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CHINA'S NEW FOREIGN TRADE LAW:
ANALYSIS AND IMPLICATIONS FOR
CHINA'S GATT BID

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INTRODUCTION

In the past fifteen years, China's unprecedented efforts to establish a legal framework for foreign trade have been a major factor contributing to its emergence as an international trading power. Since 1979, China has promulgated hundreds of foreign trade laws and regulations governing import and export administration, foreign-funded enterprises, custom tariffs, foreign exchange control, and quality control. The establishment of a foreign trade law framework has reduced the uncertainty associated with investing and trading with China, and facilitated China's integration into the world trading community. It is not an exag-

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1. In 1979, China's rank in the world's merchandise trading was 32d in exports and 24th in imports. The Top Twenty Exporters and Importers, Focus (GATT Newsletter), Apr. 1990, at 4 [hereinafter Top Twenty]. In 1993, China became number 11 among trading countries, with total imports and exports at $165.6 billion. 6 ECON. REP. (CHINESE) 23 (1994).

2. Between 1979 and 1986, China drew up over 300 economic laws and regulations, half of which were related to foreign economic relations. Liu Yue, Strengthening Foreign Trade Administration to Serve the Development of Our Foreign Trade, 1986 CHINA FOREIGN TRADE Y. B., at 492.

geration to say that China's foreign trade legislation has played an indispensable role in promoting the remarkable development of its foreign trade.

Until recently, China's foreign trade legislation was unable to meet the expectations of the international trade community and the ever-growing demands of China's robust foreign trade. One noteworthy problem was the lack of a foreign trade law setting forth the principles China would follow in regulating foreign trade activities, clarifying the relationship between government ministries and foreign trade operators, and establishing the basic system involving import and export control over goods, technologies and service. As China strived to integrate its foreign trade system into the international trade community, it became apparent that China needed a well-drafted and balanced foreign trade law. The absence of a foreign trade law had not only slowed down the promulgation of a series of supplemental regulations, but it also contributed to a lack of transparency, which is a major concern of the contracting parties of the General Agreement on Tariffs and Trade (GATT). China needed to resolve its GATT status before the World Trade Organization was established on January 1, 1995, so that it could take advantage of the benefits of the Uruguay Round negotiation. On May 12, 1994, the Standing Committee of the 8th National People's Congress passed the long-expected Foreign Trade Law (FTL) at the 7th meeting, which went into effect on July 1, 1994.

This Article analyzes the foreign trade system established by the FTL and evaluates its implications for China's bid to join GATT. Part I explores several major systems of China's foreign trade regime, such as the foreign trade management system, the

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4. One of China's moves to join the international world of trade is its application to restore its GATT seat. China was an original member of GATT when the trade agreement was established in 1947. After the Communists came to power, the Nationalists in Taiwan withdrew China's GATT seat in 1950, which was never recognized by the Communist Government in the mainland. Beginning in the early 1980s, China resumed its informal relationship with GATT by serving as an observer to GATT. On July 11, 1986, the Chinese government submitted a formal application requesting the restoration of China's contracting party status in GATT.


licensing system, import and export control, and trade in service. Part II identifies the systems that are inconsistent with international practices and makes suggestions to improve those systems in accordance with GATT's requirements of transparency and trade liberalization. Finally, this Article concludes that China's new FTL has rendered China's foreign trade regime more transparent and uniform, as required by GATT. If China can further phase out administrative controls within the framework delineated by the FTL, China will be in a stronger position to achieve an earlier return to GATT upon more favorable conditions.

I. LEGAL FRAMEWORK OF CHINA'S FOREIGN TRADE REGIME

A. Foreign Trade Management System

1. Decentralization and Search for Equilibrium of Foreign Trade Management Power between the Central and Local Government

In the approximately thirty years between the establishment of Communist China in 1949 and the historic economic reform in 1979, China adopted a highly concentrated foreign trade regime. All major trade decisions were made by the Ministry of Foreign Trade (MOFT) under the central government while all foreign trade transactions were carried out by a dozen Foreign Trade Companies (FTCs) under MOFT.7 This system served China well because it enabled China to amass the foreign currency, which was then scarce in China, needed to import materials and equipment for China's industrialization. However, once China opened up trade to the outside world, China's leadership realized that this highly centralized foreign trade system was too rigid to meet the demands of dealing with western countries whose economy and trade regimes were quite different from its own.

Beginning in the early 1980s, the Ministry of Foreign Economic Relations and Trade (MOFERT) gradually relinquished the monopoly that it exercised over foreign trade through a dozen FTCs under its control. Some industrial ministries under the central government were allowed to set up their own FTCs to directly conduct foreign trade in goods produced by a network of factories under the ministries' jurisdictions.8 Meanwhile, provinces and municipalities were authorized to establish FTCs to handle foreign trade in their respective regions.9 In addition, some large

7. There was almost no competition among these FTCs since they were organized along industrial lines, and import and export business was allocated accordingly.


and medium production enterprises were given not only the right to export products they manufactured, but also to import materials and equipment needed for the production. As a result of decentralization, the newly created FTCs acquired the right to handle all other export commodities, except sixteen kinds of especially important export commodities which are still centralized under the National Foreign Trade Company (NFTC). The breakup of NFTC's monopoly over foreign trade gave local governments and FTCs an incentive to increase foreign trade and helped stimulate local initiatives.

Moreover, part of China's efforts to decentralize foreign trade involved the central government devolving certain foreign trade management power to provincial, municipal and autonomous regional governments. Local governments were given the power to examine and approve foreign investment enterprises under certain investment amounts, to approve the establishment of foreign trade enterprises in their jurisdictions, to issue import and export licenses, and to manage quotas allocated to foreign trade enterprises in their localities. Local governments also took control of the branch offices of NFTC under MOFERT, which were previously under the jurisdiction of a national FTC office in Beijing. Furthermore, instead of turning over all the foreign exchanges to the central government, local governments were allowed to retain, for their own use, certain amounts of the foreign exchange earned through exports.

Although foreign trade decentralization injected vitality into China's foreign trade regime, decentralization also brought some unexpected problems. There were repetitious imports of the same products. In addition, FTCs engaged in unfair competition against each other. Finally, some local governments made foreign trade decisions which put local considerations above the national best interest.

The temporary loss of control led China to tighten central government control over foreign trade in the mid-1980s. China withdrew some foreign trade enterprises' approval powers from local government and put tighter control on the creation and operation of local FTCs. China also expanded the scope of commodities under licensing and quotas. Finally, China put more commodities under the exclusive control of the NFTC. Throughout the

11. Liguo Zhong, Ge Xin Shen Pi Zhi Du, You Hua Wai Shang Tou Zi Huan Jing (Reform the Approval System and Improve the Investment Environment for Foreign Investors), INT'L TRADE (GUO JI MAO Yi), No. 5, 1994, at 37.
13. HONG WANG, CHINA'S EXPORTS SINCE 1979, 113-14 (St. Martin's Press
1980s, China's foreign trade underwent decentralization and recentralization as China searched for the proper balance between central decision-making and local government decision-making.

2. Two-Tiered Foreign Trade Management

Currently, China's foreign trade management structure is composed of two levels of administration. One level comprises the ministry under the central government that is in charge of foreign trade. The other level comprises the departments (commissions and bureaus), which are in charge of foreign trade and economic cooperation under provincial, autonomous regional, and municipal governments.

At the central government level, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) is the department in charge of foreign trade and economic relations. While many other departments, agencies and financial institutions are also involved in foreign trade administration, the new FTL explicitly provides that "[t]he department in charge of foreign economic cooperation and trade under the State Council takes charge of all foreign trade work in the whole country..." Under the FTL, MOFTEC is horizontally the department within the State Council in charge of administration of foreign trade and economic cooperation and vertically the highest administrative authority in China's foreign trade apparatus.

As the regulator and coordinator of China's foreign trade system, MOFTEC works closely with the State Planning Commis-

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14. The ministry in charge of foreign economic relation and foreign trade at the central government has undergone considerable organizational changes. The framework of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) was laid down in 1982 when the Ministry of Foreign Trade, the Ministry of Foreign Economic Relations, the Foreign Investment Control Commission, and the Import-Export Commission were consolidated into the Ministry of Foreign Economy Relations and Trade (MOFERT) to be in charge of China's foreign investment and trade. After some internal restructuring, the Ministry adopted its current name, MOFTEC, in 1993.

15. Within the central government, a number of departments and agencies are involved in foreign trade activities. The State Planning Commission is responsible for making initial control figures for imports and exports for long-range and annual plans. The People's Bank of China controls the national foreign exchange and fixes the foreign exchange rate between Renminbi and foreign currencies. The State Pricing Administration supervises the setting and enforcing of prices of imported goods. Various industrial departments participate in making decisions of imports and exports regarding goods under their jurisdictions. Tian Liwei, Li Jun, He Yuzhou, Zhang Shongtao, Run Wo Guo Dui Wai Mao Kong Zhi Ji Neng De Zhuan Huan (On the Mechanistic Change in the Macro-Control of China's Foreign Trade), FIN. & TRADE ECON., 1986, at 37.

16. Foreign Trade Law, supra note 6, art. 3, ¶ 19-586, at 25,201.
sion and other related ministries to formulate the national foreign trade policy, to make the national import and export plan,\textsuperscript{17} and to draft laws and regulations involving foreign trade activities. In addition, as the highest administrative authority for foreign trade, MOFTEC is responsible for granting foreign trade rights to FTCs, enterprises and organizations; approving export quotas and import and export licenses; supervising technology transfers to Chinese enterprises; approving the establishment of foreign investment enterprises in China; and negotiating bilateral and multilateral trade agreements with foreign governments. Furthermore, MOFTEC is also responsible for supervising the implementation of the national trade policy and overseeing the work of foreign trade bureaus and commissions at provincial and municipal levels. Finally, MOFTEC supervises specialized NFTC and several trade-related service companies.\textsuperscript{18}

The central level of foreign trade administration also includes the Special Commissioners' Offices of the MOFTEC at the four major port cities of Shanghai, Tianjin, Dalian, and Guangzhou.\textsuperscript{19} As representatives of MOFTEC, they are charged with coordinating foreign trade activities in the port cities, issuing export and import licenses to enterprises and foreign trade companies, assisting national foreign trade companies in export management, fostering economic and trade relations between port cities and inland areas, and advising MOFTEC on trade policy and reform.\textsuperscript{20}

\textsuperscript{17} China's foreign trade plan is divided into two types, the mandatory plan and the guidance plan. The mandatory plan involves mainly the exports of raw materials and heavy industrial products and is handled mainly by the national foreign trade corporations. The mandatory plan is of a compulsory nature, and the State will ensure its fulfillment through foreign exchange allocation and subsidization to cover the losses. In the guidance plan, the regional and industry-specific export earnings and import spending limits were laid down. The ministries and local governments will organize foreign trade corporations to carry out the plan. Since the guidance plan is more flexible, the State will use more market force to provide foreign trade corporations with incentives for its fulfillment. As a result of foreign trade reform, China has ceased to use the mandatory plan to direct export. At the same time, the mandatory plan for imports has dropped to account for only 20\% of the imports.

\textsuperscript{18} Presently, there are 13 national foreign trade corporations under MOFTEC which are organized by the trade commodities and services they represent. The national foreign trade corporations remain key players in China's foreign trade system, even though they have decentralized some of their responsibilities to their branches in the provinces and municipalities. Their importance is reflected in the fact that they have a monopoly over imports and exports of China's most important foreign trade commodities. In addition, they also have considerable administrative power in allocating quotas on the commodities within their scope of business. For more information on the national foreign trade corporations, see Madelyn C. Ross, \textit{Foreign Trade Offensive}, \textit{CHINA BUS. REV.}, July-Aug., 1987, at 33.

\textsuperscript{19} Yue, supra note 2, at 493.

\textsuperscript{20} Jamie P. Horsley, \textit{The Regulation of China's Foreign Trade}, in \textit{LAW IN THE
At the local level, the departments (commissions and bureaus) of foreign trade and economic cooperation of provinces, autonomous regions, municipalities and some large- and medium-sized cities are the foreign trade administrative authority.21 They are subject to the dual leadership of MOFTEC and local governments. The departments supervise and examine the implementation of the State foreign trade policies and legislation in their areas. In addition, they formulate and supervise the implementation of local foreign trade plans in conjunction with provincial planning commissions. They also approve the establishment, merger and dissolution of the foreign trade enterprise in their jurisdictions in accordance with MOFTEC's authorization. Furthermore, they administer the issuance of import and export licenses and the allocation of import and export quotas to FTCs in their localities. Moreover, they supervise activities of FTCs in their regions. Finally, they develop local sources for import and export commodities trade in cooperation with local production management authorities.

3. Transformation of Foreign Trade Management from Micro-Control to Macro-Control

As much as it stimulated China's foreign trade expansion, foreign trade decentralization was not as much a fundamental change of the management mechanism as it was a transfer of authority to a lower level of government. Under the decentralization scheme, the local governments were responsible for making all of the important foreign trade decisions. These decisions ranged from setting trade targets and approving the establishment of foreign trade enterprises and foreign investment enterprises to overseeing the contracts signed between FTCs and enterprises. As long as the government continues to involve itself directly in the decision-making, China will remain caught in a vicious circle. The economy will become rigid when control tightens. Then, local governments will complain when the economy loses vitality. The complaints will cause the control to relax. Finally, the economy will turn chaotic again when the central government loosens control.

The adoption of a socialist market economy has shifted the focus of the foreign trade reform from searching for a balance between the central power and local power to establishing a macro-control mechanism. Instead of making business decisions for

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21. In the mid-1980s, some qualified large- and medium-sized cities were authorized to work out their separate plans of import and export and began to enjoy the same foreign trade administrative power as a province. Yue, supra note 2, at 493.
enterprises, the government exercises macro-management by setting a general foreign trade target and developing goals and trends. Then, the government directs foreign trade through the enactment of laws, through the development of State policies, and through economic means, such as tariffs, interest rates, exchange rates and loans. As a way to strengthen the macro-management of the government, the FTL provides that MOFTEC will “take[] charge of all foreign trade work in the whole country” and declares that China will adopt a unified foreign trade system. Structurally, MOFTEC dissolved several bureaus that exercised micro-control and established new bureaus whose work involved macro-control, such as the Economic and Trade Policy and Development and Economic Coordination. At the same time, the National People’s Congress, China’s highest legislative organ, has stepped up the institution of comprehensive economic legislation for the emerging socialist market economy. The promulgation of the FTL, along with the enactment of a dozen other laws in the past two years, has been part of this undertaking to strengthen macro-management of China’s economy in general and foreign trade in particular.

B. Foreign Trade Operation System

With the government department in charge of foreign trade separating itself from foreign trade enterprise management, China’s foreign trade is increasingly run by FTCs and production enterprises with foreign trade rights. Currently, China has about 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 operations. The following systems are established in the FTL to facilitate the operation of the foreign trade system.

1. Foreign Trade Enterprise Licensing (Approval) System

   The foreign trade enterprise approval system requires a foreign trade operator to obtain a license before setting up a foreign

22. Foreign Trade Law, supra note 6, art. 3, ¶ 19-586, at 25,201.
23. Id. art. 4, ¶ 19-586, at 25,201.
26. Id.
27. Foreign Trade Law, supra 6, art. 8, ¶ 19-586, at 25,203.
To obtain a license, a foreign trade operator must meet the following requirements:

1. it shall have its own name and organization setup;
2. it shall have a clearly defined scope of foreign trade operations;
3. it shall have the site, funds and professional personnel necessary for carrying out foreign trade activities;
4. the import and export operations handled by its agencies have reached the prescribed merit or it shall have the necessary sources of goods for import or export; and
5. it shall have other conditions as required by other laws and administrative decrees.  

Foreign trade operators who satisfy the above requirements can submit an application to the respective department in charge of foreign trade. However, foreign-funded enterprises (FFEs) are exempted from licensing when they import: (1) non-productive goods for their own use; or (2) equipment, raw materials, or other materials needed in their own production or in exporting their products according to the provisions of the laws governing FFEs and relevant administrative decrees. The rationale for these exemptions is that in setting up enterprises, the FFEs have already undergone a similar approval process.

With regard to the allocation of approval power, MOFTEC is responsible for examining and approving formation of NFTCs and trans-provincial FTCs. The local foreign trade department examines and approves the formation of a FTC at or below the provincial level. A foreign trade operator who has obtained approval must register with the industrial and commercial authorities to obtain a business license. It must also register the scope of its permitted activities with the General Customs Administration and MOFTEC before it can operate.

One controversial issue involves whether to license private business to set up FTCs. After much debate, some Congressmen favored licensing private businesses as long as they met the requirements set forth in the FTL. Although no clause in the FTL expressly prohibits private business from engaging in foreign trade.

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29. *Foreign Trade Law, supra* 6, art. 9, ¶ 19-586, at 25,203.
30. *Id.*
31. *Id.* art. 10, ¶ 19-586, at 25,203.
33. *Id.*
34. *Id.*
36. *Id.*
trade, China, in practice, continues to deny private business the right to set up a FTC. This bias against private business seems to have a lot to do with State monopoly over foreign trade which has been practiced since the Communists took power in the late 1940s. The more direct economic reason seems to be that, despite experiencing rapid growth in the past fifteen years, private business has not developed the necessary scale and expertise to engage in foreign trade. Indeed, very few private companies, if any, can meet the criteria set forth in Article 9 of the FTC.

Foreign businesses are also denied the right to set up FTCs in China, even though they have put considerable pressure upon China to open foreign trade business. While foreign investment enterprises, both exclusively foreign-funded enterprises and joint venture enterprises, can export their products and import certain equipment and materials necessary for production, no foreign businesses are allowed to set up FTCs to deal directly with Chinese customers.

Another concern involves how the approval agency will apply the criteria. Because the FTL does not have a mandatory approval provision and does not provide an appeal process, some commentators fear that the departments could turn down the application of a qualified enterprise under the discretion power. While this concern is justified since there is too much uncertainty in law enforcement in China, it is nevertheless unnecessary. Although in theory, the FTL leaves enough flexibility to administrative agencies to use the approval system to limit the number of foreign trade operators, the power will be used only in rare case where there is danger of losing control. In most cases, the licensing system is intended to control the quality of foreign trade operators as opposed to controlling the number of foreign trade operators.

Because the enterprise licensing system itself tends to reduce the number of foreign trade operators, it constitutes a form of quantitative restriction of trade in violation of the letter and spirit

37. Before the enactment of the FTL, individuals were not allowed to set up foreign trade companies in China. The draft foreign trade law proposed no substantial change with regard to this practice. Although some opinions favoring private business to engage in foreign trade were voiced in the deliberation of the FTL, it did not lead to a revision of the relevant clause. For more information, see Xiao Wang, China: Impending Law Will Promote Fair Trade, BUS. WK. (CHINA DAILY SUPP.), Dec. 5, 1993, at 1.

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of GATT, which is based on free trade principles. In an ideal situation, China should abandon this kind of administrative control because China has committed itself to move its foreign trade regime toward the international practice. However, the experience of the past few years has demonstrated that a certain level of administrative control is still necessary for China to maintain a normal foreign trade order.

The most important utility of the enterprise licensing system is that it provides China with an effective means to maintain the normal order of the foreign trade and the fine reputation enjoyed by China's foreign trade enterprises. In 1988, with the decentralization of foreign trade approval rights, foreign trade enterprises increased by two-thirds, with many of these enterprises not qualified to handle foreign trade. Because these enterprises lacked a stable source of export product, sufficient understanding of the international market, and well-trained personnel, there was considerable disorder when substandard products were sold to the international market and contracts were not duly honored. It took some effort on the part of the central government to restore the normal foreign trade order. The experience of the recent past has suggested that between the dismantling of old administrative controls and the maturing of the market mechanism, administrative control must be reduced in a phased way. As China's foreign trade minister states: “[i]f the licensing system is abandoned, China's foreign trade would be in a mess.”

In this sense, it is in both China's and its foreign trade partners' interest to do away with the licensing system only when the condition is fully ripe.

2. Foreign Trade Agency System

The foreign trade agency system was established in 1984 to provide the production enterprises with a channel to sell their products to, and buy goods from, the international market. In 1988, MOFERT formulated the Interim Regulations for Foreign Trade Agency System to regulate the major aspects of the foreign trade agency system. The FTL codifies the foreign trade agency system and makes it one of the basic systems of China's foreign

40. For a better understanding of the legal issues regarding the foreign trade agency system, see Zhang Yuejiao, Wo Guo Wai Mao Dai Li Zhi De Fa Lu Guan Xi (The Legal Relationship of the Foreign Trade Agency System), INTL TRADE (GUO JI MAO YI), No. 10, 1991, at 18.
trade regime.\textsuperscript{42}

Under the foreign trade agency system, a FTC enters into a contractual relationship directly with a production enterprise or other entity to serve as its agent in conducting purchasing and selling in the international market.\textsuperscript{43} The FTC will sign import or export contracts on behalf of the entity and charge a commission for the service, but the entity will bear the responsibility for all of the profits and losses of the transaction.\textsuperscript{44}

Under the Interim Regulations, the FTC and production enterprises should sign a contract to establish an entrusting relationship based on principles of equality and mutual consultation.\textsuperscript{45} The entrusting contract is the basic evidence to determine the rights and obligations of each party. The agency relationship will not be recognized and the rights and obligations of the parties will not be enforced without the entrusting contract, unless the entrusting party confirms the acts of the entrustee.\textsuperscript{46} The implication of the foreign trade agency system for foreigners is that foreigners must deal with either a FTC or a production enterprise authorized to conduct foreign trade. It is important for both Chinese production and foreign supplemental buyers to be aware that under the agency system, only a foreign trade operator may negotiate, sign and revise contracts with a foreign party. A foreign trade operator undertakes all contractual rights, obligations, and liabilities of the foreign party.\textsuperscript{47}

Compared with the procurement system in exports and the allocation system in imports, the foreign trade agency system represents a major step forward in bringing the domestic suppliers and end-users closer to the international market and linking domestic prices to the international market prices.\textsuperscript{48} Under the

\begin{footnotes}
\item 42. *Foreign Trade Law*, supra note 6, art. 13, ¶ 19-586, at 25,203-05.
\item 43. Id.
\item 44. LARDY, supra note 9, at 41.
\item 45. *Foreign Trade Law*, supra note 6, art. 13, ¶ 19-586, at 25,203-05; *Foreign Trade Agency Regulation*, supra note 41, art. 3.
\item 46. *Foreign Trade Agency Regulation*, supra note 41, art. 4.
\item 47. Gregory Barton, *Buyers and Sellers Beware when Signing Contracts*, S. CHINA MORNING POST, Jan. 6, 1992, at 11.
\item 48. The differences between the procurement system in exports, the allocation system in imports, and the foreign trade agency system are reflected in the fact that under the procurement system, a FTC signs a purchase contract with a production enterprise to buy export products and it is responsible for any profits and losses when it turns to sell the export products to foreign buyers. The defect of the procurement system is that it totally separates the production enterprise from the buyers in the international market. Because the production enterprises often manufacture products that do not suit the demands of the international market, FTCs incur large costs for stocking the export products which in turn increase the cost of production for FTCs. For instance, in 1983, the losses and subsidies for FTCs were running as high as Renminbi 970 million. DEMIN QIU, *ZHONG GUO WAI MAO TI ZHI*
\end{footnotes}
agency system, the financial interests of the production enterprises and the FTCs are closely linked. The freedom the production enterprises enjoy in choosing an FTC as its agent puts growing business pressure on the FTC to change its bureaucratic style of business management and to attract and keep more clients. On the other hand, because the production enterprise is ultimately responsible for the profits and losses of its products, it must closely monitor the international sale of its products, constantly improve the quality of its products, and reduce its production costs. Moreover, the agency system has the potential to combine an FTC’s experience in international purchasing and sales with a production enterprise’s strength in developing new products and technological innovation, thus greatly increasing the efficiency of China’s import and export business.

One of the major problems encountered in implementing the agency system was that some FTCs were not motivated in providing production enterprises with feedback from buyers. Sometimes, FTCs purposely withheld crucial international market information on product demand and prices in an effort to induce the production enterprises to sell low and buy high.49 FTCs often showed no interest in serving as conduits for information regarding product technology, styling, and packaging.50 As a result of this lack of international market information, many production enterprises were very slow to react to market changes, which ultimately impaired the competitiveness of their export products in the international market.51 To facilitate the bond of a close relationship, the FTL requires that “a foreign trade operator acting as an agent shall provide appropriate information to the trustor such as market prices and conditions of clients.”52 Besides providing market information to producers and end-users, FTCs are further encouraged to strengthen their bonds with producers and end-users to create a stable base of export products.

C. Import and Export Control System over Goods and Technologies

Import and export controls are used in China to best allocate China’s resources, to introduce the most advanced technologies, to provide protection to China’s infant industries, and to maintain the normal foreign trade order. The FTL has codified China’s

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50. Id.
51. Id.
52. QIU, supra note 48, at 45.
import and export control system which ranges from total ban of trading in certain commodities to restriction achieved through licensing and quotas.\(^5\)

1. **Scope of Import and Export Control**

   According to the FTL, China bans the imports of certain goods and technologies which jeopardize national security or the public interest, endanger the life or health of the people, endanger the environment, or are banned by international treaties or agreements to which the People's Republic of China is a signatory or a party.\(^5\) In addition, the FTL allows the State to restrict the import or export of the goods or technologies that: (1) involve national security or public interest; (2) are in short supply at home, or are in danger of being exhausted; (3) are restricted by importing countries or regions due to a limited market; (4) are necessary to protect the smooth or accelerated development of certain industries at home; (5) involve important agricultural, animal husbandry, and fishery products; (6) are necessary to maintain a certain financial position of the nation in the world or to ensure a balance of international payments; or (7) are subject to import and export restrictions by international treaties of agreements to which the People's Republic of China is a signatory or a party.\(^5\)

   To keep the public informed of the list of restricted goods and technologies, the FTL authorizes MOFTEC, in consultation with other relevant departments under the State Council, to draft, revise and publish the catalogs of the banned or restricted goods and technologies.\(^5\) In the past decade, the catalogs have been under constant revision with some products being added or removed.\(^5\) Depending on the balance of China's international payments and other factors, MOFTEC may, independently or together with other relevant departments under the State Council, make prompt decisions to restrict or ban the import or export of special goods or technologies not listed in the catalogs.\(^5\)

   Generally, a foreign trade operator can import and export non-restricted goods and technologies within its approved scope of business without the need to apply for a separate license. Chinese foreign joint venture enterprises do not need to apply for an import license for machinery, equipment, parts, raw materials, or

\(^5\) Foreign Trade Law, supra note 6, art. 19, ¶ 19-586, at 25,207.
\(^5\) Id. art. 17, ¶ 19-586, at 25,207.
\(^5\) Id. art. 16, ¶ 19-586, at 25,205-07.
\(^5\) Id. art. 18, ¶ 19-586, at 25,207.
\(^5\) For a long time, China banned imports and exports with South Korea and Israel due to antagonistic relations between China and these two countries. The establishment of foreign relations has finally resulted in the lifting of the ban. 
\(^5\) Foreign Trade Law, supra note 6, art. 18, ¶ 19-586, at 25,207.
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fuel needed for production within the scope of operation stipulated in the contract. Neither do they need to apply for an export license to export products within the scope of an approved joint venture contract. On the other extreme, trade of goods within the scope of approved business and trade handled by particular types of economic entities are not subject to licensing and quota requirements.

2. Import and Export Quotas

The import and export quota system was originally adopted to ensure effective utilization of quotas imposed on China's textile exports. Since 1979, China has signed bilateral textile agreements with the United States, Canada, Sweden, Finland, Austria, Norway and the European Economic Community (EEC), which include quota restrictions on Chinese textile exports to those countries. In addition to textile exports, some other export products, such as steel, ammonium tungstate exports to the United States, shoes, dried sweet potatoes, and canned mushrooms exported to EEC countries, and ceramics exported to Britain are also subject to quota restrictions. In order to stabilize the export market, fresh and frozen commodities exported to Hong Kong and Macao were subjected to quota administration in 1986. In addition, China also imposes import quotas to protect certain sectors of its economy. In 1992, import quotas applied to 7.7% of total imports, and export quotas covered 15% of China's exports. Along with the licensing system, quota administration serves the important purpose of controlling the total volume of imports and exports, making a rational distribution of key, staple or resource-bound goods on domestic and overseas markets, preventing dumping of export goods at low prices, and controlling high-price competition for imports.

a. Export Quotas

China's export quotas are divided into three types: planned quotas, passive quotas, and active quotas. Planned quotas cover thirty-eight varieties of bulk exports of resources that impact the national economy and people's livelihoods. They serve the important purpose of maintaining the balanced development of China's economy and ensuring the stability of people's living standards.
Passive quotas are basically a response to quota restrictions imposed on China's exports. Active quotas are set up to prevent market saturation and sharp drops for exports in overseas markets and price hikes for imports in domestic markets. According to the Interim Procedures for Export Commodities Control, the export commodities under control of State quota license include: (1) thirty-eight varieties of bulk exports of resources that impact the national economy and people's livelihoods and bulk traditional exports; (2) fifty-four varieties of China's key export commodities that dominate the world market or a specific market, or commodities that foreign countries request China to restrict; (3) twenty-two varieties of key brand-name, top-quality and special local products, certain products exported in great amounts, and a few other exports placed under general export license control; and (4) twenty-four varieties of Chinese exports which are put under passive control because foreign countries have imposed quotas on them.

Under the FTL, quotas apply to goods and technologies whose imports and exports are subject to restriction. Goods and technologies subject to quota can be imported or exported only when they have been approved by MOFTEC independently or jointly with other relevant departments under the State Council.

MOFTEC fixes active quotas according to domestic and foreign market conditions after MOFTEC solicits the opinions of the related importer and exporter associations. MOFTEC and relevant departments under the State Council usually allocate the annual active quota. MOFTEC works with the relevant departments to recommend adjustments of the products covered by the active quota administration list. The recommendations are made in accordance with the domestic industry and the export policies and submitted to the State Council for approval.

The passive quotas are the result of bilateral agreements between the Chinese government and other foreign governments regarding import limits on textiles. MOFTEC assigns, adjusts,
supervises, and administers the textile export quotas nation-
wide.\footnote{Id. art. 3, ¶ 50-400, at 62,743.} Local foreign trade departments then adjust the local tex-
tile quotas according to the regulations of MOFTEC and control, super-
vises, and inspect the quotas assigned to the local export corre-
porations.\footnote{Id.}

The export quotas are allocated to FTCs and production enter-
prises with foreign trade rights for execution. There are sixteen
kinds of especially important export commodities under planned
quotas that are managed by the State and implemented by
MOFTEC, through the NFTC.\footnote{Id. art. 3, ¶ 50-400, at 62,743.} Other export quotas are allocat-
ed to FTCs, which have the right to export those commodities, and
to production enterprises and FFEs, which have foreign trade
rights.\footnote{Id. art. 3, ¶ 50-400, at 62,743.}

Under the FTL, “the important export quotas shall be allocat-
ed . . . on the basis of the principles of efficiency, fairness, open-
ness and fair competition.”\footnote{Textile Quotas Law, supra note 71, art. 11, ¶ 50-400, at 62,745.} As a reflection of the fairness prin-

ciple, the FTL and other regulations require the government de-
partments at various levels to attach great importance to the
merits of a foreign trade enterprise in allocating export quotas.\footnote{Export Commodities Measures, supra note 62, art. 5, ¶ 50-708, at 63,665.}

For instance, in assigning textile quotas, the relevant agencies
will pay close attention to the actual export amount of the previ-
ous year, export price, and contributions to the textile export of a
the allotment process, annual quota allotment under quota license

China has introduced bidding into the quota allocation pro-
(now MOFTEC) of the People’s Republic of China Concerning the Administration of the Textile Export Quota, MOFTEC will ar-

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\footnote{EEC, Canada, Finland, Norway and Austria. Administrative Measures of the Min-
istry of Foreign Economic Relations and Trade of the People’s Republic of China on
Export Quotas of Textile Products, Act of Dec. 29, 1992, art. 2, 1 CHINA L. FOR
FOREIGN BUS. REG. (CCH) ¶ 50-400, at 62,741-43 [hereinafter Textile Quotas Law].}

\footnote{Id. art. 3, ¶ 50-400, at 62,743.}

\footnote{Id. art. 3, ¶ 50-400, at 62,743.}

\footnote{Id. art. 3, ¶ 50-400, at 62,743.}

\footnote{Id. art. 3, ¶ 50-400, at 62,743.}

\footnote{Export Commodities Measures, supra note 62, art. 5, ¶ 50-708, at 63,663-65.}

\footnote{Id.}

\footnote{Export Commodities Measures, supra note 62, art. 3, ¶ 50-708, at 63,663-65.}

\footnote{Textile Quotas Law, supra note 71, art. 11, ¶ 50-400, at 62,745.}

\footnote{Export Commodities Measures, supra note 62, art. 5, ¶ 50-708, at 63,665.}

range bidding for some of the products under quotas every year.\textsuperscript{81}

With regard to export commodities quota control, corporations and enterprises empowered to export commodities under planned-quota control must propose and report the amounts of the commodities planned to be exported in the following year.\textsuperscript{82} The proposal and report is made to the foreign economic relations and trade departments of the provinces, autonomous regions, municipalities directly under the Central Government, or cities handling their own development plans.\textsuperscript{83} Local subsidiaries must also report the export plans to their parent corporations if they import or export non-ferrous metals, metallurgy, international petrol-chemical, electronics, or autos.\textsuperscript{84} After receiving the export plans from foreign trade corporations and enterprises, local government offices in charge of foreign trade will balance all of the proposed export amounts of commodities, and submit a written report of the results to MOFTEC.\textsuperscript{85} In addition, foreign trade and industry-trade corporations under various ministries or commissions will compile the plans for exporting the planned-quota commodities in the following year and report them to MOFTEC.\textsuperscript{86} MOFTEC will make a final determination for all the proposed amounts of annual exports of commodities under the planned-quota goods and give orders for their enforcement.\textsuperscript{87} After the local government in charge of foreign trade and MOFTEC approve the export plan, FTCs must apply for licenses of the allocated quotas of export from offices assigned by MOFTEC by showing their planned-quota export certificates.\textsuperscript{88} A license for an annual export quota is valid for the current year and is subject to non-renewal.\textsuperscript{89}

b. Import Quotas

Import quotas (also called planned quotas) are adopted primarily to protect China's machinery and electronic industries and to maintain the balance of payments. The import quotas generally cover the products China needs to import in order to regulate market supply. Excessive import of these products will not only

\begin{itemize}
  \item \textsuperscript{81} Textile Quotas Law, supra note 71, art. 12, \$ 50-400, at 62,751.
  \item \textsuperscript{82} Provisional Regulations of the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China Concerning the Administration of Voluntary Quotas for Export Commodities, Act of Apr. 20, 1993, art. 5, 1 CHINA L. FOR FOREIGN BUS. REG. (CCH) \$ 50-683, at 63,517.
  \item \textsuperscript{83} Id.
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} Id. art. 6, \$ 50-683, at 63,519.
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id.
  \item \textsuperscript{88} Id. art. 13, \$ 50-683, at 63,521.
  \item \textsuperscript{89} Id. art. 14, \$ 50-683, at 63,523.
\end{itemize}
seriously harm the development of China’s machinery and electronic industries and products, but also will threaten the status of the State’s foreign exchange payment.  

The planned quotas are usually determined at the annual Planning Conference in which MOFTEC, State Economic and Trade Commissions, other departments of the central government, State corporations, and trading companies conduct a complex negotiation. Once the State Council determines and approves the “demand” for each product, MOFTEC will notify all provinces, autonomous regions, municipalities directly under the central government, cities handling their own development plans, and FTCs under various central departments, who will then execute the quotas. With regard to machinery and electronic products, the allocation of the annual quotas is essentially administered by the State Council’s Machinery and Electronics Imports Office (SCMEIO).

While the procedure for applying quotas may vary slightly from product to product, the procedures on quota administration of machinery and electronic products illustrate the overall practice. To import machinery and electronic products covered by quota administration, the importing unit files applications for import of the products and provides the relevant documents and explanations to the local machinery and electronic products administrative organizations (often the machinery and electronic bureau of local government). The local administrative authority will relay the application and relevant materials to an office specially set up to coordinate and control machinery and electronic products imports; the office will approve and issue quota certificates.

3. Import and Export Commodity Licensing

Import and export commodities licensing requires a foreign trade operator to apply to the appropriate agency for a license before ordering goods for import or shipping goods for export. In the early 1950s, China instituted the first licensing system as part of the socialist planned economy. In the early 1980s, as China decentralized its foreign trade system, China promulgated two regulations to improve foreign trade management: (1) the Interim

90. Provisional Procedures on Control of Import of Machinery and Electronic Products, art. 9 (MOFTEC, Oct. 7, 1993), reprinted in CHINA ECON. NEWS, Nov. 22, 1993, at 8 [hereinafter Machinery Import Procedures].


92. Id.

93. Machinery Import Procedures, supra note 90, art. 11, at 9.

94. Id. art. 13, at 9.
Procedures of the State Import-Export Commission and the Ministry of Foreign Trade of the People's Republic of China Concerning the System of Export Licensing; and (2) the Provisional Regulations of the People's Republic of China on the System of Licensing of Importing Licensing. The FTL makes the licensing system one of the two methods for importing and exporting because it has proven to be an effective and flexible means to regulate foreign trade.

A foreign trade operator is deemed to have obtained the import and export license for the commodities within the approved scope of business after a government agency grants the foreign trade right. As a result, a foreign trade operator need not apply for a separate license for each transaction within the approved scope of its business. However, a foreign trade operator must apply separately for an export license in the case of goods under section (1), Article 3 of the Interim Procedure of the State Import-Export Commission and the Ministry of Foreign Trade of the People's Republic of China Concerning the System of Export Licensing. Similarly, a foreign trade operator must apply separately for an import license for the import of restricted goods under Article 6 of Provisional Regulations of the People's Republic of China for the System of Licensing for Importing Goods.

a. Import Licensing

Import licensing serves three purposes. First, it protects the country's infant industries by restricting the import of certain products. Second, it maintains balance of payments for foreign currency by restricting the import of consumer goods. Finally, it allocates foreign exchange to different FTCs to allow them to import the most advanced technology and raw materials China needs for its economic development. The FTL requires a foreign trade operator to apply for import licenses for all restricted goods and technologies.

In addition to commodities within the scope of approved business of an FTC or a production enterprise with foreign trade right, other goods are exempt from import licensing requirements. These exempt goods include: (1) samples of advertising goods purchased from, or provided by, foreign business in the course of

96. Id.
97. Foreign Trade Law, supra note 6, art. 19, ¶ 19-586, at 25,207.
98. Export Licensing Procedure, supra note 3, art. 3, Vol. I, at 182; Import Licensing Procedure, supra note 3, art. 4, ¶ 51-600, at 64,201-03.
99. Fifty-three broad categories of products are subject to import licensing and importing licensing covered 25.1% of China's total imports. TRADE REFORM, supra note 49, at xx.
business of a foreign trade company authorized to conduct foreign trade; (2) urgently needed scientific, educational, cultural, sports, medical and health articles valued under $5,000 purchased by the above units; (3) urgently needed parts or parts of machines, instruments or electrical appliances at a value less than $5,000 purchased by factories, mines and other enterprises; and (4) specially approved exempt goods by the State Council or MOFTEC. In addition, FFEs are not required to apply for an import license for any machinery, equipment, spare parts, and raw or other materials contributed as part of a foreign investor's investment. Nor do they need to apply for an import license for such items that cannot be purchased in China, but are needed for the joint venture production.

As the Import Licensing Regulations stipulate, MOFTEC and the foreign trade bureaus of the various provinces, autonomous regions and municipalities are the organs charged with carrying out import licensing. MOFTEC generally acts on behalf of the State to issue import licenses. However, MOFTEC also authorizes the foreign trade bureaus of the provinces, municipalities and autonomous regions to issue certain types of licenses for their regions or districts within their jurisdictions. The chief trade commissioners in the port cities of Shanghai, Tianjin, Dalian, and Guangzhou are responsible for issuing import licenses for their jurisdictions.

Under the import licensing system, goods are divided into broad groupings according to the criteria for their award and the authorities for their administration. Category I licenses are administered by the central office of MOFTEC in Beijing and are awarded only to those importers that have allocation of foreign exchange from the central government, approval from the ministry concerned, and a valid import contract. Category I licenses cover almost the same products that are subject to the mandatory import plan. Category II import licenses are administered either by Special Commissioners' Offices located in the four port cities or by provincial or municipal Economic Commissions. Category II licenses are awarded to the importers who have foreign exchange allocation from the local government, approval from a concerned ministry or from the provincial government, and a valid import contract.

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100. Import Licensing Procedure, supra note 3, art. 7, ¶ 51-600, at 64,203-05.
101. Id. art. 9, ¶ 51-600, at 64,205.
102. Id. art. 3, ¶ 51-600, at 64,201.
103. Id.
104. TRADE REFORM, supra note 49, at xx.
105. Some of the products, such as fertilizers and cotton are subject to the mandatory import plan but not the Category I license. Id.
An importer who applies for an import license must present documents approving the importation from the relevant departments and submit an application which states the name of the imported commodities, specifications, quantity, unit price, total price, etc.\textsuperscript{106} Licenses are valid for one year. Government departments will refuse to issue an import license or will revoke an issued import license when: (1) the State decides to cease or suspend the imports of certain commodities; (2) the imports violate State foreign policy; (3) the imports do not conform to the provisions of a bilateral trade agreement or payment agreement; (4) the imports fail to meet health or quarantine standards; or (5) the imports are harmful to State interest.\textsuperscript{107}

b. Export Licensing

Export licensing is established to strengthen the State control over export commodities and to coordinate and unify the foreign trade activities of the various localities and departments in foreign transactions and export.\textsuperscript{108} Export licensing serves the purposes of increasing the prices of export commodities and ensuring the adequate availability of these goods domestically.\textsuperscript{109} In 1992, export licensing was used for 676 Harmonized System commodity groups which accounted for fifteen percent of China's exports.\textsuperscript{110}

Except goods and technologies within an approved scope of business, an FTC or a production enterprise having the foreign trade right is required to apply separately for an export license when: (1) quotas are imposed on the commodities by the importing countries or regions; (2) a quantitative control is imposed by MOFTEC to prevent flooding the international market; (3) minimum export prices are imposed by MOFTEC to prevent the prices from being set too low; (4) commodities are controlled and prohibited by a competent authority of the State Council; or (5) commodities are subject to export control imposed by MOFTEC in order to meet conditions in the world market or due to foreign policy constraints.\textsuperscript{111} An export license is also required when:

(1) goods are shipped abroad by enterprises, State agencies, people's organizations, schools or individuals that have not received approv-

\textsuperscript{106} Import Licensing Procedure, supra note 3, art. 11, ¶ 51-600, at 64,205-07.
\textsuperscript{107} Id. art. 10, ¶ 51-600, at 64,205.
\textsuperscript{108} Export Licensing Procedure, supra note 3, art. 1, Vol. I, at 182.
\textsuperscript{109} The export licensing for some agricultural commodities such as beef, pork, and vegetables exported to Hong Kong and minerals such as tungsten exported to the international market are for the purpose of price control. Controls over rice and maize are for the purpose of ensuring sufficient domestic supplies. TRADE REFORM, supra note 49, at 68.
\textsuperscript{110} Id.
\textsuperscript{111} Export Licensing Procedure, supra note 3, art. 3, Vol. I, at 183-84.
China's Foreign Trade Law

al to engage in export business; (2) goods to be shipped abroad are products for exhibition and sale at exhibitions in foreign countries organized by relevant departments, enterprises and people's organizations; (3) enterprises, factories and mines which have signed contracts with foreign countries for compensation trade, processing on order or loans request to export commodities directly, without going through the foreign trade corporations; (4) goods are shipped abroad by foreign diplomatic missions, representatives of foreign enterprises, foreign nationals, or tourists; and (5) goods taken out of China by foreign nationals and tourists exceed a reasonable amount for personal use.\textsuperscript{112}

Under the Export Licensing Procedure, MOFTEC and the relevant foreign trade bureaus of the provinces, municipalities and autonomous regions are the organs that issue the export license.\textsuperscript{113} MOFTEC and the Special Commissioner's Offices in certain port cities are responsible for issuing export licenses on a few export commodities which are important to China's export and which face keen competition in the world market; foreign trade bureaus at the provincial level will issue licenses on the majority of licensing commodities.\textsuperscript{114}

A foreign trade operator should submit an application for an export license to an approving agency that includes the name of the exported commodity concerned, its specifications, the country or region of destination, quality, per-unit price, total price, delivery date, method of payment, etc.\textsuperscript{115} After examining and approving the application, the approving agency issues a license for the export of the commodities, which will be valid for no more than six months.

Under the Export Licensing Procedure, MOFTEC has the emergency power to notify the enterprises to cease, suspend or reduce the export of any commodity to any country or region in situations in which: (1) the export does not conform to China's specific policies toward the particular importing country or region; (2) the export does not conform to the content and spirit of bilateral trade and payment agreements signed between China and a particular importing country and region; (3) it is necessary to postpone, suspend or reduce the export for the purpose of balancing foreign exchange in bilateral trade; and (4) the quality of the commodities involved does not conform to standards prescribed by the State or the provisions of the export contract, as tested and examined by the State Import and Export Commodities Inspection

\begin{itemize}
\item \textsuperscript{112} \textit{Id.} art. 4, Vol. I, at 184-85.
\item \textsuperscript{113} \textit{Id.} arts. 1-2, Vol. I, at 182.
\item \textsuperscript{114} Yue, \textit{supra} note 2, at 494.
\item \textsuperscript{115} \textit{Export Licensing Procedure, supra} note 3, art. 6, Vol. I, at 185.
\end{itemize}
c. International Trade in Service

Service trade involves many broad areas including finance, insurance, transportation, tourism, telecommunications, consulting services, and projects under contracts. The developing nature of China's service trade, combined with China's lack of experience in international service trade, makes China more cautious in its approach toward service trade in drafting the FTL. Unlike the trade in goods and technologies, in which China sets the principle of free trade, the FTL commits China to encouraging the development of service trade but falls short of establishing free trade principles. Under the FTL, China will grant market access and national treatment only to those parties who have signed or entered into the international service trade treaties or agreements with China. Beyond those areas, China has adopted an approach to opening the service sector on a selective and gradual basis.

China's protective approach toward service trade is generally attributed to the developing and sensitive nature of China's service trade. For a long time, China regarded the service industry as non-productive. As a result, the Chinese government carried out an economic policy that stressed the development of the manufacturing industry to the neglect of the service industry. Not until the 1980s did China begin to implement an overall reform policy. Despite the service sector's impressive growth and diversification during the 1980s, China's share of international service trade is still insignificant. As of 1987, China's total share in world export and import of private services was only 0.9% and 0.5%, respectively. According to statistics collected by GATT in 1989, of the forty leading service import and export countries, China ranked twenty-seventh in service export and thirty-second in service import.

Another factor contributing to China's cautious approach to service trade a lack of comprehensive evaluations of China's service industry. While each department commands a decent knowledge of the service industries within its jurisdiction, there is no agency that is responsible for collecting the statistics of each service industry and conducting general research to identify the

118. Foreign Trade Law, supra note 6, art. 23, ¶ 19-586, at 25,211.
119. Top Twenty, supra note 1, at 4.
weaknesses and strengths of those service industries. The lack of such concrete research not only makes it premature for China to swing open the doors of its service industry, but renders it difficult for China to conduct efficient service negotiations with other countries. 121

Furthermore, because the service industry includes such sensitive industries as banking, insurance, transportation and telecommunications, China shares the concern of other developing countries that foreign control over these industries might pose a threat to China's sovereignty and security. For China, control over these industries represents not only the socialist nature of its economy, but also its economic and political sovereignty. Although foreign service providers may provide more efficient and inexpensive services, China will proceed very cautiously because political considerations are bound to outweigh economic considerations where sovereignty and security are at stake.

The FTL's protective approach toward service trade does not provide a long-term solution to the growth of China's service industries, a fact of which China's policymakers are aware. On the one hand, the reciprocity principle of international trade requires China to open its service market further if China hopes to enjoy broader access to other countries' markets. On the other hand, a certain degree of controlled competition is helpful to stimulate the development of domestic service industries. The FTL addresses this issue by providing that China shall encourage the development of international service trade in steps. 122 In accordance with this principle, China has selectively opened its service sector to foreign service providers in finance, insurance, law, commerce trade and other fields. 123 In the financial sector, China has opened thirteen cities to foreign financial institutions to handle their foreign currency business. 124 Foreign insurance companies are allowed to set up offices to conduct liaison activities in China. 125 Through the end of September 1994, 108 foreign financial institutions, including 100 banks, 4 finance companies, and 4 insurers, have been approved to operate in China. 126 Currently, four drafted financial laws have been submitted to the State Council for discussion and examination and are expected to come into effect soon. 127 As China's domestic banks become more com-

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121. Id.
122. Foreign Trade Law, supra note 6, art. 22, ¶ 19-586, at 25,211.
123. For a detailed introduction to the opening of trade, see He Ning, Hong Xiaodong Fu Wu Mao Yi—Wu La Gui Hu He De Xin Yi Tie (Service Trade—A New Topic in the Uruguay Round), INT'L TRADE (GUO JI MAO YI), Nov. 5, 1994, at 29.
124. Id.
127. These four financial laws are "Law of the People's Bank of China," the
petitive, China will open its financial industry further to allow foreign banks to handle Renminbi business and to allow foreign insurance companies to sell insurance to Chinese enterprises and customers.\textsuperscript{28} For example, following the Chinese Ministry of Communications' 1992 decision permitting foreign shipping companies to set up wholly foreign-owned or Sino-foreign joint ventures to ship export and import goods, one foreign company established a subsidiary, and two foreign companies set up offices.\textsuperscript{29} Foreign firms are also permitted, with some restrictions, to invest in airport facilities.\textsuperscript{30} In professional service, accounting and law are partly open to foreigners, and foreign law firms can set up offices in Beijing, Shanghai, Guangzhou, Shenzhen and Haikou.

More significantly, China has been actively involved in international service trade negotiation. As a participant of the Uruguay Round talks, China submitted, in accordance with the procedures of the talks, an opening price list of initial commitments regarding service trade and an exchange-reduction opening price list for agricultural and non-agricultural products.\textsuperscript{31} China signed the General Agreement on Trade in Services (GATS) and the Agreement on Agriculture, and proclaimed that, once it is admitted into GATT, it will accept the obligations formulated at the Uruguay Round.\textsuperscript{32} It is safe to predict that with the restoration of China's GATT seat, the pace of opening China's service trade will be greatly accelerated.\textsuperscript{33}

II. EVALUATION OF THE NEW FOREIGN TRADE LAW

In all fairness, the first FTL in China's foreign trade legislative history has not brought about the fundamental changes to China's foreign trade regime that some contracting parties would have expected. What it has accomplished is the establishment of some general principles directing foreign trade and the codification of the foreign trade systems that have been in practice in China. The historic role of this FTL has been to fill a major gap in


128. Id.

129. China's Service Sector Opens Wider, supra note 125.

130. Id.


133. Since 1982, China's service trade has grown at annual rate of 15.5%, which is 15.1% higher than the growth of commodity trade. China's Service Sector Opens Wider, supra note 125.
China’s foreign trade legislation and to contribute to the improvement of the legal regime governing foreign trade. The most distinctive feature of this foreign trade law is that it has struck an appropriate balance between moving China’s trade regime closer to GATT’s liberalization requirement and preserving China’s fundamental interest in economic development. By exposing all the major discrepancies between China’s trade regime and the international practices, the FTL has underscored the need to continue trade liberalization, specifically in coordination with domestic economic reform.

A. Moving China’s Foreign Trade Regime Closer to GATT

China’s FTL was promulgated at a time when China was making the last efforts to have its GATT seat restored before the end of 1994. China views the enactment of the FTL essentially as an opportunity to present the achievements of foreign trade reform and to increase its chance of returning at a favorable term. The FTL has established three general principles. 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.

1. Unity of Foreign Trade Regime

One unavoidable result of foreign trade decentralization and liberalization is that the unity in China’s foreign trade regime has been diminished. Before foreign trade reform, China, with its centrally-planned economy, maintained a highly unified foreign trade regime in which all the trade decisions were made by the foreign trade department under the central government. With the decentralization of China’s economic management systems, the local governments, especially the governments in the Special Economic Zone and the fourteen coastal cities, have been given legislative power to experiment with new reform policies involving foreign trade and investment. With the decentralization of foreign trade, many foreign trade decision-making powers previously exercised by the central government have been transferred to the foreign trade departments of the local governments, and

more government ministries have been involved in foreign trade management.\textsuperscript{135} While the increase of local government foreign trade power has helped to bring local initiatives into play, foreign trade decentralization and liberalization have also created a dilemma because they have caused the central government to lose supervisory control, which is critical in maintaining unity in foreign trade legislation and law enforcement.

The erosion of unity in foreign trade legislation and law enforcement is apparent in the different treatment that China gives to enterprises in Special Economic Zones and to foreign-funded enterprises and domestic enterprises. In addition, the local authorities and various ministries under the central government often pass local legislation and administrative regulations that are inconsistent with China’s foreign trade laws.\textsuperscript{136} National foreign trade laws are not enforced uniformly because localities and ministries adopt different criteria in interpreting the laws.\textsuperscript{137} With increased uncertainty in foreign trade legislation and law enforcement, lack of unity has become a major concern of the GATT contracting parties.\textsuperscript{138}

Faced with these growing concerns over the unity of China’s foreign trade regime, the FTL makes special efforts to reaffirm China’s commitment to maintain “a unified foreign trade system.”\textsuperscript{139} To promote unity in foreign trade legislation, the FTL vests MOFTEC with the power to promulgate all the policies, laws and regulations regarding foreign trade.\textsuperscript{140} To ensure unity in foreign trade law enforcement and management, the FTL authorizes MOFTEC to take charge of foreign trade work in the entire

\textsuperscript{135} See Import and Export Control System over Goods and Technologies under Part II. Besides MOFTEC, many other government departments and industrial ministries are also involved in licensing and quota administration. For instance, State Economic and Trade Commissions is responsible for quota administration over machinery and electronics.

\textsuperscript{136} In 1986, Guangdong made a list of items subject to import controls. Some of the items, such as farm vehicles and heavy-duty trucks, were not contained on the import license list issued by the central government. Fair-Trade Subcommittee of the American Chamber of Commerce in Hong Kong, \textit{Import Controls in China}, \textit{China Bus. Rev.}, Jan.-Feb., 1987, at 42.

\textsuperscript{137} It is reported that one demonstration of this lack of uniformity is that one port of entry will enforce one rule while another port of entry might stress another. \textit{U.S.—China GATT Accession Talks Described as Making Progress}, 11 Intl Trade Rep. (BNA) No. 23, at 899 (June 8, 1994) [hereinafter \textit{Making Progress}].

\textsuperscript{138} For more on the United State’s concern over the unity of China’s trade regime, see \textit{China Trade Status: Hearings on H.R. 4590 Before the House Ways and Means Subcommittee on Trade}, FDCH TESTIMONY, July 28, 1994 (statement of Ambassador Charlene Barshefsky).

\textsuperscript{139} \textit{Foreign Trade Law}, supra note 6, art. 3, ¶ 19-586, at 25,201.

\textsuperscript{140} \textit{Resumption of Legal Status in GATT}, \textit{China's Foreign Trade}, July 1992, at 3.
country. Under the FTL, MOFTEC remains a powerful governmental organ exercising tremendous control in maintaining a unified foreign trade regime. Although efforts to restore uniformity in the foreign trade regime will face opposition from local governments and other industrial ministries who are reluctant to give up power, the FTL demonstrates the central government's commitment to increased unity in the trade regime.

2. Increasing Transparency of China's Foreign Trade Regime

Prior to China's transformation to a socialist market economy, lack of transparency was a distinctive feature of China's foreign trade regime. Under the centrally-planned foreign trade system, China relied primarily on foreign trade plans and "internal documents" to direct foreign trade activities. The annual imports and exports plan was classified as a top "business secret" of the State. The "internal documents," which were frequently used in directing foreign trade activities, were available only to a very limited number of government officials involved in foreign trade. The lack of transparency in China's foreign trade regime increased the difficulty in penetrating China's markets and was a major concern of the GATT contracting parties over the incompatibility of China's trade regime with the international practice.

Over the past decade, China has taken significant steps to improve the transparency of its foreign trade regime. The promulgation of hundreds of laws and regulations, many of which relate to foreign trade, has established a legal framework for foreign trade and has signaled China's move away from administrative control toward legal, as well as economic, management of foreign trade. In response to the GATT contracting parties' requests to halt the use of "internal documents," a significant number of previously unavailable decrees, rules, and regulations pertaining to import and export administration have been disclosed and published. China has made further commitment not to enforce any law, rule, regulation, administrative guidance or policy measure governing trade unless it was published.

142. With provinces gaining more political and economic powers in the last decade, it becomes more difficult to withdraw any power and rights given to the local governments. However, in this case, the central government has a strong incentive to pursue the policy of unity because the practice of local governments competing against each other in offering foreign investors preferential investment often have resulted in the loss of revenues to the central government.
145. *China to Make Trade Regulation Transparent, U.S. Official Says, ASIAN
Before the adoption of the FTL, the contracting parties' lingering doubts over the transparency of China's foreign trade regime focused mainly on China's practice of placing quotas on a long list of import and export products, 146 lack of transparency in the allocation of licensing and quotas, and internal directives taking precedence over published regulations. 147 The FTL represents a major step toward improving the transparency of China's foreign trade regime, which is an essential requirement of GATT. As the very first foreign trade law to fill a gap in China's foreign trade legislation, the FTL has made China's foreign trade regime more transparent than ever before. The FTL makes it easier for foreign trade partners to monitor MOFTEC's and other departments' foreign trade regulation by establishing a legal framework for foreign trade and by defining MOFTEC's jurisdiction, authority, and relation to other governments involved in foreign trade activities. Even though the FTL fails to abolish the use of quotas, the FTL requires the publication of the list of commodities under quotas and the identification of the government department in charge of making the list. These requirements represent a step toward keeping the practice transparent. 148 Moreover, the FTL makes the allocation of licenses and quotas more open and efficient by introducing more competition mechanisms into the distribution process. Following the enactment of the FTL, rules involving export quota bidding have been published, and public bidding has been introduced into the allocation of export quotas for four agricultural products. 149 The awarding of the licenses are based on the prices the bidding companies offer, their financial ability, and their credibility in the international market. 150

3. Diminishing Role of Non-Tariff Barriers

In the pre-reform period, China mainly relied on non-tariff barriers, such as foreign trade planning, licensing, quotas, and import monopoly, to manage the foreign trade. By contrast, in the reform period, the FTL significantly limits these administrative controls. Foreign trade planning is the most important and effec-

146. The alleged secret quota is one of the several major issues raised by the Unites States with regard to transparency of China's foreign trade regime. Making Progress, supra note 137, at 899.
147. It was reported that a secret State Council directive effectively banned American companies from participating in the development of China's telephone system. Jan Prybyla, How Should the U.S. Handle Trade Issue with China?, E. ASIAN EXEC. REP., Apr. 15, 1993, at 9.
148. Foreign Trade Law, supra note 6, art. 20, ¶ 19-586, at 25,211.
149. Quota Bidding Rules, supra note 80, at 5.
tive non-tariff barrier China has used to manage foreign trade. Foreign trade planning 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 foreign trade plan is formulated, the State will allocate foreign exchange responsibilities to FTCs to enable them to import the products covered under the import plan and to cover the losses suffered by FTCs 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.\textsuperscript{151}

Under the new foreign trade regime, the role of the foreign trade plan in China's foreign trade regime has been conspicuously diminished. First, the scope of the foreign trade plan has shrunk considerably from the 1980s to the middle 1990s. For instance, the mandatory import plan, which constituted 40% of China's imports in 1986, accounted for only 18.5% of all imports in 1992.\textsuperscript{152} The mandatory export plan has already been abandoned. As a reflection of China's determination to abandon eventually the mandatory foreign trade plan, the drafters of the FTL simply chose not to write any provisions on foreign trade planning in the FTL. While some might argue that the omission has more to do with China's desire to improve the appearance of its trade regime, an equally strong case can be made that China simply regards any foreign trade planning as transitional and will abandon it in the near future.

Meanwhile, efforts have also been made in the past decade to reduce and eventually abolish other forms of administrative controls. Import substitution, which was used to import those products that China itself could manufacture, was abolished in the early 1990s.\textsuperscript{153} Although licensing will remain for a period of time, China declared that it would eliminate it in phases.

B. China's Distinct Situation Versus International Practice

China's FTL lies at an interesting juncture in China's economic and foreign trade reforms. The adoption of a socialist market economy has dispelled any major uncertainty about the direction of China's economic development, making it possible for China to establish its foreign trade principles consistent with the general principles of GATT. However, the transitional nature of China's economy requires China to retain enough flexibility to enforce these general principles. Indeed, in enacting the FTL, China's policy-makers have given due consideration to the special

\textsuperscript{151} TRADE REFORM, supra note 49, at 24.
\textsuperscript{152} Id. at 28.
\textsuperscript{153} Id. at 81.
characteristics of China’s foreign trade regime.

1. China’s Developing Nation Status

The drafters of the FTL recognized that despite China’s remarkable economic growth and emergence as a major world trade power, it remains largely a developing country with a huge population to feed but comparatively limited natural resources to cultivate.\textsuperscript{154} It has been China’s consistent position that, for GATT purposes, China should be regarded as a developing country.\textsuperscript{155} As a developing country, China’s industries, especially capital, technology and knowledge-intensive industries, have lagged far behind the world in output, quality, technology, pricing mechanism and scale of production.\textsuperscript{156} To build and develop those national industries which are considered to be essential, China has long subjected auto, electronics, chemical, and advanced textile industries to a multiplicity of protections, such as high tariffs, import substitutions, import licensing, and quota administration.\textsuperscript{157} As a result of overprotection, these industries generally lack the strength and experience to compete with foreign counterparts in the international and domestic markets. The same is true with regard to the service industry. Compared with their foreign competitors, China’s service enterprises provide substantially fewer services.\textsuperscript{158} Even available services are not as sophisticated and convenient as the services of foreign service providers.\textsuperscript{159} In addition, the monopolization of service industries by a few companies and protection from foreign competitors have left

\textsuperscript{154} For a discussion of China’s developing status, see \textit{Is China Already a Super Giant?—Some Cold Water on the Hot Toning}, \textit{CHINA ECON. NEWS}, June 14, 1993, at 1-2.

\textsuperscript{155} One of the principles of China’s GATT bid is that China should be treated as a developing country. Li Zhingzhou, \textit{Resumption of China’s GATT Membership}, 21 J. WORLD TRADE L. 25, 25 (1987).

\textsuperscript{156} The gap between China’s machinery industry and developed country’s machinery is very obvious as only 5% of China’s machinery has reached the international level and 65% are below the international level. Li Gang, \textit{Return to GATT: Challenge and Opportunity}, INT'L TRADE (GUO JI MAO YI), No. 10, 1992, at 10.

\textsuperscript{157} China has maintained very high tariffs on a series of industrial products. The tariffs on some of the major imported industrial products are, 180% on cars, 220% on color TVs, 100% on refrigerators, 100% on tape recorders. \textit{Id.} at 9. Perhaps a comparison between China’s tariffs and those of the developed countries is more illustrative. In 1993, China’s import duties on sedans were 150%. During the same year, the developed industrial countries had an average import duties of merely 5% and the developing countries had an average of 13%. \textit{GATT Reentry: A Risk To China’s Fledgling Car Industry}, \textit{CHINA ECON. NEWS}, Feb. 22, 1993, at 5.

\textsuperscript{158} China’s insurance company did not begin to provide family property insurance until the early 1980s.

\textsuperscript{159} In China, a customer is not allowed to withdraw their foreign currency deposit until three months after he deposits the money using a check.
China's service industry with little experience of domestic as well as international competition. Given the vulnerability of many of China's industries, it is almost certain that many of China's industries will suffer huge losses if foreign manufacturers and service providers were allowed to compete freely against Chinese enterprises. There is even a danger that many of China's industries will never have a chance to grow strong enough to compete if China were to lift protections prematurely.

While China is sincere in bringing its foreign trade regime in line with international practice, the need to continuously protect its industries requires China to take a gradual approach to the opening of its service market, and to retain such protective measures as import licensing and quotas until China's industries have developed sufficient strength to handle foreign competition. Taking these factors into consideration, the FTL continues to use licensing and quotas to protect domestic industries, to safeguard its international monetary standing, and to maintain a balance of international payments. In light of China's inexperience in international service trade and the overall level of China's service industries, the FTL adopts a gradual liberalization principle instead of free trade principles governing the import and export of goods and technologies.¹⁶⁰

2. The Transitional Nature of China's Economic System

Perhaps the most distinctive feature of China's economic system is that it has been undergoing a transition from a planned economy to a socialist market economy. Unlike most other GATT applicants who only need to liberalize their foreign trade regimes, China also faces the daunting task of transforming its fundamental economic system from an administratively controlled economy to a market-oriented economy. China has carried out domestic economic reforms on pricing and the enterprise system very cautiously because these reforms will profoundly impact people's lives and social stability. While China intends to use foreign trade reform to stimulate the structural change of its economy, it has attached great importance on coordinating the development of domestic and foreign trade reform in making foreign trade reform measures compatible with China's general economic system. Because China's economic system has been only partly reformed, and new economic measures such as pricing, taxation, and interest rates

¹⁶⁰. China has taken some steps in opening its services trade to foreign investors. Foreign banks are allowed to deal in yuan business and foreign insurance companies; accounting and auditing firms are permitted to operate in China through joint ventures. Now China's Focus Falls on GATT, S. CHINA MORNING POST, May 27, 1994, at 20.
have not been very effective in regulating economic activities, China will have to rely continuously on administrative and economic means to ensure the smooth transition of its economic and trade regime. At this stage of China's economic reform, administrative control continues to play an important role in reducing the disruptions caused by embracing a market economy, and in maintaining stability in the life of the people, because it is the most familiar and effective under certain circumstances. In foreign trade management, China still needs planned quotas and some kind of exclusive management of certain commodities by NFTCs to guarantee the fulfillment of the national economic plan. As Chinese foreign trade enterprises face growing global protectionism, a strong government arm helps China make a good bargain in creating a favorable foreign trade environment. With FTCs gaining more business autonomy in a developing market mechanism, administrative controls in the form of licensing and quotas coordinate effectively FTC activities to ensure that FTCs will exercise their autonomy in maximizing both their interests and the national interest.

3. Inefficiency of China's Market Mechanism

In a mature market economy, price, taxation, exchange rates, interest rates, and finance are the major tools with which governments regulate the economy and direct enterprise activities. However, because of the embryonic nature of China's socialist market economy, economic leverages, especially pricing, have not been very effective in guiding enterprise activities in the market. While the proportion of market prices has grown to cover eighty percent of categories of goods in China, government fixed prices still apply to twenty percent of categories of goods that the Chinese government considers crucial to the life of the people and to the national economy. Price distortion is reflected in the fact that, for some commodities, government fixed prices are substantially higher than the cost of production and international market prices, thereby creating a higher demand in the domestic market. On the other hand, some government fixed prices are substantially lower than the cost of production and international market prices, thereby creating a strong incentive to export. Government price fixing leads to situations where the oversupply of a particular good in the international market does not result in the in-

crease of domestic prices and domestic sales. Because the domestic price of many products are fixed without giving sufficient regard to the cost of production, they do not effectively guide the enterprise or control the flow of imports and exports.

Such price system dysfunction adversely affects both imports and exports. On the import side, the higher domestic prices of some commodities are responsible for blind, repetitious importing of the same or similar product that threatens to consume large amounts of precious foreign exchange. On the export side, lower domestic prices give FTCs an incentive to sell products to the international market and to earn foreign currency. This has led to domestic FTCs competing against each other for control of export goods and expansion of export channels. Because of the intensity of the competition, some FTCs have utilized unfair competition practices, such as controlling sources of export goods and selling at unreasonably discounted prices to undercut competitors. The practice of the price competition, as a whole, is detrimental to China's national interest, resulting not only in the loss of revenue to China, but also in anti-dumping lawsuits against Chinese products.\textsuperscript{162}

Since the time to abandon the dual track pricing system is not yet ripe, China must use both economic and administrative means to alleviate the adverse effects of price distortion during the transitional period. China has retained licensing and quotas in the FTL because it recognizes that they are instrumental in regulating supply and demand and in curing the deficiencies of the market mechanism.

4. Lack of Genuine Independence of Chinese Enterprises

Another critical part of China's distinct situation involves State-owned enterprises which are the pillars of its economic system. The State has not given State-owned enterprises full independence to play by market economy rules. Consequently, these enterprises cannot fully control the profits and losses in their business activities. The most prominent problem State-owned enterprises have to face is that they lack sufficient power to make business decisions in a quickly changing market. Although the Industrial Enterprise Law and Regulations enacted in 1986 intended to expand the powers of State-owned enterprises in production, investment, foreign trade, pricing, recruitment, labor, and wages, enterprises have not gained the right to decide invest-

\textsuperscript{162} Shuxin Tong, \textit{Tong Yi Du Wuai Shi Fa Zhan Wo Guo Du Wuai Jing Ji Mao Yi De Ke Guan Xu Yao. (Uniting to Compete Against Foreigners Is an Objective Requirement of Developing Our Country's Foreign Economy and Trade), INT'L TRADE PROBS., No. 14, 1986, at 17.
ment policies, to dismiss unproductive workers, or to engage im-
ports and exports without first obtaining government approv-
al. Oftentimes, the enterprises have to go through the same
process as it did under the planned economy to seek the approval
of government authorities on such purely business decisions as
investment, foreign trade, assets disposal, recruitment, and wag-
es. These limits cause the enterprises to react very slowly to mar-
ket changes when making business decisions.

The enterprises' lack of independence means that they are
not really responsible for their losses. Although one-third of
China's State-owned enterprises operate at a loss, only a few of
them have actually gone bankrupt. Due to the fear of social un-
rest caused by massive unemployment, China has been very reluc-
tant to send the State-owned enterprises through the bankruptcy
process. As a result, banks must provide loans to these enterpris-
es, even if they are unable to repay the loans within the time
period prescribed in the loan agreement. In addition, State-owned
enterprises receive various direct or indirect subsidies from the
government. For those State-owned enterprises who suffer losses
because of the policy reason, the State provides direct subsidies to
help the enterprises absorb the loss. Furthermore, the State will
provide indirect subsidies, such as low-price energy and resources
and guaranteed bank loans, to State-owned enterprises that are
responsible for carrying out the national economic plan in order to
enable them to fulfill the plan target.

While foreign trade enterprises enjoy more independence in
their business activities, they are yet to be fully independent.
Under the current system, it is difficult, if not impossible, to ex-
pect FTCs, especially NFTCs, to be fully responsible for their
losses because the State often requires them to export a particular
product whose international market price is lower than the cost of
exporting. The State, in turn, assigns these FTCs exclusive rights
to handle the export of products whose subsidized local procure-
ment price is substantially lower than the international market
price, thus helping to make the FTCs profitable. Besides the
structural and policy reasons, the State also indirectly subsidizes
FTCs by purchasing products from production enterprises. Moreover, China's reluctance to send FTCs to bankruptcy is partly
to blame for the abnormal price competition engaged in by the
FTCs in the international market.

Because State-owned enterprises lack full autonomy in busi-

163. Kent Chen, Economic Backbone Coming to Life, S. CHINA MORNING POST,
164. TRADE REFORM, supra note 49, at 115.
165. Jan Prybyla, How Should the U.S. Handle Trade Issues with China?, E.
ness activities, the State-owned enterprises will be in a disadvantaged position when they compete against foreign competitors if China immediately lifts all administrative controls on imports. On the other hand, since FTCs are gaining some degree of autonomy without being ultimately responsible for their losses, they will naturally seek to advance their own interests, even at the expense of the national interest.

C. Issues and Prospects

As the above discussion demonstrates, the drafting of the new FTL reflects a strong tension between conforming China's foreign trade regime to international practice and giving due consideration to China's distinct situation. The balancing of these two interests has led to a foreign trade law that has left a considerable gap between what the FTL provides and what contracting parties expect with regard to trade liberalization. As Dwoskin, the chairman of the GATT working party reviewing China accession, stated after the enactment of FTL, "it is the consensus of the members of the working party in their report to the chairman that they don't feel that the market access offers that China has put on the table are really sufficient."\(^\text{166}\)

1. The Remaining Inconsistencies Between the FTL and GATT Requirements

From the contracting parties' perspective, the major deficiency of the FTL is that it retains all the major administrative controls which enable China to pick and choose in restricting foreign trade. The enterprise licensing system basically excludes private business and foreign business from setting up FTCs in China. The requirement that foreign companies must go through Chinese FTCs prevents foreign companies from engaging in after-sale service and marketing products on a large scale. With commodities licensing and quotas, China can control the timing and the types and amounts of imports and exports. In quantitative terms, over fifty percent of the country's foreign exchange earnings are subject to central government control, and fifty percent of imports are subject to some form of non-tariff barriers.\(^\text{167}\) While certain GATT members might retain one or two of these administrative controls at a time, no members are expected to have all of them at one time.\(^\text{168}\) More troubling is that the FTL has left too much

168. It is reported that South Korea also includes the licensing system in its foreign trade law. Xiao Wang, *Trade Law Meets International Standards*, Bus. Wk.
discretion in the hands of administrative agencies. Administrative agencies lack concrete standards to guide them in compiling lists of products subject to licensing and quotas. Furthermore, foreign enterprises must obtain approval from administrative agencies before they can obtain a license. Despite China's embrace of free trade principles, the FTL retains numerous administrative devices and vests broad discretion in the hands of administrative agencies. As a result, China's foreign trade regime is too prone to bureaucratic whim and is inconsistent with international practice. For example, in 1993, the government successfully helped raise the price of garlic sixty-six percent when it allowed only sixteen firms to export garlic instead of the more than 1,000 firms it had allowed the year before.\textsuperscript{169}

2. Recommendations for Further Reforms

To fully integrate China's economic regime into the international trade system, China must continue economic and foreign trade reform so that its foreign trade regime will conform to GATT's requirements of transparency and liberalization. These will be discussed in detail below.

a. Improving Transparency and Reducing Arbitrariness in Trade Management

An important goal of reforming China's foreign trade regime is to make the trade regime more transparent and less arbitrary through comprehensive legislation. By establishing only general principles governing foreign trade activities, the FTL has left open several issues for further legislation. The immediate solution is to step up legislation on the major systems of the trade regime in accordance with the general principles embodied in the FTL. Without further legislation, a general FTL will be of little help in reducing arbitrariness in China's foreign trade management.\textsuperscript{170}

Because the contracting parties have more concerns over lack of transparency and arbitrariness in the process of foreign trade enterprise approval, commodity licensing, and quota allocation, the license issuance and quota allocation processes must be more open, fair, simplified, and efficient.\textsuperscript{171} Formulating concrete and

\textsuperscript{169} China May See its Trade Deficit Expand in Year, ASIAN WALL ST. J., July 4, 1994, at 3.

\textsuperscript{170} It is China's plan to use three years to build up a fairly complete system of foreign economic and trade laws and regulations. See Jin Man, Commerce Laws to be Ready Within Three Years, BUS. WK. (CHINA DAILY SUPP.), Aug. 1, 1994, at 1.

\textsuperscript{171} Several laws and regulations have been published in the past few years to regulate licensing and quotas administration. Among them are: Detailed Rules of the Ministry of Foreign Trade and Economic Cooperation for Export Commodities
definitive standards and providing an appeals process would effectively reduce arbitrariness and mitigate the contracting parties' concerns. Revising some of the regulations governing licensing and quota allocation, and publishing the regulations governing the examination and approval of foreign trade enterprises, will help to alleviate those concerns.\textsuperscript{172}

China must restore uniformity in foreign trade policy and policy enforcement to reduce the uncertainty in trading with the Chinese FTCs located in different provinces and subject to different ministries. The National People's Congress should enhance legislative supervision to invalidate local legislation that is inconsistent with the foreign trade legislation of the country. In addition, MOFTEC should uniformly enforce China's trade laws and policies. Provinces and ministries should be prohibited from applying different standards in administering licenses because of local considerations.

Moreover, efforts should be made to adopt internationally accepted foreign trade practices. China should publish anti-dumping regulations, anti-subsidy regulations, and regulations on safeguard measures in the near future to shield domestic industries from unfair competition from foreign competitors. At the same time, China should publish regulations governing the behavior of import and export enterprises and competition between Chinese foreign trade enterprises.\textsuperscript{173}

b. Replacing Administrative Control with Economic Regulation in Trade Management

From a long-term point of view, the more important solution to making China's trade regime consistent with international practice is to continue to reform China's foreign trade regime pursuant to the trade liberalization principle. Foremost, while the State will continue to pursue an export development strategy and to support foreign trade growth by adopting various trade promotion policies, the government should avoid falling into the pattern of involving itself in the micro-management of foreign trade. The immediate attention should be devoted to reducing and eventually phasing out the mandatory import plan and foreign exchange plan to dismantle the country's foreign trade planning

\textsuperscript{172} In addition to a lack of concrete standards governing licensing approval, another defect in licensing regulations is that it does not provide an appeal process to those applicants who have failed to acquire the license.

\textsuperscript{173} MOFTEC Spokesman on Foreign Trade Restructuring, XINHUA NEWS AGENCY, July 27, 1994.
apparatus. China should abandon the foreign trade contract system, which calls for negotiation of a contract between the central government and local government, and local government and FTCs; the foreign trade contract system duplicates many features of the system used to negotiate economic plans, and it directs FTCs to seek foreign exchange earnings instead of maximizing profits.  

Despite playing a positive role in bringing about the foreign trade growth, relying primarily on FTCs to handle Chinese foreign trade insulates domestic producers and end-users from buyers and sellers in the international market. Thus, the practice operates as an obstacle to normal commercial relations between Chinese companies and foreign companies. Restricting FTCs from engaging in production and restricting production enterprises from handling foreign trade does not adequately prepare them to respond to international market changes. China should relax its approval standards for foreign trade rights so that more production enterprises and scientific research institutions can enter into foreign trade; this would allow these entities to combine their technological sophistication with an expertise in international trade. As more enterprises enter the foreign trade arena, bankruptcy will play its role in eliminating inefficient foreign trade operators.

While industry protection remains necessary considering China’s industrial development level, it is important to protect those industries that urgently need to be protected and to use internationally accepted means to provide protection. Although the time for China to abolish all non-tariff barriers in licensing and quota administration is not ripe, the scope of the non-tariff barriers nevertheless should be reduced steadily since they constitute the most opaque part of China’s trade regime. Licensing requirements on consumer goods, intermediate and capital goods, and raw materials could be reduced; some of China’s consumer goods have already reached a certain level of competitiveness. The overlapping of the administrative controls on some products


175. As of the end of 1993, China had authorized approximately 2,000 industrial enterprises to handle foreign trade. Wu Yi, Lu He Mian Du Yi Chang Mei You Xiao Yan De Shi Jie Shang Zhan (How to Face a Smokeless Commercial War), CHINA REFORM, July 1994, at 7.

176. Both Chinese scholars and foreign scholars have advocated introducing a bankruptcy mechanism to foreign trade enterprises. Their arguments are that because most FTCs are small or medium-size enterprises, their bankruptcies will not result in large-scale social unrest. Hangshen, supra note 174, at 30.

177. TRADE REFORM, supra note 49, at 82.

178. Id. at 87-88.
seems to be redundant and too complicated; therefore, it is possible to remove some products from multiple administrative controls. Furthermore, the current distinction between Category I and Category II should be abolished and steps should be taken to discontinue the practice of assigning import and export rights to one or a few NFTCs, such as timber, cement, and fertilizers, as this represents the most effective method of administrative control over imports. As China's industries become more competitive, and as the need for protection declines, tariffs and taxes should replace licensing and quotas as the main means for protection.179

c. Deepening Price and Enterprise Reforms

China must reform key aspects of its economic system in order to make its foreign trade regime totally compatible with the GATT requirements. First, China should lift government price controls on all products. In this way, enterprises, especially State-owned enterprises, would be truly independent. Second, China should switch from micro-management of the economy to macro-management of the economy.

In light of the restraint price distortion imposes on China's foreign trade reform, price liberalization should be the top priority of future reforms. Price distortion is responsible for the mandatory import plan, which, in turn, has led to the retention of the commodity licensing system, quotas, and monopolization of NFTCs; therefore, removing price controls on all products will create the conditions necessary to eliminate all the major administrative controls mentioned above.180 Currently, prices of industrial and capital-intensive products are higher than prices of the same products in the international market. Further, prices of primary and labor-intensive products are lower than prices of the same products in the international market. To correct this distortion, China will have to take steps to remove price controls on grains, some raw materials, and services, so as to eliminate the root cause of the price distortions.181 In addition to removing price controls, the price-setting mechanism should be improved to let enterprises become the true price setters.

Another priority is to reform China's enterprise system to create a modern enterprise system. The focal point of enterprise reform is to transform the operational mechanism and to raise efficiency. Since government interference operates as a major

179. For a discussion of China's commitment to lift control over import licenses, see China to Lift Control over Import Licenses Within 5 to 6 Years, CHINA ECON. NEWS, May 17, 1993, at 2.
180. TRADE REFORM, supra note 49, at 102.
obstacle for transforming the enterprise operational mechanism, the first step of enterprise reform should separate the government at various levels from the operational functions of the enterprises to allow the enterprises to make all important business decisions. On the other hand, the government must guarantee the enterprises the power to make decisions on such issues as capital construction, important technological improvement, and appointment of general managers to the enterprises.\textsuperscript{182} When conditions permit, more medium and large State-owned enterprises should be transformed into limited-liability companies and limited-liability stock companies pursuant to the Company Law.\textsuperscript{183}

To facilitate the creation of the modern enterprise system, reforms to establish social protection systems, such as welfare, unemployment insurance, and social security, should be accelerated so as to relieve the enterprises of all the undue burdens they now shoulder. In addition, the residence system should be reformed on a large scale to allow the free flow of the population to provide the labor forces needed.\textsuperscript{184} If the enterprises are still not able to compete, they should be sent to bankruptcy without any hesitation.

To ensure the success of the enterprises and price reforms, a more rounded system for macro-control will have to be established in the near future. This will allow the government to carry out economic management primarily through economic and legal measures instead of through administrative controls, such as the national economic plan, State price-setting on important commodities, and State subsidies. What are most urgently needed are structural reforms in finance, taxation, banking, investment, materials supply, and foreign exchange to strengthen the overall coordination in the operation and the management of the economy. Under the macro-control mechanism, the government will direct the activities of the enterprises mainly through regulating the market.

CONCLUSION

Since 1986, when China first submitted its application to have its GATT seat restored, China has made serious efforts to

\begin{itemize}
  \item \textsuperscript{184} China has long maintained a rigid residence registration system which restricts the people to move from rural areas to cities. In the past few years, reforms have been undertaken to allow the rural peoples to acquire the residency registration of some small cities.
\end{itemize}
move its foreign trade regime toward the international system represented by GATT. China's foreign trade management has been transformed from micro-control to macro-control. The State is increasingly resorting to economic means to manage foreign trade. In addition, the State has broken foreign trade monopolization by a few FTCs by authorizing thousands of FTCs and production enterprises to handle foreign trade. Finally, the scope of non-tariff barriers have been significantly reduced as China seeks to give tariffs a more important role. As a result of economic and foreign trade reforms, sufficient market mechanisms, institutions, and culture have developed to enable China to play a meaningful role in GATT without causing significant disruptions. The FTL consolidates the achievements in the reform of the foreign trade system and lays a legal foundation for reforming part of China's foreign trade regime that conforms to the contracting parties' requirements. By making China's foreign trade more transparent and uniform, the FTL has rendered China's foreign trade regime more consistent with international practice.

The issue of the compatibility of China's trade regime to the international system should be put into perspective in analyzing China's FTL. First, China's economic and foreign trade regime is substantially more liberalized than such centrally planned economies as Romania, Hungary and Poland at the time when they were admitted into GATT. A lack of precise criteria for the admission of non-market economy countries allows the contracting parties to have applied different standards to different countries. In this case, the contracting parties tend to make excessive demands from China as they fear that the size of China's economy and, especially its ever growing trading power, will cause more disruptions if there are no extra safeguard measures. Second, China has done almost everything it can to bring its trade regime in line with international practice. The reason that the FTL has not been able to eliminate all non-tariff barriers is not due to a lack of sincerity, but rather to the complexity of China's economic and foreign trade reforms, and to tensions existing between foreign trade reform and domestic reform. Moreover, China will be able to bring its quantitative control under GATT requirements for developing countries if China continues to limit the scope of the quantitative restrictions as it promises. Finally, in the

186. As a product of compromise, GATT allows the developing countries to maintain quantitative restriction under Article XII (providing for an exception for balance of payments), Article XVIII Section B (providing for special balance of payment exception for developing countries), or under Section (c) (providing for exception to protect infant industries in developing countries). B.I.S.D. 26S/205, 206,
mere fifteen years since initiating economic and foreign trade reform, China has already made itself a significant player in the international trade arena and has substantially reformed its foreign trade regime in line with international practice, as reflected in the new FTL. With the FTL setting China in the right direction of trade reform, and with China's foreign trade keeping the same momentum, the day that China makes its foreign trade completely compatible with the international practice should not be far off.