TRADE POLICY DEVELOPMENTS PAPER NO. 2

REPORT ON CHINA

(FOR THE PERIOD APRIL 2011- JUNE 2011)

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This report has been prepared by the Centre for International Trade and Economic Laws (CITEL), Jindal Global Law School, Sonepat, NCR of Delhi under a project of the Centre for WTO Studies, Indian Institute of Foreign Trade (IIFT), New Delhi.

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ABBREVIATIONS

APEC	-	Asia-Pacific Economic Cooperation
APEDA	-	Agricultural Products Export Development Authority
AQSIQ		The General Administration of Quality Supervision, Inspection and Quarantine
ARFs	-	Automatic Registration Forms
Art.	-	Article
ASEAN	-	Association of South-East Asian Nations
BL	-	Bidding Laws
BOFT	-	Bureau for Fair Trade for Imports and Exports
CAAC	-	General Administration of Civil Aviation
CBRC	-	China Banking Regulatory Commission
CCC	-	China Compulsory Certification
CEPA	-	Comprehensive Economic Partnership Agreement
CERC	-	China Electricity Regulatory Commission
CIRC	-	China Insurance Regulatory Commission
CPC	-	Communist Party of China
CQC	-	The China Quality Certification Centre
CSRC	-	China Securities Regulatory Commission
DFEC	-	Department of Foreign Economic Cooperation
DITEA	-	Department of International Trade and Economic Affair
DSB	-	Dispute Settlement Body (WTO)
EEA	-	European Economic Area
EFTA	-	European Free Trade Association
EPA	-	Economic Partnership Agreement
EU	-	European Union
FDI	-	Foreign Direct Investment
FTAs	-	Free Trade Agreements
GAC	-	General Administration of Custom

GAT	-	General Administration of Taxation
GDP	-	Gross Domestic Product
GIs	-	Geographical Indications
GPA	-	Agreement on Government Procurement GPA
HS	-	Harmonized System
IBII	-	Investigation Bureau for Industry Injury
IECE Equipment	-	The IEC System for Conformity Testing and Certification of Electrical
IP	-	Intellectual Property
IPR	-	Intellectual Property Rights
ISO	-	International Organization for Standardization
IT	-	Information Technology
ITES	-	Information Technology Enabled Services
MLPS	-	The Multi-Level Protection Scheme
MOA	-	Ministry of Agriculture
MOF	-	Ministry of Finance
MOF	-	Ministry of Finance
MOFCOM	-	Ministry of Commerce
MPS	-	The Ministry of Public Security
MRRFTO	-	Measures for Registration for the Record of Foreign Trade Operators
NAFTA	-	North American Free Trade Agreement
NBER	-	National Bureau of Economic Research
NCAC	-	National Copyright Administration of China
NDRC	-	National Development and Reform Commission
NME	-	Non-Market Economy
NPC	-	National People's Congress
NPK	-	Sodium, Phosphorous, Pottasium
NT	-	National Treatment
OECD	-	Organization for Economic Cooperation and Development

PBC	-	The People's Bank of China
PPP	-	Purchasing-power parity
PRC	-	People's Republic of China
PRD Department	-	Office of the Economic and Commercial Counselor, Policy Research
PSI	-	Pre-shipment inspection
QIP	-	Quarantine Inspection Permit
RAIEG	-	Regulation on the Administration of the Import and Export of Good
RMB	-	Renminbi
ROO	-	Rules of Origin
SAARC	-	South Asian Association for Regional Cooperation
SAC	-	The Standardization Administration of China
SAFE	-	State Administration of Foreign Exchange
SAFE	-	State Administration of Foreign Exchange
SAIC	-	The State Administration of Industry and Commerce
SASAC	-	State-Owned Asset Supervision Administration Commission
SAT	-	Chinese State Administration of Taxation
SCNPC	-	Standing Committee of the National People's Congress
SEZs	-	Special economic zones
SIPO	-	State Intellectual Property Office
SOEs	-	State-owned enterprises
SPC	-	Supreme People's Court
STE	-	State-trading enterprises
TBT	-	Technical Barriers to Trade
TCF	-	Textiles, clothing and footwear
TRIMs	-	Trade-Related Investment Measures
TRIPs	-	Trade-Related Aspects of Intellectual Property Rights
TRQs	-	Tariff-rate quotas
USTR	-	United States Trade Representative

VAT	-	Value-added Tax
WAP	-	The WLAN Authentication and Privacy Infrastructure
WIPO	-	World Intellectual Property Organization
WLANs	-	Wireless Local Area Networks
WTO	-	World Trade Organization

SUMMARY

1. China's exchange rate policy is considered by many as highly trade distortive. Undervaluation of Chinese Yuan is alleged to provide higher export earnings for Chinese exporters which may have an adverse impact on the domestic industry in the importing economies. However, *The Economist* reports that the real exchange rate with the US Dollar, determined on the basis of consumer price index (CPI), has strengthened by almost 50% since 2005.

2. China continue to impose restraints on exports of raw materials—including quotas, licensing conditions, duties and fees to promote the development of downstream industries. Export quotas are mantained on rare earths and minerals. Export restrictions distort trade flows just as other import barriers. They generally result in a decrease in export volumes which potentially divert supply to the domestic market. India needs to monitor various export restraints maintained by China.

   On 25 March 2011, the Chinese Ministry of Finance (MOF) and the Chinese State Administration of Taxation (SAT) jointly announced a circular to impose an adjusted Rare Earth Tax from 1 April 2011. In accordance with this Circular, the tax rate of mined light rare earths will become RMB 60($9.1) per ton, while that of medium and heavy rare earths is RMB 30($4.5) per ton. The asymmetrical operation/differential impact of this tax policy needs to be examined to find out whether this is a *de facto* discrimination.

3. In China law and other administrative regulations include provisions which are very general. Most of such regulations are promulgated at the central, provincial and local levels. Although final regulations are published in China, they often leave room for discretionary application. The extent of discretion in rule making administrative decision making needs to be studied over a period of time to assess whether they could constitute trade barriers.

4. In May 2011, China entirely revamped its food safety administration with the publication of *Regionalization Management System on Primary Agricultural Products Requirements (GB/T26407-2011).* This will serve as the national standard and will enter into force on 1 September 2011.

5. China continues to be included in the Priority Watch List of the 2011 US Special 301 Report. It is highlighted that the Chinese framework for protection and enforcement of IPRs had persistent and significant inadequacies.

6. China has not notified its subsidy schemes to the WTO SCM Committee after 2006. The lack of transparency makes it difficult to identify the scope of prohibited export subsidies and other trade distorting domestic support measures.

7. Chinese methodology for customs valuation needs to be examined in depth as it is widely alleged that the customs authorities are not often using the "transaction value" method.

8. According to APEDA, only 4 agricultural products from India (mangoes, grapes, bitter gourd and tobacco leaves) have been able to make their way to the Chinese market. The reasons which constitute the barriers for entry should be examined in depth.

9. China is turning out to be a key user of trade contingent remedies. As on 31 December 2010 China had taken 137 antiumping measures. China has also started using CVD duty investigations.

TRADE POLICY DEVELOPMENTS REPORT: PEOPLES' REPUBLIC OF CHINA FOR THE QUARTER APRIL, 2011 TO JUNE,2011

INTRODUCTION

I.ECONOMIC ENVIRONMENT: MACROECONOMIC FUNDAMENTALS

Since 1978 China has pursued a strategy of gradual transition from a centrally planned to a market-based economy coupled with an "open door" policy that has involved substantial liberalization of its international trade and investment regimes.This strategy has delivered sustained and rapid real economic growth averaging about 10% annually between 1978 and 2008.In 2011, according to the IMF[1] China's Gross domestic Product (GDP) based on purchasing-power-parity (PPP) per capita GDP in International Dollars was at 8,288.81 (US$ 6,515.861 billion in current prices). It accounts for 14.35% of the world GDP in PPP terms. In 2011, China became the world's biggest manufacturer displacing the United States from a position it had held for more than a century.[2]According to the IMF, China is poised to overtake the US as the world's largest economy by 2016. Based on PPP, China's GDP will rise from $11.2 trillion in 2011 to $19 trillion in 2016, while America's economy will increase from $15.2 trillion to $18.8 trillion.[3] It is estimated that China's share of the global economy will ascend from 14% to 18%, while the US' share will descend to 17.7%.

Despiteits impressive recordin various economic parameters, China still has different problems. Its economic growth and the consequent human resources development have been by and large confined to the eastern provinces such as Guangdong, Fujian, Zhejiang, Jiangsu, Shandong, Liaoning and to an extent Inner Mongolia.The western provinces of Gansu, Guizhou, Qinghai, Shaanxi, Sichuan, and Yunnan and the 5 autonomous regions (Guangxi, Inner Mongolia, Ningxia, Tibet, and Xinjiang), and 1 municipality (Chongqing) constitute 71.4% of mainland China's area,but 19.9% of its total economic output, as of 2009. This has resulted in massive urbanization with all its accompanying problems. Today, almost 50% of the people live in urban areas. China's demographic advantage—an abundant supply of labor in the country side—is started to wane. However, optimists believe that the demographic dividends will continue to pay at least for the next decade and the reduced supply of labor will be offset by productivity gains.

China's economic reforms which are widely credited for generating double-digit economic growth during the last decade started with reforms in the agriculture sector.Linking remuneration to output and granting autonomy to farming households produced large increases in agricultural productivity, which has allowed China to liberalize agricultural imports considerably and still compete effectively with overseas producers.Exposure to international trade has improved agricultural productivity further.The reform also freed surplus labour from agricultural activities, which has been a source of increase in productivity in other sectors of the economy.

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[1]Report for Selected Countries and Subjects at http://www.imf.org/external/pubs/ft/weo/2011/01/weodata/weorept.aspx?sy=2011&ey=2016&ssd=1&sort=subjct&ds [henceforth IMF China Report 2011]

[2], *Rising Power, Anxious State*, The Economist June 25- July 1, 2011

[3] IMF, *China's economy to surpass that of US by 2016*, April 26, 2011 at http://articles.economictimes.indiatimes.com/2011-04-26/news/29475130_1_trillion-chinese-economy-china-daily

Trade and investment liberalization played an important role in extending China's reform programme to the manufacturing sector.The chinese startegy has been to attract foreign capital in theSpecial economic zones (SEZs) which were separated from the rest of the predominantly state-controlled economy and largely freed from import and export restrictions.The SEZs were expanded to other kinds of zones specialized in high technologies, free-trade zones, and bonded areas to encourage processing trade. Processing trade now accounts for around 40% of China's total international trade (including both imports and exports). Subsequently many of the the special incentives were withdrawn. For example, China has unified its enterprise income tax on FIEs and domestic enterprises in 2008.[4]

China's liberalization of trade and FDI has stimulated competition in the economy and contributed to the improved competitiveness of domestic producers.Starting from the mid-1990s, the Government began to privatize and restructure state-owned enterprises (SOEs) and to facilitate the development of private enterprise.FDI has encouraged both the emergence of the private sector and the scaling-back and restructuring of the SOEs.Although the Government is still "guiding" the allocation of resources in the economy, the market is playing an increasingly important role and the private sector now accounts for more than 60% of the GDP. [5]

It is widely acknowedged that China's economic growth was export led.China, with its merchandise trade at US $ 1.20 trillion (9.6 % of world merchandise exports) in 2009 became the world's largest exporter, followed by Germany, US, Japan, Netherlands, France, Italy, Belgium, Korea and UK.In the wake of the 2008 global economic crisis, China's exports fell by 16% and its imports fell by 11%. Real GDP growth declined from 9.6% in 2008 to a year-on-year rate of 6.2% in the first quarter of 2009, the lowest rate in more than a decade.However exports picked up in 2010.Its value was US$162 bn in June, 2011. Exports of goods and services currently constitute 39.7% of China's GDP. In the first half of 2011, China's import & export totaled US$1703.67 billion with a year-on-year growth of 25.8%. China's export was US$874.3 billion and its import was US$829.37 billion, up by 24% and 27.6% respectively. In June, China's import & export totaled US$301.69 billion with a year-on-year growth of 18.5%. China's export was US$161.98 billion and its import was US$139.71 billion, up by 17.9% and 19.3% respectively.[6]

China's major exports include office machines and data processing equipment, telecommunications equipment, electrical machinery and apparel and clothing. China's largest exports markets are European Union, United States, Hong Kong, Japan and South Korea.[7]

I.1 Fiscal Policy

The two main entities responsible for fiscal policy are the National Development and Reform Commission (NDRC) and the Ministry of Finance (MOF).MOF[8] is primarily responsible for macroeconomic policymaking and administration of the state's budget, drafting of financial and tax policy, and management of revenues from taxes, treasury bonds, and hard currency reserves. But it also has some micro-level responsibilities, such as monitoring budgetary and construction fund spending at local levels, overseeing the issuance of central government bonds, and negotiatingloans provided by foreign governments.

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[4] WT/TPR/S/230 (26 April, 2010) at1, para 3

[5] Id., at para 5

[6] *Trade statistics,* MINISTRYOF COMMERCE PEOPLE'S REPUBLICOF CHINA, http://english.mofcom.gov.cn/statistic/statistic.html (last visited July17, 2011)

[7] *China Exports*, TRADING ECONOMICS, http://www.tradingeconomics.com/china/exports

[8] MINISTRY OFFINANCE, US-CHINA BUSINESS COUNCIL, http://www.uschina.org/public/china/govstructure/govstructure_part5/9.html

In 2011, total government revenue increased by 8% while total government expenditure rose by 21.2%; the budget deficit decreased from 1trillion RMB to about 900 billion RMB (2% of GDP).Part of the increase in budget expenditure was directed to education, medical care, and social security. [9]The 2010 central government debt is around 80% of GDP when off-budget government debt is included, such as debt owed by policy banks, local governments, asset management companies, pension, and banks' non-performing loans.[10]

I.2 Stimulus Package

The Chinese government responded to the global financial crisis with expansionary fiscal and monetary policies and the introduction of a large economic stimulus package designed collectively to boost domestic demand and help sustain economic growth in the face of sharp decline in external demand.[11]The stimulus package entailed a massive expenditure of an estimated $586 billion by 2010 on wide array of national infrastructure and social welfare projects. It includedconstructing new railroads, subways, airports and rebuilding areas like those devastated by the Sichuan earthquake in May.The package, which was announced by the State Council, or cabinet, is the largest economic stimulus effort ever undertaken by the central government. It would amount to about 7% of China's GDP during each of the next two years.Beijing also said that it would be loosenining credit and encouraging lending and that it needed to have a more "pro-active fiscal policy" to strengthen its economy.

In2009, China's National Development and Reform Commission announced a revision of the stimulus and published a breakdown of the allocation funds.

- 1.5-trillion yuan, or nearly 38% of the total package earmarked for public infrastructure development. The sectors targeted include railway, road, irrigation, and airport construction.
- One trillion yuan, second largest allocation earmarked for reconstruction works in regions hit by the Sichuan earthquake; that was followed by funding for social welfare plans, including the construction of low-cost housing, rehabilitation of slums, and other social safety net projects.
- 370 billion yuan earmarked for rural development and technology advancement.. The allocaton was targeted at building public amenities, resettling nomads, supporting agriculture works, and providing safe drinking water.
- Technology advancement fund mainly targeted at upgrading the Chinese industrial sector, gearing towards high-end production to move away from the current export-oriented and labor-intensive mode of growth. This was in line with the government's latest Blueprint for revitalizing 10 selected industries.
- 210 billion yuan, or 5.3% of the stimulus package for promoting energy saving and gas emission cuts, and environmental engineering projects.
- 150 billion yuan was allocated for educational, cultural and family planning purposes.

China's economic growth was sustained to an extent by the economic stimulus.Chinese economic growth was around 10% even as most of the G-7 economies were slowing.Owing to the success of the economic stimulus plan, the central government has tightened regulation in the financial system on banks to curb

[9]*FACTBOX-Selected figures from China's 2011 budget*, REUTERS, May 3, 2011.
[10]*How manageable is China's red ink?,* THE ECONOMIST, Jun 28, 2011.
[11] David Barboza, *China plans $586 billion economicstimulus*, THE NEW YORK TIMES, Nov. 9,2008; *Chinese economicstimulus program,* WIKIPEDIA, http://en.wikipedia.org/wiki/Chinese_economic_stimulus_program

lending amid fears of a property bubble which could dent economic recovery.In 2011, it was revealed that as much as 20% of the loans under the program distributed by the Municipal and Local governments have turned out to be bad loans and could be written off.[12]

I.3 Monetary Policies

The People's Bank of China (PBC) was established in 1948 and assumed the responsibilities of a central bank in 1983; its status as a central bank became official in 1995. Modeled after the US Federal Reserve system, PBC manages monetary policies through various local offices.

PBC shifted to a moderately lose monetary policy and cut interest rates several times.[13]A large part of the stimulus package was to be implemented through increased bank lending (only RMB 1.18 trillion of the package came from the Central Government budget).In the aftermath of the global economic recession in 2008-09, PBC has been encouraging banks to provide loans, through, inter alia, "window guidance".Moreover, in 2009 while keeping benchmark lending costs unchanged, the PBC has been encouraging new bank lending which almost led to a growth in lending to RMB 9.6 trillion by the end of the year.[14]

The PBC being conscious of the risks of excessively loose monetary policy contributing to inflationary pressures, began to reduce monetary stimulus in 2010 by increasing the reserve requirement ratio.In 2011, China vowed to implement a prudent monetary policy.A statement released by State Council following its executive committee meeting presided over by Premier Wen Jiabao, stated thatChina would adopt multiple tools, including an open market operation, a bank reserve requirement ratio and interest rate adjustments to check market liquidity.[15]In 2011, accordingly the People's Bank of China has twice increased the RMB reserve requirement ratio.[16]

I.4 Exchange Rate Policy: Yuan (RMB)

The use of foreign exchange is state controlled in China, adding another level of state involvement. Chinese firms have to apply to the State Administration of Foreign Exchange (SAFE) under the People's Bank of China for foreign exchange. The PBC has been empowered to hold and manage the state's foreign exchange and gold reserves, make payment and settlement rules in collaboration with relevant departments, monitor money-laundering related type of suspicious fund movement, and participate in international financial activities at the capacity of the central bank. Under the central bank, the SAFE is responsible for promulgating regulatory measures governing foreign exchange transactions under current account, supervise and monitor foreign exchange transactions under capital account, including inward and outward remittance and payments, and provide the PBC with propositions and references for the formulation of exchange rate policy.

Since 1994,China had a system whereby its currency was pegged to the US dollar at a fixed rate of exchange.By the end of 1996, the RMB was fully convertible on the current account for trade related

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[12]John Schoen, *It's China's turn to wrestle with a pile of bad debt*, MSNBC.COM,http://www.msnbc.msn.com/id/43600432/ns/business-eye_on_the_economy/

[13] PEOPLE'S BANKOF CHINA, CHINA: MONETARY POLICY REPORT*,* Quarter 2 (2010).

[14] Supra 4 at 4, Para 11

[15]See*China vows to continue prudent monetary policy*, http://news.xinhuanet.com/english2010/china/2011-04/13/c_13827448.htm, (last visited April 13, 2011)

[16] Highlights of China's Monetary Policy in the First Quarter of 2011, (June 17, 2011)

purposes.[17]This system was abandoned in July 2005. The authorities revalued the dollar bilateral rate by 2.1%. PBC announced that the exchange rate has to be made more flexible with its value based on market supply and demand. In February2010, the Chinese Premier claimed that in terms of real valueagainst the US dollar, the RMB had gained 53% since the mid-1990s, and 22% since 2005 when China initiated its exchange rate reform. The RMB has advanced 3.7% since June 2010 when China resumed the reform.[18]

Box I

China's currency exchange rate: Does it confer a subsidy, and if so challengeable?

The allegation that China has been manipulating the currency policy to achieve a trade advantage is nothing new.

China unified its dual exchange rate and depreciated it by 50% in 1994. The nominal exchange rate is currently around 6.67 yuan to the dollar or has been fairly the same since 2008. This pattern itself could lead to the conclusion that there is a governmental intervention in the currency policy. Thus, for illustration, when a Chinese exporter having been paid in dollars comes to the Central Bank to trade these dollars for yuan, that exchange would seem to qualify as a "financial contribution" under WTO Subsidies Agreement. The claim that the Chinese Government' exchange policy confer a "benefit" rests on the comparison to the "probable free market value" of yuan with its current exchange rate.

A subsidy (financial contribution plus benefit and specific to an enterprise or industry or contingent on export performance) is prohibited under ASCM (Article 3) if it is export contingent, either in law or fact. The benefit to these beneficiaries is dependent upon the existence of exports. They cannot enjoy the benefit without exporting. Thus, the subsidy to these beneficiaries can be considered as either expressly contingent on exporting or at least in fact tied to an actual or anticipated exportation or export earnings.

Even if the USD-Yuan exchange rate is export contingent, it may not still qualify as a subsidy. In order to determine whether a benefit exists, it has to be determined whether the Government is receiving less than the "adequate compensation". The issue would be what yuan would be worth if its value were set by the market. The first recourse is to look at what other sellers and buyers in the same jurisdiction are giving and getting in similar transactions. Of course these evidentiary requirements are difficult to be collected in the context of a WTO dispute proceeding. The lack of information will be another constraint.

China's 2006 notification included one export contingent subsidy. But understandably, China did not report currency exchange rates as a possible subsidy.

Exchange rate problems traditionally lie with the IMF. But there are no clear answers or initiatives from the Fund. At least in the US, legislation is seen as the most likely congressional response to Chinese currency policy. *TheEconomist*, the news magazine, reports that the real exchange rate with US Dollar, determined on the basis of consumer price index (CPI) has strengthened by almost 50% since 2005.This may be a bit of comfort for the US and other leading importers of Chinese goods and services.

Source: Based on news reports in The Economist, US CRS Reports, etc.

However, there is a widespread belief that the RMB is still substantially undervalued and that China has resorted to massive interventions in the currency market to maintain the inflated value of the dollar. It is pertinent to quote Fred Bergstein:

> "China's currency manipulation represents the largest protectionist measure maintained by any major economy since the Second World War. China has intervened in the foreign exchange markets by an average of $1 billion a day for the last five years, buying dollars to keep them

[17]Maria DaCosta(book,), 2004

[18] See *China to push forward exchange rate reform prudently (*Feb. 2, .2011) at http://www.chinadaily.com.cn/bizchina/2011-02/28/content_12088084.htm

expensive and selling renminbi to keep them cheap, building a gigantic reserve of $2.5 trillion in the process. Largely as a result, the renminbi is undervalued by at least 20% relative to economic fundamentals. The largest trading country in the world is therefore subsidizing all exports by at least 20% and imposing an additional tariff of at least 20% on all imports."[19]

Exchange rate is an issue where China is supposed to trade cautiously mainly in view of factors such as inflation, growth and employment.[20]

India has major stake in the yuan(RMB) revaluation.India's interests are enumerated in Box –I below.

Box-II

Yuan exchange rate on India's trade policy

Revaluation of RMB (depreciation of Rupee vis-a-vis RMB) will have impact on the trade of India, particularly with higher elasticity for imports. By keeping RMB undervalued against the USD and depreciating it in line with the USD in the international market without taking into account the economic fundamentals of China, it provides competitive advantage over its trade competitors and trade partners including India.

(Source: S. Arunachalaramanan and Ramesh Golait 2011[21]

I.5 Structural Policies

Three features of China's current stage of economic development and reform stand out.[22]One is China's large and persistent surplus of domestic savings over domestic investment, which has as its international counterpart China's current account surplus in its balance of payments.China's savings (Gross National Savings) rate as percentage of GDP in 2011 was 54.28%and investment as percentage of GDP was 48.56%.[23]The second is China's heavy dependence on overseas demand for its manufactured exports to sustain economic growth.The third is overcapacity in several of China's core industries, particularly in the face of current reduced global demand for the output of those industries.

I.6 Savings

Ma & Yi 2011 contend that China's high household savings rate is caused by both secular and institutional factors.[24]The secular factors being decline of agriculture (between 1980-2008 share of agriculture in GDP fell from 30%-10%), rapid urbanisation(20%-40% between 1980-2008)and sudden drop in dependecny ratio (68% to 38% within a generation, resulting in a surge of the working-age share of the population from 60% to 74% because of one child policy) led to a steady transfer of people from the firm to the factories.[25]According to the authors this has led to a model of development called Lewis modelwhereby,

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[19]*Protectionism by China Is Biggest Since World War II*, N.Y. TIMES, July 20, 2011.
[20]*Fast Yuan Revaluation No Panacea: China's Zhou*, REUTERS, Oct 2010.(day not known)
[21]S. Arunachalaramanan and Ramesh Golait, *The Implications of Renminbi Revaluation On India's Trade -A Study*, RESERVR BANK OF INDIA, April , 2011, http://www.rbi.org.in/scripts/PublicationsView.aspx?id=13324#L2[henceforth Implication on India's trade]

[22]Supra note 4 at 8-11, para. 25-34.
[23] International Monetary Fund, *Peoples' Republic of China: Article IV Consultation*, IMF Country Report 11/192.
[24] Ma & Yi 2011 at 7-8
[25] Id.

the modern sector with rising productivity draws surplus labour from the traditional sector at a relatively low wage.This model predicts rising profit share in income, accelerated capital accumulation and faster economic growth during the transformation process therefore resulting in a higher saving rate.

In case of China strong institutional factors have also played a part.

First, between 1995 and 2005, China went through its toughest corporate restructuring, leading to large-scale labour retrenchment with the employees received modest social welfare benefits, while many smaller money-losing state companies were shut down altogether. Such corporate restructuring tends to directly boost corporate efficiency and increase corporate savings.The reduction in job security, cause future anxiety and enhances life savings.

Second, the 1997 pension reform transformed the previous pay-as-you-go system to a partially funded three-pillar scheme. The new scheme reduced pension benefits, increased contributions and introduced pre-funded individual pension accounts. It has expanded to cover more firms over time. This institutional change has interacted with the diminished role for family and increased concerns over rising pressure on public retirement schemes in anticipation of rapid population ageing and thus could have induced additional accumulation of capital through increased saving and investment---the so-called'second demographic dividend'.[26]

Third, high domestic savings have been complemented with high corporate and government savings.High corporate savings were largely a result of the decision by the government not to make the State-owned Enterprises(SOEs) pay dividends to the Government[27].High government saving on the other hand reflected higher levels of income of the government.The Chinese government's marginal propensity to save exceeded 50% during the 2000s, compared to less than 20% in the 1990s.[28]

Nationally, the high savings rate has been blamed for impeding the efforts by the authorities to boost domestic demand so as to achieve a more balanced growth path for the economy, including increasing the consumption of imported goods and services.Some elements of the stimulus packages introduced over the past two years can help reverse China's chronic savings surplus, for example, the long-term investment in healthcare reform and increased government expenditure on education and pension reform, as long as these are sustained.However, much of the increase in government expenditure is likely to have only a temporary impact, so that a large part of the narrowing of the saving-investment gap in 2009, and concomitant reduction in the current account surplus to GDP ratio from 9.4% in 2008 to 5.8% in 2009 could be reversed as fiscal stimulus is removed from the economy.

Yang,Zhang andZhou however,argue that the savings rate will decline in the future because of the following reasons:

(a) Slow down of China's growth (average annual rate of 8.1% for 2011–2015 by the World Bank) (and an even lower range of 5.37–7.27% for 2010–2020 by the Asian Development Bank).
(b) Decline in corporate savings due to increasing insistance of the government that the State owned Enterprisespay dividends.

[26]Wang and Mason, 2008
[27] Supra 24 at 11
[28]Supra 24 at 20

(c) Labour unrest causing a subsequent increase in minimum wages.This has to be seen as a part of a series of measures taken for income re-distribution.It is contended that such re-distribution can reduce the savings rate because low-income families have higher propensity to save.
(d) Over time, the life cycle earnings in China will converge gradually to the typical earnings profiles observed in more advanced economies. The combined effects of slower earnings growth and the steepening of age-earnings profiles will reduce household saving.

At the enterprise level, further reforms to modernize China's capital markets, including its stock and bond markets, are needed to create a more efficient allocation of savings in the economy and reduce the need for discretionary saving by private enterprise. In the past, China's stock markets had a split-share structure, with large volumes of non-tradeable shares for listed SOEs and only around one third of the shares tradeable.China began converting non-tradeable shares into tradeable shares from 2005.By the end of 2010, about 87% of non-tradeable shares were floated, and the China Securities Regulatory Commission (CSRC) plansto have all shares floated by 2016.China's corporate bond market remains small, with outstanding bonds valued at only 3.5% of GDP.China allowed short-term commercial paper to be traded in the interbank market from 2005, and allowed the trading of medium-term notes in 2008.In 2007, a pilot programme began of trading longer-term bonds on China's two stock exchanges.Currently, insurance companies can purchase corporate bonds and listed banks (including foreign banks) can participate in bond trading on the interbank market.[29]However, small and medium-sized enterprises are still not allowed to issue corporate bonds, which obstructs their access to capital.In 2011 the People's Bank of China stated that China will encourage businesses to raise funds by issuing bonds, and will gradually open up the bond and other financial markets to overseas investors.[30]

I.7 Rebalancing the economy

One of the key direction changes in policy that has occurred in the past few years is the expressed need to rebalance the Chinese economy.Nicholas R Lardy has in his essay,*China Rebalancing economic Growth*,[31]has argued that China's growth since the late seventies has been driven by exports supported by high rates of domestic investment and a high savings rate as well as FDI inflows.While the growth of domestic consumption has been high in absolute terms, it has lagged behind growth of the economy. In the 1980s household consumption averaged slightly more than half of GDP. This share fell to an average of 46% in the 1990s. But after 2000, household consumption as a share of GDP fell sharply—and by 2005 accounted for only 38% of GDP, the lowest share of any major economy in the world.[32]

At the Annual Central Economic Work Conference in December 2004 , China's leadership were of the view that China's growth path was not sustainable in the long run. This decision is seen to have been arrived at pursuant to the following suggestions:[33]

(a) Fall in the multi-factor productivity growthof the Chinese industry.
(b) To increase personal consumption and alleviate or at least slow the pace of increasing income inequality.

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[29] Supra note 4 at 8, para 29
[30]*Chinese Government Boosts the Bond Markets*, XINHUA (April 9, 2011), http://news.xinhuanet.com/english2010/china/2011-04/09/c_13820685.htm
[31] Nicholas R lardy, *China Rebalancing Economic Growth*, *available at*http://csis.org/files/media/csis/pubs/090212_01rebalancing_econgrowth.pdf [hereafter Nicholas lardy]
[32]*Id.* at 2
[33]*Id.* at p 5-9

(c) Increase employment generation.
(d) Reduce the pressure on environment and
(e) Reduce regional disparity.

China's efforts at rebalancing seem to be working. A World Bank Report released in 2011 finds that:[34]

> "China's domestic economy grew even faster than exports in those 3 years and China's imports surged alongside domestic demand—outpacing exports, in real terms. This lowered the current account surplus from 10.1% of GDP in 2007 to 5.1% in 2010, leading to some external rebalancing simply because China grew much faster than the rest of the world.At the same time, the relative importance of exports in the economy declined because of these trends and the fact that domestic prices rose much faster than export prices. Having peaked at 39% in 2006, the share of exports in GDP was an estimated 29% in 2010 (in value added terms the reduction was somewhat less). These developments are of course influenced by the global crisis, which depressed global demand and led China's government to implement a large and effective stimulus. Looking ahead, whether these trends will be sustained depends on China's policies, including the progress with rebalancing, and other developments domestically and globally."

A secondary goal of the rebalancing is to increase the role of the services sector in the economy.The same Report also notes that during the 11thFive Year Plan Period:[35]

> "On the production side, the secondary (industrial) sector grew broadly as fast as the services sector, in real terms. The share of the service sector in GDP increased because of more rapid price increases in the services sector and a fall in the share of agriculture. However, industry clearly remains very important. On the expenditure side, consumption has so far substantially lagged investment, which in 2010 made up more than 46% of GDP."

In short, the rebalancing efforts will have significant impliactions for the Chinese economy in the years to come.

I.8 Overcapacity

The European Union Chamber of Commerce in China[36] came out with a comprehensive study of overcapacityin China in 2009.TheEU Report gives the following reasons for the accumulation of overcapacity:[37]

- Rapid urbanisation: 1% of China's population moves each year from rural areas into urban ones. The major housing development that results from this migration creates massive domestic demand for construction machinery, building materials, steel, cement, and chemical products.
- High savings: The Chinese have a high savings rate, (because of the factors enumerated above). This abundance of capital has led to abundant domestic funding and low interest rates.

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[34] CHINA QUARTERLY REPORT, APRIL 2011, at p. 8, THE WORLD BANK, available at www.worldbank.org.cn (last visited June 28, 2011)
[35] *Id.* at p 14
[36] European Chamber of Commerce, *Overcapacity in China: Causes, Impact and Recommendations*, April 2009[henceforth ECC Report]
[37] Supra note 6

- Low input prices: Input prices are low mostly because government policies stimulate the secondary sector, especially heavy industry. This would include preferential government procurement for local products, subsidised production in terms of mispricing land, labour and environment.

Some of the industries which have significant opercapacities include: (a) Steel; (b) Aluminium ; (c) Cement; (d) Chemicals(varying degrees); (e) Coal liquification and (f) ethylene deriavatives ;(g) oil refining; (h) wind power equipment.[38]

The solutions suggested in the report are susbtantially the same as the suggestions made to rebalance the Chinese economy - to increase the share of services, increase consumption etc.[39]

Due to overcapacity there was a large scale power shortage in China in 2011. The government took strong steps to eliminate overcapacity by shutting down2,255 enterprises.According to an MIIT statement obsolete production capacity in 18 major industrial sectors - including iron, steel, coke, cement, flat glasses, paper making as well as printing and dyeing - will be eliminated.[40] Further, production capacity for 31.22 million tons of iron, 27.94 million tons of steel, 19.75 million tons of coke and 153.27 million tons of cement will be removed by the end of the year as the country continues to reduce pollution, conserve energy and upgrade industry.

China also took an ambitious programme of industrial consolidation.[41]The priority industries for the consolidation would be automobile, steel, cement, electrolytic aluminum, rare earth mining, IT, equipment manufacturing and medical industries.However there seems to be concentrated opposition by local government to the project over the prospect of lost revenues.

Box-III

Chinese Overcapacity: A Threat to India?

Over the longer term, a slowing China would result in excess capacities across many manufacturing sectors and would change global demand-supply dynamics, especially given China's low cost of production. This could result in intense competition for India's manufacturing exports and put pressure on profitability for exporters. In the short-term, however, the impact would be limited due to the growing trade deficit between the two economies, with India's exports to China accounting for only a small part of its total overseas shipments.

Source: Fitch, 2011

I.9 Trade Policy Objectives

China's overall trade policy objective has been described in the following terms"to accelerate the opening of its economy to the outside world, to introduce foreign technology and know-how, develop foreign trade,

[38] See generally ECC Report
[39]See generally ECC Report at 46
[40]*Overcapacity being cut amid power shortages*, CHINA DAILY, July 12, 2011, available at http://www.china.org.cn/business/2011-07/12/content_22972243.htm .
[41]See China to drive consolidation of 8 industries over next 5 years, 8th July 2011 available at http://www.whatsonsanya.com/news-17047-china-to-drive-consolidation-of-8-industries-over-next-5-years.html

and promote economic development that is "mutually beneficial" with its trading partners.In this context, China has recently concentrated more on the opening up of its services sectors."[42]

II. ECONOMICPOLICY FORMULATION AND EVALUATION

II.1 Institutions involved

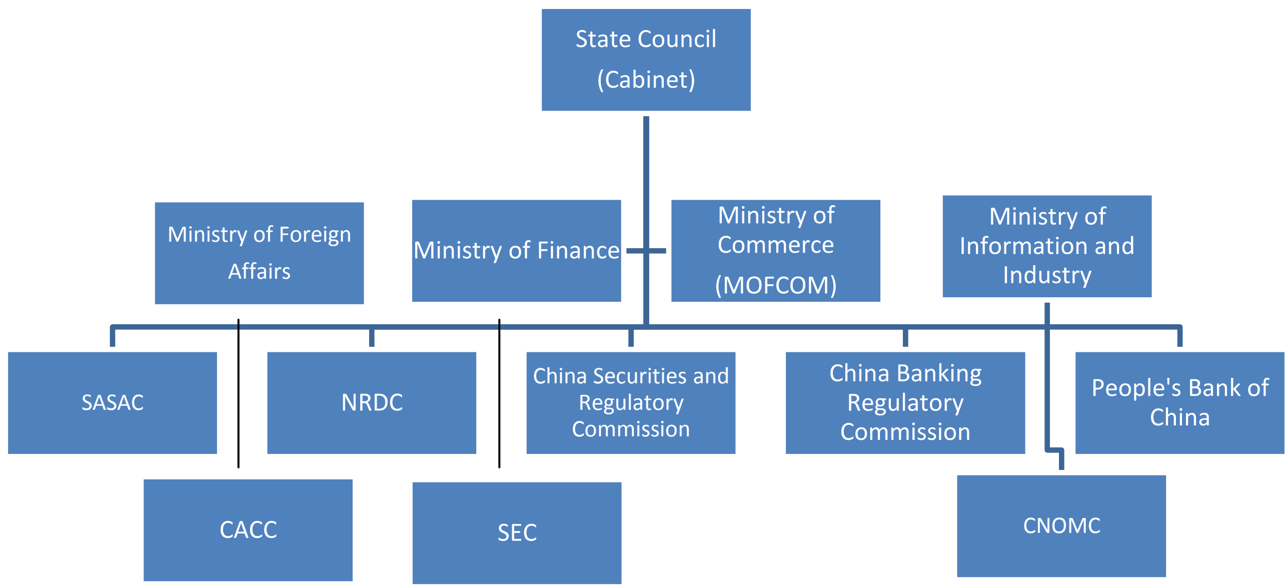
The structure of the Chinese State and the key institutions involved in legislation and executive function is given in Box 1.

Chinese legislative institutions[43]: The Chinese Constitution doesnot contain a legislative list for the Central, State and the Provincial Governments akin to the Indian Constitution.However the basic legislative framework is that the National People's Congress (NPC) "enact and amend basic laws governing criminal offences, civil affairs, the state organs and other matters"[44].UnderArt.64ordinary laws and regulations will have to be adopted by more than one-half of the Deputies of NPC.The Standing Committee of the NPC has the power to (a) enact and amend laws, with the exception of those which should be enacted by the NPC, (b) interpret laws and (c) amend laws made by the NPC when the NPC is not in session(Art. 67).This wide scope of powers makes the SNPC the main legislative body.The State Council can also adopt administrative measures and administrative rules (Art. 89).The difference between what is considered to be a law and an administrative regulation has not been defined.In addition,local Congresses of Provinces and Municipalities may adopt local regulations, which must not contravene the Constitution, the law, the administrative rules and regulations, and they are required to report such local regulations to the Standing Committee of the National People's Congress for the record(Art. 100).

The Special Administrative Regions of Hong Kong and Macau are distinct from this Governance structure.

[42] Supra 4 at 11, para.1
[43]CONSTITUTION OF CHINA, http://english.gov.cn/2005-08/05/content_20813.htm, (last visited Nov. 18, 2010)
[44] XIANFA, Art 62(3), (China)

Economic and Trade Policy: Key Ministries and Institutions*



**The list of institutions/agencies is illustrative and not exhaustive*

Ministry of Finance(MOF):[45]The Ministry of Finance (MOF) is a part of the State Council and the main executive body entrusted with fiscal policy.administers macroeconomic policies and the national annual budget. It also handles fiscal policy, economic regulations and government expenditure for the state.The ministry also records and publish annual macroeconomic data on China's economy like growth rates, government deficit etc.

The Ministry is however co-equal in power to the State-owned Assets Supervisionand Administration Commission (SASC)- an agency entrusted with the management of State run Enterprises and the People's Bank of China- an agency entrusted with the monetary policy.The political head of both SASC and PBOC sit in the State Council.Ministry of Commerce (MOFCOM). MOFCOM is a part of the State Council. MOFCOM is responsible for administering China's foreign trade, economic cooperation and foreign investment.The MOFCOM is the main central government agency regulating inbound FDI.

In addition to its regulatory role, MOFCOM provides Chinese companies withinformation and guidance. For example, in July 2004 MOFCOM and the Ministry of Foreign Affairs jointly issued the *Countries and Industries for Overseas Investment Guidance Catalogue*.This Catalogue sets out a list of preferred industry sectors in sixty-eight countries shaped both by Beijing's impressions of previous endeavors and perceived prospects for future success. Preferred investments benefit from a broad range of incentives offering priority access

[45]*Ministry of Finance -- The World Bank's counterpart agency in China* , THE WORLD BANK, http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CHINAEXTN/0,,contentMDK:20600295~menuPK:318996~pagePK:1497618~piPK:217854~theSitePK:318950,00.html ; also see Official Website of the Ministry of Finance in http://www.mof.gov.cn/

to financing and foreign exchange, tax concessions and preferential customs treatment. MOFCOM is also establishing an information bank for Chinese enterprises which intend to expand overseas.

MOFCOM's role is however not confined to being a passive information bank,it seems to have an active intelligence connection as well.A South African think tank in its 2009 report notes:[46]

> "The Ministry of Commerce (MOFCOM) also plays a critical role and boasts some of the world's top economic intelligence gathering units. While it is predominant with regards to the government's formal interface with foreign commercial interest groups, it also has subintelligence units dealing with economic information gathering. According to the French publication, Intelligence Online, MOFCOM works closely with the MSS, with key agents from the latter assigned to ministry positions as special staff."

Prior to 2003, China had multiple agencies handling trade contingency actions. MOFTEC – predecessor of the MOFCOM-- handled the dumping investigations; SITEC handled the injury investigations.In 2004 the*Foreign Trade Law*was enacted which entrusted the responsibility of enforcing the law on the MOFCOM.Within MOFCOM three bureaus are responsible for dumping investigations.These Bureaus and their respective functions are as follows:[47]

(a) Bureau for Fair Trade for Imports and Exports(BOFT): BOFT is responsible for drafting anti-dumping implementing regulations, receiving petitions and initiationg anti-dumping investigations, publishing public notices, making the final dumping determination.
(b) Investigation Bureau for Industry Injury(IBII): IBII isresponsible for drafting injury regulations, initiaing and investigating industry injury.
(c) Department of Treaty and Law (Legal Department): Any person aggrived by the final injury determination made by the IBII or the dumping determination made by BOFT can approach the Legal Department for an administrative reconsideration under the *Administrative Reconsideration Law.*

However the final imposition of duty lies not (whether provisional or final) with the MOFCOM but with the Customs Tariff Commission- an interagency body under the State Council.

***National Development and Reform Commission (NDRC)*[48]:** NDRC was formerly called State Planning Commission and State Development Planning Commission. NDRC is a macroeconomic management agency under the Chinese State Council, which has broad administrative and planning control over the Chinese economy. NDRC is the PRC government's chief ministry-level economic planning body. Because of its broad scope of authority over foreign investment project approvals, pricing policies, and national medium-to-long term economic plans, NDRC is sometimes considered a "super ministry".

The NDRC's functions are to study and formulate policies for economic and social development, maintain the balance of economic development, and to guide restructuring of China's economic system.[49] The

[46]Executive Research Associates, *China in Africa*, http://www.ide.go.jp/English/Data/Africa_file/Manualreport/pdf/china_all.pdf
[47] See Xiaochen Wu, *Anti-Dumping law and Practice of China,* page number, (2009)
[48]*National Development and Reform Commission (NDRC),* US-CHINA BUSINESS COUNCIL, http://www.uschina.org/public/china/govstructure/govstructure_part5/27.html; *National Development and ReformCommission,* WIKIPEDIA, http://en.wikipedia.org/wiki/National_Development_and_Reform_Commission; NDRC, http://en.ndrc.gov.cn/
[49]*Main Functions of the NDRC*, NDRC PEOPLE'S REPUBLICOF CHINA, http://en.ndrc.gov.cn/mfndrc/default.htm (last visited July 18, 2011).

NDRC has twenty-six functional departments/bureaus/offices with an authorized staff size of 890 civil servants.

NDRC has budgetary discretion over investment plans on issues important to the highest level of the government, making it the key regulator for all sectors including the financial services sector.

Key Regulatory Agencies

The following are the top tier regulatory bodies in China. The list is only indicative.

Table I.

Name of Regulatory Body	Industry Type	Year Established
Stategic Assets Supervision Commission	Stated owned Assets of Enterprises	2004
China Banking Regulatory Commission(CBRC)	Financial Services: Banking	2003
China Securities Regulatory Commission (CSRC)	Financial Services: Securities	1992
China Insurance Regulatory Commission(CIRC)	Financial Services: Insurance	1998
General Administration of Civil Aviation (CAAC)	Aviation	2002
China Electricity Regulatory Commission(CERC)	Electricity:Energy	2003
Communication Network Operation and Maintenance Commission	Telecom	2004

Source: *Government Agency websites*

II.2 Laws and regulations

Chinese law follow a particular pattern whereby the Standing Committee of the National People's Congress ("SCNPC") enacts the law and therefter administrative guidelines are issued by various Ministries that form part of the State Council.Sometimes the Supreme People's Court issues interpretations to some laws that the State Council has enacted.

Box-IV
Promulgation of Laws in China: Example

*The Contract law of the People's Republic of China*was promulgated by Order No. 15 of the President of the People's Republic of China on March 15, 1999, subsequently the Supreme People's Court issued two clarifications entitled *Interpretations of the Supreme People's Court on Certain Issues Concerning the Application of the Contract Law of the People's Republic of China (I)*-1999and *Interpretations of the Supreme People's Court on Certain Issues Concerning the Application of the Contract Law of the People's Republic of China (II)*-2009. The interpretations given by the Supreme Court will become part of the body of law. The role of the Chinese Supreme People's Court is therefore quite different from other judicial organs in the western legal systems where the highest court is often a neutral umpire and has nothing to do with express law making.

Source: Authors'sown illustration

Over the period of years the Chinese have build up a functional superstructure of laws in the field of economic and trade law.It includes, *inter alia*:[50]

(a) The Contract Law 1999
(b) Disclosure of Government Information (1 May 2008), [which stipulate disclosure requirements of government agencies]
(c) The Enterprise Income Tax Law (1 January 2008) [which unified income tax rates for all companies (domestic or foreign-invested)]
(d) The Interim Regulations on Value-Added Tax (Amended) (1 January 2009), [which transformed its VAT from production-based to consumption based tax]
(e) The Anti-Monopoly Law (1 August 2008), [the first comprehensive competition law in China];
(f) The Patent Law (1 October2009), [which, inter alia, increased penalties against infringement];
(g) The Administrative Regulations on Foreign Investment in Telecommunications Enterprises (Amended) (10 September 2008), [which lowered the minimum registered capital requirement for foreign-invested basic telecommunication providers]; and
(h) Regulations on the Administration and Supervision of Securities Firms (1 June 2008), [which strengthened supervision of securities firms and protection of consumer rights].

Other trade-related laws, regulations and rules (and their amendments) that have entered into force since 2008 include*:*

(i) Implementing Regulations for the Enterprise Income Tax Law (1 January 2008)
(j) The Regulations on the Risk Disposal of Securities Firms (23 April 2008)
(k) The Administrative Regulations on Contracting Foreign Engineering Projects (1 September 2008)
(l) The Provisions on Thresholds for Prior Notification of Concentration of Undertakings (3 August 2008)
(m) The Measures for the Examination and Approval of the Entry-Exit and Foreign-related Joint Research and Utilization of Livestock and Poultry Genetic Resources (1 October 2008)
(n) The Regulations on Foreign Exchange Control (Amended) (5 August 2008)
(o) The Interim Regulations on Business Tax (Amended) (1 January 2009)
(p) Interim Regulations on Consumption Tax (Amended) (1 January 2009)

Foreign Trade law 1994 as amended in 2004[51]remains the primary law dealing with international trade in China.The key features of the law are as follows:-

(a) Allows MFN and NT to other WTO Members on the basis of international treaties and enablesChina to take Countermeasures.(Art. 6 &7)
(b) It allows certain both natural and legal entities to be "foreign trade dealer" upon registration while reserving some items exclusively for state trading.(Art. 8-11).The failure to observe the provisions will bring fines in addition to criminal action on the delaers. (Chapter X)
(c) Permits free export and import of goods and technologies subjectto laws.(Chapter III)
(d) Chapter IV permits the State to honour its commitments made in the international treaties or agreements pertaining to international trade in services.It also enables the State to impose inspection, tariffs, quotas etc.

[50]Supra 4 at 14.
[51] Foreign Trade Law, (promulgated by Order No. 15 of the President of the People's Republic of China, April 6, 2004 , effective May 12,1994)STANDING COMM.NAT'L PEOPLE'S CONGRESS(China).

(e) Chapter V permits the State to enforcetrade related intellectual property.
(f) Chapter VI titled Foreign Trade Order permits the State to enforce foreign exchange, anti-monopoly and anti-unfair competition regulations.
(g) Chapter VII permits the State to pursue foreign trade investigations.
(h) Chapter VIII (Foreign Trade Remedies) permits the State to impose anti-dumping duties (Art41), counterveiling measures (Art 43), safeguards (Art 44) and provide necessary remedies to mitigate damage in case *a* service flowing into China or threatens to cause damage to the domestic industry that provides like or directly competitive services, the State may take the necessary remedies measures to eliminate or mitigate such damage or threat of damage.(Art 45)

After the 2004 amendments China has enacted a series of administrative regulations, many of which regulate international trade in more detail. Such regulations include:[52]

(a) Regulation on the Administration of the Import and Export of Goods, RAIEG[53]
(b) Measures for Registration for the Record of Foreign Trade Operators, MRRFTO[54]
(c) Regulations on Import and Export Duties[55]

II.3 Courts and Judicial System

The current Chinese judicial system dates back to the*Organic law of the People's Court of the PRC*.[56]

There are four levels in the judicial hierarchy: the Supreme People's Court and the following three levels found in each province, autonomous region, or municipality directly under the central government;the Higher People's Courts, the Intermediate People's Courts, and the Basic People's Courts. The Supreme People's Court, the Higher People's Courts and the Intermediate People's Courts are, in essence, appellate courts in the provinces, though they also have first-instance jurisdiction over matters which exceedcertain pecuniary limits.

At first instance, most cases in China are heard by a collegiate panel of three judges: a presiding judge and two other judges or "judicial assessors."[57] Appeals are also heard by a panel of judges.Single judges hear simple procedural cases, misdemeanour cases on the criminal side and simple civil cases.Courts at all level set up a judicial committee to be nominated by the President of the Court and appointed by the NPC, to decide complex cases.

[52]See Heng Wang, *Chinese Views on Modern Marco Polo: New Foreign Trade Amendments After WTO Accession*, 39 Cornell Int'l L.J. 329 (2006).
[53] Promulgated by the State Council, Nov. 23, 2003
[54] Promulgated by the MOFCOM, June 19, 2004.
[55] Promulgated by the State Council, Dec. 10, 2001.
[56] (promulgated by Order No.3 of the Chairman of the Standing Committee of the National People's Congress, July 5, 1979, effective Jan. 1, 1980); amended in accordance with the Decision of the Standing Committee of the Sixth National People's Congress on Amending the Organic Law of the People's Courts of the People's Republic of China adopted at its 2nd Meeting on September 2, 1983, the Decision of the Standing Committee of the Sixth National People's Congress on Amending the Organic Law of the Local People's Congresses and the Local People's Governments of the People's Republic of China adopted at its 18th Meeting on December 2, 1986 and the Decision of the Standing Committee of the Tenth National People's Congress on Amending the Organic Law of the People's Courts of the People's Republic of China adopted at its 24th Meeting on October 31, 2006 available at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384078.htm last visited 18.7.2011.
[57] Judicial assessors, who may not be lawyers by training, have the same rights and obligations as judges and are appointed by the Standing Committee of the People's Congress; See the Civil Procedure Law of the PRC, 7th National People's Congress, 4th Session, art 40 (April 9, 1991) (hereinafter Civil Procedure Law). See also Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors, passed by the Standing Committee of the National People's Congress (August 28, 2004) (effective May 1, 2005).

On the administrative side the people's Courts are managed by the adjucative committees.The Supreme People's Court also has an adjudicative committee; one of the committee's responsibilities is the issuance of "judicial interpretations" that seek to clarify unclear or ambiguous legislation.

The Chinese Courts follow what is known as "two trials for a final decision."This means after the trial the petitioner can claim an appeal as of right, provided the appeal is filed within the stipulated time.But after the second stage appeal usually there is no scope for a further appeal. However under certain limited circumstances and with the court's leave, a party can apply to have a first-instance or second-instance judgment retried. Upon receipt of an application for retrial, the court will retry the case only when one of the following requirements is met: there is new evidence that is sufficient tooverturn the original judgment or ruling; the main evidence on which findings offacts were made in the original judgment or ruling was insufficient; an error was made in the application of the law in the original judgment or ruling; the People's Court violated statutory procedure, and the judgment was so influenced; or in trying the case, the adjudication personnel accepted bribes or committed embezzlement.[58]

In 2005, the Supreme People's Court issued the Second Five-Year People's Courts Reform Plan (2004-2008) ("Second Reform Plan") thatattempts to guarantee the financial independence of the Courts, adopt a system of precedents, and coordinate a consistent understanding of the law across China.Chinese Courts have been notorious for making short non-speaking judgments.In recent times the trends are changing and speaking orders are a norm in judgments especially pertaining to the foreign parties.

As of date, the Chinese judicial sytem suffers from sub-ordination to the Communist Party, widespread corruption and inefficiency.[59]The PRC is cognizant of these shortcomings and 28 November 2008, the Politburo of the Central Committee of the Communist Party of China (CPC) adopted the Opinions on Issues Concerning the Deepening of Reform of the Judicial System and Judicial Working Mechanisms,[60]which focuses on optimizing the distribution of judicial power, implementing the policy of tempering justice with equity in criminal law, strengthening the development of human resources for justice and strengthening the guarantee of funding for justice, with the emphasis on greater supervision on the abuse of power.This has been followed up with a series of actions by the Chinese Finance Ministry.

The Court system however remains unreliable for the foreign parties who prefer to resort to arbitration.China is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 *("*New York Convention*").*

The main law pertaining toarbitration is the Arbitration Law 1995 ("Arbitration Law").Article 18 of the Arbitration Law specifically provides that if the parties do not select or name the arbitration commission in their agreement, the agreement will be void unless the commission is specified in a "supplementary agreement." While an arbitration agreement must be in writing," exchanges ofletters, telexes, telegrams, or electronic documents constitute valid supplementary agreements.Thus, in China it is not possible to host an adhoc arbitration but all arbitration must necessarily be under the aegis of an arbitral commission or institutional arbitration.[61]

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[58]Art 179, Organic Courts Law

[59]See generally laws in China.

[60]See Annual Report on China's Judicial Reform (2009) available at http://english.caijing.com.cn/2011-01-21/110625236.html last visited 17.04.2011

[61]Case law has clarified that ad hoc arbitration is not permissible in mainland China see *People's Ins Co of China, Guang Hou Branch v Guangdong Guangh Power Co Lid, 2003 Min Si Zhong Zi No 29 (China)*op cit Laws of China at n25.

The main Chinese arbitration commission that deals with foreign-relatedarbitration is CIETAC (unless the dispute is of a maritime nature, in which case the dispute will most likely be dealt with by the China Maritime Arbitration Commission). China also has various domestic arbitration commissions.

Under thePRC law[62]the parties are obligated to choose a Chinese arbitral institution if no foreign element is involved.In case a foreign element is involved the parties can choose a foreign arbitral institution.The Chinese law do not treatenterprises wholly owned by foreign entities and joint ventures having a foreign element.

Box-V
Difficulty in Enforcing Chinese Arbitral Awards in India

A Chinese arbitration award may not be enforceable in India, as neither PRC, China nor Hong Kong or Macau features in the list of 46 jurisdictions[63] notified under section 44 of the*Indian Arbitration Act 1996*. Therefore, a Chinese arbitration award can be enforced in India only if it can be shown to be in consonance with equity, justice and good conscience.

II.4 Public Procurement[64]

In China, public procurement is a guided by two distinct set of laws: theTenderand Bidding Law(The Bidding Law of the People's Republic of China,promulgated on 30 August 1999 or BL)and theGovernment Procurement Law(The Government Procurement Law of the People's Republic of China,Order of the President No.68 effective 1 January 2003 or GPL).Generally speaking, the GPL covers central provincial andgovernment purchases and the *BL* regulates all "State owned Enterprise" tenders, in particular, large-scale infrastructure projects (such as in construction, aviation, shipping, engineering, architecture, transportation, power and water), as well as large-scale, privately-invested projects for public interest (mainly joint ventures)[65].

The*BL* operates in the following public projects (Art. 3 of the BL):-

1. Projects such as large-scale infrastructure facilities and public utilities involving the social and public interests and public safety (e.g. Three Gorges Dam, Olympic Stadium)

2. Projects which are, completely or partly, invested by the state-owned funds or funded through state financing (e.g. an automobile manufacturer –necessarily a joint venture- expanding its production facilities);

3. Projects using loans or aid from international organizations or foreign governments (e.g., projects funded by bodies such as the World Bank or Asian Development Bank).

[62]Art 128, Contract Law 1999 (China)
[63]*List of jurisdictions*, ICC, (July 09, 2011) http://www.iccdrl.com/CODE/LevelThree.asp (last visited May 14, 2011)
[64]See generally *Public Procurement in China: European Business Experience for Competing inChina*http://www.europeanchamber.com.cn/images/documents/marketing_department/beijing/publications/2011/PP%20Study%20EN%20Final_0421.pdf. (henceforth referred to as Public Procurement in China).
[65]See Annexure 1 for a list of subjects that shall be typically covered under the *BL*and under the*GPL*. reproduced from Public Procurement in China: European Business Experience for Competing in China, http://www.europeanchamber.com.cn/images/documents/marketing_department/beijing/publications/2011/PP%20Study%20EN%20Final_0421.pdf(henceforth referred to as Public Procurement in China).

Under*BL*various ministries would often have their own "domestic product" requirement.The term has not been defined by the*BL* but by various ministries themselves.Sometimes the requirement is as high as 70%.[66]

The*GPL*defines government procurement as procurement of goods, works and services conducted with fiscal fundsby state organs at all levels, public institutions and social organizations.The key feature of the*GPL*is the catalogue system under which the Central, Provincial or Local Government Departments shall have to purchase all the products and services from a catalogue maintained by the Central Purchasing Agency or a department central purchasing agency.The Agency and its departments alsomaintain the local content certification sytem.

Under Art. 10 of the*GPL*preferential market access is given to "domestic products" definedas more than 50% value added in China.Foreign goods can be purchased only when (a) where the goods, construction or services needed are not available within the territory of the People's Republic of China or, though available, cannot be acquired on reasonable commercial terms (b) where the items to be procured are for use abroad (c)where otherwise provided for by other laws and administrative regulations.Chinese law requires a doemstic product to be 20% more expensive for it to be considered beyond reasonable commercial terms.This is higher than the margin put forth by most other countries.

On January and May 2010 respectively the Chinese Government circulated the *Draft Implementation Regulations on Government Procurement Law* and *Draft Management Measures for the Government Procurement of Domestic Goods*.While the former seeks to clarify some ambiguous terms the later seeks to bring clarity to the value added activities of the Foreign owned entities in China.

The*GPL*lays down a three step procedure, which is as follows[67]:-

> 1. The suppliers may submit queries to the procuring entity, and the procuring entity shall reply in a timely manner.
>
> 2. If the supplier is not satisfied with the reply from the procurement bureau, the supplier may appeal by filing a complaint with the Ministry of Finance (MOF) within 15 working days of the query response.
>
> 3. If the complainant refuses to accept the decision made by the supervisory authority, then litigation is the last step: the supplier may appeal for administrative reconsideration or lodge a case at the People's Court as administrative litigation.

The*BL* on the other hand does not offer any scope of judicial review at all.Although Art. 65 lays down that a bidder or any other interested party has the right to challenge the decision of the procuring entity. However, the same procuring entity that conducted the bid and set out the rules (the agency) is supposed to enforce the rules and monitor procedural problems.

The 2010 Draft Implementation Regulations on GPL suggest that where the BL has no provision to regulate a certain area, the law of the GPL may be applied.[68]

[66]Supra note 64 at 9.
[67]Chapter VI, Art 51-58 of *GPL*.

III.TRADE AGREEMENTS AND ARRANGEMENTS

III.1 World Trade Organization

China joined the WTO under the Protocol of Accession dated on 11 December 2001 after protracted accession negotiations.[69]Some of the pertinent commitments of China have been detailed below:[70]

Trade in goods— According to China's term of accession, tariffs on industrial goods were to be reduced to an average of 9%, and import quotas to be removed by2005. Tariffs on agricultural goods were to be lowered to an average of 15%.(Goods Schedule attached to the China Protocol).

Trade in services—foreign access is to be ensured through transparent and automatic licensing procedures in various sectors, including banking and insurance, legal and other professional services, telecommunications and tourism. (See Annex 9 of China Protocol r/w Schedule of Specific Commitments on Services List of Exemptions Article II MFN WT/ACC/CHN/49/Add.2)Specifically:

- *Right to Trade and Distribution:* Foreign service suppliers will be permitted to engage in the retailing of all products; within three years of accession,all firms would have the right to import and export all goods except those subject to state trading monopolies (e.g., oil or fertilizers); within five yearsof accession, all foreign firms would be allowed to distribute virtually all goods domestically.(Para 5 r/w Annex 2 A of China Protocol)
- *Banking*—foreign financial institutions will be permitted to provide services without client restrictions for foreign currency business upon accession; local currency services to Chinese companies within two years (by December 2003); and services to all Chinese clients within five years (by December 2006).

Trading and investment regimes

- *National treatment/non-discrimination*—Measures and practices that discriminate against imported products or foreign companies will be removed.(China Protocol Para 3)
- *Export subsidies*—Upon accession, all forms of export subsidies inconsistent with WTO rules, including grants and tax breaks linked to export performance, were eliminated.(Para 10.3 of the China Protocol r/w Annex 5 B of China Protocol)
- *Trade-Related Investment Measures (TRIMs)*—Foreign investment approvals would no longer be subject to mandatory requirements (e.g., technology transfer or local content requirements) (Para 7.3 China Protocol)
- *Trade-Related Aspects of Intellectual Property Rights (TRIPs)*—China was required to enforce the rights protecting intellectual property within China.(Paras 2A, 2C, 2 DparaVI Annex IA of China Protocol)
- *Price Controls:* China was mandated to replace price controls with market driven price except for goods and services enumerated in Annex 4 of China Protocol (Para9 of China Protocol)

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[68]Article 5, Notice: SCLAO calls for comments on the Draft Implementation Regulations on Government Procurement Law, Legislative Affairs Office of State Council P.R. China, 11 January 2010. www.chinalaw.gov.cn/article/cazjgg/20100100193904.shtml (last visited April 12, 2011)

[69] WT/L/43 (November 23, 2001)[China Protocol].

[70]See Thomas Rumbaugh and Nicolas Blancher,*China: International Trade and WTO Accession*, http://www.imf.org/external/pubs/ft/wp/2004/wp0436.pdf (last visited June 18, 2011), at 8.

- *Agricultural subsidies*—China has agreed to limit domestic agricultural subsidies to 8.5 % of the value of production (i.e. less than the 10 % limit allowed for developing countries under the WTO *Agreement on Agriculture*), and to eliminate all agricultural export subsidies upon WTO entry.(Para 12.1 of the China Protocol)

Trading Partner Safeguards

- *Special safeguard mechanism for China's textile and clothing exports*. The protocol of accession provides atransitional time-bound (until the end of 2008) special textiles and clothing safeguard clause (Agreement on Textiles)and a transitional time-bound product-specific safeguard mechanism authorizing WTO Members to take action if imports from China cause market disruption (Para16 of China Protocol)
- *Anti-dumping*. Under WTO agreement, other members can invoke "non-market economy" provisions to determine dumping cases for 15 years following accession. Non-market economy provisions imply that domestic prices cannot be used as a reference point and make it much easier to reach a positive finding in an antidumping investigation.(Para 15. (d) of China Protocol).

In view of the uniqueness of the Chinese economy the China Protocol payed special attention to the uniform administration of its trade policies throughout its territory.(para 2A of China Protocol).

The official government procurement (transactions regulated by the GPL) market estimate of 700 billion RMB represents approximately 2% of China's GDP. Yet, OECD research[71] indicates that the aggregate average public procurement spending at all levels (including central, provincial and municipal, etc) is 12-20% of a country's GDP (i.e. between 4.08-6.08 trillion RMB)[72].China is not a member of the Agreement on Government Procurement (GPA) but it became an observer in the GPA Committee on 21st February 2002 and is currently in the process of negotiating accession.[73] Its application, together with "initial Appendix I offer", was submitted to the WTO Secretariat at the end of 2007 and was circulated to the existing GPA parties early in the New Year. These actions fulfilled commitments made in the course of China's 2001 accession to the WTO and its 2006 WTO Trade Policy Review.[74]

The enhanced market access benefits will be confined to other Members of the GPA (India is not a Member of the GPA) however incidental relaxation of procurement rules and bidding process may enhance the market access of Indian Companies operating in China especially in ITES and pharmaceutical sectors. The point has been discussed in Box-IV.

Box-VI
Market access for Indian ITES Industry

The catalogue system effectively discriminates against foreign producers insofar as practically it is extremely difficult to get one's product or service enlisted in the catalogue.

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[71]See Why is Procurement Important, Factsheet 2006, http://www.oecd.org/dataoecd/35/58/37766795.pdf (last visited July 18, 2011)

[72] Supra 64 at 16, 17

[73] See *Government Procurement and the Pluri lateral Agreement on Government Procurement, Parties and observers to the GPA*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited July 18, 2011) also see GPA /93, January 14, 2008 request for accession.

[74]During its2001 accession to the WTO, in the course of which China stated its intention to "initiate negotiations for membership in the GPA by tabling an Appendix 1 offer as soon as possible".WT/ACC/CHN/49, para.341; China Protocol, Para 1.32.

The Chinese Government in the past has sought to introduce preferential treatment to indigenous innovation. The concept of indigenous innovation was sought to be introduced by the Medium- and Long-Term National Plan for Science and Technology Development (2006-20) and a follow-up document on its supporting policies, both released by the State Council in 2006.The documents set up several policy goals, namely (a) to develop a system to evaluate and qualify indigenous innovation products, (b) establish a system to use government funds to buy such products, and give them preferential treatment in the government procurement process. The plan encouraged government agencies to work cooperatively to develop measures that would favor products that use Chinese-developed ideas and technology. Pursuant to the goal the Chinese Government came up with the regulations which *inter alia*[75], require government agencies to make initial purchases of newly developed products by domestic companies that are not currently competitive in the marketplace. Products are designated in the Catalogue of Indigenous Innovation Products and government agencies are required to purchase those products, which will eventually be used in government-funded investment projects.

These policies were widely seen to have been restrictive to foreign companies operating in China. Since the regulations requirethat the Chinese entity fully own the IP and first register the trademark in China, the rule operates against foreign entities that have developed the IP in their home jurisdictions and have been operating the technology through a license agreement.Current international norms for Government procurement do not include IP ownership requirements.
Partly in response to pressure from foreign companies and partly in order to accede to the GPA, China has now revoked these rules.

This potentially opens up the opportunity for the Indian technology industry especially in ITES sector to exapand in presence in China, especially in view of the fact that according to the Indian Commerce Minister, China has agreed to give greater market access to Indian companies especially in the IT and Government Contracts.[76]

Source: http://www.china.org.cn/index.htm

Another difficult area of the Chinese accession was the role to be played by the State Owned Enterprises post accession and Government procurement.The Chinese had to concede to bringing the monopoly power of its state trading corporations under the aegis of the WTO.Thus,State Trading was confined to certain items in Annex 2A of the China Protocol and China was mandated to open trading in all subjects except those under Annex2A within three years.

III.2Regional Trade Agreements

At present China is party to sevenFree Trade Agreements (FTAs) in addition to a comprehensive economic partnership agreement with Hong Kong and Macau. Five FTAs are under negotiation andFour FTAs are under consideration.[77]The details of the said FTAs have been provided in Appendix 1.

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[75]*Indigenous Innovation: Domestic Innovation and Procurement,* CHINA BUSINESS REVIEW, (Nov.7, 2011), http://www.chinabusinessreview.com/public/1003/uscbc.html#box01.

[76] See generally *China to Give Indian Companies Greater Access to Domestic Market*, 2POINT6BILLION.COM, (August 30,2010), http://www.2point6billion.com/news/2010/08/30/china-to-give-indian-companies-greater-access-to-domestic-market-6893.html (last visited July 18, 2011); *India IT cos ramping up efforts to win China biz Wednesday*, BUSINESS STANDARD, July 6, 2011, http://www.business-standard.com/india/news/india-it-cos-rampingefforts-to-win-china-biz-report/122494/, (last visited July 18, 2011)

[77] China Free Trade Agreements, http://fta.mofcom.gov.cn/topic/chinaasean.shtml.

Worldwide FTAs can be broadly divided into two models.[78] One is the EU model, which includes both economic and political integration. The other is the NAFTA model, which focuses on economic integration only. Within the NAFTA model, again there are two different sub-categories. The first is the economic partnership agreement (EPA) approach advocated by Japan, which seeks to conclude comprehensive agreements that include trade in goods, services, and sometimes even environment protection and intellectual property rights. The Indo-Japan CEPA is an example of this model. The other approach is much narrower and focuses on trade in goods only. China has traditionally adhered to the narrower model and has been unwilling to include issues like labour, environment and even intellectual property. The Chinese agreements seem to emphasize primarily on trade access for manufacturers through bilateral tariff reduction/elimination and bilaterally scheduled commitments in services.[79]

It is instructive to look into the general characteristics of Chinese FTAs[80].

In terms of the geographical distribution, the FTAs involving China tend to be evenly spread. So far, China has concluded FTAs, or entered into negotiations, with almost every major region in the world, including Europe, America, Middle East, Africa, East and South East Asia, South Asia, and Oceania. In each region, China usually selects one trade partner to start the negotiations. A few commentators opine that this is part of a wider strategy to access markets which are part of wider regional trade framework. China's FTA partners share in common is that they are either FTA themselves, such as the ASEAN and Gulf Cooperation Council, or are members of another RTA. For example, Iceland is a member of the European Free Trade Association (EFTA), which has free trade relationship with EU via the European Economic Area (EEA); Chile is an associate Member of both the Mercosur and the Andean Community; while India and Pakistan are both Members of South Asian Association for Regional Cooperation (SAARC). By entering into RTA with these partners, China is able to indirectly access a wider market.

Secondly, with the exception of ASEAN and Australia, none of China's existing FTA partners are major trade partners of Chinabut China is always one of the top five trade partners with these economies.This asymmetric relationship gives China wide bargaining powers. China could divert some of the trade with its major trading partners, so that it could further balance and diversify its import sources and export markets at the same time, these FTA partners will have a lot of their trade diverted to China. Thereby increasing their reliance on China and further strengthen China's bargaining power and political clout.

Thirdly, all economies that have entered or are about to enter into FTA with China have recognized the market economy status of China. The China Protocol authorizes other WTO members to China as a non-market economy until 2016. China finds it convenient to negotiate with the FTA partners bilaterally and earn market economy treatment, especially with reference to antidumping matters.The expectation seems to be that as more and more countries accept the market economy status pressure will build on the others to accept this as well.So far, 37 economies have recognized the market economy status of China,[81] although most of such members can in principle treat China as a NME until 2016.

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[78]See Henry Gao, *China's Strategy for Free Trade Agreements:Political Battle in the Name of Trade*, (Working Draft), available at http://www.networkideas.org/ideasact/dec09/pdf/Henry_Gao.pdf

[79]Antkiewicz, Agata and Whalley, China's *New Regional Trade Agreements*, NBER Working Paper No. 10992, (2004), available at www.nber.org/papers/w10992, last visited 12.11.2010.

[80] Henry Gao, *RTA Strategy of China: A critical visit*, SOCIAL SCIENCE RESEARCH NETWORK, (Sept. 19 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970891

[81]*Countries Regard China's Market Economy Status*, PEOPLE'S DAILY ONLINE,

The terms of trade between China and its FTA partners indicate China imports mostly raw materials, energy products, or agricultural products, while it exports mainly textile products and electronic products from China. This shows a desire to seamlessly ensure supply of strategic resources, raw materials and agricultural supplies. Moreover, many of the FTAs also include investment provisions, which is another way for China to make sure that it can invest and subsequently control strategic resources.

Box VII
China–Pakistan FTA

Guar gum exporters from India are perhaps potentially affected by China- Pakistan FTA. China has imposed a non-preferential customs duty of 7% and 15% on guar gum exports from India, the world's largest exporter of this product. But imports from Pakistan are duty free under the China- Pakistan FTA. This preferential treatment is prejudicial to the interests of Indian exporters. China accounts for 25% to 30% of the total exports of guar gum splits. Due to the higher duty on guar powder, India's exports to China are declining.
Source:*APEDA (May, 2011)*

III.3 Generalized System of Preferences and other preferential arrangements adopted unilaterally

China provides unilateral preferential tariffs on certain products to 41 least developed countries.Chinese imports from the 41 LDCs increased from US$11.7 billion in 2004 to US$27.7 billion in 2009.The 41 LDCs[82]are Afghanistan, Angora, Bangladesh, Benin, Burundi, Cambodia, Central African Rep., Chad, Comoros, Congo DR, Djibouti, East Timor, Guinea, Eritrea, Ethiopia, Guinea, Guinea-Bissau, Laos PDR., Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Republic of Yemen, Rwanda, Samoa, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, Vanuatu, and Zambia.There is a view that China sees Africa as an 'opportunity' and has considered the trade preferences programmes as a means of cementing relationship with a number of African countries.[83]

IV.FOREIGN INVESTMENT REGIME

IV.1 Investment Promotion Measures

In November 2007 the Chinese Governmnet came out with *Catalogue for the Guidance of Foreign Invested Enterprises (Revised 2007)*[84]. The gist of the Catalogue has been reproduced below:[85]

The Catalogue provides the basic guidance for foreign investment in China. It divides investments into "encouraged," "restricted" and "prohibited" categories. In the 2007 catalogue, the encouraged section is more than twice the length of the 2004 Catalogue. The restricted and prohibited categories are not

http://www.chinadaily.com.cn/english/doc (last visited July 25, 2011)
[82] Explanatory Notes, at http://chinatradedata.com/member/product/sample/SAMPLE-2011-A.pdf.
[83] Z. Negatu, *Africa and the Global Economic Crisis*, http://www.aigaforum.com/news/Africa_and_the_Global_Economic_Crisis.pdf (last visited on July, 12, 2011).
[84] The Catalogue came into effect from December 1, 2007 replacing the former Catalogue by the MOFCOM and the Planning Commission dated March 2004,
www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/P020071121358108121219.pdf(last visited July 12, 2011)
[85]Infra 95.

substantially changed, but do contain some surprises. The major changes to note in the 2007 Catalogue are the following:

(a) There has been a substantial restriction on foreign investment in real estate and real estate brokerage firms. Construction and operation of luxury hotels, villas, office buildings and conference centers has been placed in the restricted category. In this context, this means an absolute prohibition.

(b) Continued restriction and prohibition of participation in publishing, media, market research and social research. In recognition of the influence of the Internet as an alternative publishing source, various Internet based businesses have been added to the prohibited category.

(c) Opening of the service area to logistics and service outsourcing by placing these in the encouraged category. The service area continues to be opened to foreign investment. The addition of outsourcing to the encouraged category is important. China is trying to catch up with India as an outsourcing center. Dalian in particular is being pushed as a location for such businesses.

(d) The new policy discourages or prohibits foreign investment in businesses solely devoted to export. The new policy restricts or prohibits investment in industries such as toys, furniture, shoes, and clothing or in industries with high usage of resources or energy such as steel, aluminum, paper, cement, and other basic industries.

An OECD document[86] enumerates the changes in the Chinese investment policies taking place between October 2010 and March 2011. In this period China clarified the rules applicable to resident offices of foreign enterprises.

(a) The extent to which foreign investors may acquire residential or commercial real estate was clarified. Foreign nationals living and working in China can acquire only one home in mainland China. Overseas institutions can buy only non-residential properties in cities where they are registered. Unlike past local rules, this new rule is implemented nationwide.[87]

In addition On 19 November 2010, the State Council issued the Regulations[88] on Administration of Registration of Resident Offices of Foreign Enterprises, effective on March 1, 2011. The 1983 Measures for Administration of Registration of Resident Offices of Foreign Enterprises were abolished at the same time. The regulation provides for allowable scope of activities of resident offices of foreign enterprises, conditions for application for their registration, registration process and liability. The regulation also does away with the previous provisions that the validity of the registration certificate for a resident office is one year, and extension registration is necessary in case of overdue.

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[86] *Fifth Report on G20 Investment Measures*, OECD, at 3, 11,12 , http://www.oecd.org/dataoecd/35/58/37766795.pdf (last visited July 12, 2011).

[87] 10 November 2010, new rules issued by the Ministry of Housing and Urban-Rural Development (MHURD) and State Administration of Foreign Exchange (SAFE) Ministry of Housing and Urban-Rural Development (MHURD) Jian Fang No. 186 of 2010, Circular on Further Standardizing the Regulation on Housing Purchase by Overseas Institutions and Individuals (in Chinese).

[88] *Regulations on Administration of Registration of Resident Offices of Foreign Enterprises*, Decree of the State Council of the People's Republic of China no. 584, 19 November 2010.

(b) A Circular dated November 26, 2010 further opened parts of the medical services sector to foreign capital and allowed foreign investors to establish fully owned hospitals.[89] The circular classified foreign investment in medical institutions as the "permitted" category, and provided for pilot programs for qualified foreign investors to establish wholly foreign owned medical institutions. Prior to that, foreign medical service providers were only allowed to participate in the form of joint venture with equity up to 70%. The circular further stated that approval authority of joint venture medical institutions is designated to the local level, and foreign investment in medical institutions in mid-and West China is encouraged.

(c) On January 2, 2011, China authorized domestic companies to hold their foreign-currency earnings rather than exchanging them into RMB. The step extends a pilot programme by the State Administration of Foreign Exchange (SAFE) that was started on 1 October 2010 and allowed 60 exporters in four cities and provinces to keep foreign currency resulting from export earnings.

On 18 January 2011, the State Administration of Foreign Exchange (SAFE) and the People's Bank of China announced a series of measures[90] towards capital account convertibility. China endeavours to establish full capital account convertibility during the 12th Five-Year Plan for China's Economic and Social Development (2011-2015). Planned steps include:

– the development of the foreign exchange market to include exchange rate hedging instruments;
– the establishment of currency swaps and local currency settlement arrangements with foreign monetary authorities;
– the issuance by domestic financial institutions of RMB bonds in Hong Kong, China;
– expanding the settlement of outward direct investment by individuals; and
– broadening the range of institutions that qualify as domestic institutional investors.

(d) On 6 January 2011, the PBOC issued the *"Administrative Measures for the Pilot RMB Settlement of Outward Direct Investment"*.[91] The measure seeks to facilitate settling outward direct investment and to expand the use of RMB in cross-border investment and financing. It complements an existing pilot programme for RMB settlement of cross-border trade transactions, which was launched in July 2009 in Shanghai and four cities in Guangdong province and was expanded in June 2010 to cover twenty provinces with a view to apply it nationwide. Only companies registered in an area participating in the pilot RMB settlement in cross-border trade can participate in the new scheme. The PBOC and the State Administration of Foreign Exchange (SAFE) administer the measure.

(e) Bank of China began to trade in RMB in the US on 12 January 2011, following the RMB trading in Hong Kong, China in July 2010.

[89] *Opinions on Further Encouraging and Guiding Social Capital to Establish Medical Institutions*, Guo Ban Fa No. 58 of 2010, (Nov. 26, 2010)
[90] POB Assistant Governor Speech entitled *Promote Financial Reform and Innovation, and Support Balanced and Sustainable Development of National Economy*, (Jan 14, 2011).
[91] People's Bank of China Announcement 1/2011 entitled *Administrative Rules on pilot program of RMB settlement of Outward Direct Investment* (Jan. 6, 2011) ; and "Promote Financial Reform and Innovation, and Support Balanced and Sustainable Development of National Economy", POB Assistant Governor speech, (Jan. 14, 2011).

(f) On 24 December 2010, relevant authorities in the *Shanghai Municipality issued Measures on Implementing the Pilot Program of Foreign Investment in Equity Investment Enterprises*. According to the rule, foreign partners in a Sino-foreign equity investment enterprise shall be foreign sovereign wealth funds, pension funds, endowment funds, charity funds, insurance companies, banks, securities firms and other foreign institutional investors recognized by the relevant authorities in the Shanghai Municipality.

(g) A circular dated 25 February 2011 clarifies the application of the Decision concerning Items (V) with respect to Which Administrative Examination and Approval Are Cancelled or Adjusted (Guo Fa [2010] No.21) and Some Opinions on Better Utilization of Foreign Investment (Guo Fa [2010] No.9) promulgated by the State Council.[92]

(h) A pilot programme that was planned to allow residents of Wenzhou to invest directly overseas was postponed *sine die* in late January 2011. According to the announcement made by the Wenzhou Foreign Trade and Economic Cooperation Bureau on 10 January 2011, direct investments by Wenzhou residents would have been allowed up to USD 200 million a year with a cap at USD 3 million for a single project; investment in overseas property or equities markets was also excluded from the programme's scope.

(i) China has however enhanced the scope of the national security review for inward foreign investment.On 3 March 2011, a State Council General Office circular dated 3 February 2011 entered into effect[93]. The circular establishes a joint ministerial committee to review foreign acquisitions or mergers with domestic firms. The joint ministerial Committee will carry out national security reviews of foreign acquisitions of mergers with domestic firms to assess the impact of the acquisition or merger on national defense, national economic stability, basic order in social life, and research and development capacities in key technologies related to national security.In terms of scope, the review covers mergers and acquisitions of domestic military and affiliate enterprises, facilities located near major and sensitive military facilities, as well as other entities related to national security. Also subject to the review are foreign mergers and acquisitions of enterprises in sectors such as major agricultural products, major energy and resources, key infrastructure, major transportation services, key technologies and equipment manufacturing where actual control may be assumed by foreign investors.

(j) If the merger or acquisition has or may have substantial impact on national security, MOFCOM may, according to the decision made by the joint ministerial committee, suspend the transaction or take other measures including transfer of equity or assets, to eliminate the impact on national security.

(k) On 25 February 2011, MOFCOM issued the Circular on Issues Concerning Administration of Foreign Investment (Shang Zi Han [2011] No. 72) (Foreign Investment Circular), which delegates certain powers from MOFCOM to the provincial commerce departments, and simplifies or removes some approval requirements. In addition, the Circular also calls for stronger examination

[92]Shang Zi Han No.72, Circular of the Ministry of Commerce on Issues concerning Foreign Investment Administration (2011)
[93]Guo Ban Fa No. 6,Circular of the General Office of the State Council on Launching the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2011)

and approval supervision of foreign investments in service industries, in particular specially regulated sectors (such as financial leasing and international express delivery services), sensitive industries (such as micro-lending and credit rating) and industries involving large inflows of funds (such as venture capital and equity investment). However, the Circular does not provide details of how this supervision will be enforced. While the rules for approval of foreign investment seem to have been simplified, those for foreign acquisition of Chinese enterprises have been tightened. On 3 February 2011, the State Council issued a circular, Guo Ban Fa [2011] No. 6 setting out the security review system for foreign investors seeking to acquire Chinese enterprises. According to the Circular, effective from 5 March 2011, national security reviews are required in cases where investment by foreign investors will lead to their obtaining control over a list of business activities, some of which service-related, such as important transportation services and, eventually, infrastructure facilities.[94]

IV.2Inward FDI Policy

The strategic dimesion to the change in Chinese foreign investment policies flow from 11th Five Year Plan on Foreign Capital Utilization ("Plan").[95]The Plan seeks to make some fundamental changes in the FDI policies of China.The main thurst[96] of the plan is as follows:-

(a) To shift from quantity to the quality of inward FDI.In concrete terms it implies shifting from foreign capital to make up for a shortage of investment funding and foreign exchange to using foreign capital to introduce advanced technology, management experience and high quality talent to China.

(b) Focusing on ecology, environmental protection, conservation and the comprehensively utilizing of resources.China's economic growth has suffered a lot from its former extensive development mode by high input, high consumption of resources and heavy pollution but low efficiency, under which many resources and energies have been wasted and natural environment was seriously deteriorated. The New Catalogue encourages foreign investment in development of recycle economy, clean production, renewable energy, ecological environmental protection and comprehensive utilization of resources. Some relevant items satisfying these purposes have been added to the New Catalogue as encouraged category. Now no foreign investment is encouraged for exploration of important mineral resources which are rare in China or non-renewable. Further, foreign investment with high energy consumption, heavy resources consumption and high pollution is restricted or prohibited. Also, foreign investment is not allowed for exploration for some important non-renewable mineral resources.

(c) Combining the use of foreign capital with the upgrading of domestic industry and technology.In view of China's growing trade surplus and fast expanding of reserve of foreign currency and in order to balance imports and exports, especially to promote import of high technologies and high-

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[94] WTO Secretariat, *G-20 Trade Measures* (24 May, 20111), available at http://www.wto.org

[95] 11th Five Year Plan on Foreign Capital Utilization ("Plan"), State Development and Reform Commission, November 10,2006, available at 1; and China Revised Its Investment Guidance Catalogue and Its Impact on Foreign Investment, available at www.hgexperts.com/article.asp?id=7830 (last visited Aug. 12, 2011)

[96] Blog, Steve Dickinson, *China Foreign investment (FDI) Rules* [Steve Dickinson], CHINA LAW BLOG, http://www.chinalawblog.com/2007/11/breaking_news_china_changes_fo.html (last visited July 12, 2011).

tech equipments, a general provision that foreign investment devoted to export 100% of its products as encouraged category was moved from the New Catalogue

(d) The Plan seeks to promote coordinated regional development. In parallel with the strategies of developing western regions, boosting rise of central regions and rejuvenating the old industrial bases in northeastern regions, the general provision "apply only to the central and western regions" was moved from items under the encouraged category in the New Catalogue. So accordingly, the priority industries and characteristic industries in central, western regions and old industrial bases in northeastern regions which need to be encouraged for investment will be added to the Catalogue of Guidance for Foreign Investment in Priority Industries in the Central-Western Region ("Central-Western Region Catalogue") in the future revision to the Central-Western Region Catalogue.

(e) Protection of national "economic and spiritual securtity". In concrete terms it meansinvestment in survey and exploration of tungsten, molybdenum, tin, antimony and fluorite .The exploration of these materials were formerly restricted to foreign emnterprises and it , is completely forbidden now. Many restricted items are limited to joint venture rather than Wholly Foreignh Owned Enetrprises and that the Chinese partner shall hold the controlling interests in the joint venture. Participation in publishing and media industry is still prohibited. In recognition of internet as an alternative site for publishing, various internet based business, such as news websites, web streaming audio-visual services, e-commerce and culture-related websites, have been newly added as prohibited category in the New Catalogue.

IV.3 Outward FDI

A US-China Economic & Security Review Commission document[97] enumerates the statistics about China's outbound FDI after extensive survey of all academic and government literature on the subject.The Report draws certain conclusions based on MOFCOM's2009 Statistical Bulletin of China's Outward Foreign Direct Investment[98] though the task is made arduous because: (a) significant amount of Chinese external FDI is invested in the tax havens, and (b) the definition of FDI varies from country to country. The conclusions arrived at are as follows[99]:-

(a) The Chinese tend to recycle their surplus savings in developed countries securities and public debt instruments like bonds, U.S. Treasury securities and the debt of Fannie Mae and Freddie Mac. These investments, however, bear low interest rates, and so China has been seeking alternatives to diversify its investments and realize higher returns.

(b) The Chinese overseas FDI tends to be in small amounts and highly dispersed. MOFCOM statistics show that as of 2009, there were Chinese overseas investments in 177 countries or territories (including Hong Kong and Macau). Many of these equity investments are less than $10 million. The Association of Southeast Asian Nations (ASEAN) shows that within receiving countries, Chinese FDI is often subdivided among different sectors, with each of several sectors

[97] *U.S.-China Economic & Security Review Commission*, USCC STAFF RESEARCH REPORT, March 30, 2011.
[98] http://chinainvests.files.wordpress.com/2010/12/2009-mofcom-investment-report1.pdf (last visited July 21, 2011).
[99] Supra 96 at 2-4

receiving small amounts of FDI (less than U.S. $1 million per sector, and sometimes as little as U.S. $10,000).

(c) Chinese investors prefer mergers and acquisitions over creating wholly-owned subsidiaries.

(d) The Chinese outward investments are often directed by the State, especially for firms in deals involving oil and minerals or telecommunications, which are required by the government to remain under government oversight or control.[100] Chinese governments at various levels often appoint executives in such Chinese firms and finance the deals through state banks.[101]The Chinese government's support for these industries includes a variety of subsidies as well as access to low-cost financing from the largest banks, all of which are State owned.In 2008, even as global ODI fell by 15 % as a consequence of the financial crisis, Chinese ODI flows more than doubled.In 2009, when global ODI plummeted by 43 %, Chinese ODI, buoyed by Chinese government financial support, still managed to grow by 1 %.[102]

IV.4 Management of outward FDI

The Chinese Government is working under the premise of the 'Zou Chuqu' ('Going Global') policy, first installed in 2006 and that became part of national planning in the 11th Five Year Plan (2006 - 2010).[103]

Three entities within MOFCOM which govern China's overseas FDI are: the Department of Foreign Economic Cooperation (DFEC) Office of the Economic and Commercial Counselor, Policy Research Department (PRD), and the Department of International Trade and Economic Affairs (DITEA).

DFEC is responsible for regulating Chinese OFDI and Chinese overseas labour. All overseas investments exceeding US$10,000 are required to register. The DFEC can impose fines on or revoke overseas investment license of violators of Chinese laws and relevant regulations. The Economic and Commercial Counselor is delegated by MOFCOM to monitor Chinese firms' foreign in-vestment activities and is usually stationed at and administratively subject to Chinese embassies or consulates abroad.

PRD facilitates Chinese enterprises' expansion abroad by analyzing and reporting international economic development trends, economic and political conditions of each foreign country or region, lessons on the aggregation of internalization, and preparing and circulating country reports focusing on various economic and investment issues along with the country's policies and regulations. DITEA also facilitates Chinese firms' OFDI by negotiating bilaterally and multilaterally with foreign governments and international economic institutionssuch as WTO, OECD and UNCTAD.

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[100] These so-called "strategic and heavyweight" industries also include coal, civil aviation, machinery, automobiles, IT, construction, iron and steel, armaments, power generation and distribution, and shipping. For more information, see U.S.-China Economic and Security Review Commission, 2007 Report to Congress (Washington, DC: U.S. Government Printing Office, November 2007), pp. 36-47; and U.S.-China Economic and Security Review Commission, 2009 Report to Congress (Washington, DC: U.S. Government Printing Office, November 2009), pp. 56-79 quoted in n15 of US-China 2011.

[101] China Buys Up the World, ECONOMIST, Nov. 11, 2010, Supra 96.

[102] US-China 2011 quoting UNCTAD, World Investment Report 2010: Investing in a Low Carbon Economy (New York and Geneva: United Nations, 2010), p. xvii; MOFCOM, 2009 Statistical Bulletin of Chinese Outward Foreign Direct Investment (Beijing: 2010).

[103]For a overview of the Chinese outward FDI see generally *The Management of Chinese Foreign Direct Investment*,[henceforth Management of Chinese Foreign Direct Investment] Policy Briefing , CENTRE FOR CHINESE STUDIES, (March 2011), http://www.ccs.org.za/wp-content/uploads/2011/04/Policy-Briefing-final_180411.pdf (last visited June 18, 2011); Yadong Luo a, Qiuzhi Xue and Binjie Han, *How emerging market governments promote outward FDI:Experience from China*,[henceforth Emerging Markets]JOURNAL OF WORLD BUSINESS (2009), www.doi:10.1016/j.jwb.2009.04.003 (last visited July 18, 2011)

As part of its efforts to restructure state-owned enterprises, the Chinese government established the State-Owned Asset Supervision Administration Commission (SASAC) in April 2003, which is mandated to develop China's equity exchange market, while supporting Chinese foreign investments. It was established to turn the country's top state-owned enterprises under its control into 50 globally active corporations that feature on the global Fortune 500 list.

Many large state-owned enterprises are under supervision of the SASAC. It has the authority to manage overseas state-owned assets; to decide whether and what acquisitions and mergers they can pursue; and to whether and in what percent-age they should pay dividends to the government.

A paper published by Leonard K. Cheng and Zihui Ma of National Bureau of Economic Research (NBER), attempts a vast literature survey of the Chinese studies as to the motivation of China's outbound FDI.[104] The four predominant motives that emerge are: (a) market; (b) natural resources; (c) technology and managerial skills; and (d) financial capital[105]. These motives have been augmented by the later researches. The other motivations include: (e)strategic assets (e.g., brands, marketing networks), and (f) diversification.[106]The authors contend that, because China was itself a low-cost production base, cost minimization was not a major motivation of Chinese FDI overseas.

USTR, China 2011 Report identifies the following motives and rationale for the Chinese outbound FDI[107].

(a) *Access to Raw Materials and Energy:* The need to secure access to overseas energy resources and raw materials to support China's high economic growth rate continues to be a key strategic driving force. The natural resource-seeking ODI of the Chinese energy majors is intimately connected with the government's pursuit of a national energy security agenda to secure overseas assets and supply agreements. Meanwhile, the Chinese authorities have been inviting the governments of host states aggressively by awarding aids, and providing much-needed transport and communications infrastructure, a process sometimes called "dollar diplomacy."[108] Another example of the government's close involvement with and support of overseas-directed energy acquisitions is the current conditions stipulated by the influential policy-setting National Development and Reform Commission (NDRC), requiring China's energy firms to purchase equity in upstream energy suppliers, principally through overseas acquisitions.

Although in 2009, investment in the form of M&A comprised only 30% of the total ODI, evidence shows that M&As in oil, gas, and mining are playing a growing role in Chinese outward direct investment.[109]

(b) *Acquisition of Technology, Brands, and Know-How:* Another key motivation is to assist Chinese firms acquire advanced technology, manufacturing processes, and managerial know-how. FIEs are encouraged to enter joint ventures or to purchase foreign companies through which they can absorb state-of-the-art technologies and thus "leapfrog" several stages of development. An

[104] Leonard K. Cheng and Zihui Ma, *China's Outward FDI: Past and Future*, 2008, *available at*http://www.nber.org/books_in_progress/china07/cwt07/cheng.pdf [henceforth Cheng and Ma]
[105] Cheng and Ma quoting Cai 1999 at p 4.
[106] Cheng and Ma quoting Deng at p 4.
[107]USTR, USTR-China Report, 2010.
[108] Andreas Lunding, *Global Champion in Waiting: Perspectives on China's Overseas Direct Investment,* DEUTSCHE BANK RESEARCH, Aug. 4, 2006 at 4, http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/pdf
[109] MOFCOM, *2009 Statistical Bulletin of China's Outward Foreign Direct Investment,* at 16.

example of this beingLenovo's purchase of IBM's personal computer division in 2005. Lenovo was able to gain managerial and commercial experience in international marketing and advertising, particularly within the United States, as it also acquired a world-class brand.

(c) *Competition in the Domestic Market:*One motivation for investing abroad that gets less attention is the search for new markets. This effort has grown in importance as domestic Chinese markets have become more competitive. As Wong and Chan argue in "China's Outward Direct Investment: Expanding Worldwide," "though predominantly state owned, firms that 'go global' are still motivated by profit maximization."[110]These firms' efforts at overseas expansion are thus responses to saturated domestic markets or attempts to gain first-mover advantage in untapped markets overseas rather than attempts to further Chinese strategic interests.

(d) *International Barriers to Trade:* A final motivation for Chinese investment abroad is a desire to avoid foreign quotas, tariffs, and other barriers to Chinese-made goods. This was a more compelling motivation for overseas investment before China's World Trade Organization (WTO) accession; as Wong and Chan describe, "before China became a member of the WTO, its textiles, clothing and footwear (TCF) products had limited access to the U.S. market. TCF firms consequently invested in Australia and then exported 'Made-in-Australia' products to the U.S." in order to avoid American textiles quotas for non-WTO producers.[111] Although WTO accession has lowered the tariffs and quotas on Chinese exports, Chinese firms have continued to build factories in countries that have relatively unfettered access to the American and European markets.

V. MEASURES AFFECTING IMPORTS

V.1 CUSTOMS CLEARANACE PROCEDURES AND VALUATION

General Administration of Customs (GAC) is responsible for evaluating the dutiable value of imported and exported goods. The immdediate aftermath of WTO accession coincided with the Chinese reform programme known as The *First-step Development Strategy of Building a Modern Customs Regime* (1998-2003)[112].The core element of this programme was to set up a modern custom clearence system.Subsequently the Chinese adopted what is known as the *The Second-step Development Strategy of Building a Modern Customs Regime* (2004-2007).[113]

China has reformed its Customs transit system to simplify Customs declaration procedures.Before the reform began in 2005, importers in inland areas of China had to first go through Customs transit procedures at the entry port, before declaring the goods at the Customs in the destination port.Following the reform, importers declare only at the place where they are registered.The reform has been expanded nationwide in mainland China.

Importers (and exporters) must register with MOFCOM or its authorized bodies before filing Customs declarations.Import (and export) declarations must be made in paper and electronic form, and can be made

[110] John Wong and Sarah Chan, *China's Outward Direct Investment: Expanding Worldwide*, CHINA: AN INTERNATIONAL JOURNAL 1.2 (September 2003): 283[henceforth Wong and Chan2003], www.wenku.baidu.com/view/b77b861fc5da50e2524d7f2a.html
[111] Wong and Chan 2003 at p 285
[112]SeeZhang Shujie and Zhao Shilu, *The Impact of Custom Modernisation on Export Competitiveness in China*, at http://www.unescap.org/tid/publication/tipub2543_zhang.pdf ; *The Second-step Development Strategy of Building a Modern Customs Regime*, at http://english.customs.gov.cn/publish/portal191/tab3972/info69445.htm
[113]Id

either in person or by an authorized enterprise.Declarations must be made to Customs at the port of entry within 14 days of the goods' arrival.

V.2 Customs Valuation

Following its accession to the WTO, China changed its rules on Customs Valuation in 2006. Under the regulations,customs value is determined primarily on the basis of transaction value, which includes the costs of transport and insurance and other related charges.

It is reported that China has not uniformly implemented various customs valuation measures issued following its accession to the WTO. Although the customs valuation rules provide for the use of "transaction value" as the basis for valuation, it has been pointed out that Chinese customs officials still use "reference pricing", which usually results in higher dutiable value. Under the Customs Valuation Agreement if officials harbor any suspicion with respect to the transaction value, they may value imports using a hierarchy of valuation benchmarks; however, they should opt for valuations based on the transaction price.

Under WTO rules, an importing country may, when valuing imports, add to the transaction price of the goods any royalties or software fees paid to the exporter if those fees are a condition of exporting the goods to China. Before promulgating its new customs regulations in January of 2002, China had no "condition of sale" rule. Instead, it followed a much broader domestic provision stipulating that any royalty or software fee associated with an import should automatically be included in the import's dutiable value. The 2011 USTR report has pointed out that Chinese customs officials are still automatically adding royalties and software fees to the dutiable value of all imports, even when such royalties and fees are not a condition of sale.[114]

V.3 RULES OF ORIGIN

Rules of Origin (ROO) are of two kinds: preferential and non-preferential.The PRC non-preferential ROO are embodied in the following legislation: "*Provisional Regulations of the Customs of People's Republic of China on Origin of Import Goods*" issued by the Director-General of Customs General Administration. The Chinese non preferential ROO are divided into two categories, import and export. Import ROO are used for the application of MFN rates, for compiling trade statistics, for marking of origin, for import control, and will be used for anti-dumping duties, countervailing duties, safeguard measures, and tariff quota.Export ROO are used for export control, for compiling trade statistics and for marking of origin.

V.4 Tariffs

The tariff is one of China's main border measures pertaining to imports.In 2011, tariff revenue accounted for 2.5% of total tax revenue, down from 3.3% in 2008.

V.4. (a) Development during review quarter

On 24 June 2011, the Customs Tariff Commission of the State Council released the No. 21 [Shuiweihui 2011], announcing to cut import tariff on 33 commodities. Most of these import tariffs are reduced to half of the previous rates. The import rates for air fuel and light diesel oil are reduced to zero from 9% (air fuel) and 6%(diesel oil). The 2011 Tariff Implementation Plan resulted in the decrease of certain import tariffs,

[114]USTR 2011 China Report, available at http://www.ustr.gov

namely gasoline engines (HS 8407.34.10) (from 10% to 5%), turbo engines (HS 8411.99.10) (from 5% to 0%), motor vehicles chassis (HS 8704.23.00) (from 15% to 10 %.[115]The Plan also results in an increase of import tariffs on other selected products.[116]

On 15 June 2011 the Ministry of Finance, the General Administration of Customs (GAC) and the General Administration of Taxation (GAT) jointly announced the Provisional Measures on Import Taxation Exemption for Cartoon Companies Import of Relevant Cartoon Industrial Products.Qualified companies must be registered in China in accordance with Chinese laws, including joint ventures and foreign owned companies. The qualified companies must also have capabilities for self-developing and they must produce direct cartoon products and have the registered capital of no less than 800,000 RMB.

V.4(b) Bound MFN tariff rates

China bound all its tariff lines at *ad valorem* rates.The applied MFN tariff rates are close to the bound rates and bound rates are low, thereby imparting a high degree of predictability to China's MFN tariff Bound rates vary from zero to 65% for agricultural products, and from zero to 50% for non-agricultural products.[117]

China's applied MFN tariff rates consist of "standard" applied MFN tariff rates as well as "interim" MFN tariff rates; for the relevant products, the interim tariff effectively replaces the applied MFN tariff, and the interim rates are no higher than the standard applied MFN tariff rates.

V.4 (c)Tariff-rate quotas (TRQs)

China applies TRQs to bulk commodities such as wheat, corn, rice, cotton andsoya bean oil.In 2011, TRQs continue to be applied to 8categories of imported goods, involving 45 tariff lines at the HS 8-digit level.[118]These TRQs are applied to imports from all countries.

V.5 Indirect taxes affecting imports

On 25 March 2011, the Chinese Ministry of Finance (MOF) and the Chinese State Administration of Taxation (SAT) jointly announced a circular to imposed an adjusted Rare Earth Tax from 1 April 2011.

In accordance with this Circular, the tax rate of mined light rare earths will become RMB 60 ($9.1) per ton, while that of medium and heavy rare earths is RMB 30 ($4.5) per ton. Before this Circular adopted, the taxes of rare earth minerals were levied under the category of ordinary non-ferrous metals ores, with tax rates between 0.5 and 3 ($0.07 and $0.4) per ton cubic meter.

The increase in the adjusted rare earth tax will led to heavier duties on rare earth producers, both Chinese and foreign, as well as for buyers. It is expected that rare earth prices on world markets may rise again.

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[115]WTO Tariff Profile, Report of the WTO Secretariat, http://www.wto.org<documentsonline>
[116]WTO G-20 Report, *supra* note 94
[117] Supra 4 at 27, para 18
[118]These were wheat (6 lines), maize (5), rice (14), sugar (6), wool (6), wool tops (3), cotton (2), and chemical fertilizers (3). A sliding duty is applied to out-of-quota imports of cotton. In 2009, this duty was applied so that, for cotton valued above a certain threshold, a specific duty of Y 0.57/kg applied; for cotton valued below the threshold, the rate was calculated based on an equation, but was no higher than 40%, taking into consideration the c.i.f. price of cotton (in Chinese Yuan). The threshold for 2009 was Y 11.397/kg. The average applied in-quota rate was 4.8%, while the out-of-quota rate was around 50% in 2009.

Should the application of this measure be asymmetric, in particular if local governments tax less Chinese firms operating in their jurisdiction, then there is the potential for this measure to be discriminatory.

V.6 Import prohibitions and licensing

China maintains import prohibitions on grounds of public interest, environmental protection, or in accordance with international commitments. In general, prohibited products are listed in Catalogues of Commodities subject to Import Prohibitions, issued by MOFCOM and other relevant ministries, such as the General Customs Administration, AQSIQ or the Ministry of Environmental Protection.Since China's accession to the WTO, six batches of these Catalogues have been released; In 2009, imports of 52 tariff lines (at the HS 8-digit level) were totally prohibited, and 528 lines were partially (ex-lines) prohibited, covering some products of animal origin, opium, mineral products, chemicals, raw hides, waste of skins and leather, used clothes, ash of precious metals, used articles of machinery and electronic equipment, and second-hand transport equipment.

Imports may also be prohibited on grounds of animal health, plant health, or human safety.For example, China prohibited imports of some meat products from countries with avian flu and/or other animal diseases.

China also maintains a complex procedure whereby foreign books and films can be imported only through a handful of state run entities. The measure was challenged by the United States before the WTO Dispute Settlement Body (DSB). The Dispute Settlement Panel[119] and subsequently the Appellate Body found in favour of the United States and China was given a deadline of January 19, 2011 to comply with the DSB findings. China has so far failed to adhere to the timeline.[120]

Release of notifications of Import Bans during Review quarter

Details of Measure	Source
Import ban on poultry products (HS 0207) from Morbihan - France (12 January 2011), and Gotlands - Sweden (23 February 2011), due to Newcastle disease	Permanent Delegation of China to the WTO (13 May 2011)
Import ban on artiodactyl and artiodactyl products from Bulgaria (1 February 2011), and the Democratic People's Republic of Korea (23 February 2011), due to foot and mouth disease	Permanent Delegation of China to the WTO (2 May 2011)
Import ban on certain food products and feeds from some regions of Japan (12 Prefectures), as a result of the nuclear crisis	Permanent Delegation of China to the WTO (13 May 2011)

Source: G-20 report

[119]*Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, DISPUTE DS363*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm

[120]Erik Gruenwedel, *China Fails to Lift U.S. Movie Import Restrictions,* HOMEMEDIA,(March 25, 2011), http://www.homemediamagazine.com/legal-news/china-fails-lift-us-movie-import-restrictions-23440

V.7 Licensing

China import licensing regime applies equally to goods from all WTO Members and non-members.Details of commodities subject to import licensing are published annually by MOFCOM, Customs, and the AQSIQ.

V.7(a) Non-automatic import licences

Around 95 tariff lines (at the HS 8-digit level) were subject to non-automatic import licensing; the lines cover ozone-depleting substances, and specific old mechanical and electronic products.[121]Applicants must apply for an import permit prior to applying for an import licence.Import permits are issued by the Ministry of Environmental Protection or MOFCOM, depending on the product.[122]Once the permit is obtained, a licence is granted automatically by MOFCOM to the importer. The licence is valid throughout the calendar year, and can be extended once, for a maximum of three months.

V.7(b) Automatic import licences

Automatic import licences are applied to monitor certain imports for statistical purposes.In 2009, 560 lines at the HS 8-digit level (7.1% of total lines) were subject to automatic import licensing, down from 604 tariff lines (7.9% of total lines) in 2007.These concerned mainly poultry, vegetable oil, tobacco, chemical fertilizers, coal, natural rubber, iron ore, crude and processed oil, steel, machinery products, automobile components, and ships.

V.8 State Trading

Under the Foreign Trade Law of 2004, China may subject certain goods to state trading, including to ensure stable domestic supply, stabilize prices, safeguard food safety, and protect the environment and exhaustible resources.[123]In 2009, products imported by state-trading enterprises (STEs) were:grain (including wheat, maize, and rice), sugar, cotton, chemical fertilizer, tobacco, and crude oil and processed oil Imports of vegetable oil (rapeseed oil, palm oil, and soybean oil) have been temporarily removed from the state trading requirement since 2006, although the Government reserves the right to conduct state trading in respect of these products in accordance with China's Accession Protocol.

Tobacco must be imported by one state-trading enterprise:the China National Tobacco Import & Export Group Corporation.All other products subject to state trading may be imported by both STEs and non-STEs meeting certain requirements.[124]For some products, imports by non-STEs were much higher than by STEs

[121] Non-automatic licences are also required for imports of chemicals used for military purposes (64 tariff lines at the HS 10-digit level), toxic materials (42 lines), and radioactive isotopes and their compounds (8 lines). Catalogue of Goods and Technologies Subject to Import and Export Licence Administration., http://cys.mofcom.gov.cn/accessory/200901/1231052560147.xls [07/05/09].

[122] Import permits for ozone-depleting substances are issued by the Ministry of Environmental Protection. For old mechanical and electronic products and other materials, permits are issued by MOFCOM.

[123] China notified the list of STEs to the WTO (WTO document G/STR/N/9/CHN/Add.1, 14 July 2003).

[124] For wheat, maize, rice, sugar, cotton, and chemical fertilizers, these requirements are specified in the annual announcement of the quota volume and allocation methods issued by MOFCOM; for crude and processed oil, the requirements are set out in MOFTEC (now MOFCOM) Decree No. 27 of 2002 and MOFTEC Announcement No. 19 of 2002.

Most state trading products are also subject to tariff-rate quotas.Products on which TRQs are maintained include wheat, sugar, maize, rice, and cotton, respectively, although the shares are declining for NPK (urea fertilizer) and diammonium phosphate.

The USTR 2010 notes[125]that in its WTO accession agreement, China agreed to provide information on the importing and exporting activities of state trading enterprises. China committed to provide full information on the pricing mechanisms of state trading enterprises and to ensure that their import purchasing procedures are transparent and fully in compliance with WTO rules. China also agreed that state trading enterprises would limit the mark-up on goods that they import in order to avoid trade distortions. Pursuant to these obligations China has only produced general informationwhich in view of many traders is not very useful.

V.9 Restrictive import licensing regime on Iron Ore

A number of WTO members have expressed concern on China's restrictive iron ore licensing procedures.In 2007, China reduced the number of licensed traders from 48 to 42. It also reportedly instituted further restrictions on qualifying criteria for iron ore import licenses, including tighter limitations on the size of the enterprises eligible to import iron ore and shipment sizes. In 2008, China went one step further. It reportedly temporarily suspended the issuance of licenses to importers of Australian iron ore in an effort to limit price increases being negotiated between foreign exporters of iron ore and Chinese steelmakers.

The US has also expressed concern on China's restrictive iron ore licensing procedures, such as through Steel Dialogue meetings. The United States has also raised its concerns in meetings before the WTO's Committee on Import Licensing and Council for Trade in Goods.

V.10 Contingent Trade Protection

V.10(a) Antidumping

China as a Target of Antidumping Actions:A study commissioned by NBER[126] analyses in-depth the incidence of anti-dumping measures initiated against China and by China with conclusions that are pertinent to this monitoring report.

In terms of the NBER study, roughly 80%[127]of all new antidumping investigations and measures imposed during the 1995-2010 periodcame from only 10 countries – the four "historical" developed-economy users, and six "new" developing-country users (Argentina, Brazil, India, Mexico, South Africa and Turkey). The main target areas are steel, chemicals and increasingly the apparel sectors.[128]

The invocation of antidumping measures against China haslead people to question whether trade contingency protection can be an effective measure against certain imbalances in the Chinese

[125]USTR 2010 at 62.
[126] Chad P Brown, *China WTO Entry, Antidumping Investigations and Dispute Settlement*, NBER, December 2008, at 26-27.
[127] Chad P Brown p6, Table 1 (1995-2001 and 2002-2006)
[128]Chad P Brown p8 Figure 3

economy.[129]The main discontent on the Chinese side is based on the continued non-market economy status of China[130]. The countermeasures that have been suggested mostly center around strengthening Chinese anti-dumping mechanisms and providing legal support to the Chinese exporters.[131] Incidentally, China is one of the key users of antidumping measures. (See Table below).

Table II: AD Measures by China (Dec. 2010)

Japan	25
R. Korea	25
US	22
India	4
Others	61
Total	137

Source: WTO

Development during the review Quarter

The following are some of the antidumping investigations conducted by China during the Monitoring Period:

- On May 9, 2011, the MOFCOM released Public Notice No. 21 [2011], deciding to continue the anti-dumping duties imposed upon the imported Chloroprene Rubber originating from Japan, the US and EU for another five years.[132]
- On May 5, 2011, the Ministry of Commerce of the People's Republic of China (MOFCOM) issued Public Notice No. 20 [2011], announcing its affirmative final determination in the anti-dumping and anti-subsidy investigations on imports of saloon cars and cross-country cars (of a cylinder capacity greater than or equal to 2000cc) originating in the US. The dumping margins range from 2.0% to 21.5%; the subsidy margins range from 0% to 12.9%.
- China imposes definitive antidumping duties on imports of Dispersion Unshifted Single-Mode Optical Fiber originating from the US and the EU.

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[129] See generally Jason Z. Yin,*China: How to Fight the Antidumping War? China and Global Economy*, available at http://chongbanphagia.vn/beta/files/China-How-to-fight-against-AD-war.pdf (last visited June 14),.2011, Shuming Bao, Shuanglin Lin, Changwen Zhao, *Chinese Economy After WTO Accession (page,year)*, Jason Z Yin, *China in the Antidumping in China,* 209-225 (); Daniel Ikenson,*Nonmarket Nonsense:U.S. Antidumping Policy toward China* available at http://www.cato.org/pubs/tbp/tbp-022.pdf (last visited 14.06.2011); N Gregory Mankiew and Phillip Swagel, *Anti-dumping the Third Rail of Trade Policy, Foreign Affairs* 84 *Foreign Affairs* 107(2005).

[130]See Protocol on the Accession of the People's Republic of China of Nov 10, 2001, World Trade Organization, Ministerial Decision on the Accession of the People's Republic of China, Annex, WT/IU432 (Nov 23, 2001) permits the WTO members to treat China as a Non-Market Economy till 2015.But it still allows a particular producer to prove as a matter of fact to show that China is a not a NME under the National Law of the particular state.

[131] Jason Z. Yin*, China: How to Fight the Antidumping War,* 89

[132]*China Continues Anti-dumping Duties on Imports of Chloroprene Rubber,* ANTIDUMPINGPUBLISHINH.COM, (May 10, 2011) http://www.antidumpingpublishing.com/anti-dumping-news/China-Continues-Anti-dumping-Duties-on-Imports-of-Chloroprene-Rubber.aspx (last visited July 2, 2011)

- On April 21, 2011, the Ministry of Commerce of the People's Republic of China (MOFCOM) issued Public Notice No. 17 [2011], announcing its affirmative final determination in the anti-dumping investigation on imports of Dispersion Unshifted Single-Mode Optical Fiber originating from the US and the EU. For US companies, the dumping margins range from 4.7% to 18.6%; for EU companies, the dumping margins range from 12.9% to 29.1%. The anti-dumping measures will be imposed for five years as of April 22, 2011.[133]

Terminations of Antidumping Actions

Termination on 8 April 2011 of anti-dumping duties on imports of cold-rolled Stainless Steel Sheet and Strip (HS 7219.31.00; 7219.32.00; 7219.33.00; 7219.34.00; 7219.35.00; 7219.90.00; 7220.20.10; 7220.20.90) from Japan and Korea, Rep. of (imposed on 18 December 2000)	Permanent Delegation of China to the WTO (2 May 2011)

Source: G-20 Report

V.10(b) Countervailing Duties (CVD Investigations)

China has put in place a legal framework for its CVD regime. Under the CVD regime, BOFT, an agency which works under the MOFCOM is entrusted with subsidy determinations, whereas IBII is tasked with conducting injury determinations.

In June 2009, acting on a petition from China's state-owned steel industry, MOFCOM initiated China's first CVD investigation againstrain-oriented flat-rolled electrical steel from the United States.[134]MOFCOM also initiated two additional CVD investigations involving imports of poultry and automobiles from the United States. The CVD determination on GOES resultedin a WTO challenge by the US in September, 2010.

Recent Development during review quarter

On 16 May 2011, MOFCOM released its Announcement No.19, 2011 on its preliminary ruling of anti-subsidy investigation on potato starch originating in the EU.[135] The *ad valorem* subsidy rate of French Roquette was 7.70%, that of Netherlands' AVEBE and its factories in Germany was 11.19%, and that of other EU enterprises' was 11.19%. This case is China's first anti-subsidy investigation on EU imports.

V.10 (c)SafeguardMeasures

In its WTO accession agreement, China committed to revising its regulations and procedures for conducting safeguard investigations by the time of its WTO accession in order to make them consistent with the WTO Agreement on Safeguards (Safeguards Agreement).To date, as previously reported, China has conducted only one safeguard proceeding, which resulted in the imposition of tariff-rate quotas on imports of nine categories of steel products from various countries, including the United States, in November 2002.

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[133]*China Imposes Definite AD Duties on Optical Fibre,*ANTIDUMPINGPUBLISHINH.COM, (April 29, 2011) http://www.antidumpingpublishing.com/anti-dumping-news/China-imposes-definitive-AD-duties-on-optical-fiber.aspx (last visited July 2, 2011)

[134] Blog, Simon Lester, *US Files Cases Against AD/CVD Measures*, (Sept 15, 2010), http://worldtradelaw.typepad.com/ielpblog/2010/09/us-files-case-against-chinese-adcvd-measures.html(last visited July 17, 2011)

[135]*Supra* note 6

VI.TECHICAL REGULATIONS AND STANDARDS

VI.1 TBT

The General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) is the enquiry point for the SPS and TBT Agreements under the WTO.AQSIQ is a ministerial administrative organ which comes directly under the State Council.The functions of AQSIQ include quality management, metrology management, food safety, certification and accreditation, and standardization.AQSIQ operates through its 31 provincial Bureaus of Quality and Technical Supervision.

China has four types of standards:national, professional, local, and enterprise standards.Within the national, professional, and local standards, there are voluntary and mandatory standards.Voluntary standards, however, can become mandatory if they are referenced in mandatory conformity assessment procedures.

The major legislation on standards (both voluntary and mandatory) is the Standardization Law of 1988 and its Implementing Regulations.The Standardization Administration of China (SAC), under the AQSIQ, administers standardization in China.

National standards are developed for technical requirements that need to be adopted nationally. National standards take precedence over professional and local standards. Once equivalent national standards are developed, they replace the professional and local standards automatically.In addition, there are national advisory technical documents, which are developed in areas where technology is changing fast and standards need to be developed rapidly.The process of drawing up these documents is the same as that for developing standards, but the review period is three years for national advisory technical documents, while it is five years for standards.National advisory technical documents are thus more likely to reflect fast-changing technology.

In January 2009 the SAC announced that foreign-owned companies established in China would be allowed to participate as voting members in technical committees responsible for the promulgation of national standards;the authorities emphasized that foreign companies registered in China could always participate in standardization activities, although before 2009 they could participate as observers only.[136]The SAC also represents China in international and regional standardization organizations.[137]China has signed some intergovernmental agreements on cooperation in the field of conformity assessment, and participates in the APEC MRA on Conformity Assessment of Electrical and Electronic Equipment (APEC EE MRA).

Since 2003, China has required the China Compulsory Certification (CCC) mark to be applied to Chinese and foreign goods covering more than 159 product categories—including electrical machinery, IT equipment, household appliances and their parts and components.[138]China also does not allow third country suppliers to use competent conformity assessment bodies such as testing laboratories, inspection bodies, and product certifiers. In view of this policy, foreign suppliers including Indian suppliers were required to submit their products to Chinese laboratories for testing resulting in additional burden and delayed access to the Chinese market.

[136] WTO documents G/TBT/W/326, (Oct. 29, 2009) ; G/TBT/M/49, (Dec 22, 2009).
[137] These include the International Organization for Standardization (ISO), the International Electro technical Commission (IEC), and the Pacific Area Standards Congress (PASC).
[138]USTR 2011 TBT Report

It is also reported that over the past few years China seems to be actively pursuing the development of unique requirements, despite the existence of well-established international standards, as a means for protecting domestic companies from competing foreign standards and technologies. China has adopted unique standards for digital televisions and is trying to develop unique standards for autos, telecommunications equipment, Internet protocols, wireless local area networks, radio frequency identification tag technology, audio and video coding and fertilizer as well as software encryption and mobile phone batteries.[139]

Box-VIII

WAPI Encryption Standards

In May 2003, China issued two mandatory standards for encryption over Wireless Local Area Networks (WLANs) applicable to domestic and imported equipment containing WLAN (also known as Wi-Fi) technologies. These standards, which were originally scheduled to go into effect in December 2003 and were never notified to the TBT Committee, incorporated the WLAN Authentication and Privacy Infrastructure (WAPI) encryption technique for secure communications. This component of the standards differed significantly from the internationally recognized standards. Subsequently under US pressure the Chinese voluntarily submitted a WAPI standard for consideration by the International Organization for Standardization (ISO). The technical merits of the WAPI standard were considered by the ISO in 2005, and its adoption as a standard was rejected in 2006. In 2009, China moved forward with plans to mandate the use of the WAPI standard in mobile handsets, despite the growing commercial success of computer products in China complying with the internationally recognized ISO/IEC 8802-11 WLAN standard, otherwise known as "Wi-Fi."Once again under US pressure the Chinese MIIT devised a process for approving hand-held wireless devices such as cell phones and smart phones that are Internet-enabled with WiFi ISO/IEC 8802-11 standard applicable only if those devices are also enabled with the WAPI standard. Till 2010 the Chinese have remained unwilling to compromise on the position.

Source: *USTR 2010*

The most immediate concern[140] about China is from framework regulations for information security in critical infrastructure known as the Multi-Level Protection Scheme (MLPS), which was first issued in June 2007 by the Ministry of Public Security (MPS) and MIIT. The MLPS regulation put in place guidelines to categorize information systems according to the extent of damage a breach in the system could pose to social order, public interest and national security. The MLPS regulations also appear to require, by reference, purchasers' compliance with certain information security technical regulations and encryption regulations that are referenced within the MLPS regulations.

If implementing rules for the MLPS regulations are issued and apply broadly to commercial sector networks and IT infrastructure, they could have a significant impact on sales by foreign information security technology providers in China. Some WTO members have therefore urged China to notify MLPS implementing rules laying down equipment-related requirements in accordance with China's obligations under the TBT Agreement.

Concern has also been expressed about the China's Chemical regulation, China's *Administrative Measures for Controlling Pollution Caused by Electronic Information Products*, issued by MIIT and several other Chinese agencies

[139] Id

[140] See USTR 2010 at 54,55

which entered into effect from March 2007. This measure is modelled after existing EU regulations that restrict hazardous substances in electronic products.While both the EU regulations and China's regulations seek to ban lead and other hazardous substances from a wide range of electronic products, unlike the EU Standard process,for the China RoHS regulations, there was no formal process for interested parties to provide comments or consult with MIIT, and as a result foreign stakeholders had only limited opportunity to comment on proposals or to clarify MIIT's implementation intentions.[141]

VI.2 Sanitary and Phytosanitary Measures

VI.2 (a) Overview

MOFCOM is in charge of submitting notifications on SPS measures to the WTO, and the AQSIQ is the Enquiry Point under paragraph 3 of Annex B of the SPS Agreement.The State Food and Drug Administration supervises safety of food, health foods, cosmetics, and pharmaceuticals and prescribes the policies and procedures for registering drugs, fulfilling documentation requirements, registration timelines, laws and regulations that govern clinical testing, and information regarding manufacturing, marketing, distribution and sales of pharmaceuticals in China.Specific supervision of food products and processed food products is provided by the Ministries of Agriculture and Health, and the State Administration of Industry and Commerce (SAIC).

China's main SPS legislations include:the Law on Quality and Safety of Agricultural Products, the Law on the Entry and Exit of Animals and Plant Quarantine, the Food Hygiene Law, the Law on Animal Disease Prevention, the Law on Import and Export Commodity Inspection, the Law on Frontier Health and Quarantine, as well as accompanying implementing regulations and rules.A new Food Safety Law, which entered into force on 1 June 2009, involves, *inter alia*, the promulgation of "unified" national food safety standards.[142]China submitted seven notifications to the WTO on its SPS measures in 2008 and 90 in 2009. However, concerns were raised in the SPS Committee about the lack of notification of the new Food Safety Law before its implementation.[143]

Recent development during review quarter

In 2011 China has entirely revamped[144] its food safety administration.In May 2011, *Regionalization Management System on Primary Agricultural Products Requirements (GB/T26407-2011)* was issued as a national standard and will enter into force on 1 September 2011.The standard serves as a basis for local governments to establish a regionalization management system on primary agricultural products and for third party certification bodies to conduct certification.Additionally, it seeks to further enhance the food safety level in China.

A major concern for some of the exporting countries of meat and poultry products is that China has applied SPS-related requirements on such products that are not based on sound science or current scientific testing practices One requirement establishes a zero tolerance limit for the presence of Salmonella bacteria. Similar zero tolerance standards exist for Listeria and other pathogens. Meanwhile, the complete

[141]See USTR 2010 at 57-58
[142] WTO document G/SPS/N/CHN/121, (Aug. 27, 2009).
[143] WTO document G/SPS/R/56, paragraph 179, (Jan. 28, 2010).
[144]An Introduction to China's Regionalization Management System On Food Safety, G/SPS/GEN/1101.

elimination of these bacteria is generally considered unachievable. Moreover, China apparently does not apply this same standard to domestic raw poultry and meat, raising national treatment concerns.[145].

It also maintains a maximum residue levels for certain heavy metals, veterinary drugs and other residues that the USTR claims are inconsistent with Codex Alimentarius (Codex) guidelines and other international standards.[146]

VI.2 (b) Certification and accreditation

Voluntary certifications may be applied for products not requiring a CCC mark.For example, the China Quality Certification Centre (CQC) is responsible for the CQC voluntary certification system (the CQC mark), covering more than 500 products.[147]CQC is also a member of the CB Scheme of the IEC System for Conformity Testing and Certification of Electrical Equipment (IECEE), and can issue the CB Test Certifications recognized by 52 countries and regions within the CB Scheme.[148]

Chinese Government has adopted arbitrary measures in inspection related processes. Through two measures issued in 2002, the *Administrative Measures for the Entry-Exit Inspection and Quarantine for Grains and Feed Stuff and the Administrative Measures for Entry Animal and Plant Quarantine*, AQSIQ requires importers to obtain a Quarantine Inspection Permit (QIP), prior to signing purchase contracts for nearly all traded agricultural commodities. Significant uncertainty remains even with the extended period of validity, because a QIP still locks purchasers into a very narrow period to purchase, transport and discharge cargoes or containers before the QIP's expiration, and because AQSIQ continues to administer the QIP system in a seemingly arbitrary manner.Further MOFCOM administers an additional import permit system for poultry products.[149]

Labelling

China's labelling requirements are maintained under the Standardization Law, the Food Hygiene Law, the Law on Product Quality, and various regulations on, *inter alia*, food, drugs, and cosmetics.Labels must be written in Chinese, except for products manufactured in China for export only.

VII.MEASURES DIRECTLY AFFECTING EXPORTS

VII.1Procedures

China has continued its reform on Customs transit procedures for exports, to simplify procedures for enterprises located in inland areas.Exporters now go through Customs transit procedures only at the place where they are registered; before the reform, exporters from inland areas had to go through Customs transit procedures at the inland Customs, before declaring goods at Customs at the departing port.

[145]USTR 2010 at 79-80
[146]Id. at p 80
[147]CQC online information. Viewed at: http://www.cqc.gov.cn/English/product/index.asp?Product TypeID=34 (in English) [Jan 15, 2009)
[148] Other voluntary certifications include certification of feeds, good agricultural practices (GAP), hazard-free agricultural products, organic products, as well as certifications on management systems such as the hazard analysis and critical control points (HACCP) system, the ISO-9000 system, and the ISO-14000 system.
[149]USTR 2010 at 81-82

Exports of animals and plants and their products are subject to SPS requirements similar to those on imports and to the requirements of the importing country.After the AQSIQ's reform of its entry-exit inspection procedures and the introduction of the direct-release system in July 2008, enterprises exporting certain products may go through inspection at their production areas, rather than at ports.AQSIQ has a positive list of these products, comprising 2,623 tariff lines at the HS 10-digit level.[150]However, exports of these products still need to be inspected at the port if they are transported in bulk, are for foreign assistance, need to be repacked at ports, or are subject to bilateral or regional agreements requiring SPS inspection at the border.Goods that do not meet the SPS requirements are not allowed to leave the country.

Exporters must register with Customs before making customs declarations, which must be made after the goods arrive at the customs surveillance zone, and 24 hours before loading, unless otherwise approved by Customs. China does not require pre-shipment inspection (PSI) for exports; itsPSI agencies inspect exports for its trading partners that require PSI.Licences are required for exports subject to restrictions.

VII.2 Export subsidies

China made commitments, when it joined the WTO, not to maintain or introduce any export subsidies to its agricultural products.[151]

VII.3 Export taxes

China continues to maintain restrictions on a number of products which is currently the subject matter of a WTO dispute. The export duties are imposed pursuant to China's *Customs Law*[152]*,Regulations on Import and Export Duties*[153], and *2010 Tariff Implementation Program*.[154]*Tariff Implementation Program*of a concerned year wouldset out the specific export duty rates applicable to certain products during a given year.

China's export taxes, in the form of statutory rates and interim rates (applied for a specific period), are levied on an MFN basis.[155]The customs value of export goods is based on the transaction value of the goods, together with its transportation, insurance, and other relevant costs for the goods to arrive at the departing point but before loading.Interim export duty rates can be higher than statutory export tax rates; where there are interim export duties on export goods to which the statutory export taxes are applicable, the interim rates apply.

From time to time, China has been revising its export tax rates or adjusting the list of commodities subject to export taxes, or levying special export taxes, with a view to curtailing exports of certain products, including restricting exports of highly polluting and high-energy-consuming products; promoting environmental protection; improving sustainable economic development; and conserving natural resources. The Chinese authorities maintain that these export taxes and their adjustments are consistent with WTO disciplines as they are based on Article XX of GATT 1994. They included mainly chemical fertilizers and their raw materials.China also removed or lowered export taxes on some products to mitigate the negative

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[150] AQSIQ online information. Viewed at: http://tgyws.aqsiq.gov.cn/xwdt/zdxw/200807/P020080729 584402885325.xls [17/11/09].

[151] WTO document WT/L/432, (Nov. 23, 2001).

[152]*Customs Law*, (Exhibits CHN-14, JE-68).

[153]*Regulations on Import and Export Duties*, (Exhibit CHN-13, JE-67).

[154]*2009 Tariff Implementation Program*, (Exhibit JE-21).

[155] In Annex 6 of its Protocol of Accession, China listed 84 lines at the HS 8-digit level at statutory export tax rates, and confirmed these would be the maximum export tax levels (WTO document WT/ACC/CHN/49, 1 October 2001).

effects of the global crisis on its exports;for example, in 2009, China removed or lowered export taxes on, *inter alia*, wheat, rice, fertilizers, steel, and some non-ferrous metals.

Although the authorities believe that export taxes could help conserve natural resources or protect the environment, their economic effectiveness in achieving these objectives is questionable (TableIII.).

VII.4 Tax rebates on exports

Excise tax is fully rebated on exports.

Value-added tax (VAT) may be rebated on exports, although the rebate rates are, by and large, lower than the VAT rates actually paid.The difference between the two rates constitutes a levy on exports, which may in turn constitute assistance to downstream processing of the products affected.China adjusts VAT rebate rates as part of its industrial policies, to control, the export of certain products.

It has been pointed out that China'seconomic planners manage the export of many primary, intermediate and downstream products by raising or lowering the VAT rebate available upon export and sometimes by imposing or retracting export duties. With VAT rebates ranging from zero to 17%these border tax practices are capable of creating disruption, uncertainty and unfairness in the global markets for the affected products – particularly when these practices operate to incentivize the export of downstream products for which China is a leading world producer or exporter such as steel, aluminium and soda ash.[156]

VII.5 Tax concessions under processing trade

Under the mode of "processing trade", import tariffs are exempted if the goods are imported in bond and exported within a certain period.However, some products are "prohibited from being exported under processing trade".If these products are not prohibited from being exported under normal trade (see below), their export is allowed; however, when exported under normal trade, like other products, import tariffs must be paid on their imported inputs.As China does not have tariff drawbacks, these tariffs can constitute taxes on exports.

VII.6 Export prohibitions, restrictions, and licensing

(a) Export prohibitions

Products listed in the Catalogues of Products subject to Export Prohibitions are prohibited from being exported under normal trade, mainly because of China's international obligations and domestic considerations regarding environmental and human health protection, and preservation of natural resources.China has released five batches of export prohibition catalogues since its accession to the WTO; the last took effect on 1 January 2009.Three tariff lines at the HS 8-digit level were added, covering some peat and animal or vegetable fertilizers.In total, China maintained general export prohibitions on 45 items at the HS 8-digit level in 2009.[157]

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[156]USTR Report 2010, at 40.

[157] Id at 45, para 82

VII.7 Export quotas

China maintains export quotas on around 49 products including on grains such as corn and wheat, hydrocarbons such as coal and crude oil and various metals such as tin and zinc.Some quotas are allocated by the NDRC or MOFCOM, some through a bidding process.

When allocating quotas, the Government considers an enterprise's export performance, its previous quota usage, business performance and production volume in the previous three years.Some products are subject to state trading. For these products export quotas are allocated directly to state trading enterprises.For other products, MOFCOM allocates quotas either directly to enterprises, or to departments at the provincial level, which allocate quotas to enterprises.

Rare earths are one of such products for which China imposes export quotas.[158]China produces more than 90% of the world's rare earths. China began imposing quotas on exports of rare earths in 2008. Quotas are issued on a six month basis. The quota for the first half of 2011 has been set at 14,446 metric tons. This is an 11.4% decrease from the quota for the equivalent period of the prior year. This decrease has led to concern that China is planning to substantially decrease rare earths exports in 2011. Representatives of MOFCOM have said, however, that the quota for the first half of the year should not be taken as an indication of China's plans for the full year. Many analysts point out that the Chinese export policy has been responsible for the soaring prices of rare earths. For instance, the price of neodymium arose by 74%, terbium by 128%, dysprosium by 137% and europium by 180% during May-June, 2011.[159]

As notified by the Permanent Delegation of China to the WTO on May 13, 2011, Coal export quota for 2011 was set at 38 million tones.[160]

Table III:***China's export quotas on rare earths***

Year	Quantity(in metric tons)
2007(Second Half)	23972
2008(First Half)	22780
2008(Second Half)	11376
2009 (First Half)	15043
2009(Second Half)	16267
2010(First Half)	16305
2010(Second Half)	15952
2011(First Half)	14446

Source: Dickenson's article

USTR Report on China states that:[161]

> "China's export restraints affect U.S. and other foreign producers of a wide range of downstream products, such as steel, chemicals, hybrid and electric cars, energy efficient light bulbs, wind

[158] Blog, Steve Dickinson,China *Rare Earths: Facts and Law*, CHINA LAW BLOG, http://www.chinalawblog.com/2011/01/china_rare_earths_quotas_--_the_facts_and_the_law.html (last visited July 20, 2011).
[159] Leslie Hook, *Rare earth price soar as China stocks up,* FINACIAL TIMES, June 20, 2011, at A1
[160]WTO G-20 Report, *supra* note 94
[161]USTR 2010 at 38

turbines, hard-disk drives, magnets, lasers, ceramics, semiconductor chips, refrigerants, medical imagery, aircraft, refined petroleum products, fibre optic cables and catalytic converters, among numerous others. The export restraints can create serious disadvantages for these foreign producers by artificially increasing China's export prices for their raw material inputs, which also drives up world prices. At the same time, the export restraints appear to artificially lower China's domestic prices for the raw materials due to significant increases in domestic supply, enabling China's domestic downstream producers to produce lower-priced products from the raw materials and thereby creating significant advantages for China's domestic downstream producers when competing against foreign downstream producers both in the China market and in other countries' markets."

Of particular concern is China's restriction on export of rare earth minerals (some 17 or so metals) of which China occupies 97% of the market.China has been imposing increasingly restrictive export quotas and export duties on rare earth ores, oxides and metals. In July 2010, China sharply reduced its export quotas, causing world prices for some of the rare earths to rise dramatically higherthan China's domestic prices and further hindering efforts of other countries to develop expertise in the increasingly important downstream manufacturing of green technology products. Then, in September 2010, China reportedly imposed a de facto ban on all exports of rare earths to Japan, causing even more concern among China's trading partners.

InDecember 2009 the US, EU and Mexico approached the WTO Dispute Settlement Body challengingChina's export quotas, export duties and other restraints maintained by China on the export of several key raw material inputs for which China is a leading world producer. The materials at issue include bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc.On 6 July 2011 the WTO ruled against China and held that China's curbs on its exports of nine raw materials that are used widely used in steel, aluminium and chemical industries is tune with its commitments under the WTO.[162]

VIII. MEASURES AFFECTING PRODUCTION AND TRADE

VIII.1 Subsidies and other financial assistance

In 2006, China notified the WTO of 78 subsidies as mandated by its WTO commitments. Almost all of the notified subsidies are federal subsidies. US and EU have complained that China's notification is incomplete and does not include many programmes which they have pointed out previously.

The subsidies given by the provincial governments are not included in the list.

14 out of the 78 subsidies notified by China are tax breaks and other benefits that it grants to foreign owned companies that invest certain amounts or set up certain operations in certain regions of China or other benefits available to enterprises that purchase domestically produced goods. A break-up of these 14 subsidies is as follows.

- Preferential tax policies for foreign invested enterprises:Any enterprise with foreign investment and scheduled to operate for more than 10 years will be exempt from income tax in the first and

[162] *WTO rules against China's export limits*, CHINA.ORG.CN, (Aug 7, 2011) http://www.china.org.cn/business/2011-07/06/content_22928393.htm.

second years and a 50 % reduction in the third and fourth years from the year beginning to make profit. Special incentives are also available for reinvesting profits either in the nature of increasing the registered capital of the enterprise or for making capital investments to establish other enterprises through tax refunds.

- Preferential tax policies for foreign invested export enterprises: It consists of a 50% tax exemption for those enterprises that export 70% of their total output in a given year.Enterprises set up in SEZs and technological development zones which will have to otherwise pay an income tax at the rate of 15% if they meet the above conditions.

- Preferential tax policies for foreign invested enterprises engaged in agriculture, forestry and animal husbandry:It consists of a 15 to 30% reduction in income tax.

- Preferential tax policies for foreign invested enterprises engaged in energy, transportation and infrastructure projects: Income tax at the reduced rate of 15 at for energy and transportation infrastructure projects such as harbor and wharf projects.

- Preferential tax policies for Chinese foreign equity joint ventures engaged in port and dock construction: Income tax at the reduced rate of 15% and where the period of operations is more than 15 years, total exemption from income tax from the first to the fifth year starting from the year the enterprise begins to make profit and a tax reduction of 50% from the sixth year through the tenth year.

- Preferential tax policies for enterprises with foreign investment which are technology intensive and knowledge intensive: Income tax at the reduced rates of 15% provided the enterprise's products are duly enlisted by Ministry of Science and Technology.

- Preferential tax policies for enterprises with foreign investment in 12 border cities: Income tax at the reduced rate of 24%. The border cities include Heike, Suifenhe, Hunchun, Manzhouli, Yining, Bole, Tacheng, Pingxiang, Dongxing, Wanting, Ruili and Hekou.

- Preferential tax policies for enterprises with foreign investment recognized as high or new technology enterprises and established in State high or new technology industrial development zones: Income tax levied at the reduced rate of 15% and may be totally exempt from tax in the first and second years.

- Preferential tax policies for Foreign invested enterprises on the purchase of domestically produced equipments within the total investment of a project. Deduction of up to 40% of the expenses from the increment of income tax for the concerned year when compared to the previous year while purchasing domestically produced equipments for investment projects included in the "Catalogue for the Guidance of the Foreign Investment Industries".

- Preferential tax policies for research and development of foreign invested enterprises: The actual expenses of foreign invested enterprises of R&D conducted in China, which has increased 10% or more from the previous year, may be offset by 150% from the taxable income of the year.

- Preferential tax policies for enterprises with foreign investment established in Special Economic Zones (excluding Shangai Pudong area): Income tax levied at the reduced rate of 15% for enterprises with foreign investment established in Shenzen, Zhuhai, Shantou, Xiamen and Hainan SEZs. Enterprises established in the old urban districts of cities where these SEZs are located will attract a reduced rate of income tax at 24% and if the enterprise is engaged in technology intensive projects a reduced rate of income tax at 15%.

- Preferential tax policies for enterprises with foreign investment established in the coastal economic open areas and in the economic and technological development areas: Income tax levied at the reduced rate of 15 % if they are located in economic and technological development zones and income tax at 24 % if they are located in coastal economic open areas. However, income tax @ 15% will apply for technology intensive projects as well as certain infrastructure projects established in the coastal economic open areas.

- Preferential tax policies for enterprises with foreign investment established in Pudong area of Shangai: If the enterprise is engaged in energy resources and transport construction projects such as airport, ports, highways and power stations, a reduced rate of income tax @ 15%. Where the period of operation is 15 years or more, the enterprise will be totally exempt from income tax from the first to the fifth year and 50% exemption from the sixth through the tenth year.

- Preferential tax policies for enterprises with foreign investment established in Three Gorges of Yangtze River Economic Zone: Income Tax will be levied at the reduced rate of 24%. If the enterprise is operating in energy resources or infrastructure projects, the income tax will be still lower at 15 %.

As of June, 2011, China has not submitted a second notification of subsidies after its notification in 2006--a commitment which it had offered in several meetings of the WTO SCM Committee.

VIII.2 Intellectual property rights

VIII.2(a) Overview

China has identified building an innovative country as a national development strategy.In June 2008, when the State Council issued the Outline of the National Intellectual Property Strategy, it sought to enhance China's capability of creating, utilizing, managing and protecting intellectual property.The Outline identifies the strategic goal of China becoming, by 2020, "a country with a comparatively high level in terms of the creation, utilization, protection and administration of IPRs".The objective is to promote the level of domestic applications of IPRs, increase the utilization of IPR-rich products, improve IPR protection, and promote the awareness of IPRs in society.The authorities consider the issuance of the Outline as a landmark in China's history of IPR development and protection.[163]

China has been progressively improving and updating its legislative framework on IPR protection.It formulated and promulgated major components of IPR related legislation, such as the *Trademark Law*, the *Patent Law*, and the *Copyright Law*, in the 1970s and 1980s.The *Anti-unfair Competition Law*contrary to its name also acts as an IP protection law in China and prohibits passing off and protects trade secrets. Since then, China has been revising its legislation in accordance with its emerging needs.For example, the *Regulations on the Protection of the Right of Communication through Information Network* (formulated in 2006) clarified the scope of copyright protection in the digital environment under the Copyright Law.Also, the third revision of the Patent Law was completed in December 2008, responding to emerging policy

[163] To facilitate the implementation of the Outline, in October 2008 the State Council approved the establishment of an inter-ministerial meeting mechanism involving 28 ministries (including MOFCOM), which coordinates the implementation of national IPR strategy.

needs.China is also preparing to revise the Trademark Law, the Copyright Law, and the Anti-Unfair Competition Law.

China has also been intensifying the enforcement of IPR protection, for which it has a double-track system:administrative actions (consisting of mediation by the authorities), and judicial measures (**See the next section)** Regarding criminal penalties, the Supreme People's Court and the Supreme People's Procuratorate promulgated two judicial interpretations on the application of criminal law in IP Cases in 2004 and 2007, respectively.Since then, the number of intellectual property-related criminal cases has increased considerably.

Supervision and coordination of IPR protection have been enhanced since 2006, through the annual IPR Protection Action Plans.China also set up reporting and complaint centres in 50 large and medium-sized cities, opened a hotline, "12312", and online reporting and complaint windows.In addition, China participates in IPR-related activities in APEC, WIPO, and the WTO, and is a member of various multilateral IPR conventions.[164]China has set up IPR working groups and information-exchange mechanisms with various countries and regions to enhance IPR protection.

VIII.2(b)Chinese Intellectual Property Laws

VIII.2 (b) (i) Patents

The State Intellectual Property Office (SIPO) under the State Council is in charge of patent administration nationwide.The State Patent Office under SIPO is in charge of receiving patent applications and granting patents, while local IPR administrative offices are responsible for patent disputes.

Patent rights (for inventions, utility models, and industrial designs) are protected by the Patent Law, its Implementing Regulations, and rules promulgated by SIPO.Patent rights for inventions are granted for 20 years from the date of filing, and 10 years from filing for utility models and industrial designs.

The revision also includes further grounds on which a compulsory licence may be issued. Under the previous Patent Law, compulsory licences could be granted in the event of, inter alia, "national emergency", or "any extraordinary state of affairs occurs", or "in the public interest". The revised Law further enables the grant of compulsory licences in certain circumstances for patented pharmaceutical products.This amendment gives effect to the WTO General Council Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health and subsequent Decision on the Amendment of the TRIPS Agreement in providing for compulsory licensing to enable third parties to manufacture patented drugs for export to recipients under the WTO "paragraph 6" mechanism.

A third revision of the patent law has taken place recently. The amended Implementing Regulations of the Patent Law came into force on February 1, 2011. The amended Patent Law and Implementing Regulations of the Patent Law prescribed stricter conditions to patent granting, improved examination system for patents for design and compulsory license system, added system of preservation of evidence in proceedings, supplemented measures to protect public interests, and strengthen patent protection. In the meantime, Patent Administrative Enforcement and Guidelines for Patent Examination were formulated and revised. Ministry of Agriculture (MOA) published the 8th Protection List of Agricultural Varieties of Plants and

[164] From October 2008, the WIPO Copyright Treaty, and the Performance and Phonographs Treaty, apply also to the Hong Kong SAR.

organized the revision and formulation of a series of regulations. In consideration of characteristics of various IPRs and protection needs, Supreme People's Court (SPC) formulated and published regulatory documents to standardize and unify trial of IP cases.

VIII.2(b)(ii) Trademarks

The State Trademark Office, under the State Administration of Industry and Commerce (SAIC), is in charge of the registration and administration of trademarks.Local enforcement authorities are responsible for administration at the local level.

Trademarks are protected for ten years, renewable for ten years indefinitely.Trademarks must be registered with the Trademark Office to be protected under the Trademark Law.Foreign applicants must file applications in accordance with any agreements concluded between their country of origin and China, or any international treaty to which both are parties, or on the basis of reciprocity.Trademarks may be registered through an agent recognized or designated by the SAIC.

In 2008, for the first time, the number of trademarks reviewed was higher than the number of applications, reflecting faster registration. The authorities note that trademark registration now takes 30 months, down from around 36 months.If the Trademark Office refuses registration, appeal may be made to the Trademark Review and Adjudication Board, or further to a people's court.

VIII.2(b)(iii) Copyright and related rights

The National Copyright Administration of China under the State Council administers copyright on a national scale.Local copyright registration and administration is carried out by local copyright administration offices.

Protection is granted under the Copyright Law, its Implementing Rules, and accompanying regulations. Protection for cinematographic and photographic works is for 50 years, and typographical designs for 10 years.

VIII.2(b)(iv) Geographical indications

Geographical indications (GIs) are currently regulated by:the State Trademark Office, the AQSIQ, and the Ministry of Agriculture.

From 2005, GIs can also be registered with the AQSIQ.Once registered with the AQSIQ, these GIs are protected permanently.

VIII.2(c)Enforcement of Chinese IP Law

These agencies can begin administrative actions on the request of the IP right holder, a third party, or on their own initiative.Depending on the investigation results, the administrative authority conducts mediation among the parties.The administrative authority can impose fines on the infringing party, and/or confiscate/destroy the infringing goods or copies, and materials, tools, or devices used mainly for the infringement.

If mediation does not produce satisfactory results, the administrative authority may refer the case to the people's court.Criminal remedies include monetary fines based on either the value or volume of the counterfeited goods or both.Criminal prosecutions may be taken in certain cases in accordance with the Criminal Law.The public security body is in charge of carrying out criminal investigations concerning IPR infringement.

The number of cases settled through administrative actions remains high, although the number of cases dealt with by courts has increased faster;24,406 first instance civil IPR cases were accepted by courts in 2008, and 23,518 were concluded, up by 36.5% and 35.2%, respectively.

At its meeting on 20 March 2009, the Dispute Settlement Body adopted a Panel report on *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (WT/DS362).The United States alleged, *inter alia*, that the lack of criminal procedures and penalties for commercial scale counterfeiting and piracy in China as a result of the thresholds appeared to be inconsistent with China's obligations under Articles 41.1 and 61 of the TRIPS Agreement. The case was decided in favor of the United States. On 15 April 2009, China informed the DSB of its intention to implement the recommendations and rulings of the DSB in connection with this matter.

Following a Decision of the Standing Committee of the Eleventh National People's Congress on Amending the Copyright Law, adopted on 26 February 2010, China recently reported to the DSB that it has implemented the recommendations and rulings of the DSB with respect to the Copyright Law.On 17 March 2010, the State Council adopted the decision to revise the Regulations for Customs Protection of Intellectual Property Rights.

Some of the recent enforcement statistics have been provided by the SIPO's 2010 report[165]:-

Box. VII
China: IPR Enforcement

In 2010, local IP administrations across the country received a total of 1,095 patent disputes concerning infringement and 18 of other types. 728 cases relating to counterfeiting patents were investigated and dealt with. In those actions, 20,646 person times of enforcement officials were dispatched; 10,642 business premises were inspected.

AICs at all levels across China investigated and dealt with 56,034 cases of trademark violations, among which 7,486 were general violations of trademark, and 48,548 were related to trademark infringement and counterfeiting.

National Copyright Administration of China (NCAC) intensified administrative enforcement by launching special campaign Swordnet to crack down the internet infringement and piracy in 2010. Local copyright enforcement authorities investigated and dealt with 204 cases involving copyright infringement in the first stage of the special campaign.

Judicial protection of IPR
In 2010, People's Courts nationwide received 42,931 first-instance IPR civil cases and concluded 41,718 ones. People's courts received 6,522 second-instance IPR civil cases and concluded 6,481 ones. In 2010, SPC received 313 IPR civil cases and concluded 317 ones (including those from previous years), among which 198 retrial IPR civil cases were received and 206 ones (including those from previous years) were concluded.

In 2010, the procuratorate agencies nationwide accepted 1,887 arrest approval applications relating to IPR criminal cases with 3,368 suspects involved in. They also approved arrest of 2,613 suspects in 1,566 cases.

Source: (excerpts fromSIPO Report)

[165]China's Intellectual Property Protection in 2010, SIPO, http://english.sipo.gov.cn/laws/whitepapers/201104/t20110429_602312.html.

Developments during review quarter

The USTR however considers Chinese enforcement of IP especially criminal enforcement is weak and has placed it in its Special 301 Watch List.[166]

Chinese Intellectual Property Institutions

Protecting IPRs through administrative actions is an important feature of enforcement in China.Various authorities are involved:the SIPO for patents and layout designs of integrated circuits; the State Trademark Office for trademarks; the National Copyright Administration for copyright; the State Drug Administration for protected medicines; MOFCOM for agriculture-related chemicals; and the Ministry of Agriculture for new plant varieties.Some IPRs are enforced by several agencies:GIs are regulated by the State Trademark Office, AQSIQ, and the Ministry of Agriculture.

IX. WTO DISPUTE SETTLEMENT UPDATE

Up until June, 2011 China has been involved in eight cases as a complainant and in 21 cases as a respondent before the WTO Dispute Settlement Body. In 59 cases China participated as a third party.

Most of the complaints by China have been directed against the U.S. and a substantial number includes anti-dumping practices.

Some of the more pertinent disputes in which China has participated have been reproduced in the USA Report.

Of these thirteen disputes, there also appears to be a clear distinction between the issues on which China is willing to concede during the consultation period and those which China is more determined to take to a full panel hearing. These latter issues predominantly concern anti-dumping measures and other restrictions on what China regards as key export industries.

Thus the Chinese settled three disputes regarding *Measures affecting financial information services and foreign financial information suppliers* involving the EU (DS372), the US (DS373) and Canada (DS378). The allegation was that China was restricting market access to news services through the official Xinhua news agency, an area of some political sensitivity in China. However, an agreement was swiftly reached in this dispute, with China agreeing to allow foreign financial information suppliers to set up commercial operations in China. Similarly China agreed to stop its subsidy programfor enterprises manufacturing wind power equipment, which the US alleged favoured domestic over imported goods (Dispute DS419) and subsidies which China was allegedly providing to domestic enterprises under the China World Top Brand Programme and the China Famous Export Brand Programme contingent upon meeting export performance criteria.

However, China has been aggressive in its opposition to foreign antidumping measures that it sees as obstructing its export performance. Thus it initiated in September 2008a dispute against the US (DS379)

[166]USTR 2010 at 86

relating to anti-dumping and countervailing duties on certain products from China, including pipes, pneumatic tyres and woven sacks. The dispute raised a host of issues in the context of the Non-Market Economy status of China especially about the question whether the SOEs can be considered to be classed as public bodies. The Appellate Body decided the issue substantially in favour of the US. It also initiated two anti-dumping actions against EU, namely*Measures relating toiron and steel fasteners* (DS397) and *footwear* in the second half of 2010(DS405). China is concerned that there may be procedural irregularities in the EU's determination of dumping and has also voiced concerns about its status as a non-market economy (NME) and the implications this has for anti-dumping determinations. China scored a partial victory in the panel report regarding the dumping of fasteners with the panel finding the EU's anti-dumping measures were inconsistent with its WTO obligations. However, this dispute is currently being considered by the Appellate Body and panel proceedings are still in progress for the footwear dispute

China has also participated as a third party in trade related disputes. Indeed China has been a third party in 78 disputes.China as a third party has mainly been involved in two categories of disputes[167]. One is the type of dispute in which China has substantial trade interests and the result of the case will have direct impact on China. The other is where there are no obvious effects on China, but the disputes have significance for the WTO regime, so that China's interests will be affected indirectly.

X. TRADE POLICY: AGRICULTURE

China is among the world's largest producers of rice, wheat, potatoes, corn, peanuts, tea, millet, barley; commercial crops include cotton, other fibers, apples, oilseeds, pork and fish; produces variety of livestock products.

During China- India discussions on China's accession to the WTO, both countries had agreed to work on expeditiously for the entry of 17 categories of fruits and vegetables to the Chinese market. However, in terms of the information provided by APEDA, only 4 products (mangoes, grapes, bitter gourd and tobacco leaves) have been able to make their way to the Chinese market. With respect to Basmati, a political consensus between the two countries was reached at the Eighth Joint Commission Meeting to provide market access opportunities to the product. The imports will be subject to China's right to conduct pest risk analysis as provided for under the SPS Agreement.

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[167]See Jing Gu 2006, at 5