

AUFSÄTZE

Three Years After China's Accession to the WTO: A Basic Account of China's Efforts in Implementing its WTO Commitments

Anna Tevini*

I. Background

On December 11, 2001, China became the 143rd member of the World Trade Organization (WTO), bringing to an end a fifteen-year quest to join the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT).

China viewed joining the WTO as a means to preserve and expand its access to export markets abroad, especially the European Union and the U.S. Other WTO members envisioned that China's WTO membership would enhance the development of an open market economy in China and, in particular, foster the rule of law in international trade relations with the country.

China was admitted to the WTO at a point of time where its economic and legal system was still very far from WTO-norms. In the history of the GATT, and now World Trade Organization, no other country of such trading importance has ever been admitted at a comparatively early stage.

In return for the early acceptance into the WTO, China had to commit to an extensive range of legal and regulatory reforms as well as tariff reductions. The Accession Agreements¹ require China to estab-

lish an open and transparent trade regime in conformity with WTO rule, in particular its standards concerning market access, national treatment, transparency, and the protection of intellectual property rights (IPR).²

China has now been a member of the WTO for nearly three years. The aim of this paper is to provide a rough overview on the annual progress in implementation of China's WTO commitments during this period (2002, 2003, 2004).³

II. China's Implementation Progress: 2002-2004

China has made important headway since its WTO accession three years ago. It has progressively undertaken tariff cuts, reviewed thousands of laws and regulations to mirror its WTO obligations, and established new transparency procedures in many national and sub-national ministries and agencies. Nevertheless, China's compliance with its WTO commitments has, over the past three years, been rather uneven.

1. The First Year (2002)

The initial period of China's WTO membership was characterized by important steps forward. Progress was achieved both in making many of the required systemic changes and in implementing specific commitments. The principal focus of China's first year of WTO membership was on its frame-

² In the Accession Agreements, China commits, in particular, to the following: reduction of tariffs from an average of 17 % to 9 % over several years; abolishment of requirements regarding foreign exchange balancing, local content and export performance as conditions for government approval of foreign investment contracts; lifting of the extensive restrictions on trading rights for foreign companies and opening up of the full range of distribution services to foreign companies for most products; national treatment in areas such as taxation, government regulation and the testing and certification of imported and nationally-produced products; adjusting the regulations for technical barriers to trade, import licensing procedures, customs valuations and pre-shipment inspection making them more transparent, non-discriminatory and objective; relaxation of foreign investment restrictions on many important services industries, such as telecommunications (for the first time ever), financial services, professional services, business services, audio-visual and tourism; implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); and building-up of a transparent, predictable, and rule-based system for trade with China. For a more complete summary see, e.g., *WTO News: 2001*, Press/243, September 17, 2001, WTO successfully concludes negotiations on China's entry, available at http://www.wto.org/english/news_e/pres01_e/pr243_e.htm (visited October 23, 2004).

³ Considering the broad range and complexity of China's WTO commitments, this short overview merely aims to highlight the implementation progress with regards to issues commonly referred to in statements and publications of foreign business and state entities dealing with the changes of China's economic policies after its accession to the WTO. The focus of this summary is on the implementation progress during the current year of 2004. - It includes related information available as of October 25, 2004.

* Dipl.-Jur., Junior Research Fellow at the Institute for International Law and International Economic Law, University of Göttingen. Basic research for this article was carried out during an internship with the German Agency for Technical Cooperation, GTZ WiRAM Office, Beijing, August-October 2004.

¹ The Accession Agreements consist of three key documents: (1) Protocol on the Accession of the People's Republic of China ("Accession Protocol"), which contains the terms of membership; (2) Report of the Working Party on the Accession of China (document WT/ACC/CHN/49); and (3) the Annexes containing the schedules on China's commitments on market access for goods and services. All available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#list (visited October 24, 2004).

work of laws and regulations governing trade in goods and services, at both the central and local levels.⁴ Additionally, China also devoted considerable resources to the restructuring of the various government ministries and agencies with a role in overseeing trade in goods and services.⁵ Some of these changes were required by China's accession agreement, while others were undertaken by China to facilitate its compliance with WTO rules.

Another significant focus for China during the year 2002 involved education and training. With the technical assistance of the WTO as well as of other multilateral organizations and individual countries,⁶ China started an extensive campaign to teach central and local government officials and state-owned enterprise managers about both the requirements and the benefits of WTO membership, with the goal of facilitating China's WTO compliance. In addition, several WTO information centres were set up to provide instructions relating to the WTO and the impact of China's entry.⁷ Positively, China further carried out the required tariff reductions,⁸ began the process of removing numerous non-tariff trade barriers, and worked to improve its standards regime.

As efforts concentrated on the areas mentioned above, little progress was achieved in other fields. One area of cross-cutting concern highlighted in various assessments of China's Year 1 implementa-

tion record⁹ involved transparency, a lack of effective or uniform application of China's WTO commitments at local and provincial levels, and intervention by Chinese government officials in the market. Apart from these systemic issues, special concern was raised regarding the protection of intellectual property rights, and the reluctant opening of the agriculture¹⁰ and services¹¹ sectors. The incomplete implementation of some WTO commitments in the first year was partly due to start-up problems, including an incomplete understanding of WTO rules and practices as well as a lack of coordination among relevant ministries in the Chinese government.

2. The Second Year (2003)

While foreign observers generally praised China's dynamic implementation of its WTO commitments in its first year following accession, they were less enthusiastic about the progress in the second year. Implementation efforts were seen to have lost considerable momentum, - despite improvements towards the end of the year. A foreign commentator came to describe China's implementation progress in 2003 as a "yard by yard ground game", in which each step towards implementation would come only after contentious arguments over terminological definitions, delays to or beyond mandated deadlines, or the imposition of new measures that were ostensibly directed towards WTO compliance but actually created new obstacles to foreign business activity¹². Other observers raised complaints¹³ that China had deliberately tried to frus-

⁴ For an overview of laws and regulations newly enacted or revised by China both in preparation for and following accession see *Terence P. Stewart*, *China's Compliance with World Trade Organization Obligations: A Review of China's 1st Two Years of Membership*, A Report for the U.S.-China Economic and Security Review Commission, March 19, 2004, pp. 15-21, available at http://www.uscc.gov/researchreports/2004/stewartpaper/04_03_19finalreport.pdf (visited October 23, 2004).

⁵ An early example for the restructuring was the establishment of two WTO-related departments by the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) in December 2001: the Department of WTO Affairs; and the Fair Trade Bureau for Imports and Exports. See *The U.S.-China Business Council*, *China's WTO Implementation: A Mid-Year Assessment*, 2003, p. 2, available at <http://www.uschina.org/public/documents/2003/06/17-wtoanalysispaper.pdf> (visited October 08, 2004). Regarding the reorganization of ministries, including the creation of MOFCOM, see also footnote 27 below.

⁶ For a comprehensive overview of assistance projects between 2001 and early 2003 see *Stewart* (supra note 4).

⁷ Five national WTO centres were established, one each in Beijing, Hainan, and Shenzhen, and two in Shanghai. In addition, numerous private WTO centres were set up. A wide array of information on the WTO was further made available in a broad variety of publications and on Chinese web pages. According to the *Asian Wall Street Journal*, 20-22 July 2001, p. 3, as of mid-2001 there were more than fifty-four web sites and 41,438 Web pages relating to the WTO on the Chinese Internet portal Sina, while Yahoo also offered 15 such Web sites and 113,000 WTO Web pages.

⁸ China undertook tariff reductions in 70% of the categories mandated by the WTO (including IT products, chemicals, autos and auto parts, wood and paper products as well as many agricultural products), causing the average tariff rate to drop to 12% from 15.3% since accession. See *Far Eastern Economic Review*, December 5, 2002.

⁹ See, e.g., *2002 USTR Report to Congress on China's WTO Compliance*, released December 11, 2004, available at www.usvtc.org/wto/Materials/2002-12-11-China_WTO_compliance_report.pdf (visited November 04, 2002); further see *Stewart* (supra note 4), pp. 33-62; and *William B. Abnett*, *China and Compliance with World Trade Organization Commitments. The First Six Months*. In: *China's WTO Accession. The Road to Implementation*, November 2002, The National Bureau of Asian Research, available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN015814.pdf> (visited November 4, 2004).

¹⁰ Especially slow progress was reported regarding China's administration of its tariff-rate quota (TRQ) system for bulk agricultural commodities. For more information please refer to one of the reports mentioned in the footnote above.

¹¹ Complaints were raised, in particular, regarding high capitalization requirements and restrictions on branching.

¹² *Robert A. Kapp*, President United States-China Business Council, Oral Remarks to the Trade Policy Staff Committee Hearing on China's Progress in Implementing its WTO Accession Commitments, September 23, 2004, available at http://www.uschina.org/public/documents/2004/09/tpsc_remarks.html (visited October 23, 2004).

¹³ *2004 Report to Congress of the U.S.-China Economic and Security Review Commission*, June 2004, (Chapter 2: China in the World Trade Organization: Compliance, Monitoring, and Enforcement, pp. 67-81), available at http://www.uscc.gov/researchreports/2004/04annual_report.pdf (visited October 10, 2004). See also Prepared testimony of deputy assistant U.S. trade representative Charles W. Freeman III before the U.S.-China Commission, February 5, 2004, available at <http://hong>

trate the effectiveness of the WTO's Transitional Review Mechanism (TRM). This multilateral monitoring mechanism had been especially set up in order to assess the faithful implementation of its WTO commitments by China, considering its early admittance to the WTO and the immensity and complexity of its commitments.¹⁴ Reportedly, China had refused to collaborate with other WTO members' requests for information and discussion of China's WTO implementation measures in the expected way, disabling the TRM to function as a robust mechanism for placing multilateral pressure on China to address shortfalls.¹⁵

Furthermore, observers were disappointed about the lack of improvement in many areas that had already given rise to much concern in the previous year:¹⁶ protection of intellectual property rights (continued IPR infringement affecting products, brands and technologies from a wide range of industries),¹⁷ transparency (uncertainty and lack of uniformity; limited opportunity to comment on proposed laws and regulations),¹⁸ high capitalization or other requirements exceeding international norms

kong.usconsulate.gov/uscn/trade/general/ustr/2004/020501.htm (visited October 6, 2004).

¹⁴ Part I, Art. 18 Accession Protocol. The TRM takes place annually for the first eight consecutive years following the country's accession to the WTO, with a final report after the tenth year, and is carried out by 16 separate WTO councils and committees. In addition, because of China's early entry into the WTO, the Accession Protocol establishes a special, transitional safeguard mechanism that other WTO members can use in case that influx of Chinese products to their domestic markets occurs in such a way that it threatens to cause internal market disruption, see Part I, Art. 16 para. 1 Accession Protocol.

¹⁵ The 2004 Report to Congress of the U.S.-China Economic and Security Review Commission (supra note 13) criticizes that China had refused to abide by standard WTO procedural norms, such as to respond in writing to requests for information from other member countries as part of the process. Further, it had allegedly rejected that TRM issues be raised in WTO subsidiary committee meetings at a sufficiently early stage to have a meaningful dialogue regarding member concerns. China reportedly argued that the normal customs of the WTO would not apply, because the TRM was a discriminatory measure applying only to China. The U.S. report stresses though that the TRM was instituted as a special condition since China was admitted to the WTO at an early stage. At the same time, it admits that the efficiency of the TRM process had also suffered because of a lack of consensus amongst WTO members on their expectations regarding China's actions.

¹⁶ See, e.g., The U.S. Trade Representative, 2003 Report to Congress on China's WTO Compliance, December 11, 2003, available at http://www.ustr.gov/assets/World_Regions/North_Asia/China/asset_upload_file425_4313.pdf (visited October 10, 2004); *The U.S.-China Business Council* (supra note 5); *2004 Report to Congress of the U.S.-China Economic and Security Review Commission* (supra note 13).

¹⁷ See also International Intellectual Property Alliance's 2003 Special 301 Report: People's Republic of China (Washington, DC: February 13, 2004), available at www.iipa.com/rbc/2004/2004SPEC301CHINA.pdf (visited October 3, 2004). In a survey conducted by the European Chamber of Commerce in May 2003, 76 % of respondents agreed that, while implementation and enforcement remained unsatisfactory, China's written laws and regulations on IPR had improved greatly. See EUCC 2003 Position Paper - Intellectual Property, available at www.eucc.com.cn (visited October 10, 2005).

¹⁸ *The US-China Business Council* (supra note 5), p. 1.

in the service sector (e.g. in banking),¹⁹ agriculture (problems with tariff-rate quota administration, internationally uncommon sanitary and phytosanitary (SPS) standards, and complex, confusing licensing requirements).²⁰ Further, there appeared to be a continued intervention by government officials in the market. The U.S.-China Economic Security Review Commission was especially concerned about instances in which transfers of technology were required by the Chinese government or state-owned and state-invested enterprises in return for market access or other regulatory approval.²¹

In addition to the shortfalls listed above, new concern arose. According to the European Chamber of Commerce in China (EUCCC) there was clear evidence for an increase in the use of non-tariff barriers, which are decidedly more difficult to monitor than tariffs. The EUCCC wondered if China was herewith consciously testing the framework of what might be acceptable as implementation practices.²² Examples were discriminatory tax policies (tax treatment regarding semiconductors)²³ and the use of unique technical²⁴ and safety standards²⁵ geared to exclude foreign products.

¹⁹ E.g., the European Chamber of Commerce in China criticized that the new working capital requirements for banking licenses to potentially carry out the full range of banking services (both in foreign and local currency), ranged from RMB 100 Mio (EUR 12.3 Mio) to RMB 600 Mio (EUR 73.8 Mio) per branch, amounts that were several times higher than international standards, including those prevailing in the Single European Market (i.e. EUR 5 Mio. For being operative throughout Europe), and even higher than those required before the entry of China into the WTO, at similar scope of activities. See *EUCCC - 2003 Position Paper - Banking*, available at www.eucc.com.cn

²⁰ See, e.g., *Patricia R. Sheikh*, Deputy Administrator for International Trade Policy USDA, Foreign Agricultural Service, Testimony before U.S.-China Economic and Security Review Commission, February 5, 2004, available at http://www.uscc.gov/hearings/2004hearings/written_testimonies/04_02_05wrts/patsheikh.htm (visited November 04, 2004).

²¹ 2004 Report to Congress of the U.S.-China Economic and Security Review Commission (supra note 13). See also *Prepared testimony of deputy assistant U.S. trade representative Charles W. Freeman III* (supra note 13). Prior to China's accession, forced technology transfers were a customary part of doing business in China. China agreed to end the practice of government forced transfers as part of its accession commitments, see Part I, Art. 7 para. 3 Accession Protocol.

²² *The European Chamber of Commerce in China*, Summary of Position Paper 2003, available at www.eucc.com.cn (visited October 10, 2004).

²³ China had been refunding up to 14 percentage points of the 17 percent VAT it imposes on semiconductors to companies that make the chips domestically, while collecting the entire VAT on imported chips. The U.S. argued that such discrimination violated the WTO rules on national treatment. See the section on Year 3 below and footnotes 50 et seq.

²⁴ E.g., the "Wired Authentication and Privacy Infrastructure (WAPI)" that was implemented on Dec. 1 as part of the nation's GB 15629.11-2003 Wi-Fi standard and required the use of two mandatory encryption standards in wireless networks different from internationally-recognized standards. See *Patrick Mannion/Mike Clendenin*, China's Wi-Fi Security Stance Ruffling Feathers, December 19, 2003, available at http://nwc.mobilepipeline.com/trends/trends_archive/17000496 (visited October 25, 2004); *Roy Mark*, Wi-Fi Leaders Want to Zap Beijing's WAPI, February 24, 2004, available at <http://www.internetnews.com/wireless/article.php/3316921> (visited October 25, 2004). At

A further cause for disappointment to many was that the important commitment to phase in trading and distribution rights to both minority- and majority-owned joint ventures was not implemented according to schedule.²⁶

China's WTO implementation efforts in 2003, however, took place against a challenging political and social backdrop. In 2003, China underwent a major leadership change, suffered a national SARS epidemic, undertook a sizeable restructuring of the government's economic and trade functions to streamline the country's administration of foreign and domestic trade,²⁷ and faced a host of dislocations inherent in its transition from a planned economy to a more market-oriented economy.

Notwithstanding the many challenges mentioned above, a number of positive developments did occur in 2003. Market access was improved for several services. For example, the auto financing sector was opened up to foreign investment,²⁸ and publication retailing was allowed for wholly for-

eign-owned enterprises.²⁹ Furthermore, China solved outstanding concerns that had prevented its membership in the WTO's Committee of Participants in the Expansion of Trade in Information Technology Products.³⁰

Finally, there have been important new efforts to improve transparency. In order to achieve greater administrative uniformity and regularity, the People's Congress, in August 2003, adopted the "Law on Administrative Licensing".³¹ The law is considered to be a milestone as it reduces many costly licensing requirements and invalidates internal regulations as a basis for licensing. In order to make the regulatory drafting process more transparent, MOFCOM, in November 2003, adopted the "Provisional Regulations on Administrative Transparency".³² These regulations aim to implement the commitment to provide a "reasonable period for comment to the appropriate authorities" before proceeding with the implementation of trade-related measures.³³

3. The Third Year (2004)

The year 2004 has been characterized by overall progress compared to 2003.³⁴ A number of holdover

the a meeting of the US-China Joint Commission on Commerce and Trade (JCCT) in April, China agreed to "indefinitely suspend" the proposed implementation of its proprietary WAPI encryption standard for wireless computer networks as a mandatory wireless encryption standard and announced to participate in international standards bodies on WAPI and wireless encryption for computer networks. See *Office of the United States Trade Representative, The U.S.-China JCCT: Outcomes on Major U.S. Trade Concerns*, April 21, 2004, available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2004/as_set_upload_file225_5834.pdf (visited October 25, 2004).

²⁵ E.g., uncommon sanitary and phytosanitary (SPS) standards on agricultural products, and the China Compulsory Certificate on Safety (CCC). For more details regarding the CCC, see, e.g., European Chamber of Commerce in China, 2003 Position Paper - Auto Components, available at www.euccc.com.cn.

²⁶ In the Accession Protocol, Annex 9 (Schedule of Specific Commitments on Services), China commits to a progressive extension of trading and distribution rights. Beginning one year after accession, these rights were to be granted to Joint Ventures (JVs) with minority foreign share. Two years after accession, they would have to be further extended to JVs with majority foreign share. All enterprises, including wholly foreign-owned enterprises, were to be granted the right to trade and distribute three years after accession.

²⁷ On March 10, 2003, the National People's Congress approved a proposed plan for the restructuring of certain ministries under the State Council. See "Decision of the first Session of the National People's Congress concerning the Reform of the Organization of the State Council" (第十届全国人民代表大会第一次会议关于国务院机构改革方案的决定), March 10, 2003, *Gazette of the Standing Committee of the National People's Congress* 2003, No. 2, p.190. For a good overview see *Li Fen, Die Restrukturierung des Staatsrats, ZChinR* 2003, pp. 93-95. Especially significant was the decision to create the Ministry of Commerce (MOFCOM) as a single bureaucratic entity consolidating the internal trade authority of the State Economic and Trade Commission (SETC) with the external trade mandate of MOFTEC and the responsibility of the State Development Planning Commission (SDPC) in the administration of agriculture import and export. The Severe Acute Respiratory Syndrome (SARS) affected the restructuring process in all ministries, including MOFCOM. The integration of SETC into MOFCOM was delayed and the structure was only finalized in late May 2003.

²⁸ Administrative Rules on Auto Financing (汽车金融公司管理办法实施细则), issued by the China Banking Regulatory Commission Order No. 4, effective as of October 3, 2003, *Bulletin of the China Banking Regulatory Commission* (中国银行业监督管理委员会公告) 2003, No 5, p. 3.

²⁹ See Measures on the Administration of Foreign-Invested Distribution Enterprises of Books, Newspapers and Periodicals (外商投资图书、报纸、期刊分销企业管理办法) of March 17, 2003, Decree No. 18 of the General Administration of Press and Publication of the People's Republic of China and the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China, *Gazette of the State Council of the PR China* 2003, no. 25. The measures are effective as of May 1, 2003. The Measures further permit all forms of foreign investment in wholesale distribution from December 1, 2004.

³⁰ See WTO News, April 24, 2003 "China, Egypt join WTO's Information Technology Agreement", available at http://www.wto.org/english/news_e/news03_e/news_china_egypt_25apr03_e.htm (visited November 4, 2004).

³¹ Law of Administrative Licensing (中华人民共和国行政许可法) of August 27, 2004 (effective July 1, 2004), *Gazette of the Standing Committee of the National People's Congress* 2003, No. 5, p. 439. For further information also refer to http://english.people.com.cn/200308/27/eng20030827_123175.shtml or <http://www.coudert.com/publications/?action=displayarticle&id=247> (both visited October 2, 2004).

³² Provisional Regulation on Administrative Transparency (商务部政务公开暂行办法) released by MOFCOM in November 2003 (商务部办公厅发 2003, 444 号). Following the release of these regulations, MOFCOM circulated for public comment a draft of its new *Foreign Trade Law* (March 2003), as well as the draft regulations on *Management of Foreign Investment in the Commercial Sector* (late 2003), and then incorporated many of the comments into the final text of the laws.

³³ Part I, Art. 2 (C) para. 2 Accession Protocol.

³⁴ *The U.S. Chamber of Commerce: The U.S. Chamber of Commerce, China's WTO Implementation: A Three-Year Assessment*, report prepared by Muron A. Brilliant and Jeremie Waterman, September 2004, downloadable from <http://www.uschamber.com/press/releases/2004/september/04-127.htm> (visited October 10, 2004); *The US-China Business Council, China's WTO Implementation: An Assessment of China's Third Year of WTO Membership, A Written Testimony*, September 7, 2004, available at www.uschina.org/public/documents/2004/09/tpsc_testimony.pdf (visited October 10, 2004). *Kapp* (supra note 12).

issues from earlier years have been acted upon and some important commitments have been implemented even ahead of the December 11, 2004 deadline for China's year 3 obligations. Nevertheless, certain problems and concerns remain, in particular regarding the protection of intellectual property rights.

III. Positive Developments

Of greatest significance to foreign investors in the year 2004 was the establishment of full trading and distribution rights in most sectors. This had been one of the key conditions for China's accession to the WTO. In the Accession agreements, China had committed to a progressive phase-in of full trading and distribution rights by December 11, 2004.³⁵ The initial delays in this process had previously been ground for concern.³⁶ The new regulations made an effort to incorporate a number of key suggestions from the foreign business community and seem to largely mirror China's WTO commitments.³⁷

Trading rights, i.e., the right to import and export freely, were extended to all foreign and domestic enterprises (as well as individuals) in nearly all sectors³⁸ by virtue of the revised "Foreign Trade Law" (FTL),³⁹ and the accompanying implementing regulations (the "Measures on Record Registration of Foreign Trade Operators").⁴⁰ The changes became effective on July 1, 2004, well ahead of the December 11 deadline. The new regulations replace the for-

merly required approval process for trading rights⁴¹ with a simple process of 'registration for the record'.

Distribution rights have been substantially⁴² regulated in the "Administrative Measures on Foreign Investment in the Commercial Sector" (Administrative Commercial Measures).⁴³ These provisions allow all foreign investors to conduct domestic commerce through agency, wholesale, retail, and franchising by December 11, 2004, subject to certain conditions and approval.⁴⁴ Foreign-invested companies in the form of majority owned joint ventures were granted certain distribution rights as early as June 1, 2004. Implementing regulations that clarify, for example, how existing foreign-invested companies can incorporate distribution services into their existing scopes of business, are however still missing. The commitment to establish - also by December 11, 2004 - regulations permitting direct selling ("sales away from a fixed location") had not yet been implemented.⁴⁵

Aside from the extension of trading and distribution rights, progress took place in a number of other sectors. Several business sectors were opened up further to foreign investors. For example, geographic restrictions and capitalization requirements were eased in the banking⁴⁶ and insurance⁴⁷

³⁵ See Part I, Art. 5, para. 1 Accession Protocol and Para. 84 (a) Report of the Working Party on the Accession of China, available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#ch_n.

³⁶ See the section on year 2 above.

³⁷ E.g., the elimination of high capitalization requirements in the final version of the Regulations on Management of Foreign Investment in the Commercial Sector. See: *The U.S. Chamber of Commerce* (supra note 34).

³⁸ Goods listed in Annex 2 A to the Accession Protocol, will continue to be subject to state trading. This exception is allowed by Article 17 of GATT 1994 and Article 8 of GATS.

³⁹ 中华人民共和国对外贸易法 of April 6, 2004 (Order No. 15 of the President of the PR China), China Foreign Trade and Economic Cooperation Gazette 2004, no. 36. The new FTL replaces the Foreign Trade Law of 1994 and was enacted at the 8th Session of the Standing Committee of the 10th National People's Congress of China, after a revision process that took more than two years. With its 70 articles and 11 chapters, the new FTL is 26 articles and three chapters larger than its predecessor of 1994. The revised law also added three chapters about investigation into unfair practices, trade dispute remedies and the protection of intellectual property rights in trade. For a compact overview on the contents of the FTL see *Hinrich Julius/Matthias Müller*, *Das neue chinesische Außenhandelsrecht*, ZChinR 2004, pp. 213-227.

⁴⁰ 对外贸易经营者备案登记办法 of June 19, 2004, Decree 14 of MOF-COM (商务部令 2004 年第 14 号) China Foreign Trade and Economic Cooperation Gazette (中国对外贸易与经济合作公报) 2004, no. 44, adopted at the Ninth Ministerial Conference of the Ministry of Commerce on June 19, 2004.

⁴¹ In the past, only those companies which were granted import / export licenses could officially engage in foreign trade - with the exception of foreign-invested enterprises importing unfinished products for processing or exporting processed products.

⁴² Distribution rights for certain kinds of commodities, such as books, newspapers and periodicals, oil retailed at gas stations, medicines and/or cars, and agriculture and related products, in addition remain subject to other specific rules and regulations. See art. 17 of the Administrative Commercial Measures. See further, art. 19 (franchising) art. 20 (auction business).

⁴³ 外商投资商业领域管理办法 of April 9, 2004, Decree No. 8 of MOF-COM (商务部令 2004 年第 8 号), China Foreign Trade and Economic Cooperation Gazette 2004, no. 28. The decree is effective as of June 1, 2004. China's issuance of separate regulations in the area of trading rights and distribution services appears to indicate though that China will treat the right to trade as distinct from the right to distribute. This treatment raises questions regarding China's commitment to allow foreign companies to easily integrate these rights, which is essential at a time when international transportation systems are under increasing pressure to support the growing demands of freight flows. See: *The U.S. Chamber of Commerce* (supra note 34).

⁴⁴ An approval decision is required to be rendered within four months after the application materials are received for review. For a good overview on the distribution rights see *Robert C. Maier*, *China Lowers the Trading Floor*, July 2004, available at <http://www.white.wms.com/CM/NewsAlerts/NewsAlerts345.asp> (visited October 30, 2004).

⁴⁵ The drafting process has included extensive consultations with companies and others with an interest in this issue. The regulations were scheduled to be released early September, but there seems to be a delay.

⁴⁶ Implementing Rules for the Administrative Regulation of Foreign-Invested Financial Organizations (中华人民共和国外资金融机构管理条例实施细则), issued by the China Banking Regulatory Commission (中国银行业监督管理委员会) on July 26, 2004, lowered the minimum registered capital requirements and removed the restrictions that only one new branch could be opened every twelve months.

sectors; and the convention services markets were opened to wholly foreign-owned enterprise participation (a step not even demanded by China's WTO commitments).⁴⁸ Further, China undertook efforts to improve the administration of its tariff rate quota system for agricultural products,⁴⁹ and, in mid- 2004, agreed to rescind its contested value-added tax (VAT) on semiconductor imports.⁵⁰ Other WTO members, most of all the United States, had considered this policy to be a violation of the WTO's National Treatment obligation. The U.S. had, on these grounds, initiated its first dispute resolution case before the WTO in March 2004.⁵¹ The European Union,⁵² Japan⁵³, and five more countries⁵⁴ had joined the case as co-plaintiffs in late March and April 2004.

⁴⁷ The China Insurance Regulatory Commission (中国保险监督管理委员会) on March 15, 2004 issued the Implementing Rules on the Administration of Foreign-Invested Insurance Companies (中华人民共和国外资保险公司管理条例实施细则), Bulletin of the China Insurance Regulatory Commission (中国保险监督管理委员会文告) 2004, no. 5, p. 14, which streamlined the application and approval process, and lowered capital requirements for branching. These regulations follow the earlier amendment of the Insurance Law in 2003. Problems remain, in particular, with regards to discriminatory practices in brand and product approvals.

⁴⁸ According to its commitments, China would only have had to open the sector to majority foreign-invested joint ventures. See *The US-China Business Council* (supra note 34).

⁴⁹ See, e.g., MOFCOM Announcement No. 60 of September 27, 2004, Releasing the Detailed Rules for Distribution of Tariff Quotas on Import of Palm Oil, Soybean Oil, Colza Oil and Sugar in 2005 (商务部公告 2004 年第 60 号 植物油、食糖分配实施细则), China Foreign Trade and Economic Cooperation Gazette 2004, no. 61.

⁵⁰ See footnote 23 above. China and the United States concluded a related Memorandum of Understanding in July 2004. See *DAI Yan*, Agreement ends first complaint at WTO, China Daily, July 15, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-07/15/content_348566.htm (visited October 25, 2004).

⁵¹ The U.S. referred to the obligations of China under Articles I and III of the GATT 1994, the Protocol on the Accession of the People's Republic of China (WT/L/432), and Article XVII of the GATS. See *China - Value-Added Tax on Integrated Circuits - Request for Consultations by the United States*, 23 March 2004, doc 04-1280, available at http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm (China, as respondent) (visited October 23, 2004).

⁵² See *China - Value-Added Tax on Integrated Circuits - Request to Join Consultations - Communication from the European Communities*, 30 March 2004, doc 04-1425, available at http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm (China, as respondent) (visited October 23, 2004).

⁵³ See *China - Value-Added Tax on Integrated Circuits - Request to Join Consultations - Communication from Japan*, 01 April 2004, doc. 04-1475, available at http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm (China, as respondent) (visited October 23, 2004).

⁵⁴ See *China - Value-Added Tax on Integrated Circuits - Request to Join Consultations - Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, 05 April 2004, doc 04-1525; and *China - Value Added Tax on Integrated Circuits - Request to Join Consultations - Communication from Mexico*, 05 April 2004, doc 04-1527, both available at available at http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm (China, as respondent) (visited October 23, 2004).

IV. Ongoing Concerns

Notwithstanding the progress mentioned above, there is continuous and sometimes new concern regarding the implementation of several of China's WTO commitments.

The single greatest concern relates still to China's ongoing violation of its TRIPS obligations. Even though China has made important legislative efforts to protect intellectual property rights (IPR),⁵⁵ enforcement of IPRs is reported to be inefficient,⁵⁶ often due to a lack of transparency and coordination among government agencies, local protectionism and corruption, high thresholds for criminal prosecution, and a lack of resources and training. China reiterated its willingness to improve the protection of IPRs when, in late August, it announced to undertake a one-year long intensive, multi-agency effort to combat infringements.⁵⁷

In addition to the unsatisfactory IPR situation, both, the U.S.-China Business Council⁵⁸ and the European Chamber of Commerce in China (EUCCC)⁵⁹ note in their most recent reports that China still has a long way to go, especially, in increasing general transparency, adjusting to international standards and eliminating licenses and quotas.

State intervention in designated strategic sectors of China's economy is reported to be another ongoing problem.⁶⁰ Finally, there are special worries regarding the services sector. It seems that, in addition to the old problem of generally high capitalization

⁵⁵ See, e.g., "Decision of the State Council on Amending the Rules for the Implementation of the "Patent Law of the People's Republic of China" of February 1, 2003, Decree No. 368 of the State Council of the People's Republic of China, (关于修改《中华人民共和国专利法》实施细则的决定), Gazette of the State Council 2003, No. 4, p. 4; or "Provisions on Determination and Protection of Well-known Marks" of April 17, 2003, Decree No. 5 of the State Administration for Industry and Commerce of the People's Republic of China (商标认定和保护规定), Gazette of the State Council of the PR China 2003, No. 35, p. 28. See also *Andrew Evans*, Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws, Georgia Journal of International and Comparative Law, Vol. 31 (2003), No. 3, pp. 587 et seq.

⁵⁶ See, e.g. *Amanda S. Reid*, Enforcement of intellectual property rights in developing countries: China as a case study, *DePaul-LCA Journal of Art and Entertainment Law* 2003, Vol. 13, pp. 63 et seq.

⁵⁷ See "China to launch campaign on IPR protection", available at http://www.chinadaily.com.cn/english/doc/2004-08/28/content_369578.htm (visited November 5, 2004).

⁵⁸ The U.S.-China Business Council (supra note 34).

⁵⁹ The European Business in China Position Paper 2004, released in Beijing on October 15, 2004, see China's WTO compliance not up to scratch, *Business Report*, October 15, 2004, available at <http://www.busrep.co.za/index.php?fArticleId=2263034> (visited October 26, 2004). At the time of writing, the report itself is not yet publicly available.

⁶⁰ The U.S.-China Business Council (supra note 34).

requirements, a roll-back of certain favourable market access conditions has been taking place. For example, in areas such as construction and engineering services, China has started to adopt certain policies that are more restrictive than those in place prior to its WTO accession.⁶¹ This would be a violation of China's commitment under the WTO's General Agreement on Trade in Services not to make requirements in services sectors more burdensome than at the time of its accession to the WTO.

As the December 11, 2004 deadline for the implementation of year 3 commitments is approaching, doubts arise if China will timely fulfil its obligation to further open the telecommunications sector. By December 11, China must raise the ceiling on foreign joint venture participation in mobile voice and data services to 49 % and open fixed-line basic telecom services among Beijing, Shanghai, and Guangzhou to joint ventures with up to 25 % foreign equity participation.

V. Summary and Outlook

Looking back over the nearly three years since China joined the World Trade Organization, it appears that China's implementation efforts of WTO commitments have been uneven, with initial great progress in the first year, a considerable slow-down in the second year, and some new dynamics in the ongoing third year.

While China has generally reduced tariffs in accordance with its accession commitments, it still maintains non-tariff barriers, such as licenses and quota – and partly erects new ones, i.e., through the establishment of unique national standard requirements. Continued areas of concern include, moreover, the protection of intellectual property rights, transparency, national treatment, and the continued interference of state entities in the market.

The problems with China's WTO compliance have been analysed to fit into several categories.⁶² Some issues are seen to simply reflect the difficulties experienced with meeting timeline commitments

and not a lack of desire or willingness to make the relevant changes.⁶³ Other problems are believed to mirror internal difficulties within the Chinese government in getting ministries to make adjustments agreed to by the central government in their areas of control.⁶⁴ Still other problems are considered to reflect the need for infrastructure changes or longer-term educational or normative behaviour changes, especially in the field of piracy and counterfeiting of intellectual property in China. Despite a mixed evaluation of China's implementation efforts, most foreign observers and investors seem to agree however that the country's inclusion in the WTO has had an overall positive impact on China's business climate.⁶⁵

⁶³ Delays of a few months or longer in matters that China ultimately complied with would be examples of this category.

⁶⁴ Problems in TRQ administration in agriculture and the delays and additional unwarranted burdens imposed in the financial services areas would be two typical examples of this category.

⁶⁵ See, e.g., China's WTO compliance not up to scratch, Business Report, October 15, 2004, available at <http://www.busrep.co.za/index.php?fArticleId=2263034> (visited October 26, 2004), citing a member survey of the European Chamber of Commerce in China. At the time of writing, the report itself is not yet publicly available. Further, see United States General Accounting Office. Report to Congressional Committees: World Trade Organization: U.S. Companies' Views on China's Implementation of its Commitments, March 2004, available at www.gao.gov/cgi-bin/getrpt?GAO-04-508 (visited November 5, 2004).

⁶¹ See "The Provisions on Administration of Foreign-Founded Construction Enterprises" (外商投资建筑业企业管理规定), Decree No. 113 of the Ministry of Construction of the People's Republic of China and the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China, Gazette of the State Council 2003, No. 20, and, the "Provisions on Administration of Foreign-Funded Construction Project Design Enterprises" (外商投资建设工程设计企业管理规定), Decree No. 114 of the Ministry of Construction and the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China, Gazette of the State Council 2003, No. 20. Both decrees restrict market access for foreign engineering and construction services firms by imposing, i.a., domestic industry certification and grading requirements as well as onerous capitalization and staffing requirements on foreign firms.

⁶² Stewart (supra note 4), pp. 3-4.