practical objective of market access is achieved, it does not matter whether China is entering as a "new" member or reclaiming its position as an "old" one. If this objective is not achieved, China cannot expect that its legal claim to prior membership will induce other nations to open their markets, and keep them open, to a substantial increase in imports of China's products.

31 Section 402 of the Trade Act of 1974, the United States only grants MFN treatment to a communist country on the condition that such a country permits free emigration. The provision also allows the President of the United States to grant temporary MFN treatment to a communist country provided that certain progress towards the objective of free emigration has been achieved. The President must report the emigration situation of the country in question to the Congress for congressional annual review. At present, the United States has granted China MFN status which is subject to annual review of Congress under Section 402 of the Trade Act of 1974. If China resumes its GATT membership, the United States would be put into a dilemma: it can neither invoke Article XXXV against China to satisfy its legislative requirements, nor can it deny unconditional MFN treatment to China. See H K Jacobson and M Oksenberg, *China's Participation in the IMF, the World Bank and the GATT* University of Michigan Press 1990 at 95.

Obstacles to Readmission

A distinction between a Western economy and a socialist system is that, in the former, public functions and private functions are distinguishable.

This is not the case in China, although China states it is making progress in converting its economy to a socialist democracy with Chinese characteristics. Yet to the extent that China still depends on state planning, its economic activities are inherently discriminatory, for in a planned economy, the tariff and non-tariff barriers that the GATT is designed to prevent are not the major impediments to free trade.

Rather, the impediments are governmental control and direction over purchases and prices.

Thus, even the elimination of a trade barrier may not result in increased imports to the country, if the planning authorities decide against such imports or direct the price to below cost levels.³²

Socialist Economic Reforms

A) Domestic Investment

In December 1978 the Chinese Communist Party announced that its primary emphasis would shift from class struggle to economic development.³³

Yet it was not until 1994 with China's first Company Law, that private enterprise was developed. It may be argued that the Company Law³⁴ was aimed at standardising and modernising enterprise organisation and practice with the purpose of:³⁵

32 James M Reuland, 'GATT and State-Trading Countries', Vol. 9 (1975) *Journal of World Trade* 318, 320.

33 Third Plenum of the 11th Central Committee of the Communist Party, adopted 22 December 1978.

34 Essential provisions of the Company Law were based on drafters of the Chinese law adopting a corporate management similar to those of other industrialised countries. Under the Company Law, a company in general must have a shareholders' meeting, a board of directors and a manager. The shareholders' meeting is the organ of authority and has the power to deal with the policy-oriented issues and development plans of the company, including the appointment and removal of directors. The board of directors is responsible to the shareholders' meeting and is responsible for important decisions regarding the company. The manager who is appointed by the board of directors is in charge of the daily operation of the company. The management system under the Company Law is similar to that of industrialised countries. China's Company Law also provides for the establishment of a board of advisers in the medium and large-sized companies. The board of advisers supervises the work of the directors and the manager, and ensures the protection of the interests of the company and shareholders. The management system under China's Company Law is a combination of the Anglo-American and European Continental system. Since China is a civil-law country, the balance approach taken in connection with the management system is expected.

With regard to the issue, transfer and listing of shares and debentures, the rules contained in the Company Law are simple and comply in essence with modern Corporate Law.

35 Robert C Art and Minkang Gu, 'China Incorporated: The First Corporation Law of the People's Republic of China', *Yale Journal of International Law* Vol. 20 (1995) at 273-308.

- (1) restructuring the organisation and management of state-owned enterprises.
- (2) addressing serious, chronic and seemingly intractable problems of inefficiency.
- (3) promoting competition and productivity.
- (4) removing the state from detailed management of business operations.

Generally, privatisation means relinquishing state control over industry and production to the private sector. This is done by selling enterprises to investors and in the short run the government gains liquidity and in the long run means greater efficiency and improved management because the enterprise is subject to market forces.

Yet, the Company Law states that it is there for the purpose of "maintaining the social economic order and promoting the development of a socialist market economy".³⁶

The Chinese government's retention of majority ownership in state enterprises that it has converted to the corporate form is characteristic more of corporatisation than privatisation. This preserves the Marxist-Lenin principle of ownership of the means of production by the people, ie the state.³⁷ Sale of minority interests in these corporations' stock allows the government to draw private capital into state enterprises without relinquishing ultimate control.³⁸

Whilst the law establishes a framework for solving China's chronic economic problems and, ultimately, full privatisation of business, success, will depend on the government's resolve to enact other reforms well beyond corporate law.

The World Bank states that administrative controls in the form of the commodity licensing system, quotas and monopolies of the 13 national foreign trade corporations (NFTC) under the auspices of MOFTEC must be removed.³⁹

Price control on state enterprises would need to be removed and the authorities rather than taking a micro approach to the economy should become more macro policy oriented.⁴⁰ This can be done by making a macro decision to stop price control, thus removing price distortions and anomalies and to arrive at a truly international market price for products.

Undoubtedly transferring state enterprises into limited liability stock companies would only be a facade. Behind the facade real work at a national level needs to

36 Article 1.

37 As stated in Article 6 of China's 1982 Constitution, "The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people". Indeed, ownership of the means of production may be seen as a primary justification for the existence of the state. Privatisation would therefore undercut the ideological basis of the government.

38 Dai Yannian 'Spotlight on China's Modern Enterprise System' 37 *Beijing Rev.* 28 February- 6 March 1994 at 4.

39 See on FTC's, Article by Madelyn C Ross 'Foreign Trade Offensive' *China Business Review* July-August 1987 at 3 and for price control see 'China: Foreign Trade Reform' 1994. World Bank Report 1994.

40 Bing Wang 'China's New Foreign Trade Law: Analysis and Implications For China's GATT Bid' *The John Marshall Law Review* Vol. 28 P209-495 at 536.

be done on matters like a national program of welfare, unemployment insurance and social security to be put in place to remove these responsibilities from the enterprise, whilst at the same time to allow the free migration of population to satisfy labour needs.

It can be seen that unless the government accepts the good and bad of the market system and withdraws the subsidies allowing uneconomic state enterprises to fall, the result will only be a facade of a modern economy.

B) Foreign Investment

In the last forty five years, China's foreign trade has grown rapidly; nevertheless, China had no comprehensive foreign trade law except for some separate pieces of law and regulations to govern the conduct of foreign trade.⁴¹ The Foreign Trade Law⁴² sets as its purpose "to develop foreign trade, safeguard the foreign trade order and promote a sound development of the socialist market economy".⁴³ In order to achieve these goals, the Foreign Trade Law provides specific conditions and requirements to set up foreign trade companies. Such conditions include the necessary funds, professional expertise, premises, the internal organisational structure of the company and foreign trade experience and contacts. What is important is that foreign trade companies can enjoy complete autonomy in their business decision-making and be responsible for their own profits and losses.⁴⁴ Prior to the adoption of the Foreign Trade Law, foreign trade companies enjoyed only limited autonomy in business decision-making, and governments at various levels tended to interfere.

Traditionally, China regards foreign trade as an important aspect of the economy which must be closely watched by the government, so approval of the central government is still needed.⁴⁵ This provision is, however, contrary to the spirit of the Company Law. It is also harmful for the building up of a market economy and therefore may need to be modified if and when China rejoins the GATT.

The Foreign Trade Law takes into account some of the provisions of the GATT and relevant laws of other countries. The Law applies to international trade in both

41 The Customs Law, the Law on Inspection of Import and Export Commodities, the Regulations Concerning Foreign Exchange, the Provisions for the Administration of Import and Export, the Provisions on the Place of Origin of Export Goods, etc.

42 The Foreign Trade Law of the People's Republic of China was adopted at the Fifth Session of the Standing Committee of the Eighth National People's Congress and became effective on 1 July 1994.

43 Article 1.

44 Article 11.

45 Article 9, under which a foreign trade company is required to meet the following conditions and obtain permission from the State Council's department in charge of foreign trade and economic relations: (a) have its own name and organisational structure; (b) have a specific scope of foreign trade business; (c) possess the site, capital and professionals necessary for the foreign trade business it engages in; (d) have achieved a required track record in import and export business on commission or possess the necessary sources of import and export goods; and (e) any other conditions specified in laws or administrative regulations.

goods and services.⁴⁶ State control with respect to import quantity is restricted to matters such as national security, shortage of resources, protection of domestic infant industries, international balance of payment.⁴⁷ Foreign trade companies must compete under the principles of effectiveness, fairness, openness and justice.⁴⁸ The State may also intervene in cases of dumping.⁴⁹

The Foreign Trade Law also contains a provision on national treatment and market access. This provision is in compliance with the GATT rules. Thus it can be seen the Foreign Trade Law was designed to make China's international trade regulations transparent and to remove the administrative controls over import and exports.

These two laws are but just examples of the eagerness by China to show transparency and equal treatment of foreigners and locals in its laws. Other examples are abolition of the dual exchange system, various pieces of legislation including the Draft Securities Law, the National Maritime Law effective from July 1993, the Law on Negotiable Instruments effective from January 1996, the Consumer Protection Law of 1994 and the National Labour Law effective from January 1995 are all part of China's hectic legislative program, since the formation of the working party on China's admission to GATT. All appear to satisfy the required admission criteria, viz that a contracting country must be able to show its laws and trade and economic policies accord with those of other contracting countries.

But is this good enough to satisfy GATT requirements?

Transparency and equality are at a superficial level, glossing over many foundational problems that could well cause China's push for GATT membership to fail.

From a legislative perspective, whilst the Foreign Trade Law attempts in some ways to satisfy GATT requirements, as does the Company Law and indeed all the other pieces of legislation, there is the underlying socialist ethos to overcome as well as other laws which are barriers and have not been repealed.

Take the contracts law of China. There are three pieces of legislation applicable:

- (1) the Foreign Economic Contract Law, applying to foreigners.
- (2) the Economic Contract Law, applicable to state enterprises and essentially a state planning law.
- (3) the General Principles of Civil Law, which applies to individual contracts.

All give differing treatment to foreigners and are laws which do not sit well with GATT equality philosophy.

46 See Article 2.

47 See Articles 16 and 17.

48 See Article 27.

49 See Chapter V, in particular Article 20 which provides that "the State may adopt necessary measures to eliminate or alleviate any damage or threat of damage caused by dumping".

The Chinese Attitude To Law

Chinese leaders have made it clear that development of a legal system not only regulates Chinese domestic affairs, but also encourages foreign investment, providing China the trigger to modernise. Senior Chinese leader, Deng Xiaoping, has said "it is necessary for us to make a two-pronged advance in the modernisation program. This means we must promote construction and also build up the legal system. Merely concentrating on either of the two is not enough".⁵⁰

Again, in October 1987, the 13th Party Congress Report, proposed by Party General Secretary Zhao Ziyang and accepted unanimously by the delegates, declared that China must "further perfect legislation governing business dealings with foreign firms so that foreign enterprises will be able to operate enterprises in China according to international practice".

There has been a proliferation of laws and regulations at all levels of Chinese government. One result is that it is extremely difficult for foreigners, and even Chinese lawyers, to determine which laws apply. This feature of the system creates an obstacle to the transparency of government administration and procedure.

New laws alone are not enough. The concept itself must become part of mass consciousness. A body of law without the accompanying concept of law is mere window dressing. Only when the masses believe that their rights can be protected and enforced will the rule of law prevail.

A literal reading of China's laws and regulations could result in a seriously inaccurate assessment of a given situation in China. To the extent that the Communist Party plays a dominant role in the actual governance of China, party policy will have a dominant role in the application of law.

Indeed, policy has been described as a *priori* to law. Law in China, as in the west, is no more than a detailed statement prepared to implement policy. Therefore, a clear and detailed policy statement of the Communist Party may be significantly more valuable than a detailed set of regulations. This approach is fundamental to a Marxist system, although it appears confusing and "anti-law" to those who think within the framework of Western jurisprudence. Therefore, the law as set forth in official texts in China may not reflect practice. The system implemented by modern reforms is new and complex, and long-standing practices are difficult to change and eliminate.

Put another way, the Chinese definition of the rule of law is different to the Western concept and is interpreted according to Chinese notions of individual rights and obligations and social justice. The Chinese notion of trust (*xinren*), while all important in dealings, is enshrined in law as but one indicia of social power, and other forces like economic interest and political morality can either assist or hinder its enforcement. This means in practice Chinese authorities can use their interpretation of a law to redress matters such as protecting local economic interests or to

50 China Daily, 24 June 1986.

provide justice and equity.⁵¹

Secrecy and Corruption

Both secrecy and corruption are adverse to the transparency requirement of GATT, yet both are alive and well in the Chinese legal system!

China justifies secrecy on the basis that its officials are inexperienced in dealing with foreigners in trade and market matters and so to keep the ledger balanced many internal rules are secret and known only by certain government and party officials.⁵² These are in effect directives and adhering to them is mandatory by any Chinese negotiator.⁵³ The USA in response, began negotiations in October 1991 resulting in a Memorandum of Understanding (MOU) signed 10 October 1992⁵⁴ between China and the USA. This MOU provides that China will improve "transparency" in its administration of laws relating to imports and exports.

In accordance with the MOU China agrees to promptly publish all laws, regulations, rules, decrees, administrative guidance, directions and policies upon the classification or valuation of products for customer purposes, rates of duty, taxes and charges and any requirements or restrictions on imports or exports.

China has also agreed under the MOU to make substantial tariff reductions on selected goods to ensure that disputes are dealt with impartially and to administer any trade related laws in a reasonable manner.

Historically China does not have an open system. Chinese society historically has not been regulated by positive law in the Western sense of the phrase. China's traditional legal background influences all models of China's post-revolutionary legal system. The basic Confucian concept of law involves two polarities *li* and *fa*. *Li* has been variously translated as "propriety", "moral code", "customary law of rules of conduct governing the relations between men". *Li* relies on moral force rather than physical coercion, and places a great emphasis on ruling by example, especially in superior-inferior social relationships. In such an ideal system, laws do not constitute the primary method of social control.

It may even be said today's leadership is hostile to law, for during the Cultural Revolution, Mao Zedong "publicly called for the 'smashing of the Gong-Jian-Fa (public security, procuracies and courts)' and was quoted as saying: 'Depend on the rule of man, not the rule of law'." A well-known editorial from the People's Daily during this period, entitled *In Praise of Lawlessness* called for the complete destruction of

51 See Roman Tomasic, 'Company Law and the Limits of Rule of Law in China' 1995, 4 *Australian Journal of Corporate Law* at 474-475.

52 Thomas C W Chiu 'China and GATT: Implications of International Norms for China' *Journal of World Trade* Vol. 26 No. 6 December 1992 at 12.

53 A Tay (ed) *China Laws for Foreign Business* CCH at 1404, para 2265.

54 Memorandum of Understanding between the Government of the United States of America and the Government of the Peoples' Republic of China concerning market access.

“bourgeois” law so that the proletarian legal order could be established.⁵⁵

Corruption creates an atmosphere that is discriminatory and opaque. The Chinese Communist Party, in a significant statement of policy concerning economic reform, identified the need to eliminate corruption and promote clean government as essential to economic reform, to the destiny of the Party and to the nation itself.⁵⁶

The Chinese government has attempted to combat corruption by enacting anti-corruption laws, conducting anti-corruption campaigns and by vigorously prosecuting perpetrators.⁵⁷ The long term effect of these efforts remains to be seen.

Centralism Versus Provincialism

It is a catchcry that the further one is away from Beijing, the less need there is to follow national laws.⁵⁸ This applies especially in trade and economic matters.

Theoretically China has a unitary political system, characterised by legislative supremacy, in which the National People's Congress and its Standing Committee govern the country.⁵⁹ However, it is a popular myth that China is tightly controlled from the centre. In practice, the provinces, regions and municipalities exercise a great deal of control over their respective territories.⁶⁰

Local cadres often control the local situation despite national laws which may be contrary to the edicts and interests of such cadres. Serious competition for foreign investment and trade has resulted in a mass of uncoordinated local laws and regulations governing these areas.

The interior and northern provinces are especially displeased with their perceived relative lack of prosperity in comparison to the southern coastal regions of China, where economic reforms were first initiated, and thus, there are corroding forces in China's political and social milieu.⁶¹

55 Cole R Capener 'An American in Beijing: Perspectives on the Rule of Law in China' 1988 *Brigham Young University Law Review* at 571.

56 Decision of the CPC Central Committee on issues concerning the establishment of a socialist market structure, 14 November, 1993.

57 Robert H Lin 'On the Nature of Criminal Law and the Problem of Corruption in the People's Republic of China: Some Theoretical Considerations' *New York Law School Journal of International and Comparative Law* Vol. 10 1989 at 1.

58 A recent example is with the passage of a package of amendments to the Income Tax legislation, whereby a property gains tax was to be applied to property development involving foreign partners. The Mayor of Shanghai refused to collect the tax saying it would jeopardise development in Shanghai. This was also followed by the Mayor of Guangzhou. Regulations were changed and overseas property developers who made agreements on real estate projects before 1 January 1994 were given a five year exemption. State Council's decision on implementing the "Tax Sharing" system, State Council Document No 85 issued on 15 December 1993 implemented at Second Plenary Session of the Eighth National People's Congress, March 1994.

59 William C Jones 'People's Republic of China: The Constitution of the People's Republic of China' 63 *Washington University Law Quarterly* 1985 at 708-12.

60 See Lee Maoguan 'Why Laws go Unenforced' *Beijing Review* 11-17 September 1989 at 17.

61 Chris Yeung 'Contradictions Mar Master Plan' *South China Morning Post* 17 November 1993 at 8.

Regionalism does not bode well for China's meaningful participation in the GATT. China will have to bring its regions under control in order to provide adequate assurances of transparency, national treatment and non-discrimination.

An Evaluation

GATT status for China would obviously contribute to an increase in China's foreign trade and so benefit the domestic economy. A most important gain for China would be non-discriminatory treatment by contracting countries.

If China joins GATT as a developing country, it can argue for favourable terms of entry. It is doubtful whether the West will want to grant China significant benefits as a developing country, given the real possibility of China's emergence as an economic superpower in the coming decades.

Externally, China could gain obvious benefits from the opening of overseas markets. Internally, China could use the GATT as a catalyst to reform its enterprise system and some of its governmental functions. It would give the Chinese leadership another means to introduce concepts of accountability and integrity to its enterprises.

Moreover, the Chinese central leadership might be able to use its obligations under the GATT to pressure the provinces and regions to comply with national laws intended to reform the economy. Of course, enterprise reform in the context of China may not mean government reform, at least not in core government functions controlled by the Communist Party, which would, in all likelihood, remain closed and subject to strict Communist Party control.

In the area of market reform China's economy has undergone and will continue to undergo significant market reform, but China most likely will not attempt to convert its economic system into a truly Western-type system. The lesson of accelerated economic reform in the Soviet Bloc looms large, and the Chinese leadership may prefer a slower approach to economic reform.

Harmonisation appears to be the approach taken by the current members of GATT in their review of China's application for entry in GATT. According to Professor Jackson, different economic systems will always exist in the world and systems try to create the institutional means to ameliorate international tensions caused by those differences, perhaps through buffering or escape-clause mechanisms. This is known as the interface principle and was intended primarily as a vehicle for countries with planned economies to join the GATT.

China's economic and legal systems are significantly different from those of countries that are currently parties to the GATT that have a "socialist market economy". One of the major problems with dispute settlements involving a Chinese party at present is to find a forum which suits both parties, by having a procedure which both parties expect and understand and by being able to arrive at a decision which is enforceable.

The new GATT Dispute Settlement Procedures agreed to during the Uruguay Rounds provide a "country protest" mechanism whereby a timetable and steps are

put in place to expediently resolve disputes between member states.⁶²

No doubt if China becomes a contracting country this GATT system of dispute resolution will come into play. This will provide certainty for foreigners doing business in China.

China is one of the largest trading countries on the world scene.⁶³ On entry into GATT there is no doubt that China will become an even larger trader, for tariff rates will no doubt have to be lowered to bring it in line with other developing countries.⁶⁴ There are clearly benefits for China in becoming a GATT country.

China's drive to convert to a market economy means changes in its legal system, for laws either need revision or a new law needs to be made to cope with the new issues arising from this conversion to a market economy.

Continued scrutiny of China's trade policies is critical if China is admitted to GATT. Holding China's trade regime up to international scrutiny has an inherent value. In particular, a heightened understanding of China's actual trade practices. The former dual-rate regime was so riddled with arbitrary decision-making and internal procedures that it is unlikely observers could have understood its workings simply by reading China's currency laws. A GATT forum would bring unified pressure against China's currency practices.

Many GATT members argue that China's admission should be subject to a safeguard clause, whereby any nation suffering from a flood of Chinese goods could elect to unilaterally limit Chinese imports.⁶⁵ This measure would allow retaliation against China should China dump its goods overseas. Ultimately, China must be put under continued scrutiny regarding its restrictions on all trade matters including intellectual property and foreign exchange, ensuring that China cannot rely on secret rules.

Yet the fact that China's admission has been delayed may well herald a change in China's attitude to the GATT. One could hypothesise that it may lead the political leadership to curb their desire to join and a "we don't need GATT" mentality may develop. If this occurs then there is less need for the Chinese legal system to adopt Western legal concepts and to reform for easier collaboration with other countries.

So political and ideological differences may well affect international co-operation. It must be remembered that these differences in the long run will continue to affect the harmonisation of China and the international trading community.

Conclusion

This paper has attempted to outline the obstacles to China's admission to the GATT. Many of these obstacles are entrenched in the Chinese economy, witness the problem

62 Philip Raworth and Linda C Rief *The Law of the WTO* Oceania Publications 1995 at 141-147.

63 Bruce L Reynolds (ed) 'China's Economic Reform: How Far, How Fast?' Schenectady, New York Academic Press (1989) at 43.

64 China's tariff rate is 21.9% whilst the GATT average is about 13%.

65 See 'China Agrees to Accept Conditions on Re-entry in GATT' 11 *International Trade Rep.* (BNA) 384 9 March 1994.

with state enterprises, secrecy and corruption.

It is argued that all these fundamental issues have to be addressed by the Chinese Government before the GATT contracting countries will accede to China re-joining. Even if allowed to join the GATT, the WTO will almost certainly have to put in place very stringent conditions of entry together with a monitoring of China's performance.

Whilst China is eager to rejoin because of obvious benefits and indeed the WTO in general is keen to see China within its fold, the Chinese economy is not yet in a fit state to be accepted. These structural fundamentals need modifying to a standard acceptable to the WTO. One cannot see such entrenched issues like secrecy, provincialism, and law enforcement the Chinese way, being brought to required standard to allow the GATT door to be opened by 1997.

In summary, the doors will be opened slowly and cautiously many times, to let the many issues raised in this paper be discussed and resolved in a consensual way.

It is only when China can satisfy the occupants of the House of GATT that it has nothing to hide, that China will be welcomed as a new member of the WTO family.

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