

GATT Membership for China?

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I. INTRODUCTION

In July of 1986, after an absence of over forty years, China officially applied to rejoin the General Agreement on Tariffs and Trade (GATT).¹ The government's motivations in doing so were complex. One important reason was the desire of the leadership for the enhanced international stature that GATT membership would give China.² After all, the GATT was virtually the only remaining major international organization of which China was not a member following its reentry into the world community in the 1970s. Another reason was, of course, the expected boost in export earnings that would come with access to a bigger market.³ Finally, in the eyes of many policy makers, GATT mem-

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1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT]. A great deal of ink has been spilled over the issue of whether China is joining the GATT as a new member or resuming a lapsed membership. China has always argued that because the Kuomintang regime on Taiwan was not the true government of China when it cabled its withdrawal from the GATT in 1950, the withdrawal was therefore invalid and China is still a member. The issue is beyond the scope of this Article, but is addressed in an excellent article by Ya Qin. She points out the logical fallacy of assuming that China could not lose its membership in any way other than the Kuomintang government's act. For over 30 years, the government of the People's Republic of China and the GATT contracting parties all assumed that China was not a member and acted accordingly. Although China neither gave nor received trade benefits under the GATT, no complaints were ever made against it or by it under GATT procedures. See generally Ya Qin, *China and GATT: Accession Instead of Resumption*, 27 J. WORLD TRADE 77 (1993).

2. See, e.g., Qisi Ge, *Conducting Business in Accordance with International Rules and Regulations in Foreign Economic and Trade Endeavors—On Restoring China's Signatory Status at the General Agreement on Trade and Tariffs* [sic], RENMIN RIBAO [PEOPLE'S DAILY], Nov. 23, 1992, at 5, translated in FOREIGN BROADCAST INFO. SERVICE, DAILY REPORT: CHINA, No. 92-232, Dec. 2, 1992, at 37.

3. See, e.g., Xiaodi Zhao, *A New Task for Participating in International Economic Competition—A Brief Analysis of Joining the General Agreement on Tariffs and Trade*, RENMIN RIBAO [PEOPLE'S DAILY], Sept. 4, 1992, at 5, translated in FOREIGN BROADCAST INFO. SERVICE, DAILY REPORT: CHINA, No. 92-181, Sept. 17, 1992, at 26, 27.

bership was an important element of China's domestic economic reform.⁴

China's application has been difficult for the GATT parties to handle for several reasons. On the one hand, China is a major trading nation, ranking just below the top ten.⁵ Around eighty-five percent of China's foreign trade is conducted with the GATT member nations.⁶ On the other hand, China's economic, legal, and political institutions simply do not operate the way the GATT contemplates a country's economic, legal, and political institutions will operate. Variance from GATT norms was not a problem with the occasional small nonmarket economies like Romania or Poland, which could be let into the GATT primarily for Cold War reasons without any fear of disruption of the system.⁷ But it is ironically China's presence in international markets which, while seeming to make it a natural candidate for membership, at the same time makes the current GATT members very nervous about its potential for disruption.

This Article will explore some of the conflicts between the premises of the GATT and China's current economic, legal, and political structure, as well as the extent to which China's institutions are moving in a GATT-compatible direction. It will conclude that while GATT membership would in itself promote the reforms that would make China's institutions more compatible with the GATT, such reforms are the object of considerable domestic opposition.

II. FUNDAMENTAL PREMISES OF GATT

The rules of the GATT were formulated with a particular politico-economic structure in mind and make sense only in the context of that structure.

A. *Market Economy*

First, the GATT assumes the existence of a market economy with some basic features. Decisions on buying and selling are assumed to be made by decentralized profit-maximizing actors with a hard budget constraint.⁸ The role of government

4. See *infra* note 26 and accompanying text.

5. See Ge, *supra* note 2, at 35.

6. See James V. Feinerman, *The Quest for GATT Membership*, CHINA BUS. REV., May-June 1992, at 24, 25; Zhao, *supra* note 3, at 26.

7. T.K. Chang, *After China Joins the GATT: Will It Continue to Face Annual MFN Renewal Battles?*, E. ASIAN EXEC. REP., Mar. 1993, at 9, 10-11.

8. On hard and soft budget constraints, see *infra* part III.A.1.

is to set the rules and act as a referee to ensure fairness. Trade barriers should be in the form of tariffs, which are visible and whose costs can be calculated according to market principles.⁹

The GATT shies away from numerical quotas and makes tariffs the preferred form of trade barrier not just because tariffs are more visible than other barriers and hence easier for those adversely affected to identify and lobby against. Tariffs are also the form of trade barrier that minimizes government interference and maximizes the autonomy of private market actors. Each importer can make for itself the decision whether it is worth it to import even at the higher tariff. There is no room for the corruption and favoritism that invariably accompany the granting of import licenses for less than market price.

The GATT aims for the reduction of trade barriers and the promotion of trade primarily through what we might call procedural guarantees. It does not require governments to increase imports; it attempts to promote a structure that will maximize the possibility of that happening. Thus, the GATT prefers tariffs to quotas because the harm is more obvious. This preference is also premised on the assumption that the lower tariffs are, the more imports will be bought because individual profit-maximizing buyers with a hard budget constraint will have an incentive to buy more as the price goes down, all other things being equal.

B. Rule of Law

Second, the GATT assumes that a country's political structure involves a government limited by law and a certain degree of separation of powers. Thus, for example, Article XIV specifically contemplates that signatory governments may not have the power to make subnational levels of government abide by GATT provisions.¹⁰ Similarly, the prevailing interpretation of paragraph 1(b) of the 1947 Protocol of Provisional Application¹¹ limits the scope of "existing legislation" to requirements on the executive authority that cannot be modified by executive

9. For a brief introduction to tariffs and nontariff barriers to trade, see JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 364-69 (2d ed. 1986).

10. GATT, *supra* note 1, at A43, 55 U.N.T.S. at 240. Important economic powers may, for example, be granted by a constitution to subnational levels of government such as provinces or states.

11. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A2051, 55 U.N.T.S. 308.

action,¹² clearly assuming that such requirements might actually exist.

C. *Open Society*

Third, the GATT presumes that member states are more or less open societies. It assumes a certain degree of, and strives to increase, transparency in law making and law enforcement. States could hardly object to trade barriers and seek their removal if the barriers were secret—for example, if the government sent secret directives to the managers of state-owned firms telling them to reduce imports of steel by fifty percent.

III. PROBLEM AREAS FOR CHINA AND THE GATT

What are the problems of trying to fit China into this system? As a threshold question, one must ask whether conformity to GATT norms matters. Clearly, the domestic systems of Poland and Romania did not square with many of the assumptions of the GATT when they were admitted, and yet that was not considered an insuperable obstacle.

Even so, the admission of certain nonmarket economies is explainable by considerations that do not apply to China. First, their admission cannot be viewed apart from a Cold War strategy of trying to detach them from Soviet influence. Second, their small size meant that even though they did not operate according to GATT principles, they posed no threat of disruption to the global trading order. Moreover, GATT signatories did extract a numerical promise from Poland, for example, regarding import quantities.

China presents a much bigger problem than Poland or Romania because any unwanted effects of its GATT-incompatible polity will be magnified through its prominence in international trade.

A. *Market Economy*

China's political and economic structure confounds the GATT ideal in many ways. It is not just a question of the existence of economic planning; indeed, the value of production under the state mandatory plan dropped from 12% of total pro-

12. See *Norway—Restrictions on Imports of Apples and Pears*, GATT Panel Report (June 22, 1989), in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 320 (36th Supp. 1990).

duction in 1992 to 6.5% in 1993,¹³ and approximately 90% of annual retail sales are made on the free market.¹⁴ The problem is rooted in the fact that enterprises often serve a number of purposes, only one of which is the accumulation of profits. Consequently, enterprises do not necessarily act the way profit-maximizing actors do in economic models.

1. Soft Budget Constraint

First, many (although progressively fewer) of China's enterprises are relatively insensitive to the market signals that the GATT assumes will affect business behavior because they lack a hard budget constraint.¹⁵ Enterprises lack a hard budget constraint when the decisive factor in their existence is not the difference between proceeds of production and costs of production, but whether they can get more infusions of money from the government. Costs are not as important as they would be to purely market-driven firms because these enterprises—like publicly regulated utilities in this country—can use increased costs as a basis for a plea for more money. Insensitivity to the difference between revenues and costs is another way of saying insensitivity to market signals.

13. *New Deregulation Measures: State Production Quotas Cut; Controlled Exports Fewer*, New China News Agency, Aug. 9, 1993, available in LEXIS, Nexis Library, XINHUA File.

14. Wu Xiao, *China: Free Markets Account for 90% of All Sales*, BUS. WK., CHINA DAILY SUPP., Oct. 3, 1993, available in LEXIS, ASIAPC Library, ALLASI File. It should be noted that statistics comparing quantities under the state mandatory plan with quantities under the market tend to understate the importance of the plan. This is because the only way to get an aggregate figure for nonidentical goods is to use prices (e.g., four apples at 50 cents each plus six oranges at 40 cents each yield total sales of \$4.40). Plan prices are typically lower than market prices. Thus, in an economy whose sole production is apples, if half were sold under the plan at 25 cents each and half were sold on the free market at 50 cents each, the use of prices would yield the misleading conclusion that two thirds of retail sales events were on the free market, when in fact only half were.

15. The concept of soft and hard budget constraints in socialist enterprises was developed most prominently by the Hungarian economist Janos Kornai. See generally JANOS KORNAI, *ECONOMICS OF SHORTAGE* (1980). In a firm with a hard budget constraint, the difference between proceeds of production and costs of production is a matter of life and death for the firm. In a firm with a soft budget constraint—for example, a firm whose management knows it will be bailed out by government in the event of insolvency—it is not. *Id.* at 302-14. Therefore, the difference does not act as an effective constraint on firm behavior. The standard assumptions of microeconomics—for example, that as the cost of an input rises, a firm will use less of it—do not necessarily hold. For a further discussion of soft budget constraints in the Chinese economy, see Donald C. Clarke, *What's Law Got to Do with It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 9-13 (1991).

Large state enterprises in China have historically had a soft budget constraint. They served not only economic purposes, but also political and social purposes. Not only did they generate income for the government through their profits, but they were a locus for the distribution of rewards and sanctions to the urban population. Citizens who performed some service for the state—for example, giving blood or turning out for government-organized demonstrations—were rewarded through their work unit, even though the service was of no business benefit to the enterprise. Therefore, if an enterprise showed a loss on its books, it was not necessarily due to poor management or bad market conditions. To judge an enterprise solely by its bottom line would have been absurd because the enterprise was not intended to be exclusively concerned with profit. The enterprise could always argue for a subsidy, and the state would have to give it or face the prospect of workers being laid off or going unpaid. When enterprise managers know that a subsidy may be forthcoming, they are bound to be less concerned about costs than managers who know that they will suffer from losses whether or not they are at fault.

The result of the soft budget constraint is that contrary to the expectations of the GATT, purchases of imports will not necessarily increase as much as they otherwise might as tariffs, and thus prices, fall. Many purchasers have other concerns beyond price and quality.

This is particularly difficult for the GATT structure to handle because the GATT, presuming a market order, allows firms to do things it will not allow governments to do. For example, if William Gates decides that Microsoft will henceforth use only American-made computers at its headquarters, there is no GATT violation. The GATT presumes that as long as there is no government-imposed protectionism, the economic irrationality of such an act will prevent its occurrence on a large scale. But where some government body relatively unconcerned with the bottom line is the owner, it can decide as owner to do things it could not, under the GATT, order the firms to do or, as a government, do itself.

Thus, while the Chinese government can assert that it imposes no local content requirement on joint ventures as a matter of law, joint venture contracts often do contain clauses regarding export performance and local content sourcing. It is clear that there could be a need to bind parties to buy locally

only if it did not already make economic sense. Who, then, is insisting on putting into the contract a provision that will decrease the profitability of the joint venture? Clearly it is the government (probably local) wearing its owner hat when it negotiates a joint venture with a foreign partner.

2. Subsidies

Second, subsidies are pervasive in the Chinese economy and will continue to be so, barring a major restructuring of government. Year after year the government announces its determination to make enterprises solely responsible for their profits and losses, and yet the policy seems impossible to implement.

At present, state-owned enterprises have to perform social functions for which they may be compensated through subsidies. These subsidies do more than simply confound expectations about firm behavior through their softening of the budget constraint. They may operate directly or indirectly to increase exports or reduce imports, and to this extent are disfavored by the GATT.

The GATT would prefer social functions to be undertaken by the government, with enterprises doing just business. But for China this is more than a question of just changing the direction of the flow of money. The elimination of subsidies would mean organizing society along fundamentally different principles. Social control and significant distribution of welfare benefits have traditionally taken place through the workplace. It is no small change to alter that system completely.

Because of the concentration of public functions in enterprises, any change in the system of subsidies will ripple throughout society. For example, the watchdogs of the Party's interests, the enterprise Party secretary and his or her staff, are traditionally paid from enterprise funds. But enterprises that are supposed to pay attention to the bottom line cannot afford to have nonproductive personnel on their payroll. In the absence of subsidies, the locus of urban social control will have to shift from the workplace to some other basis—probably the place of residence.¹⁶ But who is going to pay the watchdogs in that

16. A particularly striking example of this shift is contained in a report of the steps undertaken by Shanghai Petrochemical prior to its listing on the Hong Kong Stock Exchange. In addition to transferring to local government the usual laundry list of hospitals, schools, and other miscellaneous social functions, the company also divested itself of a court and a police department. See Andrew Quinn, *Huge China Share*

case? Neighborhood committees simply do not have the kind of money that is needed to maintain Party secretaries in the style to which they are accustomed, and the state is not administratively strong enough simply to shift the money that would be saved by enterprises over to neighborhood committees.

3. Ownership Structure

Third, although a large number of firms in the economy are owned by units of government at some level, ownership structure is not a major problem in itself. The issue of state ownership versus privatization is a red herring, and true private ownership has in fact played only a small role in China's dramatic recent economic growth.

One of the key elements of China's industrial reform is the much-vaunted separation of ownership and management. According to proponents, the problem with the traditional planned economy was that ownership was not separated from control: both were vested in the state. The result was excessive state interference in the operations of the enterprise. Because it is ideologically necessary to keep ownership in the hands of the state, the solution must be to separate ownership from control.

The shortcoming of this theory is that it fails to understand that ownership was always separated from control and that this separation is a problem, not a solution. Ownership was vested in an abstraction, the state. Investment funds came from a treasury that was the private property of nobody. Control, on the other hand, was necessarily vested in the hands of living individuals. Because the state is an abstract entity, not a person, it must necessarily act through human agents. Thus, there is always a principal-agent problem when the state is a principal. The agents will always have an incentive to use the principal's property for their own benefit.

In determining the GATT-compatibility of China's industrial structure, the real question is not ownership structure, but what sort of incentives managers face. There is no reason in principle why managers of state-owned firms cannot be induced to maximize profits to the same extent as managers of large publicly held corporations in the West. Neither have enough personal wealth to be significant stockholders; both need some

sort of supervision to ensure that they manage corporate wealth prudently. When managers of Chinese firms face incentives that reward cost cutting and profitability, they will cut costs and seek profits. Who owns the enterprise is irrelevant to their behavior except where the manager is also the owner, in which case no supervisory mechanism is necessary.

This principle of management behavior is borne out by statistics on industrial output. The statistics show that the pervasive image of large state-owned enterprises as lumbering dinosaurs doomed to extinction is erroneous. The power of this image is reflected in a recent article that, while noting that about half of industrial output still came from large state enterprises (as it has for several years), claimed that small township and village enterprises were the driving force of growth.¹⁷ But if large state enterprises have maintained a half share of output while the overall total has grown, then clearly they are responsible for half of the growth and their role should not be neglected. Thus, some state-owned enterprises have plainly been able to put in place a system of incentives that makes managers pursue growth.

Additionally, the township and village enterprises that have played an important role in economic growth are, with rare exceptions, essentially organizations run by some level of local government. Whether at the level of the large enterprise or at the level of the small village enterprise, true private property has played a very small role in China's recent development. Somehow, the inherent principal-agent problems have been solved at least to the extent that self-enrichment by managers is not at the expense of significant growth.¹⁸

4. Pervasive Role of Government

Fourth, although genuine competition can exist among firms that are formally designated "state-owned," a key element of a market economy—business organizations entirely independent of the state—is virtually prohibited in China. Radical changes in the Chinese system of government would be needed to create this element.

17. See Alexander Nicoll, *Long March to Market*, FIN. TIMES, Sept. 27, 1993, at 14.

18. Barry Naughton, *What Is Distinctive About China's Economic Reform? State Enterprise Reform and Overall System Transformation*, J. COMP. ECON. (forthcoming 1994).

Any organization of any importance in China can exist only with the approval of the government and must have its leadership vetted, if not actually appointed, through the Communist Party's personnel system. (This is true even of the so-called "democratic parties" that the Communist Party permits to exist.)

When the state formally withdraws from various kinds of market manipulation to meet GATT requirements, its formal control may be replaced by the same kind of manipulation under another guise. For example, one article in the Chinese press notes that entry into the GATT will require the government to reduce its direct intervention in foreign trade. But it adds that

[i]t is necessary to consider as soon as possible some way to harmonize enterprises' foreign relations and avoid Chinese enterprises "fighting against each other" on the world market. The practice of harmonizing enterprises' foreign relations, importing technologies, and fixing prices of imports and exports by non-governmental commercial chambers and associations will be acceptable to GATT.¹⁹

It must be recognized that these so-called nongovernmental organizations will be no more nongovernmental than the Chinese Olympic Committee.

5. Local Protectionism

Fifth, it will be difficult for the central government to make good on promises to open markets to foreign goods when it is hard pressed to reduce local protectionist barriers against domestically produced goods.

Out of their own interests, some localities erect checkpoints everywhere, thus artificially putting up market barriers. On the one hand, they exclude excess products from other localities from their own markets, and on the other hand, they check the outflow of local resources to other localities and try their best to protect their enterprises and markets. They adopt almost all-embracing measures, ranging from applying "economic levers" like taxation and finance, imposing heavy levies on the operation of products from outside, increasing loan interest, delaying or withholding payment for goods, and favoring their own products. Some localities employ industrial, commercial, and transportation departments, and even

19. Zhao, *supra* note 3, at 28.

public security organs, procuratorial organs, and people's courts to erect endless checkpoints and wantonly collect fees and fines, thus hampering the normal flow of commodities as well as goods and materials. . . . The State Council has issued repeated injunctions demanding the removal of checkpoints and the smoothing out of circulation channels, but actually they were not strictly enforced and while visible checkpoints were removed, invisible ones remained.²⁰

While the central government undoubtedly has the formal power to abolish local protectionist measures, its orders are often ignored with impunity by local authorities. Because the central government may simply be unable to dismantle local barriers, yet unwilling to admit its powerlessness to foreigners, these barriers may be a substantial irritant in China's relations with its trading partners under the GATT.

Many of the issues involved in establishing a GATT-compatible economic order in China can be summed up by a paradox: because of the weakness and inefficacy of market-based procompetitive measures, such as lowering tariffs or abolishing quotas, the most effective method for the central government to establish a market order is the administrative command. In other words, to get rid of local protectionism, it will not be enough for the central government to order local governments to abolish their trade barriers. The legal system, as a system for the decentralized enforcement of rules, is not strong enough to do the job. To get real results, the central government will have to resort to the method it always uses when faced with resistance or apathy from below, whether in anticrime campaigns or in economic policy: the numerical quota. It will have to say to local authorities, "You must import *X* amount."

B. Rule of Law

The GATT assumes that signatory states are essentially law governed. That is, it assumes that the power of a government is generally limited to what it has been given through some legitimate process. But in any realistic view of Chinese law, there is no such thing as limits on executive action. The idea of limited powers is wholly inconsistent with the philosophy of Chinese government.

20. *Article Urges Elimination of Local Protectionism*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Sept. 21, 1992, at 4, translated in FOREIGN BROADCAST INFO. SERVICE, DAILY REPORT: CHINA, No. 92-187, Sept. 25, 1992, at 43-44.

Indeed, it would not be too much to say that in China there is no such thing as law binding on government. The very notion of what it means to comply with a rule is different from that assumed by the GATT, especially when governmental bodies are involved. Essentially, the most that is required is a good faith effort to comply, with due regard given to surrounding circumstances. Thus, for example, local governments for several years openly violated the constitutional rule against the leasing of land with the blessing of the central government, on the grounds that local experimentation was needed before constitutional revision was appropriate. Similarly, the government continues to allow violations of the provision of the Organic Law on People's Courts calling for public trials, on the grounds that many courts still do not have a proper courtroom in which to hold the trials.

Because the GATT contemplates that trade disputes will often be resolved through the passage or repeal of legislation, this differing notion of rule compliance and of the binding effect of legislated rules on government carries within it the seeds of conflict.

C. Open Society

One of the most difficult problems to overcome in China's accession to the GATT will be the problem of transparency. Transparency—the principle that regulations and the processes under which they are formulated and enforced should be open and publicly available—is crucially important to the way the GATT operates. In many cases, the GATT declines to make a substantive rule, but instead endeavors to establish a process by which states will resolve their disputes.²¹ In China, however, the operation of the legal system and the legislative process are in principle state secrets, with details released only on a need-to-know basis.

This principle is manifested in a number of ways. Attendance at court proceedings, whether civil or criminal, is possible only with the permission of the court. Permission is by no means routine and needs some special justification. In the case of foreigners, a Supreme People's Court directive states that for-

21. Article XIX, for example, allows a state to act to restrict imports on an emergency basis when in its own judgment the imports threaten serious injury to domestic producers, but at the same time requires that notice in writing of such action be given to the GATT signatories. GATT, *supra* note 1, at A58, 55 U.N.T.S. at 258.

eigners may in special cases be allowed to attend trials, but takes pains to specify that foreigners may not be allowed to attend any trial that they particularly ask to see.²²

The publication of transcripts of court proceedings is unlawful without the permission of the government. For example, Liu Qing was sentenced to three years in prison in 1979 for having distributed a transcript of the trial of Wei Jingsheng, a dissident of the Democracy Wall era.²³

The legislative process is similarly opaque. It is unlawful to publish statutory collections without the permission of the government.²⁴ Even legislation that will be public when passed is a state secret while it remains in draft form, and its circulation outside authorized channels is forbidden. Occasionally, as with the Enterprise Bankruptcy Law, the government may seek the advice of foreigners before a law is passed or make preliminary drafts public for other reasons, but this is rare. An early draft of the Foreign Trade Law was apparently made available to the GATT Working Party on China, but was never, to my knowledge, openly published in China until its formal passage and promulgation in May 1994.

A great deal of rulemaking remains secret. The Chinese government has promised in its 1992 memorandum of understanding with the United States and in its undertakings to the GATT Working Party that all trade-related legislation will be made public.²⁵ Even with the best intentions, the government will find this promise difficult to fulfill simply because it goes so much against the grain of the way the legal system operates. Foreign trade is not governed by laws enforced by courts in open proceedings. It is governed by rules formulated by various con-

22. See Zuigao renmin fayuan guanyu renmin fayuan gongkai shenpan fei shewai anjian shi fou zhunxu waiguoren pangting huozhe caifang wenti de pifu [Reply of the Supreme People's Court on the Question of Whether Foreigners May Be Permitted to Attend Public Trials of Cases Not Concerning Foreign Interests] (July 5, 1982), in *ZHONGHUA RENMIN GONGHEGUO FALÜ GUIFANKING JIESHI JICHENG* [COLLECTED NORMATIVE INTERPRETATIONS OF THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] (1990). The very book in which this regulation is published is not intended for circulation to the general public.

23. See Richard Bernstein, *Human Rights in China: A Journey of Conscience*, N.Y. TIMES, Apr. 16, 1989, § 6, at 23.

24. See Fagui huibian bianji chuban guanli guiding [Rules on the Administration of the Compilation and Publication of Statutory Collections] (July 29, 1990), in *ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN* [COLLECTED LAWS AND STATUTES OF THE PEOPLE'S REPUBLIC OF CHINA] 237 (1990).

25. See Susan MacCormac, *Eyeying the GATT: General Agreement on Tariffs and Trade*, CHINA BUS. REV., Mar. 1993, at 34.

cerned bureaucracies and implemented through the everyday acts of those bureaucracies.

These features are not merely accidental incidents of the legal system. They go to its basic organizing principles. China's legal order is essentially entirely administrative. Most laws and regulations are best characterized as commands running down a bureaucratic hierarchy from superiors to inferiors. Laws and regulations that cannot be so characterized are often ineffective precisely because they are alien to the system. As a result, laws and regulations passed by legislative bodies are rarely very meaningful except as policy statements. The real rules according to which government departments operate are found in the regulations promulgated by and within those departments.

Once we focus on the internal organization of a government bureaucracy, it is clear that many of its procedures could legitimately remain confidential. Nobody could reasonably expect the Internal Revenue Service, for example, to publish the criteria by which it identifies suspicious tax returns.

Because of these features of the Chinese legal system, it will be very difficult for GATT parties to supervise the implementation of GATT norms within it.

IV. CONCLUSION

Many of the problems that I have outlined are not unique to China. Many countries have legal systems in which what appears on paper does not correspond with what happens in reality. What makes China's problems somewhat special is that the closed nature of the system and the wide scope of executive discretion are essential parts of the organizing principles of its legal system. They will not easily change simply because they are contrary to the basic assumptions of the GATT.

Indeed, the incompatibility of much of China's politico-economic structure with GATT principles is precisely why China's membership is strongly supported by domestic reformers. Their principal concern is not trade at all; it is to use the GATT as a stalking horse to dismantle the institutions that they feel stand in the way of domestic reform.

As one commentator argued, once China joins the GATT, the market mechanism will touch the deep-level defects of the planned economy that have never been touched by reforms in our country.

...
... [The GATT's] impact on the current structure will not be limited only to stimulating enterprises to acquire dynamism. The high efficiency is accompanied by the disappearance of the planning and approval-giving organs, the closure of enterprises failing to adapt themselves to the new environment, and the equal opportunities of selecting jobs and being selected for workers.²⁶

Despite the hopes of reformers, it would be naïve to suppose that domestic opposition to reform measures will cease once China becomes committed to reforms through GATT membership. There is still a long way to go before China's domestic institutions operate in anything like the manner that the GATT presumes they will.

26. Yue Wu, *Multilateral Rules and Market Economy—First Thought on China's Readmission to the GATT*, GUOJI SHANGBAO [INTERNATIONAL BUSINESS NEWS], Sept. 6, 1992, at 1, translated in FOREIGN BROADCAST INFO. SERVICE, DAILY REPORT: CHINA, No. 92-184, Sept. 22, 1992, at 42, 43.