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China and the GATT Agreement on Government Procurement

JOHN LINARELLI*

I. INTRODUCTION

In the late 1980s and early 1990s, many of the economies of the Western industrialized nations languished in stagnation and recession¹ while the economy of the People's Republic of China ("China" or the "PRC") grew at tremendous rates.² A major trading partner of both the United States and Japan,³ China has been named the "world's fastest growing country"⁴ by the World Bank. China's economy is already among the largest in the world, and if its current growth continues, it may be the world's largest by the early 2000s.⁵

Despite all of this, China claims to be a developing country, with a per capita gross national product in 1992 of approximately \$380.00.⁶ As part of its pursuit of economic development, China has moved to reform its socialist economy to be more responsive to market forces⁷

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This article is dedicated to Professor Don Wallace, Jr., whose contributions to the subject of international and comparative procurement law and policy have been remarkable. His guidance to me has been generous, thoughtful and invaluable. I would also like to thank Professor James V. Feinerman for his steadfast encouragement of my research on the Chinese legal system.

1. See David Smyth, *Trade Agreements Brightening the Gloomy World Economies; Finance: GATT, in Particular, is Expected to Provide a Strong Boost at a Time When Key Countries are Dealing with Recession, Unemployment, Inflation and Other Ills*, L.A. Times, Jan. 10, 1994, at D7.

2. Nicholas D. Kristof, *The Rise of China*, Foreign Aff., Nov. 1993, at 61-62.

3. Alan Elsner, *Christopher Says China not Meeting Terms for MFN*, Reuters, Feb. 24, 1994, available in LEXIS, News Library, Reubus File; *Lies, Damn Lies and Trade Figures*, S. China Morning Post, Jan. 30, 1994, at 6; *Zhu Expects China-Japan Trade to Balloon 10-Fold*, Agence France Presse, Feb. 25, 1994, available in LEXIS, News Library, Afp File; *Michiyo Nakamoto, China-Japan Trade Increases by 31%*, Fin. Times, Jan. 26, 1994, at 6.

4. *China: World Bank Says China's Per Capita GNP is \$380*, Reuter Textline China Daily, Jan. 3, 1994, available in LEXIS, World Library, Txprim File; *World Bank: China "World's Fastest Growing Country" has [Per Capita] GNP Equal to Gambia's*, BBC Summary of World Broadcasts, Jan. 1, 1994, available in LEXIS, World Library, Bbcswb File.

5. Kristof, *supra* note 2.

6. See *China: World Bank Says China's Per Capita GNP is \$380*, *supra* note 4.

7. See *infra* notes 19, 98-101 and accompanying text.

and has pursued an export oriented strategy for growth⁸ reminiscent of Japan and the Four Tigers.⁹ As a result of this drive towards economic development, China depends significantly on open foreign markets for exportation of its goods.

The implications for world trade of China's growth and sheer size are tremendous.¹⁰ However, China is not a party to the General Agreement on Tariffs and Trade ("GATT"),¹¹ the most comprehensive multilateral treaty governing trade between nations.¹² At present, China

8. World Bank, *The East Asian Miracle* 144 (1993) ("An export-push strategy has been central to China's rapid development since the government opened the economy to the outside world in 1978."). As explained by the World Bank:

Since the launching of the reform program in 1979, the promotion of external trade has been central to China's efforts to modernize its economy. The policy has met with remarkable success, with exports having increased ninefold and imports more than sevenfold over the period.

....

Historically, China's approach to trade policy has been aimed at achieving export growth for the sake of generating foreign exchange without sufficient regard to its costs, while import policy has featured controls to regulate import growth.

World Bank, *China Foreign Trade Reform* xv (1994).

9. The "Four Tigers" are Taiwan, Korea, Singapore and Hong Kong. See Howard Shapiro, CLE Conference, *The Tides of Trade: The Four Tigers*, 2 Int'l Legal Persp. 87 (1990).

10. Long Younglu, *China's Readmission to GATT - GATT & China's Socialist Market*, 93-138 F.B.I.S.-PRC, July 21, 1993, at 7. Arthur Dunkel is quoted as saying:

China's market has become the most active part of the world market, and it is unwise to shut China, which enjoys a huge market potential, outside the door of GATT. Both GATT and the world market will pale [in] significance at the loss of the vast China market.

Id.

11. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT].

12. This Article uses the terms "membership" in GATT or "joining" GATT interchangeably, based on standard practice as it has evolved. As explained by Professor John Jackson:

Since in theory GATT is not an "organization," it does not have "members." The terminology used to emphasize this theory in the agreement itself is "contracting party." Yet we can fairly speak of "membership," in the light of the evolution of the GATT into what it is today.

Apart from the twenty-three nations which were original GATT [contracting parties], nations become GATT contracting parties by one of two methods. The normal method is governed by Article XXXIII of GATT and requires a two-thirds vote of approval by the existing contracting parties for a nation to be accepted into GATT.

....

A second path to membership also exists, however. Article XXVI(5c) provides that if a parent country has accepted the GATT in respect of a dependent customs territory (such as a colony), and if that customs territory later becomes independent, such territory can become a GATT contracting party merely through sponsorship by the parent country.

John Jackson, *The World Trading System: Law & Policy of International Economic Relations* 45 (1989).

only has observer status in the GATT. This means that China can attend meetings of the GATT Council and of the various GATT committees and bodies,¹³ including the GATT Committee on Government Procurement,¹⁴ and can participate in deliberations by these bodies but cannot vote on issues raised.¹⁵ Further, due to its lack of status as a contracting party, China does not enjoy most-favored nation treatment or other benefits conferred by GATT. Nor is China required to reciprocate such benefits to GATT members absent non-GATT bilateral treaties mandating such treatment on a country-by-country basis.¹⁶

The Uruguay Round of the GATT established the World Trade Organization [hereinafter WTO] in an attempt to address deficiencies in the organizational aspects of GATT. See *The GATT Uruguay Round: A Negotiating History (1986-1992)*, at 1891-1950 (1993). Provisions for joining the WTO and what is known as GATT 1994 are set forth in Final Act Embodying the Uruguay Round of Multilateral Negotiations, Agreement Establishing the World Trade Organization, available in Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade (Office of the U.S. Trade Representative, 1994) [hereinafter WTO Agreement]; Final Act Embodying the Uruguay Round of Multilateral Negotiations, Decision on Acceptance of and Accession to the Agreement Establishing the World Trade Organization, available in Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade (Office of the U.S. Trade Representative, 1994).

13. Robert E. Herzstein, *China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*, 18 *Law & Pol'y Int'l Bus.* 371, 374 (1986); Committee on Government Procurement, Report Presented to the Contracting Parties at their Thirty-ninth Session, GATT Doc. L/5503 (1983).

14. Committee on Government Procurement, Report of the Committee Presented to the Contracting Parties at Their Thirty-ninth Session, GATT Doc. L/6940 (1991). As an observer on the Committee on Government Procurement, China "may participate in the discussions but decisions shall be taken only by Signatories." *Id.* Furthermore, "[t]he Committee may deliberate on confidential matters in special restricted sessions." Participation of Observers, GATT Doc. L/5101/Annex I (1981) (Annex I was prepared in order to advise countries of the parameters of observer participation in the Committee).

15. *Supra* note 13.

16. See, e.g., Agreement on Trade Relations between the United States of America and the People's Republic of China, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4651 (entered into force Feb. 1, 1980). China has sought entry into the GATT system since July 10, 1986. Herzstein, *supra* note 13, at 374; China Files Membership Application, Council Hears U.S. Farm Trade Charges Against Japan, 3 *Int'l Trade Rep. (BNA)* 915 (July 16, 1986). China's application poses a unique legal problem for GATT. China was one of the original twenty-three contracting parties to the GATT, but the government of the Republic of China on March 6, 1950 withdrew from the GATT. Ya Qin, *China and GATT Accession Instead of Resumption*, *J. World Trade*, Apr. 1993, at 79-80. The question which has arisen is whether China will resume the original "China seat" or whether it will be a new contracting party. This distinction, however, may be of significance only to lawyers. The nature of China's economy and China's economic reforms appear to dominate the considerations of China's application for membership. See, e.g., Jeanne-Marie Claydon Gescher, *GATT's Problem with China*, *Far E. Econ. Rev.*, Jan. 11, 1990, at 46.

Although not presently a member of GATT, China has applied for membership,¹⁷ and this presents a serious challenge for the GATT and the World Trade Organization ("WTO"), the GATT's successor organization. Given China's large and growing economy and foreign trade volume, it may in the very near future be difficult for GATT to remain a feasible multilateral mechanism for the governance of international trade without China's participation.¹⁸ However, if China becomes a member of the GATT, which appears inevitable, questions arise as to whether it could also become a signatory to the GATT Agreement on Government Procurement (the "Agreement on Government Procurement" or the "Agreement") — this despite the fact that, in the eyes of some, the Agreement on Government Procurement is designed primarily for developed, industrialized nations which have economies characterized by a high degree of private ownership and a definable and limited government procurement sector.¹⁹

This Article examines the relationship of the GATT to China in the context of the Agreement on Government Procurement. To date, the relation of this particular part of the GATT to China seems to have been ignored by the literature.²⁰ This Article seeks to identify the broad issues raised by the prospect of China's accession to the Agreement and

17. With the establishment of the WTO China's quest for GATT membership became one for WTO membership. For the sake of clarity, I will continue to refer to GATT. There has been much discussion of China's application to join the GATT. See generally Harold K. Jacobson & Michel Oksenberg, *China's Participation in the IMF, the World Bank, and GATT* (1990); Qin, *supra* note 16, at 77; Chung-Chou Li, *Resumption of China's GATT Membership*, *J. World Trade L.*, June 1987, at 25; Wenguo Cai, *China's GATT Membership: Selected Legal and Political Issues*, *J. World Trade*, Feb. 1992, at 35; Feng Yu-shu, *China's Membership of GATT: A Practical Proposal*, *J. World Trade*, Dec. 1988, at 53; Thomas C.W. Chiu, *China and GATT: Implications of International Norms for China*, *J. World Trade*, Dec. 1992, at 5; Paul D. McKenzie, *China's Application to the GATT: State Trading and the Problem of Market Access*, 24 *J. World Trade* 5, 1990, at 133; Beth Van Hanswyck, *Legal Implications of China's Application to the General Agreement on Tariffs and Trade*, 5 *China L. Rep.* 75 (1988); Lori F. Damrosch, *GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics*, 1992 *Colum. Bus. L. Rev.* 19 (1992); Penelope Hartland-Thunberg, *China's Modernization: A Challenge for the GATT*, *Wash. Q.*, Spring 1987, at 81; Peter C. Sheridan, *Note, The Accession to GATT of the People's Republic of China: New Challenges for the World Trade Regime*, 23 *Willamette L. Rev.* 843 (1987).

18. McKenzie, *supra* note 17, at 150; Jacobson & Oksenberg, *supra* note 17, at 88.

19. See *infra* notes 82-86 and accompanying text.

20. General Agreement on Tariffs and Trade, Agreement on Government Procurement, Apr. 12, 1979, in GATT, 26 *Basic Instruments and Selected Documents*, 33-55 (1980) [hereinafter *Tokyo Round Agreement*], amended by General Agreement on Tariffs and Trade, Protocol Amending The Agreement on Government Procurement, Feb. 2, 1987, in GATT, 34 *Basic Instruments and Selected Documents* 12-22 [hereinafter *Protocol*].

to recommend possible solutions in order to set a framework for future discussion. In Section II, the article sets forth a brief analysis of the Agreement on Government Procurement. In Section III, it then examines whether China, based on its legal and economic structure, could become a party to this agreement. In Section IV, the Article suggests possible methods for dealing with accession to the Agreement by China.

II. THE AGREEMENT ON GOVERNMENT PROCUREMENT

Significant non-tariff barriers may exist in procurements by a country's government. These barriers can take many forms and often result in preferential treatment for domestic goods, services and suppliers or in outright prohibitions against procurement of foreign goods or services.²¹ Moreover, governments generally represent a significant market for goods and services, representing in many countries the largest single purchaser of goods and services.²² Further, for some items, such as military hardware, the government may have a monopsony in the item. As a result, protectionist policies in government procurements may significantly distort the free trade goals of the GATT.²³

The GATT Tokyo Round of negotiations (the "Tokyo Round"), opened in September 1973, addressed, among other things, non-tariff barriers to international trade, such as import licensing, subsidies and countervailing duties, and barriers to entry in government procurement.²⁴ The Agreement on Government Procurement was one of several agreements reached in this round.²⁵

The Tokyo Round version of the Agreement on Government Procurement (the "Tokyo Round Agreement") went into effect on January 1, 1981.²⁶ It was subsequently amended by a protocol on

21. Director General of GATT, *The Tokyo Round of Multilateral Trade Negotiations* 75 (1979) [hereinafter *Director General of GATT*].

22. Director General of GATT, *supra* note 21, at 75; Joanne Fiaschetti, *Technical Analysis of the Government Procurement Agreement*, 11 *Law & Pol'y Int'l Bus.* 1345 (1979); GATT, *GATT Activities* 1992, at 70 (1993).

23. Mark Linscott, *Presentation in International Procurement Law and Policy Seminar at the Georgetown University Law Center* (Feb. 2, 1994); see John H. Barton & Bart S. Fisher, *International Trade and Investment* 441 (1986) ("If national authorities were to purchase only domestic products, this would amount to a significant [non-tariff barrier]").

24. See Director General of GATT, *supra* note 21, at 8-9; Leslie Alan Glick, *Multilateral Trade Negotiations: World Trade After the Tokyo Round* 52-86 (1984).

25. Director General of GATT, *supra* note 21, at 1-16; Ronald Wellington Brown, *The New International Government Procurement Code Under GATT*, N.Y. St. B.J., Apr. 1981, at 198.

26. Tokyo Round Agreement, *supra* note 20, art. IX.

February 2, 1987, with the amended agreement taking effect on January 1, 1988.²⁷

Although not officially on the agenda for the GATT Uruguay Round of negotiations (the "Uruguay Round"), signed in Marrakech on April 15, 1994, the Agreement on Government Procurement was further amended during this round (the "Uruguay Round Agreement"). The Agreement as modified during the Uruguay Round will go into effect on January 1, 1996.²⁸

The parties to the Tokyo Round Agreement are Austria, Canada, the European Union and its member governments, Finland, Hong Kong, Israel, Japan, Norway, Singapore, Sweden, Switzerland, and the United States.²⁹ The Uruguay Round Agreement will not apply to Singapore but will apply to South Korea and Hong Kong as of January 1, 1997.³⁰ Aruba is seeking to accede to the Uruguay Round Agreement, and the U.S. is pressuring Taiwan to accede as part of Taiwan's application for GATT membership.³¹ This means that the thirty-four observers on the Committee on Government Procurement outnumber the actual parties to the Agreement.³²

A. *Government Procurement Standards Applicable to GATT Members*

GATT Article III:4 provides in pertinent part:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like

27. Protocol, *supra* note 20, at 12. The Protocol included the clarification of the term procurement as including leases and hire-purchases with or without the option to purchase, the lowering of the SDR from 150,000 to 130,000, the strengthening of the nondiscrimination prohibitions in the Agreement, the strengthening of prohibitions on information exchanges between procuring entities and potential offerors, additional provisions on procurement notices and tender documentation, and additional provisions on post-award publication requirements.

28. Final Act Embodying the Uruguay Round of Multilateral Negotiations, Agreement on Government Procurement, Apr. 15, 1994, available in Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade (Office of the U.S. Trade Representative, 1994) [hereinafter Uruguay Round Agreement]; Annet Blank, *The New Agreement on Government Procurement in the GATT 1* (Jan. 21, 1994) (unpublished manuscript on file with author).

29. Blank, *supra* note 28, at 2-3.

30. *Id.*; Uruguay Round Agreement, *supra* note 28, art. XXIV:3.

31. Blank, *supra* note 28, at 2-3; U.S. and European Community Urge Taiwan to Join GATT Aviation, Procurement Codes, 10 Int'l Trade Rep. (BNA) 1728 (Oct. 13, 1993).

32. GATT Doc. L/6940 (1991), *supra* note 14.

products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.³³

This most-favored nation principle forms one of the fundamental tenets of the GATT. GATT Article III:8(a), however, provides that this provision “[s]hall not apply to laws, regulations, or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.”³⁴ And GATT Article III:8(b) provides that the most-favored nation principle shall not apply to “subsidies effected through governmental purchases of domestic products.”³⁵ Rather, with regards to government procurements, contracting parties are required to provide only *de minimis* “fair and equitable treatment” to products produced by other contracting parties.³⁶ This highly discretionary standard effectively imposes no meaningful obligations on contracting parties to the GATT.³⁷

Country participation in the Agreement on Government Procurement is voluntary.³⁸ Both the Tokyo Round and the Uruguay Round Agreements provide that countries may join the agreement in two ways. First, by signature. Under the Tokyo Round Agreement, a GATT contracting party could accept the obligations of the Agreement “by signature or otherwise” when its entity lists were agreed to and included in Annex I of the Agreement.³⁹ Under the Uruguay Round Agreement, GATT contracting parties become parties to the Agreement if they sign by April 15, 1994; contracting parties who sign the Agreement by this date but who make effectiveness conditional to ratification will become parties so long as they ratify it before January 1, 1996.⁴⁰ Second, countries may join the Agreement by acceding to the it. Under the Tokyo

33. GATT, *supra* note 12, art. III:4.

34. *Id.* art. III:8.

35. *Id.*

36. *Id.* art. XVII:2.

37. The general exceptions in GATT article XX and the security exceptions in GATT article XXI apply to government procurements. See Director General of GATT, *supra* note 21, at 76; *infra* text accompanying notes 60-62.

38. In the Uruguay Round, it was decided that the Agreement on Government Procurement would be a plurilateral agreement in which participation would remain voluntary. WTO Agreement, *supra* note 12, art. II; Blank, *supra* note 28, at 4 n.2.

39. Tokyo Round Agreement, *supra* note 20, art. IX:1(a).

40. Uruguay Round Agreement, *supra* note 28, art. XXIV:1.

Round Agreement, a country, whether or not it was a GATT contracting party, could accede to the Agreement according to terms negotiated with already existing parties to the Agreement.⁴¹ Under the Uruguay Round Agreement, these same terms of accession apply to countries which are members of the WTO⁴² or of the GATT and seek to participate in the Agreement.⁴³

The Uruguay Round Agreement contains a special provision for determining observer status on the Committee on Government Procurement. Governments not party to the Agreement that (1) follow the specification provisions set forth in the Agreement, (2) publish procurement notices as required by certain provisions of the Agreement and (3) ensure that their procurement regulations will not normally change during the course of a procurement and, in the event that they do, can ensure satisfactory means of redress are entitled to observer status.⁴⁴ The Uruguay Round Agreement is unclear as to whether it is necessary for countries that are already observers, such as China, to maintain these standards in order to keep observer status.

B. Coverage for Country Participants

The Agreement on Government Procurement does not cover all procurements by parties to the Agreement. Application with regards to any party depends on which entities and procurements the party has agreed to make subject to the Agreement, whether a procurement meets or exceeds value thresholds set forth in the Agreement and whether national security, or another exception, removes a procurement from the ambit of the Agreement.

41. Tokyo Round Agreement, *supra* note 20, art. IX:1(b)-(d).

42. See *supra* note 38.

43. Uruguay Round Agreement, *supra* note 28, art. XXIV:2; see Final Act Embodying the Uruguay Round of Multilateral Negotiations, Decision on Accession to the Agreement on Government Procurement, Apr. 15, 1994, available in Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade (Office of the U.S. Trade Representative, 1994) at 417 (detailing procedures for accession).

44. Uruguay Round Agreement, *supra* note 28, art. XVII.

1. Entity Lists and Covered Procurements

The Tokyo Round Agreement by its explicit terms reached procurements of goods by "entities under the direct or substantial control" of the parties and "other designated entities."⁴⁵ In practice, however, application of the Agreement was limited to a specified list of entities agreed to by participants and set forth in Annex I of the Tokyo Round Agreement.

Similarly, coverage under the Uruguay Round Agreement is as specified for each party in the five annexes of Appendix I of the Agreement (the "Annexes"). Annex 1 contains "central government entities"; Annex 2, "sub-central government entities"; and Annex 3, "all other entities that procure in accordance with the provisions of this Agreement." Annex 4 defines the extent to which services are covered by the Agreement, and Annex 5 specifies construction services covered in the Agreement.⁴⁶ The addition of services and the inclusion of sub-central governments as entities covered by the Agreement were the most significant changes resulting from the Uruguay Round. Prior to the Uruguay Round, the Agreement covered only goods and central government bodies.⁴⁷

The Annexes are the subject of extensive negotiations among members because, in effect, they determine the scope of the Agreement. The more expansive the lists contained in the Annexes, the broader the coverage of the Agreement. Therefore, lists drawn too narrowly could threaten the viability of the Agreement.⁴⁸ To facilitate negotiation of the Annexes, in June 1978 it was decided that the process of offers and requests used in the GATT would be applied to negotiating entity lists.⁴⁹

45. Tokyo Round Agreement, *supra* note 20, art. I:1(c)

46. Uruguay Round Agreement, *supra* note 28, art. I:1.

47. Linscott, *supra* note 23.

48. See Director General of GATT, *supra* note 21, at 79.

49. As explained in the Report of the Director General of GATT on the Tokyo Round:

In June 1978, agreement was reached on a procedure for negotiations on entities, through the familiar GATT process of offers and requests. Countries were to notify in their offers those bodies to be considered as entities for purposes of the Agreement and in their reports, those entities in other countries that they would like to be so considered. Developing countries were given greater flexibility in tabling their offers consistently with their development, financial and trade needs Offers began to come forward as from July 1978.

Id.

2. Value Thresholds

The Tokyo Round Agreement applied to procurements greater than or equal to SDR 130,000.⁵⁰ The Uruguay Round Agreement is more flexible in that it permits governments to specify thresholds in the Annexes.⁵¹ All current signatories have done so.⁵²

As the GATT Director General described negotiations over thresholds in the Tokyo Round, when the Agreement was initially drafted, “[d]eveloping countries were aiming for the lowest possible threshold in developed country markets as they felt they had greater prospects at the lower end of the purchasing scale probably involving the less sophisticated requirements of governments.”⁵³ The United States also favored a low threshold, based on the belief that procurements by other countries would on average be for lower amounts than United States procurements.⁵⁴ The concern was to set a threshold low enough to promote meaningful agreement yet high enough to avoid the imposition of undue burdens on participating governments.⁵⁵

3. National Security and Other Exceptions

Article VIII of the Tokyo Round Agreement and Article XXIII of the Uruguay Round Agreement set forth exceptions from coverage under the Agreement for reasons of national security or for “measures necessary to protect public morals, order or safety, human, animal or plant life or health, intellectual property, or relating to the products of handicapped persons, of philanthropic institutions or of prison labor.”⁵⁶ These exceptions are similar to the security and general exceptions found

50. Tokyo Round Agreement, *supra* note 20, art. I:1(b). A Special Drawing Right, or SDR, is the international reserve unit of account of the International Monetary Fund. Fiaschetti, *supra* note 22, at 1348-49 n.29; Blank, *supra* note 28, at 3 n.1.

51. Uruguay Round Agreement, *supra* note 28, art. I:4.

52. The threshold in Annex 1 (“central government entities”) for all signatories is SDR 130,000. The threshold in Annex 2 (“sub-central government entities”) for most signatories is SDR 200,000. Annex 3 (“all other entities”) contains higher thresholds, such as at SDR 400,000 for utilities. The threshold for construction is SDR 5 million for most signatories in the first three Annexes. Blank, *supra* note 28, at 3.

53. Director General of GATT, *supra* note 21, at 78; Glick, *supra* note 24, at 30.

54. Glick, *supra* note 24, at 29-30.

55. *Id.* at 26; Director General of GATT, *supra* note 21, at 78.

56. Tokyo Round Agreement, *supra* note 20, art. VIII; Uruguay Round Agreement, *supra* note 28, art. XXIII; Director General of GATT, *supra* note 21, at 139.

in GATT Articles XX and XXI.⁵⁷ Although these provisions provide for exceptions to the Agreement, even for items and entities set forth in the Annexes, the customary way for a country to exempt certain types of procurements from the Agreement is to have them excluded from the Annexes. For example, the United States excludes many defense-related and other purchases from coverage under the Agreement by refusing to include them in the Annexes for the United States.⁵⁸

C. *National Treatment and Nondiscrimination*

National treatment and nondiscrimination are among the most important principles of the Agreement. The Uruguay Round Agreement provides that “[w]ith respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement,” the parties to the Agreement must apply “immediately and unconditionally” to the goods, services and contractors of the other parties to the Agreement “treatment no less favorable than” (a) that given to domestic goods, services and contractors and (b) that given to goods, services and contractors of any other party.⁵⁹ Further, the parties to the Agreement must apply the rules of origin for goods and services which they apply in the “normal course of trade and at the time of importation to imports of the same products or services from the same Parties.”⁶⁰

These broad principles have little meaning without adherence to open procurement and published laws by procuring countries. Therefore, the Agreement attempts to implement its principles by setting certain minimum transparency requirements for participating countries.⁶¹ This is done in part through rules on tendering, offeror qualifications, challenge procedures, and other rules and procedures designed to open up and make transparent the procurement process of the participating

57. Director General of GATT, *supra* note 21, at 139 (“General and security exceptions are provided for broadly along the lines of the relevant GATT Articles (XX and XXI)”); GATT, *supra* note 11, art. XX (“General Exceptions”); *id.* art. XXI (“Security Exceptions”).

58. Glick, *supra* note 24, at 64-65.

59. Uruguay Round Agreement, *supra* note 28, art. III:1; see also Tokyo Round Agreement, *supra* note 20, art. II:1. The extension of this provision to services was added during the Uruguay Round. The provision on national treatment and non-discrimination does not apply to customs duties, import charges and import regulations. *Id.* art. II:2; Uruguay Round Agreement, *supra* note 28, art. III:3. Customs duties, import charges and import regulations are covered elsewhere in the GATT.

60. Uruguay Round Agreement, *supra* note 28, art. IV; Tokyo Round Agreement, *supra* note 20, art. II:3.

61. Linscott, *supra* note 23.

countries and to remove and prevent secret or *de facto* discrimination against foreign goods, services and contractors.⁶² This section briefly discusses these principles and procedures in the Agreement.

1. Published Laws and Directives and Related Requirements

The Agreement requires parties to promptly publish all laws, regulations, judicial decisions, significant administrative rulings and standard contract clauses relating to government procurements covered under the Agreement in publications listed in Annex IV of the Tokyo Round Agreement and Appendix IV of the Uruguay Round Agreement. Publication of these materials must be in such a manner as will enable other parties and contractors to “become acquainted with them.”⁶³ Additionally, parties to the Agreement must be prepared, upon request, to explain their government procurement procedures to any other party⁶⁴ and to furnish post-award debriefings to unsuccessful offerors.⁶⁵

Both the Tokyo Round and the Uruguay Round Agreements require each government accepting or acceding to the Agreement to ensure that the laws, regulations, procedures and practices of its covered entities conform to the Agreement.⁶⁶ Each party to the Agreement must also inform the Committee on Government Procurement of changes in its laws and regulations and their administration.⁶⁷

2. Tendering, Source Selection and Award Requirements

Both the Tokyo Round and the Uruguay Round Agreements contain detailed provisions governing tendering procedures, tendering and procurement documentation and notices, source selection procedures,

62. Fiaschetti, *supra* note 22, at 1346; Glick, *supra* note 24, at 65-66.

63. Tokyo Round Agreement, *supra* note 20, art. VI:1; Uruguay Round Agreement, *supra* note 28, art. XIX:1.

64. Tokyo Round Agreement, *supra* note 20, art. VI:1; Uruguay Round Agreement, *supra* note 28, art. XIX:1.

65. Tokyo Round Agreement, *supra* note 20, arts. VI:2-5, V, VI; Uruguay Round Agreement, *supra* note 28, arts. VII-XV, XVIII.

66. Tokyo Round Agreement, *supra* note 20, art. IX:4(a); Uruguay Round Agreement, *supra* note 28, art. XXIV:5(a).

67. Tokyo Round Agreement, *supra* note 20, art. IX:4(b); Uruguay Round Agreement, *supra* note 28, art. XXIV:5(b).

negotiation procedures, and provisions relating to contract award.⁶⁸ The provisions governing offeror qualifications prohibit member countries from imposing qualification requirements on contractors if they are contrary to the principles of national treatment and nondiscrimination. Qualification requirements must, among other things, be published in adequate time for compliance, be limited to those requirements essential to the offeror's ability to perform and be no less favorable to foreign contractors than to domestic contractors.⁶⁹

Specifications are inherently restrictive of competition and could be prepared or used to unduly restrict competition. Both Agreements prohibit the improper use of specifications in procurements to create unnecessary obstacles.⁷⁰ The Agreements require the use of performance specifications and international standards where appropriate; national standards, under the Uruguay Round Agreement, are to be used only when international standards do not exist.⁷¹ Brand name only specifications are prohibited, although brand name or equal specifications are permitted.⁷² The Uruguay Round Agreement contains a procurement integrity provision prohibiting entities from obtaining improper advice from a potential offeror on the preparation of specifications.⁷³

68. Tokyo Round Agreement, *supra* note 20, arts. V, VI; Uruguay Round Agreement, *supra* note 28, arts. VII-XV, XVIII.

69. Uruguay Round Agreement, *supra* note 28, art. VIII; Tokyo Round Agreement, *supra* note 20, art. V:2.

70. Uruguay Round Agreement, *supra* note 28, art. VI:1; Tokyo Round Agreement, *supra* note 20, art. IV:1.

71. Uruguay Round Agreement, *supra* note 28, art. VI:2; Tokyo Round Agreement, *supra* note 20, art. IV:2.

72. Uruguay Round Agreement, *supra* note 28, art. VI:3; Tokyo Round Agreement, *supra* note 20, art. IV:3. Gosta Westring distinguishes three main types of specifications: (1) design specifications, (2) performance specifications and (3) description by "chemical analysis or physical characteristics." Gosta Westring, *International Procurement* 53-54 (1985). Westring describes brand name or equal specifications as a subset of the third category. He explains:

Another way of specifying the desired chemical or physical characteristics, which is cheap and easy but which may limit the scope for competition, is by referring to a *brand name*, adding the words "or equal" in order to extend an invitation to suppliers of similar products to compete with the brand name product referred to.

Id. at 54 (emphasis in original).

73. Uruguay Round Agreement, *supra* note 28, art. VI:4.

3. Challenge Procedures

The Tokyo Round Agreement required member countries to have procedures in place for the hearing and review of complaints by disappointed offerors in procurements.⁷⁴ The Uruguay Round Agreement contains much more extensive requirements for challenge procedures, some of which are remarkably similar to features in the bid protest system currently in place for federal procurements in the United States.⁷⁵ Some of the important new requirements are as follows:

- (1) Consultations with procuring entities are encouraged and must be performed in an impartial and timely manner. Further, they must not be prejudicial to the offeror's interests in obtaining meaningful relief in a challenge.⁷⁶
- (2) Challenge procedures must be "non-discriminatory, timely, transparent, . . . effective" and in writing.⁷⁷
- (3) If challenge procedures specify time limits for the initiation of a challenge by a disappointed offeror, the time limit must be no less than ten days.⁷⁸
- (4) Challenges must be heard by a court or an "impartial and independent review body."⁷⁹ The decision of the review body must be subject to judicial review or must have a procedure which provides for hearings before an opinion is rendered. The procedure must also allow for representation by counsel, public proceedings, participant access to the proceedings, written decisions stating the basis for any decision, the

74. Tokyo Round Agreement, *supra* note 20, art. VI:5. Both versions of the Agreement provide that the governments of unsuccessful tenderers may seek information, initiate consultation or invoke the dispute settlement procedures set forth therein. *Id.* arts. VI:6-8, VII; Uruguay Round Agreement, *supra* note 28, arts. XIX:2-4, XXII.

75. See Blank, *supra* note 28, at 7; U.S. General Accounting Office Bid Protest Regulations, 4 C.F.R. pt. 21 (1994); John Cibinic & Ralph Nash, *Formation of Government Contracts* 1005-46 (1986).

76. Uruguay Round Agreement, *supra* note 28, art. XX:1.

77. *Id.* art. XX:2, :3, :8.

78. *Id.* art. XX:5.

79. *Id.* art. XX:6.

presentation of witnesses and the disclosure of documents to the review body.⁸⁰

- (5) The procedure must contain provisions for "rapid interim measures," possible suspension of the procurement process and other measures designed to allow for effective relief while not unduly disrupting the procurement process.⁸¹

D. Developing Country Preferences

GATT contracting parties have articulated some concern with the economic well-being of developing countries and have attempted measures specifically intended to benefit them.⁸² The Tokyo Declaration of 1973, which launched the GATT Tokyo Round, stated that one of the two goals of the Tokyo Round was to assist the developing countries in international trade.⁸³ Along these lines, three clauses in the Preamble of the Tokyo Round Agreement address issues relating to developing countries.⁸⁴ Some have asserted, however, that the Agreement does not

80. *Id.*

81. *Id.* art. XX:7.

82. See, e.g., Final Act Embodying the Uruguay Round of Multilateral Negotiations, Decision on Measures in Favor of Least-Developed Countries, available in Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade (Office of the U.S. Trade Representative, 1994); GATT Committee III, Third Report of Committee III, GATT Doc. L/1162 (May 24, 1960); GATT Committee III, Report of Committee III on the Meeting of 21-28 March 1961, GATT Doc. L/1435 (March 1962); GATT Committee III, Report Adopted on 16 November 1962, GATT Doc. L/1732 (March 1963); GATT Committee III, Report Submitted to Ministerial Meetings in May 1963, GATT Doc. L/1989 (June 1964); GATT Committee III, Report by the Chairman of Committee III Submitted to the Contracting Parties on 18 November 1964, GATT Doc. L/2304 (July 1965); Report of the Working Party Submitted to the Contracting Parties on 25 November 1964, GATT Doc. L/2282 (July 1965); Protocol Relating to Trade Negotiations Among Developing Countries (1972); GATT Committee on Trade and Development, Trade Negotiations Among Developing Countries (Decision of November 1971), GATT Doc. L/3636 (1972); Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT Doc. L/4903 (Nov. 28, 1979). See generally Gerald M. Meier, *The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries*, 13 *Cornell Int'l L.J.* 239 (1980); Tigrani E. Ibrahim, *Developing Countries and the Tokyo Round*, 12 *J. World Trade L.* 1 (1978); Bela Balassa, *The Tokyo Round and the Developing Countries*, 14 *J. World Trade L.* 93 (1980).

83. Meier, *supra* note 82, at 239.

84. The Preamble provides in pertinent part as follows:

Considering that Ministers also agreed that negotiations should aim to secure additional benefits for the international trade of developing countries, and recognized the importance of the application of differential measures in ways which will provide special and more favorable treatment for them where this is feasible and appropriate;

have much impact on developing countries and that the GATT Agreements on Subsidies and Countervailing Duties are more significant to developing countries.⁸⁵ It has also been said that “the industrializing developing countries, not the least developed countries, have the best chance to benefit from the Agreement,” apparently because the emerging enterprises of the industrializing countries will be able to take advantage of open procurement markets.⁸⁶

The Agreement explicitly attempts to provide benefits to developing countries in the following ways:

- (1) Parties to the Agreement must “duly take into account” various “financial and trade needs” of developing countries relating to balance of payments, establishment of domestic industries, economic development and support for industrial units dependent on government procurement.⁸⁷

Recognizing that in order to achieve their economic and social objectives to implement programmes and policies of economic development aimed at raising the standard of living of their people, taking into account their balance-of-payments position, developing countries may need to adopt agreed differential measures;

Considering that Ministers in the Tokyo Declaration recognized that the particular situation and problems of the least developed among the developing countries shall be given special attention and stressed the need to ensure that these countries receive special treatment in the context of any general or specific measures taken in favor of the developing countries during the negotiations

Tokyo Round Agreement, *supra* note 20, pmb1.

85. Professor Gerald Meier explains:

The most significant accomplishment of the Multilateral Trade Negotiations is its series of codes and agreements regarding non-tariff matters. The agreements cover: “agricultural products . . . valuations for customs purposes; government procurement; technical barriers to trade relating to national product standards; import licensing; antidumping duties; and subsidies and countervailing duties. The latter two hold the greatest significance for the less developed countries.

Meier, *supra* note 82, at 247; Balassa, *supra* note 82, at 111-12 (“Among the individual codes, the Code on Subsidies and Countervailing Measures is of particular interest to the developing countries [w]hile the provisions of the Code on Government Procurement extend to non-signatory, least-developed countries, it is the industrialized, developing countries that have the best chance to benefit from the Code.”).

86. Balassa, *supra* note 82, at 112.

87. Uruguay Round Agreement, *supra* note 28, art. V:1; Tokyo Round Agreement, *supra* note 20, art. III:1.

- (2) The objectives stated in (1) above "shall be duly taken into account" in the negotiation of entity lists for developing countries.⁸⁸
- (3) Parties to the Agreement must develop and apply procurement laws and policies in a manner which will "facilitate increased imports" from developing countries.⁸⁹
- (4) In the development of the Annexes, developed countries, "shall endeavor to include entities purchasing products of export interest to developing countries."⁹⁰
- (5) Developing countries may negotiate with other countries "mutually acceptable exclusions" from the national treatment principle for certain entities, services or goods set forth in the Annexes and may modify their lists in accordance with the procedure set forth in the Agreement.⁹¹
- (6) Developed countries which are parties to the Agreement must, upon request and in a nondiscriminatory basis, provide "all technical assistance which they may deem appropriate" to the procurement area for the benefit of developing countries which are parties to the Agreement.⁹²
- (7) Developed countries which are parties to the Agreement are required to establish information centers to respond to "reasonable requests" from developing countries for information on procurements and procurement laws and

88. Uruguay Round Agreement, *supra* note 28, art. V:3; Tokyo Round Agreement, *supra* note 20, art. III:3.

89. Uruguay Round Agreement, *supra* note 28, art. V:2; Tokyo Round Agreement, *supra* note 20, art. III:2.

90. Uruguay Round Agreement, *supra* note 28, art. V:4; Tokyo Round Agreement, *supra* note 20, art. III:3.

91. Uruguay Round Agreement, *supra* note 28, art. V:4-5; Tokyo Round Agreement, *supra* note 20, art. III:4-5.

92. Uruguay Round Agreement, *supra* note 28, art. V:8-9; Tokyo Round Agreement, *supra* note 20, art. III:8-9.

policies. The Committee on Government Procurement also may set up such an information center.⁹³

- (8) Least developed countries shall receive "special treatment" from developed countries which are parties to the Agreement, including those least developed countries which are not parties to the Agreement.⁹⁴

In addition to the provisions enumerated above, which are applicable under either the Tokyo or Uruguay Round Agreements, the Uruguay Round negotiations resulted in a new provision concerning offsets.⁹⁵ Offsets are measures which are designed to benefit local or domestic economic development, such as local content requirements, special investment regulations and restrictions on technology transfers. The Agreement generally prohibits offsets, except that they may be used by developing countries that negotiate conditions for their use when they accede to the Agreement.⁹⁶ The use of offsets by developing countries, however, is not without restrictions. Under the new provision, developing countries must negotiate their use when they accede to the Agreement, and such offsets may be used only in the area of offeror qualifications and not in the area of criteria for award of a procurement contract. They must also be "objective, clearly defined and non-discriminatory" and they must be set forth in an annex to the Agreement.⁹⁷

93. Uruguay Round Agreement, *supra* note 28, art. V:11; Tokyo Round Agreement, *supra* note 20, art. III:10. The United Nations Conference on Trade and Development ("UNCTAD") and the GATT have, since January 1968, jointly operated the International Trade Centre, located in Geneva, Switzerland. The purpose of the Centre is to assist developing countries with trade matters. See Westring, *supra* note 72, at 11; U.N. Conference on Trade and Dev., *The History of UNCTAD, 1964-1984*, at 39, 269, UNCTAD Doc. OSG/286, U.N. Sales No. E.85.II.D.6 (1985); Keith Le Rossignol, *Official Commercial Representation Abroad: Handbook for Officers of Developing Countries* 388 (1973).

94. Tokyo Round Agreement, *supra* note 20, art. III:11. Under both Agreements, the Committee on Government Procurement is required to conduct reviews both annually and every three years in order to assess the operation and effectiveness of the developing country provisions of the Agreement. The annual review is less rigorous than the triennial review. The triennial review is a "major review." *Id.*, art. III:13.

95. Uruguay Round Agreement, *supra* note 28, art. XVI; see Blank, *supra* note 28, at 5-6.

96. Uruguay Round Agreement, *supra* note 28, art. XVI:2.

97. *Id.* art. XVI:2.

III. COULD CHINA PARTICIPATE IN THE GATT PROCUREMENT AGREEMENT?

The obstacles to China's becoming a party to the Agreement are similar to those blocking China's way to GATT membership in general. The Agreement appears to at least implicitly require an economic structure in which public and private functions are distinct, or at least distinguishable, and in which such distinctions have meaning. This is in conflict with China's socialist legal and economic systems. In essence, China presents an "apples versus oranges" problem for the GATT.

China has asserted that it is making substantial progress in converting its economy to a socialist market orientation with "Chinese characteristics."⁹⁸ There have, however, been conflicting signals on the nature of its economic reforms.⁹⁹ And, to the extent that China still relies on state planning, its economic activities are inherently discriminatory.¹⁰⁰ This section identifies some of the characteristics of Chinese law and the Chinese economy that must be addressed to consider China for membership in the Agreement on Government Procurement.

A. *Defining a "Government Procurement" by an "Entity" in China*

The threshold issue in determining compatibility with the Agreement is determining what it means for a "procurement" to be made by an "entity. In a socialist country, such as China, this is problematic. Despite significant economic reforms in China, the state enterprise system produces ninety percent of the gross domestic product of China.¹⁰¹ Clearly, it would be impractical for all of these state

98. See Yonglu, *supra* note 10, at 3-7; Decision of the CPC Central Committee on Issues Concerning the Establishment of a Socialist Market Structure (Nov. 14, 1993), China Econ. News, Nov. 29, 1993, at 1 (Supp. No. 12) [hereinafter Decision of the CPC Central Committee].

99. See Chris Yeung, Public Ownership Remains Mainstay, S. China Morning Post, Nov. 26, 1993, at 1; Chris Yeung, Contradictions Mar Master Plan, S. China Morning Post, Nov. 17, 1993, at 8; Public Ownership Remains the Mainstay in Enterprise Reform, China Econ. News, Dec. 6, 1993, at 1-2.

100. In a planned economy, the tariff and non-tariff barriers that the GATT is designed to prevent are not the major impediments to free trade. Rather, the impediments are governmental control and direction over purchases and prices. Thus, even the elimination of a trade barrier may not result in increased imports to the country, if the planning authorities decide against such imports or direct the price to below cost levels. Herzstein, *supra* note 13, at 375; James M. Reuland, GATT and State-Trading Countries, 9 J. World Trade L. 318, 320 (1975).

101. Chris Yeung, Public Ownership Remains Mainstay, *supra* note 99, at 1.

enterprises to be deemed engaging in "procurement" as that term is used in the Agreement.

One of China's most recent reforms has been the development of a private enterprise law.¹⁰² For all of its economic reforms, China delayed enactment of such a law until January 1994.¹⁰³ This new law, often called the new "corporation law" or "company law," is in many respects different from a typical Western law of corporations. In particular, public ownership remains with the state as the "mainstay" of the Chinese economy.¹⁰⁴ Based on this foundation of public ownership, the law attempts an overlay of management responsibility and investor provisions.¹⁰⁵ Introducing concepts of management risk, reward and

102. See *supra* notes 97-98; Eleven Draft Laws to be Deliberated by Legislators Next Week, Xinhua General Overseas News Service, Dec. 17, 1993, available in LEXIS, News Library, Xinhua File. Enterprise reform dominated the agendas of the Third Plenary Session of the Central Committee of the Fourteenth National Congress of the Chinese Communist Party in November 1993 and the last bi-monthly session of the National People's Congress in December 1993.

103. See *supra* note 102; William C. Jones, Some Questions Regarding the Significance of the General Provisions of Civil Law of the People's Republic of China, 28 Harv. Int'l L.J. 309, 312 n.17, 327-28 (1987); Company Law of the People's Republic of China, 2 China Laws for Foreign Bus. (CCH Australia) ¶ 13-518 (1985).

The legal nature and status of private enterprises in China is unclear. As of 1987, China had only enacted the general principles of a civil law code. General Principles of Civil Law of the People's Republic of China, Law & Contemp. Probs., Spring 1989, at 27 (Whitmore Gray & Henry R. Zheng trans.); see also Opinion (For Trial Use) of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of Civil Law of the People's Republic of China, Law & Contemp. Probs., Spring 1989, at 59 (Whitmore Gray & Henry R. Zheng trans.); The General Principles of Civil Law, available in WESTLAW, Chinalaw Database, File No. 0079. These General Principles failed to adequately define juristic personhood. See Jones, *supra* note 103; William Jones, Sources of Chinese Obligation Law, Law & Contemp. Prob., Summer 1989, at 69, 73. In 1988, China enacted its Law on Industrial Enterprises Owned by the Whole People, again bypassing any questions on how to make the distinction, at least a distinction that Western industrialized nations would make, between a private and a public enterprise. The Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People, available in WESTLAW, Chinalaw Database, File No. 464; James V. Feinerman, The New State Enterprise Law: China Takes a Step Towards Comprehensive Corporate Law, E. Asian Executive Rep., June 15, 1988, at 9; Kenneth T.K. Wong & Zhonglan Huang, A Critical Analysis of the Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People, 7 Pac. Basin L.J. 180, 188, 197-98 (1990). The Whole Enterprise Law covered only state-owned enterprises. In 1988, China exacerbated the confusion by enacting regulations on the registration of private juristic persons even before there was a law on how to create one. See Provisional Regulations on the Registration of Names of Industrial and Commercial Enterprises, available in Westlaw, Chinalaw Database, File No. 0190; James V. Feinerman, Economic Law 30 (June 30, 1993) (Materials for Chinese Law course, Georgetown University Law Center, fall 1993) (on file with author) [hereinafter Economic Law Materials].

104. See *supra* notes 98, 101-102.

105. Decision of the CPC Central Committee, *supra* note 98, at 3-5.

responsibility, the law attempts to make state enterprises more efficient and responsive to market forces.¹⁰⁶ Such an approach appears to accommodate ideological and practical difficulties with private ownership in a socialist system. Although some reformers may advocate outright private ownership, this is apparently too radical for hard liners and local cadres who share an interest in the status quo.¹⁰⁷

In addition to the problem of identifying "entities," determining which state organs in the state and collective structure "own" an enterprise, or certain parts of it, would be a daunting task because ownership rights in China are ill-defined.¹⁰⁸ Because state-owned property will remain in the state's hands and may, in some cases, comprise a significant part of a Chinese company's assets, it is unlikely that the new corporation law will be of great utility in distinguishing which Chinese entities should be covered by the Agreement.¹⁰⁹

For these reasons, the determination of which Chinese enterprises may be considered for treatment under the Agreement on Government Procurement should not be made in a manner which unduly focuses on enterprise ownership or on whether the enterprise is a "public" or "private" enterprise. Rather, in China, where public ownership and state enterprises dominate the economic scene, it may be preferable to assess enterprise status on the basis of what a particular enterprise does rather than what it is or by whom it is owned. It may, for example, be more productive for China and the GATT contracting parties to focus on whether a purchase involves something traditionally purchased in a "public procurement" rather than on the ownership interests underlying a procuring entity.

However, the Agreement avoids this question altogether, relying instead on the process of negotiation between parties to the Agreement

106. *Id.*; see Jianfu Chen, *Securitisation of State-Owned Enterprises and the Ownership Controversy in the PRC*, 15 *Sydney L. Rev.* 59 (1993); Edward J. Epstein, *The Theoretical System of Property Rights in China's General Principles of Civil Law: Theoretical Controversy in the Drafting Process and Beyond*, *Law & Contemp. Probs.*, Spring 1989, 177, at 193-211.

107. See Chen, *supra* note 106, at 66-70 ("ideological and political-economic debates" concerning share ownership).

108. James V. Feinerman, *The New State Enterprise Law: China Takes a Step Towards Comprehensive Corporate Law*, *E. Asian Executive Rep.*, June 15, 1988, at 12-15.

109. See *How to Turn a State-Owned Enterprise into a Company*, *Chinese Econ. News*, Mar. 7, 1994 (interview with Zhang Yanning, Vice Minister of the State Economic and Trade Commission); *Company Law*, *supra* note 103, art. 4 ("The ownership of State-owned assets in a company shall reside with the State"); see also Preston M. Tolbert, *China's Evolving Company Legislation: A Status Report*, 14 *Nw. J. Int'l L. & Bus.* 1, 6 (1993).

to resolve the issue.¹¹⁰ In the case of China, relying on this process to determine what entities and transactions should receive treatment under the Agreement would be difficult, although not impossible. For the existing parties to the Agreement, the overriding policy question would be whether they would want such entities and transactions as were offered by China for inclusion in the Agreement to be subjected to the Agreement or to other GATT provisions on tariff and non-tariff barriers. Because the GATT, by its own terms, does not apply to government procurements and the Agreement offers no meaningful definition of "procurement" or "procuring entity," the Agreement potentially grants the relatively few parties to it significant power to affect other GATT parties and the application of the GATT. Specifically, classification of a type of transaction as constituting or not constituting public procurement will, in all likelihood, affect how that type of transaction is dealt with under the GATT. For China, the question would be how it could benefit most in the determination of which of its state-owned entities should be defined as engaging in government procurement and, subsequently, should be offered for inclusion in the Agreement.

The Agreement provides no guidance on determining which entities and transactions should be covered. But it seems likely that the parties to the Agreement intended some limits on its scope. If it were determined that objective standards are desirable in defining "procurement by an entity," several factors could be used.

As an initial matter, a distinction should be made between state trading and government procurement. Despite China's substantial economic reforms, state trading is inevitable in an economy dominated by state enterprises. The GATT's traditional definition of government procurement hints at one possible strategy for distinguishing between such trading by state enterprises and government procurement: under this definition, government procurement consists of purchases made "for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial resale."¹¹¹ The GATT Director General has further elaborated on this distinction, stating that:

In State trading, the government or its agent is involved in buying, selling and sometimes in manufacturing operations.

110. See *supra* notes 45-48 and accompanying text.

111. GATT, *supra* note 12, art. III:8(a).

Government procurement involves the government or its agent acting as a consumer, procuring for its own consumption and not for commercial resale.¹¹²

During the Uruguay Round, in the context of targeting state trading enterprises for certain disclosure requirements, the definition of what constitutes a state trading enterprise received additional refinement. The GATT was amended by the Uruguay Round to state, in relevant part:

Government and non-governmental enterprise, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.¹¹³

This last quoted provision applies specifically to isolating state trading enterprises. Significantly, excepted from the reach of this provision are “imports of products for immediate or ultimate consumption in governmental use or in use by an enterprise as specified . . . and not otherwise for resale or use in the production of goods for sale.”¹¹⁴

Although such definitions, as articulated in the GATT, do not specifically apply to the Agreement on Government Procurement, the distinctions which they draw are extremely relevant to the Agreement. It is not clear, however, that any of these definitions could be easily applied to a country such as China, in which the incidents of commercial resale, production for commercial resale and consumption by the government may be particularly difficult to isolate. They might nonetheless provide working guidelines for future negotiations.

Another approach to the problem of defining government procurement is presented in guides written to the model laws for procurement published by the United Nations Commission on International Trade Law (“UNCITRAL”). As set forth in the *Guide to*

112. Director General of GATT, *supra* note 21, at 75.

113. Final Act Embodying the Uruguay Round of Multilateral Negotiations, Understanding of the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, art. I, Apr. 15, 1994, available in Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade (Office of the U.S. Trade Representative, 1994).

114. *Id.* The purpose of this last provision is to require state trading enterprises to notify GATT Council for Trade in Goods of their activities so that the Council can police state trading enterprises to “ensure transparency” of their activities. *Id.*

*Enactment of the UNCITRAL Model Law on Procurement of Goods and Construction*¹¹⁵ and the *Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services*,¹¹⁶ a state should consider the following six factors when determining whether these model laws apply to enterprises that are not clearly attached to the government:

(1) “[W]hether the Government provides substantial public funds to the entity, provides a guarantee or other security to secure payment by the entity in connection with its procurement contract, or otherwise supports the obligations of the procuring entity under the contract.”¹¹⁷ The Chinese leadership is attempting to decrease enterprise reliance on government financial support,¹¹⁸ and although government support is still pervasive in China, it is diminishing as the Chinese implement management accountability. This first factor could therefore be of increasing significance. As fewer enterprises depend solely on government largess for their existence, meaningful distinctions could be drawn relying on this factor.

(2) “[W]hether the entity is managed or controlled by the Government or whether the Government participates in the management or control of the entity.”¹¹⁹ Again, this factor may become more and more significant as reforms take effect and as government and Communist Party involvement in enterprise management lessens.

(3) “[W]hether the Government grants to the entity an exclusive license, monopoly or quasi-monopoly for the sale of goods that the entity sells or the services that it provides.”¹²⁰ This factor would be difficult to apply in the context of China as it would only appear to blur the distinction in the GATT between procurement and state trading.

(4) “[W]hether the entity is accountable to the Government or to the public treasury in respect of the profitability of the entity.”¹²¹ Whether reforms to increase management responsibility in China create

115. United Nations Commission on International Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods and Construction*, U.N. Doc. A/CN.9/393, at 14 (1993) [hereinafter “Guide I”].

116. United Nations Commission on International Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services*, U.N. Doc. A/CN.9/403, at 17 (1994).

117. *Id.*; Guide I, *supra* note 115, at 14.

118. Feinerman, *Economic Law Materials*, *supra* note 103, at 17-23.

119. Guide I, *supra* note 115.

120. *Id.*

121. *Id.*

a responsibility to "the Government or to the public treasury" may be unanswerable. Public and private functions, at least as those terms are defined in the West, are not plainly distinguishable in China.

(5) "[W]hether an international agreement or other international obligation of the State applies to procurement engaged in by the entity."¹²² This factor parallels the current practices followed by the signatories to the Agreement. It does little more than leave the question of the distinction between private and public sectors for further negotiation.

(6) "[W]hether the entity has been created by special legislative action in order to perform activities in the furtherance of a legally-mandated public purpose and whether the public law applicable to Government contracts applies to procurement contracts entered into by the entity."¹²³ The GATT parties would have trouble applying this standard to China. They must first reach agreement on what is a "legally-mandated public purpose." A neutral standard acceptable to the Chinese and to the mostly Western industrialized nations that are the parties to the Agreement would have to be formulated. The latter part of this factor — whether public law applicable to government contracts applies to the enterprise — would be difficult to apply because China appears to have no uniform, country-wide, systematic and readily available procurement law that is applied to a defined set of transactions deemed procurements.

As a practical matter, China's ability to apply the Agreement selectively may also be constrained by the most-favored nation principles imposed on parties to the Agreement. Further, a lot may hinge on whether China is entitled to some form of preferential treatment as a developing nation in accession to the Agreement. However, the ultimate determinant will, in all likelihood, be whether the contracting parties to the GATT deem China's reforms sufficient for entry into the GATT and whether they are deemed sufficient for participation in the Agreement.

The GATT Secretariat and the current GATT members have been struggling with many complex issues regarding China's ability to comply with GATT free trade principles and regarding the need to ensure that compliance continues once China becomes a contracting party. The Chinese economy presents enormously complex questions to the GATT,¹²⁴ and one plausible, yet still very complex, solution might be

122. *Id.*

123. *Id.*

124. See *supra* notes 10-14 and accompanying text.

to impose the disciplines and obligations of the Agreement on Government Procurement on the Chinese economy in general — in other words, on virtually all of China's enterprises.¹²⁵ Indeed, this has been the suggestion of certain scholars.¹²⁶ These same scholars, however, conclude that such obligations would be unworkable because, among other things, they would be too clumsy and burdensome to administer and enforce.¹²⁷

B. Lack of Transparency in the Chinese Legal System as a Potential Obstacle to the Ability to Join the Agreement

The sheer scale, diffuseness and profundity of the changes in China may itself be an obstacle to membership in the GATT and the Agreement because it may substantially hinder China's compliance with the transparency principle. China's laws and economic relations change rapidly. In its ongoing liberalization of the economy, the Chinese government experiments extensively. Further, the central and regional authorities of China are constantly promulgating additional laws and policies to attract foreign investment, increase foreign currency reserves and promote exports of Chinese products.¹²⁸ This section attempts to deal with some of the challenges facing the Chinese legal system in this turbulent environment as they relate to the requirement of transparency in the Agreement on Government Procurement.

1. Secret Law

In China, a significant part of the legal system has remained secret and internal, for disclosure only to certain government and party officials.¹²⁹ Many of these internal laws relate to foreign trade and

125. This was suggested by Professor Don Wallace, Jr. in a seminar on International Procurement Law and Policy held at the Georgetown University Law Center in the spring of 1994 (Mar. 9, 1994). See *infra* note 126.

126. Herzstein, *supra* note 13, at 391-92; McKenzie, *supra* note 17, at 152-53.

127. See *supra* note 126.

128. See China's Status as a Contracting Party: Memorandum on China's Foreign Trade Regime, GATT Doc. L/6125 (Feb. 18, 1987), at 8; James V. Feinerman, Chinese Law Relating to Foreign Investment and Trade: The Decade of Reform in Retrospect, S. Prt. 102-21, 102d Congress, 1st Sess. 829-30, 832 (1991).

129. Chiu, *supra* note 17, at 12 n.32; James V. Feinerman, The Quest for GATT Membership: Will Taiwan be Allowed to Enter Before China?, China Bus. Rev., May-June 1992, at 25.

investment.¹³⁰ Such secrecy in the law is incompatible with the transparency requirements of the Agreement and with GATT generally.

In response to this situation, the United States began an investigation on October 10, 1991 of China's market access barriers under Section 301 of the Trade Act of 1974.¹³¹ On October 10, 1992, China and the United States signed a Memorandum of Understanding in settlement of the investigation (the "MOU"). China agreed to "publish on a regular and prompt basis all laws, regulations, rules, decrees, administrative guidance and policies" pertaining to foreign trade in a manner that allows governments and businesses to "become acquainted with them."¹³² The MOU requires China to designate an official journal for publication of these items.¹³³ The MOU further requires China to administer its laws in a "uniform, impartial and reasonable manner."¹³⁴

The MOU requirements are similar to the publication requirements set forth in the Agreement on Government Procurement. Some of the most important provisions of the Agreement are similarly designed to require transparency in the procurement systems of participating countries. Specifically, the Agreement requires publication of procurement laws and immediate changes to national legislation upon accession to the Agreement.¹³⁵

It is questionable whether China will be able to adhere to such commitments in the long term because the historical antecedents for such an open system are weak. The very characteristic of open and knowable laws does not have a strong historical basis in China.¹³⁶ Even in

130. See *supra* note 129; U.S. Department of State, 103d Cong., 1st Sess., Country Reports on Economic Policy and Trade Practices 82 (Comm. Print 1993) [hereinafter 1993 Country Reports]; U.S. Department of State, 103d Cong., 2d Sess., Country Reports on Economic Policy and Trade Practices 45 (Comm. Print 1994) [hereinafter 1994 Country Reports].

131. See *supra* note 130; Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Republic of China Concerning Market Access, Oct. 10, 1992, 31 I.L.M. 1275, art. VIII (Nov. 1992) [hereinafter MOU].

132. MOU, *supra* note 131, art. I, ¶ 1.

133. *Id.* art. I, ¶ 4.

134. *Id.* art. I, ¶ 5.

135. See *supra* notes 63-65 and accompanying text.

136. Chinese society historically has not been regulated by positive law in the Western sense of the phrase. The Confucian concept of law is *li*, which can be roughly translated as rules governing morality and propriety. Such law is not published but is established by example. See *infra* authorities cited in notes 141-142. By contrast, the Chinese Legalist concept of *fa* entails a penal law code and official coercion. As explained by Deborah E. Townsend:

China's traditional legal background influences all models of China's post-revolutionary legal system. The basic Confucian concept of law involves two polarities, *li* and *fa*. *Li* has been variously translated as "propriety," "moral code," "customary law," or "rules of conduct governing the relations between men." *Li* relies on moral force rather

modern times, the sentiment of the Chinese leadership has been markedly anti-law.¹³⁷ A "modern legal system" in the Western sense was never able to take serious hold in China in the past, despite efforts at certain times in modern Chinese history to transplant such a system to China, and it is open to question whether the current leadership will in the long run want such a system.¹³⁸ Quite apart from such weighty jurisprudential questions, the Chinese central authorities may in practice experience difficulties ensuring that local authorities adhere to GATT procurement norms and to published laws.¹³⁹

2. Corruption and the Need for Administrative Reform

China, like many other countries, is awash in corruption.¹⁴⁰ This

than physical coercion, and places a great emphasis on ruling by example, especially in superior-inferior social relationships. . . .

. . . .
In such an ideal system, laws do not constitute the primary method of social control. . . .

. . . .
Confucianism recognizes that *li* alone cannot control all elements of society at all times. Thus *fa*, translated variously as "positive law," "punishment" or simply as "law," controls at those times when *li* cannot. *Fa*, a formal legal code that controls through fear of sanctions, is primarily manifested by penal law. . . .

. . . .
The concepts of *li* and *fa* dominated Chinese legal thought throughout dynastic China. While various rulers promulgated a number of detailed legal codes, the codes generally concerned criminal and administrative matters. Dynastic legal codes rarely addressed, and courts rarely adjudicated, "civil" matters as Western legal scholars defined them. Such matters generally were left to the control of *li*, customary law.

Deborah E. Townsend, *The Concept of Law in Post-Mao China: A Case Study of Economic Crime*, 24 *Stan. J. Int'l L.* 227, 229-31 (1987) (footnotes omitted).

137. This was the case during the Cultural Revolution for example. See Alice E. Tay & Eugene Kamenka, *Law, Legal Theory and Legal Education in the People's Republic of China*, 7 *N.Y.L. Sch. J. Int'l & Comp. L.* 1, 5-22 (1986); Cole R. Capener, *An American in Beijing: Perspectives on the Rule of Law in China*, 1988 *B.Y.U. L. Rev.* 567, 571 (1988).

138. See Tay & Kamenka, *supra* note 137, at 5-10; James V. Feinerman, *Introductory Materials*, 22-26 (Fall 1993) (Materials for Chinese law course, Georgetown University Law Center, fall 1993) (on file with author).

139. See discussion *infra* part III.D. China is not as tightly controlled by the central government or the Communist Party Central Committee as one would suspect. Regional and local factions exercise significant amounts of control over their geographic areas and may in some cases ignore national laws and decrees.

140. See Edward J. Epstein, *A Matter of Justice*, 1992 *China Rev.*, at 5-9; Townsend, *supra* note 136; Robert H. Lin, *On the Nature of Criminal Law and the Problem of Corruption in the People's Republic of China: Some Theoretical Considerations*, 10 *N.Y.L. Sch. J. Int'l & Comp. L.* 1 (1989); Ralph H. Folsom et al., *International Business Transactions* 762-71 (1991) (discussing

creates a procurement environment that is inherently discriminatory and nontransparent. A bureaucracy characterized by systemic corruption results in idiosyncratic and unequal government practices. Such corruption is antithetical to the concept of an open government procurement system fundamental to the Agreement on Government Procurement.

The establishment of a procurement system has been suggested as a means to implement administrative reform and to fight corruption. Indeed, it has been posited by one United States procurement expert, in the context of Eastern Europe, that "[a] revitalized public service sector with training in the principles of business management, ethics, and integrity related to procurement will help support the integration of these emerging democracies with other market oriented economies."¹⁴¹

In the case of China, there is no emerging democracy in the sense that the West defines a democracy. Moreover, China's enterprise system will remain quite different from what exists in the West and what the Eastern European countries are attempting to implement. The Chinese do, however, recognize the need for change. The Chinese Communist Party, in a significant statement of policy concerning economic reform, identified the need to eliminate corruption and promote clean government as essential to economic reform, to the destiny of the Party and to the nation itself.¹⁴² The Chinese government has attempted to combat corruption by enacting anti-corruption laws, conducting anti-corruption campaigns and by vigorously prosecuting perpetrators.¹⁴³ The long term effect of these efforts remains to be seen.

China will need to reduce corruption appreciably in order to participate in the Agreement on Government Procurement. China's early adherence to the Agreement, however, could be a means to accelerate internal reform. China's adherence to the extensive tendering and other provisions of the Agreement, which are designed to create open procurement systems, may serve to eliminate or to at least deter or mitigate corruption in those enterprises and for those procurements which might be selected for coverage under the Agreement.

corruption generally).

141. Wayne A. Wittig, *The Essence of Public Procurement for the Post-Communist World*, Contract Management, Mar. 1993, at 19.

142. Decision of the CPC Central Committee, *supra* note 98.

143. See *supra* note 140.

3. "Rule of Law" Considerations

In 1978, with Deng Xiaoping's rise to power, the Chinese Communist Party saw a legal system as a necessary element in the country's economic development. A legal system was perceived as necessary for modernization and to attract foreign investment.¹⁴⁴ Several characteristics of the emerging Chinese legal system are significant to China's future compliance with the Agreement on Government Procurement.

First, there has been a proliferation of laws and regulations at all levels of Chinese government. One result is that it is extremely difficult for foreigners, and even Chinese lawyers, to determine which laws apply.¹⁴⁵ This feature of the system creates an obstacle to the transparency of government procurement.

Second, a literal reading of China's laws and regulations could result in a seriously inaccurate assessment of a given situation in China. To the extent that the Communist Party plays a dominant role in the actual governance of China, party policy will have a dominant role in the application of law.¹⁴⁶ Indeed, policy has been described as *a priori* to law.¹⁴⁷ Law in China may be viewed as a more detailed statement prepared to implement a policy.¹⁴⁸ Therefore, a clear and detailed policy statement of the Communist Party may be significantly more valuable than a detailed set of regulations.¹⁴⁹ This approach is fundamental to a Marxist system, although it appears confusing and "anti-law" to those who think within the framework of Western jurisprudence.¹⁵⁰

Third, the law as it is set forth in official texts in China may not reflect practice. Indeed, laws have been ignored in certain contexts by the

144. Capener, *supra* note 137, at 567-69.

145. See discussion *supra* part III.B.

146. Ronald C. Keith, *Chinese Politics and the New Theory of "Rule of Law,"* 125 *China Q.* 109, 110 (1991); William C. Jones, *People's Republic of China: The Constitution of the People's Republic of China*, 63 *Wash. U. L.Q.* 707, 713-16 (1985); Paul Cantor & James Kraus, *Changing Patterns of Ownership Rights in the People's Republic of China: A Legal and Economic Analysis in the Context of Economic Reforms and Social Conditions*, 23 *Vand. J. Transnat'l L.* 479, 496 (1990).

147. Keith, *supra* note 146, at 110.

148. See *supra* note 146.

149. See *supra* note 146.

150. See *supra* note 146.

populace and the leadership.¹⁵¹ The system implemented by modern reforms is new and complex, and long-standing practices are difficult to change or eliminate.¹⁵² This characteristic of the Chinese legal system may have some basis in Chinese and East Asian culture.¹⁵³

In a recent policy pronouncement, the Chinese Communist Party set forth the policy that the Chinese legal system is to be "tightened up."¹⁵⁴ What this means is uncertain at this time. The Party appears to be saying, in the context of economic reform, that the legal system must be improved and the concept of "rule of law" must take on increased prominence.

C. Aspects of the Chinese Legal System Significant to the Implementation of Norms Mandated in the Agreement

1. China's Experience with Tender Requirements

For whatever segment of the Chinese economy that is treated as engaged in "procurement," adherence to the principles of the Agreement may not be unworkable. China has had some prior experience with tender requirements. In particular, it has enacted laws and instructions that require the use of structured tendering procedures.¹⁵⁵ Along these

151. See William C. Jones, Some Questions Regarding the Significance of the General Provisions of Civil Law of the People's Republic of China, 28 Harv. Int'l L.J. 309, 313-24 (1987); see also David Zweig et al., Law, Contracts, and Economic Modernization: Lessons from the Recent Chinese Rural Reforms, 23 Stan. J. Int'l L. 319 (1987).

152. This has been described by one scholar as the difference between "law on the books" and "law in action." See Jones, *supra* note 151, at 313 n.23 (citing and discussing Roscoe Pound, Law in Books and Law in Action, 4 Am. L. Rev. 12 (1910)).

153. During the Meiji era, Japan adopted extensive Western legal codes, primarily from the French and German codes. These codes, however, have been applied in Japan in a manner quite different than in Europe. In periods subsequent to the Meiji era, there was an eventual merger of Japanese "customary" or "living" law, based in Confucianism, with European-style "book" law. Percy R. Luney, Jr., Traditions and Foreign Influences: Systems of Law in China and Japan, 52 Law & Contemp. Probs., Spring 1989, at 129, 148-50. Professor Luney has postulated that "[t]he current Westernization of the Chinese legal system resembles the Meiji era of Japanese legal development," *id.* at 149. See generally James V. Feinerman, Japanese Success, Chinese Failure: Law and Development in the Nineteenth Century 11-26 (discussing Japan's adoption of civil code) (unpublished manuscript, on file with author).

154. Decision of the CPC Central Committee, *supra* note 98, at 13-14.

155. See Machinery and Electronic Equipment Bidding's Guide by the China Tendering Centre for Machinery and Electronic Equipment, reprinted in China Econ. News (Sept. 6, 1993) (unofficial translation). A survey of Westlaw's Chinalaw database revealed the following titles: Implementation Rules for the Provisional Regulations of Beijing Municipality Concerning New Technology Industry Development Zone, art. 7 (1988), available in WESTLAW, Chinalaw

lines, under the MOU, China agreed to implement a bidding process for the procurement of digital switching systems "conducted on the basis of internationally accepted procedures of open tender and bidding without discrimination as to the source of the equipment or the entity seeking to acquire the equipment."¹⁵⁶ Moreover, China has established international tendering agencies and has complied with World Bank requirements on bidding and source selection for contracts financed by the World Bank.¹⁵⁷ China thus may be able to promulgate a system that meets the tender requirements of the Agreement.

2. Offeror Qualifications and Special Laws for Foreigners

As part of China's efforts, initiated in 1978, to achieve economic modernization, China has promulgated a series of laws designed to encourage direct foreign investment in the country.¹⁵⁸ One of China's

Database, File No. 0474; Provisional Regulations of the Beijing Municipal People's Government on the Control of Construction Foreign Construction Enterprises (1988), available in WESTLAW, Chinalaw Database, File No. 0336; Rules for the Trial Implementation of the Economic Responsibility System in Undertaking Contract Projects of Capital Construction (1983), available in WESTLAW, Chinalaw Database, File No. 0317; Provisional Measures on Invitation of Tenders and Submission of Tenders concerning Land Sale in Shenzhen (1987), available in WESTLAW, Chinalaw Database, File No. 0445; Measures Relating to the Import Substitution by Products Manufactured by Chinese-Foreign Equity Joint Ventures and Chinese-Foreign Cooperative Ventures, art. 5 (1987), available in WESTLAW, Chinalaw Database, File No. 0452; Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises (1982), available in WESTLAW, Chinalaw Database, File No. 0100; Measures of Shanghai Municipality on the Compensatory Transfer of Land Use Rights, arts. 14, 15(9),(10),(17),(18) (1987), available in WESTLAW, Chinalaw Database, File No. 0387.

156. MOU, *supra* note 131, art. II, ¶ 1(v); see China Proposed Market Access Changes in Last-Ditch Attempt to Avoid 301 Case, *Inside U.S. Trade*, Oct. 11, 1991, at 17.

157. See An Introduction of the International Tendering Company of China National Technical Import Corporation (pamphlet available from the China National Technical Import Corporation); see also The International Bank for Reconstruction and Development, Guidelines Procurement under IBRD Loans and IDA Credits (1992); The International Bank for Reconstruction and Development, Guidelines Use of Consultants by World Bank Borrowers and by the World Bank as Executing Agency (1981). I consulted Preven Jensen, the Procurement Advisor for the East Asia Region with the World Bank, and Lera Pinto, a procurement specialist with the World Bank, on China's adherence to World Bank Procurement Guidelines. They advised that China generally is required to adhere to the Guidelines. They also advised that model documents for China are being prepared pursuant to an institutional development grant issued by the World Bank. Ms. Pinto advised that these model documents will not deviate significantly from standard World Bank requirements.

158. See Feinerman, *supra* note 128, at 829-31; See generally Liu Chu, Laws and Regulations Concerning Business Enterprises with Foreign Participation, in *Chinese Foreign Economic Law: Analysis & Commentary 1* (Rui Mu & Wang Guiguo eds. 1990); Kevin Hobgood-Brown, Foreign

first laws of the reform era was a Joint Venture Law, promulgated in July 1979, which permits equity joint ventures between state enterprises and foreign concerns.¹⁵⁹ In addition to the equity joint venture, foreigners are currently permitted to use two other enterprise forms to conduct business in China: the contractual joint venture and the wholly foreign-owned enterprise.¹⁶⁰

In addition to these laws laying out the permissible business combinations, there are numerous other laws governing the conduct of business by foreigners, such as laws governing technology transfers and contract relations. In the area of the law of contracts, three sets of contract laws exist in China. The Economic Contract Law governs agreements between state enterprises.¹⁶¹ It is essentially an administrative law designed to implement state economic planning, although it allows enterprises to exercise some autonomy. The Foreign Economic Contract Law and the United Nations Convention on the International Sale of Goods, of which China is a signatory, govern contracts between state enterprises and foreigners.¹⁶² And, the General Principles of Civil Law contains general principles of law applicable explicitly to contracts between individuals,¹⁶³ as well as possibly to other types of contracts. It is unclear, however, how far the General Principles of Civil Law extend past contracts on the individual level.¹⁶⁴

Direct Investment from a Western Perspective, 12 *Loy. L.A. Int'l & Comp. L.J.* 31 (1989).

159. Feinerman, *supra* note 128, at 829; Law of the People's Republic of China on Sino-Foreign Joint Equity Enterprises (July 1, 1979, amended Apr. 4, 1990), in 1 *China Laws for Foreign Bus.* (CCH Austl.) ¶ 6-500 (1985).

160. Feinerman, *supra* note 128, at 829; Chu, *supra* note 158, at 1.

161. Economic Contract Law of the People's Republic of China (Dec. 13, 1981), in 1 *China Laws for Foreign Bus.* (CCH Austl.) ¶ 5-500 (1985).

162. Foreign Economic Contract Law of the People's Republic of China (Mar. 21, 1985), in 1 *China Laws for Foreign Bus.* (CCH Austl.) ¶ 5-550 (1985). China has been a party to the Convention on the International Sale of Goods since January 1, 1988. Convention on the International Sale of Goods, in *China Law and Practice*, June 11, 1987, at 24.

163. See *supra* note 103. Civil Codes in the civil law tradition typically contain a general part, specifying rules applicable to all other subjects covered by the code, and a special part, specifying rules applicable to specific subjects such as obligations, property, succession and domestic relations. Unfortunately, China has not yet promulgated a special part to its civil code; any such special part would necessarily contain much needed detail on contract law. See Herbert Bernstein, *The PRC's General Principles from a German Perspective*, *Law & Contemp. Probs.*, Spring & Summer 1989, at 117, 118-19.

164. William Jones contends that the General Principles of Civil Law do indeed apply to all activities and that they are intended to cover what the Chinese call "economic law," that is law governing activities between enterprises. He labels this the triumph of the "big civil law school" over the "little civil law school." William Jones, *Sources of Chinese Obligation Law*, 52 *Law & Contemp. Prob.*, Summer 1989, at 69, 74. Given the current text of the Economic Contracts Law,

All of these laws affect contract formation and may present significant disparate treatment for foreigners that could run afoul of the Agreement.

Another area of disparate treatment for foreigners is in the provision of services in the Chinese market. The provision of many services by foreign firms has essentially been banned. Chinese laws have permitted foreign participation in only a narrow range of services, such as hotels, restaurants and repair services, and the Chinese have conducted only limited experimentation in allowing foreigners to offer other types of services.¹⁶⁵ This will have to change if China wishes to join the GATT or participate in the Agreement on Government Procurement. Services are covered under the Uruguay Round Agreement in Annexes 4 and 5, and the current parties will no doubt seek to have at least some services classified as procurements.

China's aggressive push for foreign companies to export from China, rather than to sell in China, could also be significant if it is used to hinder the ability of foreign concerns to offer their products in what are deemed procurements.¹⁶⁶ Therefore, unless China is granted some special accommodation as a developing country under the Agreement,¹⁶⁷ China will have to alter such restrictions to the extent that they are inconsistent with the Agreement. Finally, the import barriers that have formed the heart of discussions for China's application to join

however, this victory is by no means clear in the field of China's law of contracts. The General Principles of Civil Law and the Economic Contracts Law could be read as inconsistent with one another, suggesting that the debate between "little" and "big" civil law schools is still ongoing.

165. The 1994 Country Reports provide in pertinent part as follows:

While the [MOU], if fully implemented, will reduce or eliminate many of the most serious barriers to the trade of goods, China has only recently begun to reform the services sector. China has recently permitted "experiments" in a number of service sectors by authorizing one or two foreign firms to establish joint ventures in accounting, legal services, and insurance. In general, Chinese restrictions on certain foreign firm service activities (including insurance, construction, banking, accounting, and legal services) prevent U.S. firms from enjoying a reciprocal level of participation in China's service sector. . . . Following repeated U.S. Government requests for formal consultations on trade in services issues, China has agreed to such consultations, to commence in February 1994.

1994 Country Reports, *supra* note 130; see also Chu, *supra* note 158, at 6; 1993 Country Reports, *supra* note 130.

166. See Feinerman, *supra* note 128, at 832-33; Chu, *supra* note 158, at 7, 36-38. The U.S. Government has found that "China has maintained a multilayered web of import restrictions." 1994 Country Reports, *supra* note 130, at 81. A recent World Bank Study, however, has found China to be a considerably more open economy than suspected, although having "opaque" import policies. World Bank, China, Foreign Trade Reform, *supra* note 8, at 17-20, 82-83.

167. See discussion *supra* part II.D.

the GATT will have to be eliminated to the extent that they apply to transactions which are designated as procurements.

D. Regionalism in China as a Potential Obstacle to the Ability to Join the Agreement

The broad reach of the Agreement may be difficult to enforce given the strong pull of regionalism in China. This is insofar as the Uruguay Round Agreement applies to "sub-central government entities," to be included in Annex 2 of the Agreement,¹⁶⁸ and insofar as national treatment and nondiscrimination are core principles in the Agreement.¹⁶⁹

These provisions may be difficult for China to enforce, even if it is willing to seek compliance from regional, provincial and local entities. In theory China has a unitary political system, characterized by legislative supremacy, in which the National People's Congress and its Standing Committee govern the country.¹⁷⁰ However, it is a popular myth that China is tightly controlled from the center. In practice, the provinces, regions and municipalities exercise a great deal of control over their respective territories.¹⁷¹

Local cadres often control the local situation despite national laws which may be contrary to the edicts and interests of such cadres.¹⁷² Serious competition for foreign investment and trade has resulted in a mass of uncoordinated local laws and regulations governing these areas.¹⁷³ The interior and northern provinces are especially displeased with their perceived relative lack of prosperity in comparison to the southern coastal regions of China, where economic reforms were first initiated, and thus, there are corroding forces in China's political and social milieu.¹⁷⁴

Regionalism does not bode well for China's meaningful participation in the Agreement. China will have to bring its regions under

168. See supra note 46 and accompanying text.

169. See discussion supra part II.C.

170. Jones, supra note 146, at 708-712.

171. See Lee Maoguan, Why "Laws Go Unenforced", Beijing Rev., Sept. 11-17, 1989, at 17; cf. Lena H. Sun, The Dragon Within, Wash. Post, Oct. 9, 1994, at C3.

172. See supra note 171; Zweig, supra note 151, at 323, 327-330, 340-61.

173. See discussion supra part III.B.

174. See Chris Yeung, Public Ownership Remains Mainstay, supra note 99, at 1. But see David L. Denny, Provincial Economic Differences Diminished in the Decade of Reform, in Joint Economic Comm., 102d Cong., 1st Sess., China's Economic Dilemmas in the 1990s; The Problems of Modernization and Interdependence 186 (Comm. Print 1991).

control in order to provide adequate assurances of transparency, national treatment and nondiscrimination.

E. Challenge Procedures — Chinese Dispute Resolution

China has no procedures in place that resemble the challenge procedures of the Uruguay Round Agreement. However, China has a long-standing tradition of resolving disputes outside of formal court systems, and China may be able to develop such a system.¹⁷⁵

Even so, foreign firms have encountered difficulties in dispute resolution in China.¹⁷⁶ These difficulties have occurred mainly in attempts to require international or third party mediation or arbitration on a contract-by-contract basis.¹⁷⁷ This indicates that any challenge procedure developed for compliance with the Agreement would have to be promulgated as law and adequately enforced against Chinese enterprises.

F. China as a Developing Country under the Agreement

China has sought to join GATT as a developing country. As a developing country within GATT, China would probably be able to maintain some barriers to imports, particularly for imports which would affect infant industries or which would adversely affect China's balance of payments.¹⁷⁸ Further, the developing country provisions of the Agreement on Government Procurement allow parties to the Agreement to extend two types of benefits to developing countries: greater access to the procurement markets of the parties to the Agreement and approval of measures by developing countries to protect their own economies and industries.

175. See generally Michael Moser, *Law and Social Change in a Chinese Community*, 60-73 (1982); David Laufer, *Mediation, Conciliation and Arbitration in China*, 12 *Loy. L.A. Int'l & Comp. L.J.* 91 (1989); Shi Weisan, *Arbitration and Conciliation: Resolving Commercial Disputes in China*, 12 *Loy. L.A. Int'l & Comp. L.J.* 93, 93 (1989). See also Steven N. Robinson & George R.A. Doumar, "It is Better to Enter a Tiger's Mouth than a Court of Law" or Dispute Resolution Alternatives in U.S.-China Trade, 5 *Dick. J. Int'l L.* 247 (1987) (describing Chinese attitudes to alternative dispute resolution in a commercial setting).

176. Feinerman, *supra* note 128, at 836-37.

177. *Id.*

178. Van Hanswyck, *supra* note 17, at 91; see *supra* part II.D for a discussion of benefits to developing countries under the Agreement.

These provisions, however, leave too much discretion to the mainly developed countries that are the existing parties to the Agreement, both as to the scope of the benefits to be granted and, indeed, as to whether benefits should be granted at all. Given China's role as a major exporter, the developed countries could be quite stingy about granting China any meaningful benefits in the procurement area. Notably, the U.S., although it has recognized China as a developing country, has refused to grant to China the benefits of the Generalized System of Preferences.¹⁷⁹

This is unfortunate for China, since it would have much to gain from open overseas procurement markets. If granted benefits under the Agreement, China could continue its success by exporting products destined for the many low to middle technology areas of the industrialized nations' procurement sectors.¹⁸⁰

IV. SOME CONCLUSIONS ON CHINA AND THE AGREEMENT ON GOVERNMENT PROCUREMENT

If China ever presents an application to the GATT Committee on Government Procurement to become a party to the Agreement, three methods exist for handling the application.¹⁸¹ First, the parties to the

179. Li, *supra* note 17, at 42; see Feinerman et al., *China's Entry into the International Economic System*, 82 *Am. Soc'y of Int'l Law Proc.* 172 (1988); see *Comm. on Ways and Means*, 101st Cong., 2d Sess., *The President's Report to Congress on the Generalized System of Preferences as Required by Section 505(B) of the Trade Act of 1974, as Amended* 78 (Comm. Print 1990).

180. See *The World Bank, China's Foreign Trade Reform*, at 7-9 (1994) (discussion of manufacturing areas in which China's exports have increased).

181. These methods are based on Professor John Jackson's interface theory of accommodating economic relations between countries with differing economic systems. See Jackson, *supra* note 16, at 81-87. Professor Jackson's interface theory is still relevant despite recent trends towards privatization. The theory acknowledges that economic systems may be different even among countries with market-oriented economies, such as the U.S. and Japan. Professor Jackson's interface theory is as follows:

The stark reality of international economic relations is the accelerated development of interdependence, by which is meant that various economies in the world relate to one another to an increasing extent in such a way that economic forces, or conditions that develop in one economy, are transmitted rapidly to others. As already mentioned, this poses considerable difficulties for national leaders, who find it harder to satisfy the needs of their constituencies. National governments and governmental leaders feel vulnerable. The solution is to look towards an international approach, hopefully on agreed principles. But there are a number of different possibilities for such principles, possibilities about what we might call "techniques to manage interdependence." Three main alternatives come to mind:

(1) Harmonization: A system that gradually induces nations towards uniform approaches to a variety of economic regulations and structures. An example would be standardization of certain product specifications. An obvious difficulty would be the

Agreement could, in accordance with what appear to be their normal procedures, engage in reciprocity — that is “[a] system of continuous ‘trades’ or ‘swaps’ of measures to liberalize (or restrict) trade.”¹⁸² The problem of reciprocity is that there are no criteria for measuring it or for monitoring compliance with the Agreement.¹⁸³ This lack of standards may accommodate agreements based on divergent positions.¹⁸⁴

Second, the parties might attempt harmonization — the gradual inducement of countries toward uniform economic and trade practices.¹⁸⁵ An attempt at harmonization is unlikely to yield substantial

resistance of national or other groups which desire to maintain their particular individuality or contrary preference choices in structuring their economies.

(2) Reciprocity: A system of continuous “trades” or “swaps” of measures to liberalize (or restrict) trade. GATT tariff negotiations have followed this approach, and there have been many variations on the “reciprocity ideas.”

(3) The interface principle: This approach recognizes that different economic systems will always exist in the world, and tries to create the institutional means to ameliorate international tensions caused by those differences, perhaps through buffering or escape-clause mechanisms.

Obviously countries as different as China and the United States, or the Soviet Union and the EEC, will experience difficulties in developing an appropriate set of principles for their trade — principles that will satisfy their various citizens or constituents that such trade is fair to all concerned.

If what is needed is a broad concept of “interface accommodation” among differing economic systems, even in countries as similar as, say, the United States and Japan, it can be argued that a parallel basic approach is needed for countries with a state-trading, or “non-market” orientation, if those countries are to be accommodated in GATT. Reiterating what I have said earlier in this chapter, it should be noted that there are powerful reasons why such accommodation should be managed. Thus, the interface technique becomes very important.

Jackson, *supra* note 12, at 45.

182. Jackson, *supra* note 16, at 83-84.

183. See discussion *supra* part II.B.1; see also Penelope Hartland-Thunberg, China, Hong Kong, Taiwan and the World Trading System 84 (1990). Dr. Hartland-Thunberg explains in the context of tariff concessions under GATT that “no criteria have been developed for measuring reciprocity.” She continues:

The conceptual problems of defining the value of a concession, and the empirical problems of acquiring the requisite data once a definition is settled, all remain formidable. In addition all negotiators prefer to return home with their own calculations to show that the export concessions they obtained were greater than the import liberalization they conceded. A country’s private negotiating agenda might aim to maximize domestic employment opportunities through trade negotiations or to maximize its export proceeds or to minimize the impact of trade negotiations on its balance of payments position, or other specific goals. An undefined concept of reciprocity accommodates a variety of negotiating agendas. It has been politically useful to permit reciprocity to remain ambiguous.

Id., at 84.

184. See *infra* note 1951 and accompanying text.

185. Jackson, *supra* note 16, at 84.

results. China's economy has undergone and will continue to undergo significant market reform, but China will not attempt to convert its economic system into a truly Western-type system absent fundamental, unforeseen change in the Communist Party leadership.¹⁸⁶ Moreover, given the dire economic situation in the former Soviet bloc countries, many of which attempted immediate or accelerated economic reform, the Chinese leadership may prefer a more tentative, slower approach to economic reform.¹⁸⁷ Harmonization, however, appears to be the approach taken by the current members of GATT in their review of China's application for entry in GATT.

The third approach is what Professor John H. Jackson calls the "interface principle."¹⁸⁸ According to Professor Jackson, "[t]his approach recognizes that different economic systems will always exist in the world and tries to create the institutional means to ameliorate international tensions caused by those differences, perhaps through buffering or escape-clause mechanisms."¹⁸⁹ The interface principle was intended primarily as a vehicle for countries with planned economies to join the GATT. This issue has receded in importance as many countries have abandoned economic planning.¹⁹⁰ However, China's economic and legal systems are, and will remain, significantly different from those of the Western or Westernized countries that are currently parties to the Agreement, despite the gradual phasing out of China's planned sector. This can be seen in pronouncements stating that China is attempting to progress towards a "socialist market economy" in which public ownership will remain the mainstay of the system.¹⁹¹

186. See Damrosch, *supra* note 17, at 33.

187. Hartland-Thunberg, *supra* note 183, at 24 ("highly eclectic and pragmatic trial and error approach adopted by the Deng regime"); James V. Feinerman, *Lectures for Chinese Law Course* at Georgetown University Law Center (Fall 1993).

188. Jackson, *supra* note 16, at 84.

189. *Id.* Professor Jackson undoubtedly would classify such mechanisms under the rubric of "safeguards," which he defines as follows:

The term "safeguards" is generally used to denote government actions responding to imports which are deemed to "harm" the importing country's economy or domestic competing industries. These mechanisms often take an "import-restraining" form, whether they be increased tariffs, quantitative restrictions, "voluntary" restraints by the exporting countries, or other measures. As such, the term "safeguards" embraces a number of legal and political concepts, including that of the "escape clause" which for many decades has been built into national and international rules regarding international trade.

Jackson, *supra* note 12, at 148 (footnote omitted).

190. See Damrosch, *supra* note 17, at 32.

191. See discussion *supra* parts III and III.A.

The interface principle is the most likely path to a workable compromise. An escape mechanism in the context of procurements would have to be speedy and effective so that procurements are not unduly delayed. One such mechanism could be a dispute resolution process in the form of a "country protest" system. Such a dispute resolution process would have to be much quicker, more efficient and more effective than the historical GATT dispute resolution processes. The parties could, for example, implement a dispute resolution system similar to the national protest systems that exist in some countries for use by disappointed offerors, except that the "protests" would be by and between countries.¹⁹²

In the context of any of these approaches, the problem remains as to what entities are to be treated as engaged in government procurement. The *ad hoc* and arbitrary nature of specifying entities for inclusion into the Annexes opens the Agreement to potential abuse by the few parties to it. The failure of the Agreement to contain meaningful standards specifying the extent of country participation is inconsistent with the fundamental goal of the Agreement to open up government procurements. To the end of remedying this situation, the standards set forth above, or some version of them, should be used to negotiate country obligations.¹⁹³ A complete abdication of negotiating power or slavish adherence to legalism, however, would not be prudent. There should be a degree of what Henry Kissinger calls "constructive ambiguity" purposefully cast in the language of the document so that the

192. The "country protest system" could be a hybrid procedure resembling both the new GATT Dispute Settlement Procedures agreed to during the Uruguay Round, combined with an even more expedited time frame, to accommodate the need to maintain economy and efficiency in procurements. See Final Act Embodying the Uruguay Round of Multilateral Negotiations, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, available in Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade (Office of the U.S. Trade Representative, 1994); Andreas F. Lowenfeld, Remedies Along with Rights: Institutional Reform in the New GATT, 88 Am. J. Int'l L. 477 (1994); 1989 O.J. (L 395) (E.C. Council Directive of Dec. 21, 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts); U.S. General Accounting Office Bid Protest Regulations, 4 C.F.R. pt. 21 (1994); 31 U.S.C. § 3553 (1988) (General Accounting Office bid protest authority); 28 U.S.C. sec. 1491(a)(3) (1988) (U.S. Court of Federal Claims preaward jurisdiction); 40 U.S.C. sec. 759 (General Services Administration Board of Contract Appeals bid protest authority in procurements for automated data processing goods and services).

193. See discussion *supra* part III.A.

parties can reach agreement.¹⁹⁴ The ultimate test of whether something should be covered by the Agreement is probably as much a question of sovereignty as it is of whether the enterprise is conducting public procurement.¹⁹⁵ For example, sensitive military procurements, while clearly public procurement, are for the most part not included in the annexes of the various contracting parties to the Agreement.

In the context of China, transparency would be a paramount consideration. China could enact a procurement law to govern the enterprises and purchases to be covered by the Agreement. This might serve to simplify the process, create transparency and mitigate obstacles to national treatment and nondiscrimination. The current parties to the Agreement could be given some means to furnish China with input on the enactment and implementation of the law. Many developing countries, including China, have been compelled to open up some procurement markets under World Bank lending procedures.¹⁹⁶ In the event of China's becoming a party to the Agreement, there would then exist two sets of mutually reinforcing obligations working to open up China's markets.

If China joins GATT and the WTO as a developing country, it can argue for favorable terms of entry into the Agreement. It is doubtful whether the West will want to grant China significant benefits as a developing country, given the real possibility of China's emergence as an economic superpower in the coming decades.¹⁹⁷ Moreover, the Agreement does not appear to contain objective and measurable requirements for the assistance of developing countries.¹⁹⁸

China can benefit from membership in the Agreement both externally and internally. Externally, China could benefit from the opening of overseas procurement markets. Internally, China could use the Agreement as a catalyst to reform its enterprise system and some of its governmental functions.¹⁹⁹ As explained in a preceding section, China is introducing the concept of management responsibility for enterprise

194. Peter G. Peterson, Address at the China Business and Financial Symposium sponsored by China Daily (May 4, 1994) (held in New York City).

195. See Jackson, *supra* note 12, at 199.

196. See *supra* note 157 and accompanying text. This point was suggested by Professor Don Wallace, Jr. in a review of the article in a seminar on International Procurement Law and Policy, Georgetown University Law Center (Mar. 7, 1994).

197. See *supra* note 196.

198. See discussion *supra* part II.D.

199. See Wittig, *supra* note 141.

success and failure to its enterprises.²⁰⁰ Procurement in accordance with the Agreement would give the Chinese leadership another means to introduce concepts of accountability and integrity to its enterprises. Moreover, the Chinese central leadership might be able to use its obligations under the Agreement to pressure the provinces and regions to comply with national laws intended to reform the economy. Of course, enterprise reform in the context of China may not mean government reform, at least not of the core governmental functions controlled by the Communist Party. Key aspects of the Chinese government would, in all likelihood, remain closed and subject to strict Communist Party control.²⁰¹

With the completion of the GATT Uruguay Round and the agreements establishing the WTO, the evaluation of China's bid for GATT and WTO membership may take on renewed focus. In this evaluation, the members of the GATT and the WTO should give serious consideration to China's membership in the Agreement on Government Procurement. The Agreement should not be relegated to the limited participation that has characterized its existence since its birth in the Tokyo Round.²⁰² There are many intriguing possibilities for participation in the Agreement by the "world's fastest growing country."²⁰³

200. See *supra* notes 104-110 and accompanying text.

201. This was suggested by Lee Howell in a written critique of this article as part of a seminar in International Procurement Law and Policy held at the Georgetown University Law Center in Spring 1994.

202. See *supra* notes 25-28 and accompanying text.

203. See *supra* note 4 and accompanying text.