

Negotiating Port Access: The Sino-U.S. Opportunity for Leadership in the Maritime Transport Services Industry

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I. INTRODUCTION

The maritime carriage industry is a vital component of the global economy and accounts for a significant percentage of international trade.¹ Maritime carriage, however, depends on reasonable access to ports and port facilities. Bilateral trade agreements and international customs currently regulate access, but bilateral agreements often create conflicting standards that lead to delays and higher costs. In countries such as China, international custom is binding only if the State consents to its application.² The World Trade Organization (WTO) has tried repeatedly to draft an agreement to provide uniform standards to govern access, but some members have refused to compromise national interests, and problems continue to plague maritime services.

¹ Frances Williams, *Shipping Liberalisation Push*, FIN. TIMES (London), Oct. 6, 2000, at 12, available at <http://globalarchive.ft.com/globalarchive/articles.html>. Four-fifths of the world's trade is transported by ships. *Id.*

² See JEANETTE GREENFIELD, CHINA'S PRACTICE IN THE LAW OF THE SEA 9-11 (1992). China recognizes international treaties and customs as important sources of international law, but reserves the right to accept or reject them. *Id.*

Numerous international maritime transport service providers have complained about China's cumbersome regulatory procedures, regulations restricting access to ports and port facilities, and preferential treatment favoring Chinese carriers.³ Responding to these criticisms, China recently enacted a Maritime Procedure Law⁴ to supplement its Code of Maritime Law ("Maritime Code")⁵ and allowed foreign shipping companies to establish offices in Chinese ports.⁶ China hopes these new laws and procedures will make it easier to resolve conflicts and provide the fair and consistent standards needed to attract foreign investment and trade.

Like many nations, China, in addition to drafting generally applicable rules and procedures, also utilizes bilateral agreements. Until 1998, China had a bilateral maritime accord with the United States.⁷ Although both countries have agreed to abide by the terms of the old agreement until a new one is reached, neither has made a serious effort to negotiate a new accord.⁸ Meanwhile, problems continue to plague their relationship.⁹ This article argues that China's efforts to re-examine and

³ Rob McKay, *WTO Boost for Chinese Maritime Sector*, LLOYD'S LIST INT'L, May 26, 2000, at 1, available at 2000 WL 6442437.

⁴ Maritime Procedure Law Of The People's Republic Of China [MPL] (effective July 1, 2000) (adopted by the Thirteenth Session of the Standing Committee of the Ninth People's Congress, Dec. 25, 1999); see Claire Morgan, *The PRC's New Maritime Procedure Law*, in THE JAPAN SHIPPING EXCHANGE BULL., Sept. 2000, at 33; *China to Draft Law on Maritime Lawsuits*, CHINA BUS. INFO. NETWORK (CBNET), Aug. 25, 1999, available at 1999 WL 7730734 [hereinafter *Maritime Lawsuits*].

⁵ MARITIME LAW OF THE PEOPLE'S REPUBLIC OF CHINA [MARITIME CODE] (effective July 1, 1993) (adopted at the Twenty-Eighth Meeting of the Standing Committee of the Seventh National People's Congress, Nov. 7, 1992); see JOHN SHIJIAN MO, SHIPPING LAWS IN CHINA 15-16 (1999); *Maritime Code of the People's Republic of China*, 6 U.S.F. MAR. L. J. 302, app. A, at 303 (Spring 1994) [hereinafter *MCPRC*]. Dr. Mo also provides an English translation of China's Maritime Code. MO, *supra*, at 427-74.

⁶ Adrian Clarke, *Rules Post New Picture of Maritime Industry*, in CHINA LAW & PRAC. 51 (Apr. 2000). These changes were prompted in part by China's desire to make itself more attractive to foreign investment and trade. *Courts Getting Tougher But Fairer*, CHINA DAILY, Dec. 15, 1999, available at 1999 WL 30608481 [hereinafter *Courts Getting Tougher*].

⁷ See Matthew Flynn, *China: High Hopes for Reinstatement of Maritime Agreement*, LLOYD'S LIST INT'L, Feb. 28, 2000, at 5, available at 2000 WL 6439374.

⁸ See Tim Sansbury, *US and China Start Slowly: Hopes are High*, J. COM., Sept. 23, 1999, at 4.

⁹ *Id.*

change its maritime laws¹⁰ and its willingness to accept the safeguards built into the recent U.S.-China WTO bilateral trade agreement¹¹ suggest that it is possible for the United States and China to negotiate a bilateral accord on maritime issues such as access to ports and use of port facilities. Because of their importance to the global economy and influence on the maritime services industry, the United States and China should renew bilateral maritime trade services negotiations and focus on drafting a treaty outlining mutual responsibilities and setting a schedule for compliance. Such an agreement could serve as a model for the WTO and provide clear standards for an international maritime transport services agreement.

Part II of this article begins with a brief analysis of China's ports and port facilities and the application of current Chinese civil and maritime law. China's bid for membership in the WTO is discussed next, followed by an analysis of the potential impact of WTO regulations on China's port controls. Part III examines the commercial relationship between the United States and China and summarizes the arguments in favor of a new bilateral maritime agreement on port access. Part IV concludes with a brief look at prospects for a solution to the international impasse in maritime transport services negotiations.

II. BACKGROUND

A. *Policy and Problems Concerning Access and Use of Chinese Ports and Port Facilities*

1. *Rules and Procedures*

Since 1979, China has promulgated laws regulating the conduct of foreign flag vessels, including rules governing access to and use of port facilities.¹² While national security concerns prompted the enactment of

¹⁰ See MO, *supra* note 5, at 2; see *Maritime Courts Shift to Nation's Judicial System*, CHINA DAILY, July 1, 1999, available at 1999 WL 17780601 [hereinafter *Maritime Courts Shift*]; *Maritime Lawsuits*, *supra* note 4; *Courts Getting Tougher*, *supra* note 6.

¹¹ Brad L. Bacon, *The People's Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma*, 9 MINN. J. GLOBAL TRADE 369, 394 (2000). China has agreed that various U.S. safeguards will remain in effect for twelve years after China's accession to the World Trade Organization (WTO) to prevent sudden surges in imports from harming U.S. producers. China has also agreed to be subject to antidumping measures for fifteen years after accession. See *id.*

¹² See FRANCOIS DE BAUW & BERNARD DEWIT, *Regulations Governing the Supervision and Control of Foreign Vessels by the People's Republic of China*, in CHINA TRADE LAW: CODE OF THE FOREIGN TRADE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 221-32 (1982) (quoting Regulations Governing the Supervision and Control of Foreign

many of these laws, health, safety, and customs considerations were also important.¹³ Regulations governing health, safety, and customs duties and restrictions were added to those enacted for national security purposes to provide a comprehensive legal framework to facilitate the development of international trade.

China imposes numerous restrictions on foreign flag vessels, including regulating port entry and departure, berthing, and the loading and unloading of cargo.¹⁴ To enter a Chinese port, a foreign vessel must complete all required entry procedures through an agent in the designated port at least one week before the vessel's scheduled arrival.¹⁵ Upon arrival, the vessel must wait until a pilot can come on board to help with navigation and docking.¹⁶ Failure to comply with the pilot's commands can lead to the arrest of the vessel by Chinese officials or an order for the offending vessel to leave immediately.¹⁷ The Chinese will detain a vessel indefinitely if it violates regulations on the loading of freight or fails to pay port charges or compensation for any damage caused.¹⁸ China hopes the timely promulgation of its regulations governing the movements and

Vessels by the People's Republic of China (approved by the State Counsel on Aug. 22, 1979)).

¹³ GREENFIELD, *supra* note 2, at 34. Article 9 of the Foreign Trade Law prohibits vessels in Chinese ports and coastal waters from engaging in activities that endanger the safety, rights, and interests of the PRC. It also requires compliance with regulations governing straits, waterways, routes, and areas closed to navigation. See BAUW & DEWIT, *supra* note 12. China's Ministry of Communications (MOC) and Ministry of Foreign Trade and Economic Cooperation (MOFTEC) are responsible for drafting and promulgating port and port facilities regulations. Clarke, *supra* note 6.

¹⁴ BAUW & DEWIT, *supra* note 12. Similar regulations also govern salvage operations, the handling of dangerous cargo, the reporting of maritime accidents, and specifications for signals, communications, firefighting equipment, and training. See *id.*

¹⁵ GREENFIELD, *supra* note 2, at 32. The Chinese Harbor Supervision Officer must give his approval before the vessel departs from its last port of call, and the master must report twenty-four hours ahead of arrival the exact time of entry. *Id.*

¹⁶ The Chinese may even ban the vessel master's return. *Id.*

¹⁷ *Id.* at 31.

¹⁸ *Id.* at 34. While Chinese authorities are willing to compromise on matters of discipline within a ship's company and have signed several bilateral treaties recognizing flag state jurisdiction over internal matters, harbor officials have retained jurisdiction in matters affecting public order (e.g., Maritime accidents occurring in Chinese territorial waters must be reported by the captain of a foreign ship within 48 hours after entry, any accident that occurs in port must be reported immediately). Vessels must report any crimes taking place in a Chinese port immediately. See *id.*

activities of foreign vessels will provide shippers adequate notice of requirements and encourage them to use Chinese facilities and services.¹⁹

Although many access and use regulations were enacted to help improve trade relations, China also drafted laws to protect the Chinese public from the risks associated with increased trade. For example, China established agencies at all ports of entry to conduct inspections to prevent the unauthorized introduction of nonnative plants and animals.²⁰ The Chinese understand that opening their ports to foreign commerce exposes the public and the environment to dangers that can threaten public welfare. Consequently, the “Law on the Quarantine of Border-Crossing Animals and Plants” authorizes agencies to quarantine nonnative animals and plants, to conduct investigations into the conditions of their transport, and to make determinations concerning the extent of the threat posed by the non-indigenous species.²¹

Similarly, to protect its citizens from hazardous materials, China has formulated and published regulations for inspecting the packaging of dangerous export goods.²² Dangerous goods like pesticides, industrial chemicals, and medicines are significant export commodities for the Chinese.²³ Laboratories were built at various ports to test and devise improved handling methods and safer packaging.²⁴ Port authorities are cooperating to ensure compliance with established inspection protocols and safety standards.²⁵

In an effort to promote the growth of its own shipping industry, China enacted cabotage laws to restrict the activities of foreign shipping service providers.²⁶ Article 4 of the Maritime Code restricts maritime

¹⁹ See *infra* note 97 and accompanying text. See generally Clarke, *supra* note 6, at 50.

²⁰ *Regulations on Implementing Quarantine Law Published*, XINHUA NEWS AGENCY-CEIS, Dec. 9, 1996, available at 1996 WL 12534404.

²¹ *Id.*

²² *Splendid Results for Packaging Inspection of Dangerous Export Goods*, CHINA'S FOREIGN TRADE, Nov. 1, 1996, available at 1996 WL 11692305.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *MCPRC*, *supra* note 5, art. IV; see also *MO*, *supra* note 5, at 4. Cabotage is “the reservation of a nation’s coastwise trade exclusively for that nation’s own vessels.” Clyde J. Hart, Jr., Maritime Administrator of the U.S. Maritime Administration (MARAD), U.S. Dept. of Transp., Statement before the House Subcomm. on Coast Guard and Mar. Transp. (Sept. 24, 1998), at <http://www.marad.dot.gov/Headlines/testimo>

transport and towage services between Chinese ports to registered Chinese flag vessels.²⁷ Foreign flag vessels are limited to a single Chinese port of call per trip and must visit a foreign port before returning. No foreign ships may engage in coastwise trade between China's ports unless issued a permit by the proper authorities.²⁸ Permits are difficult to obtain, however, and foreign vessels that do are subject to various taxes and surcharges.²⁹ Generally, China enforces its cabotage laws,³⁰ primarily for reasons of national security,³¹ but also because it helps domestic providers maintain a competitive edge.

2. *Problems with Enforcement*

Although China established its regulatory scheme to eliminate administrative inefficiencies and promote national standards, provincial, and municipal officials can enact regulations that govern similar issues.³² While a system of overlapping jurisdiction is consistent with the policy and practice of several nations including the United States, France, and England, it may be problematic for China because of its limited ability to enforce certain aspects of national policy.³³ In China, national directives

ny/testim1.htm (last visited Apr. 1, 2001). Cabotage is common practice among the maritime nations of the world. *See id.*

²⁷ *MCPRC*, *supra* note 5, art. IV. A "flag" vessel is registered to and operates under the laws of the nation whose flag it flies. *See* BLACK'S LAW DICTIONARY 638 (6th ed. 1990).

²⁸ *MCPRC*, *supra* note 5, art. IV.

²⁹ *See* GREENFIELD, *supra* note 2, at 81-83.

³⁰ *See* *MCPRC*, *supra* note 5, art. IV; *see also* GREENFIELD, *supra* note 2, at 31-39 (discussing the procedures and requirements for foreign vessels entering Chinese ports). *See generally* William Tetley, *The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law*, 30 J. MAR. L. & COM. 595, 610 (1999) (stating that the coasting trade is subject to national laws, not the Maritime Code).

³¹ *See* GREENFIELD, *supra* note 2, at 33-39.

³² *See Tianjin Port Aims High in Container Shipping*, XINHUA NEWS AGENCY-CEIS, Apr. 10, 1996, available at 1996 WL 3776885.

³³ Allison Conner, *Legislation and Interpretation: Law and Society in China*, Lecture at the University of Hawai'i William S. Richardson School of Law (Sept. 26, 2000). For example, China's controversial one-child policy, although successful in the major cities, has failed in the countryside, because China's economic programs are putting pressure on rural families to ignore attempts to restrict family size. Efforts to compel compliance vary from province to province, and, in many areas, local officials have compromised these efforts. Michael Palmer, *The Re-emergence of Family Law in*

are frequently “ignored or superficially followed.”³⁴ Chinese courts, for example, are criticized for refusing to recognize and enforce foreign-related arbitral awards.³⁵ Article 195 of China’s Civil Procedure Code³⁶ authorizes the Intermediate People’s Courts to enforce arbitral decisions, but they are often unwilling to do so against local persons or firms for “public policy” reasons.³⁷ Responding to foreign criticism and perceptions of local bias, the Supreme People’s Court (SPC) has taken steps to ensure that decisions setting aside or refusing to enforce foreign arbitral awards are carefully reviewed.³⁸ Ironically, the Chinese

Post-Mao China: Marriage, Divorce and Reproduction, in CHINA LEGAL REFORMS 125-27 (Stanley B. Lubman, ed., 1996).

³⁴ Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 J. INT’L L. BUS. 383, 402 (2000); see also *Of Laws and Men*, THE ECONOMIST, Apr. 7, 2001, at 16 (commenting on the lack of an independent judiciary and explaining that part of the problem is the lack of trained and qualified lawyers to interpret the new laws).

³⁵ Charles Kenworthy Harer, *Arbitration Fails to Reduce Foreign Investors’ Risk in China*, 8 PAC. RIM L. & POL’Y 393, 395 (1999).

³⁶ CODE OF CIVIL PROCEDURE OF THE PEOPLE’S REPUBLIC OF CHINA [CPC] art. 195 (adopted by the Fourth Session of the Standing Committee of the Seventh National People’s Congress, Apr. 9, 1991). “When one party concerned fails to implement the ruling made by the PRC foreign affairs arbitration organ, the other party concerned may request that the ruling be carried out in accordance with this law by the Intermediate People’s Court of the place where the arbitration organ is located, or where the property is located.” *Id.*

³⁷ See Urs Martin Lauchli, *Cross-Cultural Negotiations with a Special Focus on ADR with the Chinese*, 26 WM. MITCHELL L. REV. 1045, 1068-69 (2000); see also Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 904-05 (1996).

³⁸ Xian Chu Zhang, *Chinese Law: The Agreement between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects*, 29 HONG KONG L.J. 463, 468-69 (1999). Responding to the comments of foreign parties seeking enforcement, the Supreme People’s Court (SPC) issued a circular in August 1995 entitled, “Concerning the Handling of Issues Regarding Foreign-Related Arbitration and Foreign Arbitration Matters by the People’s Courts.” Lower courts must now report decisions concerning foreign-related disputes involving the validity of an arbitration agreement to a higher court for review before they can refuse to enforce the judgment. *Dispute Resolution*, 1996 CHINA ECON. REV. 23, Mar. 1, 1996, available at 1996 WL 9692081. According to the circular, when an Intermediate People’s Courts (IPC) intends to refuse either to recognize or enforce a foreign or foreign-related award, it must send a report to the High People’s Courts (HPC). If the HPC agrees, the HPC must submit a report to the SPC. IPCs can refuse to recognize or enforce awards only with SPC authorization. See generally Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People’s Republic of China*, 1 ASIAN-PACIFIC L. & POL’Y J. 12 (2000).

leadership is partially to blame for the diffusion of power, because its efforts to promote economic reforms have engendered a growing dependence on local government control of critical resources.³⁹

The push for economic reforms, however, is not the only reason behind the diffusion of power; local interests are also demanding a greater voice in the political process. The Chinese Communist Party (CCP) has begun allowing elections of the members of neighborhood committees to make the committees more accountable to their constituents.⁴⁰ The trend toward greater participation in political affairs is so widespread that even National People's Congress delegates must re-examine old attitudes and strive to satisfy the demands of their supporters.⁴¹ Consequently, local officials facing increasing pressure from constituents asking for protection from foreign competition may continue to act in a manner that undermines national policies.⁴² Conflicts between local and national access laws may lead to disparate procedures, contrary to the national government's goal of establishing uniform standards to promote trade. Therefore, the National People's Congress, the Supreme People's Court, and the national maritime courts must work together with local authorities to coordinate regulatory policy and improve enforcement of national standards.⁴³

3. *International Customs and Conflicts of Law*

In addition to their own regulatory scheme, the Chinese also observe certain aspects of accepted international practice and custom. For example, China does not believe in an unqualified right of access to its ports.⁴⁴ Most coastal nations agree that a littoral state may regulate

³⁹ Lubman, *supra* note 34, at 402; see also *Expansion of Local Government Approval for Foreign Investment Projects*, in CHINA LEGAL DEV. BULL. 20-22 (Alex Rooth ed., Apr. 2000).

⁴⁰ Calum MacLeod, *An End to the Granny Snoops*, SOUTH CHINA MORNING POST, June 1, 2000, available at <http://www.scmp.com/News/Template/PrintArticle.asp> (last visited Aug. 18, 2001).

⁴¹ Murray Scott Tanner, *The Erosion of Party Control over Lawmaking in China*, CHINA QUARTERLY, No. 138, (1995) at 402-03.

⁴² Albert H.Y. Chen, *Sources of Law and the Law-making System*, in AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 123 (1992). Local courts sometimes yield to pressure from local officials and refuse to enforce judgments ordered by the courts of other provinces. See *id.*

⁴³ See *Courts Getting Tougher*, *supra* note 6. The SPC has ordered China's courts to attain an enforcement standard of seventy-five percent by the end of the year 2000. *Id.*

⁴⁴ GREENFIELD, *supra* note 2, at 39.

foreign flag vessels within territorial waters, and thus, has the right to decide whether or not to permit foreign merchant ships access to its ports.⁴⁵ The forced opening of Chinese ports by the British after the Opium War of 1842, the subsequent cession of Hong Kong, and other excesses of Western colonialism made the Chinese particularly sensitive and resistant to encroachments on their national sovereignty.⁴⁶ Foreign vessels may enter only those ports and harbors China's Ministry of Communication (MOC) designates for foreign use.⁴⁷

In dealing with international conflict of law disputes, the Chinese have established areas where international authority prevails. Article 268 of China's Maritime Code provides that the international conventions and treaties that China has ratified prevail over relevant provisions of the Maritime Code in cases of inconsistency or unless such prevalence has been excluded by a specific reservation made by China at the time of ratification.⁴⁸ Thus, the Chinese will submit to international authority if they have signed the agreement. They are not, however, willing to completely abandon their sovereign authority. In Article 276 of the Maritime Code, China reserved its right to reject applications of foreign law, or international law or custom where they conflict with the Chinese Constitution, violate Chinese sovereignty, or pose a threat to national security or unification.⁴⁹ Although China preserves its right to review and reject international laws, these provisions of the Maritime Code indicate that China will accept limited international authority over domestic maritime policy and suggest that it may be willing to accept limited international regulation of port access and shipping services.

⁴⁵ *Id.* at 31.

⁴⁶ See IMMANUEL C.Y. HSU, *THE RISE OF MODERN CHINA 184-93* (1995).

⁴⁷ GREENFIELD, *supra* note 2, at 32. Currently under Chinese law, the only vessels that may enter and leave Chinese ports are those that have received permission from an authorized official or are from countries that have signed a commercial treaty with China. *Id.*

⁴⁸ See MO, *supra* note 5, at 392. International conventions may apply directly if there is no appropriate domestic law or regulation. Chinese courts may also apply common international practices and commercial usage in the absence of local conventions and domestic practice. The party alleging the application of a common practice or commercial usage has the burden of proving that the customary rules are established and accepted by a majority of the international community of nations. *Id.*

⁴⁹ *Id.* at 400.

B. *China's Accession and Potential Impacts of WTO Regulations on Port Access*

At the 1994 Uruguay Round of multilateral talks, negotiators were unable to agree on whether to include maritime transport services within the General Agreement on Trade in Services (GATS).⁵⁰ The United States, the European Union, Canada, and several other member nations created a Negotiating Group on Maritime Transport Services (NGMTS) to continue working on an agreement.⁵¹ Negotiations are currently underway,⁵² but talks have stalled repeatedly while members struggle to devise a set of rules and procedures to restrict laws and policies that favor national flag vessels and protect local providers from international competition.⁵³ Because countries often favor local shippers and hinder international carriers by controlling access to their port facilities,⁵⁴ access

⁵⁰ *U.S. Decides Against Making Offer In WTO Maritime Talks*, General Developments, 13 ITR 25 (June 19, 1996), § WTO, at d38 [hereinafter *U.S. Decides*]. The General Agreement on Tariffs and Trade (GATT) provided the basic framework for the creation of the WTO. The General Agreement on Trade in Services (GATS) falls within the scope of WTO/GATT oversight. See Final Texts of the GATT Uruguay Round Agreements Including the Agreement Establishing the World Trade Organization, Apr. 15, 1994, AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION art. II (2) & (4), Office of the U.S. Trade Representative (1994) [hereinafter WTO AGREEMENT].

⁵¹ Amy Porges, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Regulation of International Trade-GATT Agreements and Documents*, AM. SOC. INT'L L., pt. 12, 1994 BDIEL AD LEXIS 58 [hereinafter *GATT Agreement*]. The Negotiating Group on Maritime Transport Services (NGMTS) met in May of 1994 to begin negotiations on a variety of international shipping issues including access to and use of port facilities. A final report setting a date for the implementation of the results of the negotiations was expected at the scheduled conclusion of talks in June 1996. As the deadline neared, the United States refused to table an offer and suggested the group renegotiate the framework for an agreement in the year 2000. *U.S. Decides*, *supra* note 50. Because U.S. participation was considered crucial, the talks were postponed as suggested. All the participants agreed not to adopt any measures affecting trade in maritime services in a manner that would improve their negotiating position except in response to measures adopted by other countries. See John R. Schmertz & Mike Meier, *WTO Announces Suspension of Global Maritime Transportation Negotiations*, EUR. UNION NEWS, INT'L L. UPDATE, July 1, 1996, at 95.

⁵² E-mail from Alexandre Beaulieu, Information and Media Relations Division; World Trade Organization, to Mark S. Hamilton, Adjunct Professor of History, Hawai'i Pacific University and Juris Doctorate candidate, University of Hawai'i, William S. Richardson School of Law (Aug. 17, 2000, 15:51:23 EST) (on file with author).

⁵³ Ted L. McDorman, *Regional Port State Control Agreements: Some Issues of International Law*, 5 OCEAN & COASTAL L.J. 207, 221 (2000).

⁵⁴ *Id.*

to and use of port facilities is considered one of the most important issues for negotiation.⁵⁵ WTO officials predict the NGMTS will conclude talks on rules and regulations by the end of 2000 and enter a second phase of negotiations focusing on market access as early as 2001.⁵⁶ The United States, however, remains reluctant to participate.⁵⁷ In March 2000, the U.S. State Department and U.S. Department of Transportation officials refused to comment publicly on whether they supported reaching an agreement.⁵⁸ Most international shipowners feel U.S. participation in the bargaining process is crucial to the success of an agreement, so talks will be postponed until the United States indicates a willingness to actively participate in substantive negotiations.⁵⁹

Since submitting a formal bid for accession in December of 1995,⁶⁰ China has worked slowly, but methodically, toward concluding bilateral accords with all of the WTO members expressing an interest in negotiating market access in goods and services.⁶¹ The Chinese considered membership in the WTO a necessary step in the process of modernization; however, talks between China and the WTO were frequently suspended or delayed. Negotiators were often far apart on such critical issues as the demand for regular inspections of the implementation

⁵⁵ *Id.*

⁵⁶ Beaulieu, *supra* note 52.

⁵⁷ *Fading Borders of Commerce*, AM. SHIPPER, Mar. 1, 2000, at 20, 2000 WL 18252541 [hereinafter *Fading Borders*].

⁵⁸ *Id.*

⁵⁹ *Id.* The United States' reluctance to part with protections of the Jones Act forced postponement of talks until the year 2000 even though the Council of European and Japanese National Shipowners' Association stated that their countries would agree to U.S. requests to retain the Jones Act. *See id.*

⁶⁰ Bacon, *supra* note 11, at 378-379.

⁶¹ Meeting of the Working Party on the Accession of China (July 27, 2000), http://www.wto.org/english/news_e/news00_e/chisum_e.doc (last visited August 17, 2000). As of August 17, 2000, of the original 37 WTO members interested in trade with China, only Switzerland had not yet signed an agreement. *Id.* By June 2001, of the members who subsequently became interested in bilateral negotiations, only Mexico had not endorsed China's accession; however, the President of Mexico, Vicente Fox, indicated that Mexico would be more flexible in talks on the issue. *See Mexico To Be 'More Flexible' With China*, HONOLULU ADVERTISER, June 7, 2001, at A2. Mexico and China reached an accord, September 13, 2001. *China Resolves Key Issue in WTO Debates*, HONOLULU ADVERTISER, Sept. 15, 2001, at A9 [hereinafter *Key Issue*].

of WTO regulations.⁶² A dispute among the United States, the European Union, and China concerning the terms of a single paragraph governing insurance companies hindered the signing of a final agreement.⁶³ Nevertheless, after years of difficult, seemingly endless negotiations, China has finally reached an agreement on the terms of its membership in the WTO.⁶⁴

WTO membership promises substantial benefits for the Chinese economy, particularly for its maritime industries.⁶⁵ Since 1949, China has emphasized the development of a blue-water, globally oriented shipping industry.⁶⁶ China currently owns approximately 450,000 ships of which 1,500 are ocean-going.⁶⁷ In 1994, Chinese-owned and registered vessels were sailing to more than 1,100 ports in 150 countries.⁶⁸ Unfortunately, not every aspect of China's shipping industry has kept pace with the growth in ship numbers and ports of call. Although China is committed to modernizing its ports and improving internal infrastructure links to port facilities,⁶⁹ bureaucratic resistance hampered its efforts in this area.⁷⁰ The

⁶² *China Favors Good WTO Terms Over Quick Entry*, DEUTSCHE PRESSE-AGENTUR, Sept. 29, 2000, available at LEXIS News [hereinafter *Good WTO Terms*]. China insisted on entering the WTO as a "developing nation" which would allow it limited protection of key industries. Western economists believed the WTO system could collapse if this is happened. China also resisted demands for precise wording on market openings and access to foreign markets raising doubts about China's commitment to implementing key terms. See *id.*

⁶³ *Key Issue*, *supra* note 61.

⁶⁴ *Id.*

⁶⁵ See MO, *supra* note 5, at 2. Nearly 90% of the goods China imports and exports arrive or leave through Chinese ports. *Id.* Market access should increase for foreign entrepreneurs entering Chinese markets and for Chinese businessmen abroad, therefore, the volume of China's imports and exports should also increase.

⁶⁶ *Maritime Courts Shift*, *supra* note 10. China is committed to becoming the world's leading maritime shipper. According to the 1993 International Shipping Registrar, the PRC ranked as the world's ninth largest shipping country; Hong Kong was 14th. See MO, *supra* note 5, at 3. The China Shipping Group, formed from offshoots of China Ocean Shipping Company, recently opened trade routes with the U.S. west coast. It is emphasizing a new building program utilizing foreign and domestic shipbuilders to ensure itself of a steady supply of new ships to replace its aging fleet. Analysts predict it will become one of the world's top five shipping firms. See *Shipping: Big League Hopes*, CHINA ECON. REV., Dec. 23, 1999.

⁶⁷ MO, *supra* note 5, at 3.

⁶⁸ *Id.*

⁶⁹ GEORGE LAURIAT, CHINA SHIPPING: THE GREAT LEAP FORWARD 121 (1983).

lack of modern equipment and supportive infrastructure has led to problems like port congestion, excessive turn-around-times, and high demurrage charges.⁷¹ WTO accession should enhance China's position as a responsible member of the global economy and enable it to demonstrate the stability and creditworthiness needed to encourage the influx of foreign investment capital to improve its facilities, equipment, and infrastructure.

Given the influence of international conventions like GATS on international standards and practice,⁷² it is important that China participate in future WTO/GATS maritime trade service negotiations. Even if China was not a member of the WTO, a new GATS agreement on the use of ports and port facilities could have a profound effect on China's shipping laws by creating new "standards or customs."⁷³ Because China's ports and port services compete for a share of a highly competitive global market, a new WTO/GATS agreement could force China to change its laws and procedures and its port access policies simply because international standards changed to accommodate the new GATS rules. Nearly 90% of the goods China imports and exports arrive or leave through Chinese ports.⁷⁴ In light of the potential impact of any new standards on its maritime industries, China needs to participate in the GATS negotiations.

Even after joining the WTO, the absence of a GATS agreement on maritime transport services may still pose problems. As mentioned, GATS is part of the basic regulatory framework that the 1994 General Agreement on Tariffs and Trade (GATT) provides for the WTO.⁷⁵ Until the NGMTS finalizes its GATS negotiations, GATS does not extend to shipping services; however, GATT regulations designed to promote free

⁷⁰ Stuart Harris, *China's Role in the WTO and APEC*, in CHINA RISING: NATIONALISM AND INTERDEPENDENCE 146 (David S. G. Goodman & Gerald Segal eds., 1997).

⁷¹ LAURIAT, *supra* note 69.

⁷² Luke T. Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT'L L. 541, 553 (1983); *see generally* Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876 (1983).

⁷³ *See generally* Lee, *supra* note 72, at 541. If the author's reasoning for the application of the United Nation's Convention of the Law of the Sea to third-party states is correct, it follows that an international covenant, like WTO/GATS, could also be applied to non-signatory third-party states. *See id.*

⁷⁴ MO, *supra* note 5, at 2.

⁷⁵ WTO Agreement art. IV (5).

trade may apply if a member nation's maritime laws and policies hinder competition.⁷⁶ Although GATT is silent on the issue of port access,⁷⁷ a delay in loading or unloading, even one due to faulty equipment, may be perceived as a trade barrier that violates GATT rules.⁷⁸ Member nations that believe China has treated them unfairly can complain to the WTO and embroil China in the WTO Dispute Settlement process.⁷⁹ Even when China is not guilty of deliberately hampering trade, it may receive an adverse ruling.⁸⁰ If China feels that the WTO decision undermines its control of access to its ports or infringes upon its sovereignty, it may refuse to comply.⁸¹ China's efforts to negotiate bilateral trade agreements indicate it is willing to standardize procedures to prevent these types of disputes. An agreement with the United States on port access and use of port facilities would help establish China as a responsible member of the international maritime transport services community and serve as a model for an international accord.

III. ANALYSIS

A. *The United States-China Relationship: Conflicts of Law and Policy*

The last 10-year bilateral maritime accord between China and the United States ended in 1998.⁸² Although the United States and China have extended the old agreement until a new one is drafted, the two

⁷⁶ Ted L. McDorman, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 J. MAR. L. & COM. 305, 310-11 (1997).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Frederick M. Abbott, *Reflection Paper on China in the World Trading System: Defining the Principles of Engagement*, in CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT 190-191 (Frederick M. Abbott ed., 1998); see *supra* notes 50-51 and accompanying text (explaining the GATT-WTO relationship).

⁸⁰ McDorman, *supra* note 76, at 310-11.

⁸¹ See HSU, *supra* note 46, at 184-93. As mentioned, China is particularly sensitive to issues of national sovereignty.

⁸² See Agreement on Maritime Transport Between the Government of the United States of America and the Government of the People's Republic of China, Dec. 15, 1988 [hereinafter Maritime Transport Agreement], available at 1988 WL 404672; Flynn, *supra* note 7.

countries have met infrequently since the lapse of the old accord, and, consequently, misunderstandings have ripened into problems.⁸³ China recently proposed container shipping regulations that would require Chinese government approval for all shipping contracts and for the prices of goods entering or leaving Chinese ports.⁸⁴ The United States immediately voiced its concern that the Chinese government might set rates, a charge China denied.⁸⁵ Nevertheless, China temporarily suspended plans to implement the regulations.⁸⁶ The United States also protested the MOC's proposal to publicly announce the terms of its shipper-carrier service contracts, arguing that the Ocean Shipping Reform Act of 1998 (OSRA) specifically stated that the key terms of contracts were to remain confidential.⁸⁷ The United States felt the proposal would negate the competition-enhancing aspects of OSRA.⁸⁸ Although the United States and China met to discuss these issues, they were unable to resolve their differences and talks were suspended.⁸⁹

U.S. carriers often complain that Chinese officials provide preferential treatment to Chinese nationals and arbitrarily restrict access to ports and port services.⁹⁰ Responding to the numerous restrictions on the Chinese end of the transport trade, the Federal Maritime Commission (FMC) instructed its attorneys to prepare sanctions to limit port access for Chinese flag ships and assess fines of up to \$1.1 million when a Chinese ship enters a U.S. port.⁹¹ When the FMC used similar threats to retaliate

⁸³ See Agreement Between the United States and China Extending the Agreement of Dec. 15, 1988, as Amended and Extended, on Maritime Transport, June 22-July 20, 1998, U.S.-China, T.I.A.S. 12,026, available at 1998 WL 646151 (Treaty) [hereinafter Extension]; see also notes 7-9 and accompanying text.

⁸⁴ Anna Wilde Mathews, *U.S., China Square Off Over Shipping*, THE ASIAN WALL ST. J., Jan. 29, 1999, available at 1999 WL-WSJA 5426990.

⁸⁵ Sansbury, *supra* note 8.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* See also Flynn, *supra* note 7; McKay, *supra* note 3; *China Should Listen*, J. COM, Feb. 4, 2000, at 5 [hereinafter *China Should Listen*].

⁹⁰ See Flynn, *supra* note 7; see also McKay, *supra* note 3.

⁹¹ Sansbury, *supra* note 8. Section 19 of the Merchant Marine Act of 1920 provides the FMC authority to regulate unfavorable shipping conditions in foreign trade. See Randy L. Baldemor, *Federal Maritime Commission Sanctions on Japanese Carriers: A Call for Fairer Methods of Resolving Disputes*, 8 PAC. RIM L. & POL'Y 109 (1999).

against Japanese ships for restrictions on American use of Japanese ports, Japan changed its regulations.⁹² Because China does not want to jeopardize the nearly \$100 billion in annual trade that passes through U.S. and Chinese ports,⁹³ the threat of sanctions may prove effective.

China has unilaterally taken steps to change its procedures and establish reasonable standards for port access.⁹⁴ However, because the responsibility for creating standards and procedures is split between different government ministries, decision-making is often fragmented. For example, both the MOC and the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) share responsibility for overseeing portions of China's maritime industry, including access to and use of port facilities.⁹⁵ The MOC regulates shipping and grants business licenses and operational approval certificates.⁹⁶ The MOFTEC handles foreign-related business and issues formal replies or approvals for applications for Wholly Foreign-Owned Shipping Company (WFOSC) status.⁹⁷ In principle, MOFTEC acts as the administrator where as the MOC functions as the decision-maker.⁹⁸ However, responsibilities can overlap. This arrangement may

⁹² Alan Wm. Wolff, *America's Ability to Achieve Its Commercial Objectives and the Operation of the WTO*, 31 LAW & POL'Y INT'L BUS. 1013, 1025 (2000); see Baldemor, *supra* note 91.

⁹³ See Mathews, *supra* note 84; see also Sansbury, *supra* note 8.

⁹⁴ *Examination and Approval of Wholly Foreign-Owned Shipping Companies*, CHINA LEGAL DEV. BULL., Apr. 2000, at 6-8. In January, the PRC issued provisional measures for the administration and approval of Wholly Foreign-Owned Shipping Companies (WFOSC) subject to relevant treaties and related legal agreements between China and the governments of the foreign companies. Conditions for establishing a WFOSC include requirements that: 1) the company maintain a resident representative office approved by the MOC for at least three years in the port city where it proposes to establish its WFOSC; 2) that at least once a month the company's vessels berth in the port city where it proposes to establish a WFOSC; 3) that it provide security in registered capital of not less than one million U.S. dollars; and 4) at least 85% of the staff and workers must be Chinese citizens. A WFOSC may establish branches in other port cities if: 1) its registered capital is fully paid and it has been operating for at least one year; 2) the parent company has had scheduled vessels berth at the port of the place where the branch is to be established; and 3) the parent company has maintained a resident representative office approved by the MOC in the city where the branch is to be established for at least a year. *Id.*

⁹⁵ Clarke, *supra* note 6. The provisional measures for WFOSC went into effect July 1, 2000; see *supra* note 94. See Clarke, *supra* note 6, at 52-55, for the original Chinese and full-text English translation.

⁹⁶ Clarke, *supra* note 6.

⁹⁷ *Id.*

⁹⁸ *Id.*

lead to inconsistent interpretations and implementation of regulations, and justify complaints that Chinese rules and regulations are impossibly vague.⁹⁹

Chinese shippers have similar complaints about delays due to discriminatory applications of U.S. laws and regulations. For example, several years ago congressional conservatives blocked China Ocean Shipping Company's (COSCO) lease of an abandoned Navy base in the Port of Long Beach, although the company had been a responsible tenant in the area for some time.¹⁰⁰ More recently, COSCO asked the FMC to exempt it from OSRA requirements so that it could lower its rates without advance notice.¹⁰¹ COSCO argued that, although it is state-owned, OSRA restrictions should not apply because it is managed and run independently from the Chinese government.¹⁰² Under OSRA, state-owned companies can only change rates after a 30-day notice period.¹⁰³ The FMC delayed acting on the request and is waiting for talks to produce a new agreement before ruling on the application.¹⁰⁴

Discriminatory policies or an unequal application of regulations, however, does not cause many of China's problems with the United

⁹⁹ Bacon, *supra* note 11, at 396. Article X of GATT states that all trade-related "laws, regulations, judicial decisions, and administrative rulings of general application . . . shall be published promptly in such a manner as to enable governments and traders to become acquainted with them." See GATT Agreement art. X; Bacon, *supra* note 11, at 396. MOFTEC was created to provide greater transparency and access to China's trade laws, the MOFTEC Gazette publishes all trade-related laws and regulations and is viewed as a crucial first step towards creating the legal transparency required by the WTO. MOFTEC also maintains websites to provide a medium for the timely posting of new laws and regulations, however, criticism over the lack of transparency within China's multi-tiered legal system continues. Laws and regulations published in the Gazette are frequently outdated and incomplete, overly ambiguous and general, bureaucrats are allowed too much discretion. See *supra* note 95. See MOFTEC's websites, <http://www.cei.gov.cn> and <http://www.moftec.com.cn>, for more information.

¹⁰⁰ Bill Mongelluzzo, *Cargo Expected to Soar if Taiwan, China Are Admitted to WTO*, J. COM., Mar. 28, 2000, at 16. Long Beach is the United States' busiest container port. *Id.* at 1.

¹⁰¹ Sansbury, *supra* note 8. China Ocean Shipping Company (COSCO) is China's state-owned shipping line. The FMC delayed approval of COSCO's application for most of 1999 while awaiting the outcome of trade talks. The exemption would allow COSCO to profit from the same pricing flexibility that privately owned carriers enjoy, private lines can change their tariffs at will. *Id.* See also *China Should Listen*, *supra* note 89; Flynn, *supra* note 7.

¹⁰² Flynn, *supra* note 7.

¹⁰³ Sansbury, *supra* note 8.

¹⁰⁴ *Id.*

States. In 1998, 41% of U.S. ports reported landside infrastructure impediments to the flow of commerce affecting both domestic and foreign carriers utilizing U.S. port facilities.¹⁰⁵ Federal and state authorities are cooperating with private owners and operators in an effort to reduce this figure to 37% by the year 2001.¹⁰⁶ Nevertheless, because the percentage of ports reporting problems will remain high, China will continue to have valid complaints about U.S. port services.

Disputes over maritime law and policy like those between the United States and China are not unusual. Many countries have regulations that conflict and create trade barriers. Conflicts of law are common even among long-term trading partners like the United States and Europe.¹⁰⁷ To improve relations and prevent disputes, the United States and the European Community have established a program to exchange information and help coordinate reforms.¹⁰⁸ Shipping industry experts are urging them to establish similar programs with China.¹⁰⁹ Both the United States and the European Community complain about problems with China.¹¹⁰ In its 1997-98 annual report, the European Community Shipowners Association complained of China's restricted access to services, preferential cargo allocations, discriminatory measures favoring national carriers, abusive tariffs for services that were often not rendered, and unrealistic and unjustifiable liability claims by Chinese customs officials.¹¹¹ The United States has made similar complaints.¹¹² Both the United States and the European Community agree that China needs to revise its maritime laws and policies to provide a "predictable, consistent

¹⁰⁵ Transportation, Budget of the United States Government, Fiscal Year 2001, at 224. Aging port facilities, shallow harbors unable to accommodate today's larger ships and a critical shortage of state-of-the-art, cargo-handling equipment slow the movement of cargo through U.S. ports. See BILIANA CICIN-SAIN & ROBERT W. KNECHT, *THE FUTURE OF U.S. OCEAN POLICY* 213-14 (2000).

¹⁰⁶ CICIN-SAIN & KNECHT, *supra* note 105, at 223-24.

¹⁰⁷ See *How about a Global Alliance of Maritime Regulators?*, AM. SHIPPER, Feb. 1, 2000, available at 2000 WL 18252533 [hereinafter *Global Alliance*]; Williams, *supra* note 1.

¹⁰⁸ See *Global Alliance*, *supra* note 107.

¹⁰⁹ *Id.*

¹¹⁰ See *id.*; McKay, *supra* note 3; Sansbury, *supra* note 8.

¹¹¹ Aviva Freudmann, *Maritime Talks Are Called for Once More*, J. COM., Oct. 13, 1999, at 1.

¹¹² Flynn, *supra* note 7.

regulatory environment” for trade,¹¹³ however, the European Community’s negotiations with China have moved forward faster than talks between China and the United States.¹¹⁴ China and the European Community are currently negotiating and may soon complete a new maritime services agreement,¹¹⁵ but talks between the United States and China have stalled.¹¹⁶ China and the United States concur on the need to find a diplomatic solution,¹¹⁷ but while both have agreed to abide by the provisions of the lapsed agreement until a new bilateral accord is reached,¹¹⁸ neither seems anxious to conclude a new agreement and changing conditions within the shipping services industry make a new comprehensive regulatory agreement between them increasingly more important.¹¹⁹ Officials of the United States Maritime Administration were hopeful China’s campaign to gain entrance into the WTO would spur the Chinese to accelerate the pace of negotiations.¹²⁰ China, however, postponed accession until it was satisfied that the terms of the final accord did not threaten critical industries.¹²¹ China is one of the largest sources of cargo for U.S. ports and carriers,¹²² and the dollar amount of trade

¹¹³ See *Global Alliance*, *supra* note 107.

¹¹⁴ See Georgette Lalis, *EC Looks to Warmer Industry Relations*, *The London Shipping Law Centre’s Cadwallader Annual Memorial Lecture*, LLOYD’S LIST INT’L, Sept. 18, 2000, available at 2000 WL 22742771; see also McKay, *supra* note 3; Sansbury, *supra* note 8; Flynn, *supra* note 7.

¹¹⁵ Lalis, *supra* note 114.

¹¹⁶ Sansbury, *supra* note 8; see also Flynn, *supra* note 7.

¹¹⁷ Sansbury, *supra* note 8; see also Flynn, *supra* note 7.

¹¹⁸ See Mathews, *supra* note 84; Extension, *supra* note 83.

¹¹⁹ See Sansbury, *supra* note 8; Bill Mongelluzzo, *Ports Predict 2000 Will See Growth Across Trade Lanes*, J. COM., Feb. 15, 2000, at 1; Mathews, *supra* note 84.

¹²⁰ See Flynn, *supra* note 7. American policy-makers believe WTO accession will spur the growth of democracy within China. Wolff, *supra* note 92, at 1021. Some argue only the promise of WTO membership induced China to make concessions. *Id.* at 1026.

¹²¹ See *Good WTO Terms*, *supra* note 62. China insisted on entering the WTO as a “developing nation,” which would allow it limited protection of key industries. *Id.*

¹²² Mongelluzzo, *Cargo Expected*, *supra* note 100, at 16. Approximately 9,000 U.S. companies are exporting goods and services to China, but the balance of trade is clearly in favor of China and other Asian countries. Southern California ports sent 1 million empty containers back to Asia in 1999. See Mongelluzzo, *Ports Predict*, *supra* note 119. The United States’ deficit with China reached \$7.6 billion dollars in July 2000.

between the two countries is significant.¹²³ Eventually, problems of restricted access, discriminatory allocation of services, and inadequate infrastructure will prompt China and the United States to resume talks and reach an agreement on the use of port facilities and services. Until then, however, regulatory conflicts and procedural inconsistencies will continue creating artificial barriers to trade.

B. *China's Performance of Conditions Imposed by Other International Accords*

Critics question not only China's commitment to resolving conflict of law issues but also whether it will adhere to and enforce international treaty provisions.¹²⁴ As mentioned, China has had problems with enforcement.¹²⁵ In the well-publicized Revpower case,¹²⁶ for example, the Shanghai Intermediate Court initially refused to recognize and enforce the decision of the Arbitration Institute of the Stockholm Chamber of Commerce.¹²⁷ Only the intervention of the Supreme People's Court and the adoption of new rules against setting aside foreign arbitral awards

Diane Yukihiro Chang, Editorial, *China Trade Pact*, HONOLULU STAR-BULL., Sept. 22, 2000, at A20.

¹²³ Estimates range from sixty-six billion to eighty-five billion U.S. dollars. See Mathews, *supra* note 84; Sansbury, *supra* note 8.

¹²⁴ See Zhang, *supra* note 38, at 468 n. 33. U.S. Trade Representative Charlene Barshefsky flew to China to warn China's premier Zhu Rongji that China must demonstrate "commercially meaningful implementation" of the recently negotiated, bilateral trade agreement so that President Clinton could, as is required by law, certify to Congress that China will join the WTO on the terms negotiated. Diane Yukihiro Chang, Editorial, *China Tries to Wriggle Out of Commitments*, HONOLULU STAR-BULL., Oct. 14, 2000, at B2. U.S. officials are worried China will selectively implement the terms of the agreement and slow the pace of reforms to protect vulnerable domestic industries.

¹²⁵ See *supra* notes 35-38 and accompanying text; *Courts Getting Tougher*, *supra* note 6.

¹²⁶ Revpower is a U.S. company that manufactures batteries. Because of a dispute with a Shanghai factory, it applied for arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce. Although the Institute awarded Revpower \$9 million dollars against the factory, it took six years for Revpower to get a Shanghai court to accept its application for enforcement. In the interim, the factory transferred all of its assets to other companies. See Zhang, *supra* note 38; Fredrick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in The People's Republic of China*, 15 BERK. J. INT'L L. 329, 341-42 (1997); Randall Peerenboom, *Enforcement of Arbitral Awards in China*, CHINA BUS. REV., Jan. 1, 2001, available at 2001 WL 13260942.

¹²⁷ Zhang, *supra* note 38.

saved an international incident.¹²⁸ Judicial acts setting aside or refusing to enforce agreements or recognize foreign arbitral awards are now subject to the heightened scrutiny of the SPC.¹²⁹ Arguably, the actions of the SPC should reassure foreign firms that China is working to improve enforcement.¹³⁰

Critics also question China's ability to implement the provisions of an international obligation like a maritime trade services agreement.¹³¹ China's capabilities may be questionable, and assistance programs may be necessary.¹³² The history of China's participation in international organizations, however, supports an inference that it will try to act appropriately.¹³³ Studies suggest that when China joins an international organization, it normally operates within the existing framework of the organization and satisfies its treaty obligations.¹³⁴

China is currently a member of the World Bank, the International Monetary Fund, and the World Intellectual Property Organization, and usually participates in member activities without seeking special treatment.¹³⁵ China is also a member of the Asia-Pacific Economic Cooperation (APEC) organization.¹³⁶ Its participation in APEC has been both "cooperative and constructive."¹³⁷ Moreover, since taking its seat as a permanent member of the U.N. Security Council in 1971, China has had differences of opinion with U.S. and European members, but it has not acted in a manner that could be characterized as politically irresponsible.¹³⁸ China will, of course, continue to pursue its own interests

¹²⁸ The case prompted a motion in the United States Congress against China's accession to the WTO. *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.*; see *Courts Getting Tougher*, *supra* note 6.

¹³¹ Wolff, *supra* note 92, at 1032.

¹³² *Id.*

¹³³ Abbott, *supra* note 79, at 35.

¹³⁴ Harris, *supra* note 70, at 149.

¹³⁵ Abbott, *supra* note 79, at 34.

¹³⁶ Harris, *supra* note 70, at 148.

¹³⁷ *Id.* APEC members have committed themselves to free market economies by the year 2020; for developed countries the deadline is 2010, for developing countries it is 2020. *Id.* at 142.

¹³⁸ Abbott, *supra* note 79, at 33.

in international affairs, as might any sovereign nation; however, it is also committed to the gradual development of a market-oriented economy.¹³⁹ Although the pace of Chinese implementation of maritime trade services agreement provisions may not meet with U.S. approval, indications are that the Chinese will honor a commitment.

C. *What China's WTO Accession Suggests for Future U.S.-China Negotiations*

Nations commonly create rights of access and non-discriminatory treatment for foreign merchant vessels through bilateral friendship treaties.¹⁴⁰ The failures of the established system of bilateral negotiated conventions, however, have prompted members of the international shipping community to speak out in favor of moving the regulatory oversight of maritime services away from national governments and into the hands of a multinational body like the WTO.¹⁴¹ Because port access and services are frequently mentioned as critically important problem areas affecting the entire international community, among the issues proposed for consideration during the WTO/GATS Millennium Round of negotiations were rules giving national flag carriers preferential access to crowded terminals, pilotage and ship services, and regulations preventing foreign flag carriers from providing their own cargo handling, warehousing, agency, and freight services.¹⁴²

Under the auspices of a WTO/GATS maritime services agreement, China would have to commit to creating regulations that protect and afford national treatment to other members, i.e., equal treatment for foreign services providers.¹⁴³ This is what the United States asked for in the suspended bilateral talks.¹⁴⁴ Article VI of GATS requires WTO members

¹³⁹ *Id.* at 35.

¹⁴⁰ See McDorman, *Port State Enforcement*, *supra* note 76, at 310. The relevant multilaterally treaty on port access is the 1923 Convention and Statute on the International Regime of Maritime Ports, *reprinted at* 58 L.N.T.S. 285. "As of 1993, thirty-seven countries were parties, [but] neither the United States nor China have joined." *Id.* See MO, *supra* note 5, at 16-18 (listing the various agreements and treaties that the PRC has signed).

¹⁴¹ *Fading Borders*, *supra* note 57.

¹⁴² Freudmann, *supra* note 111. Furthermore, there may be a movement to dispense with the NGMTS and return maritime services talks to the general GATS framework. See *id.*

¹⁴³ See Flynn, *supra* note 7.

¹⁴⁴ *Id.*

to provide national treatment “immediately and unconditionally to services and service suppliers” of member nations and in a “reasonable, objective and impartial manner.”¹⁴⁵ Equal treatment of maritime services providers should serve as the foundation for a new U.S.-China agreement.

Accession to the WTO differs from participation in other international organizations. For China, WTO membership entails commitments and obligations that may involve substantial political and short-term economic costs.¹⁴⁶ For example, China can expect to face external and internal ideological opposition.¹⁴⁷ Poor equipment, lack of technical expertise, budgetary constraints, and other economic factors may also limit China’s ability to perform according to the terms of a WTO agreement. Moreover, some sectors of the Chinese economy can be viewed as those of a developed country and some as that of a developing country.¹⁴⁸ Therefore, China demanded advantages offered a developing nation on some issues.¹⁴⁹ Problems may arise, however, if China insists a sector of its economy deserves developing country status and its trading partners disagree and want to apply standards appropriate for a developed country in that sector.¹⁵⁰ The terms of a port services agreement between the United States and China could establish areas where China would be treated as a developing country and others where it would have developed country status.¹⁵¹

Several prominent maritime trading nations have called for the resumption of WTO/GATS maritime talks.¹⁵² Because China and the United States together account for a significant percentage of world trade,¹⁵³ a comprehensive maritime services agreement between them

¹⁴⁵ Bacon, *supra* note 11, at 404.

¹⁴⁶ Harris, *supra* note 70, at 140-41.

¹⁴⁷ *Id.*

¹⁴⁸ See Sean Leonard, *When China Joins: The Power of WTO Dispute Resolution*, CHINA LAW & PRAC. (July-Aug. 2000), at 37. See Leonard for an interesting discussion of WTO dispute settlement procedures at 36-40.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 39.

¹⁵¹ See Leonard, *supra* note 148, at 39; see also Harris, *supra* note 70, at 140-41.

¹⁵² John Zarocostas, *U.S., Other WTO Members Support Proposal to Restart Maritime Services*, J. COM., Oct. 6, 2000, at WP. The United States agreed to participate. See *id.*

¹⁵³ See *Good WTO Terms*, *supra* note 62. Forecasters predict China could become the world’s third largest trading nation after it joins the WTO. See *id.*

could establish operating standards for the industry and provide a model for the next round of talks.

D. *Forging a New Relationship: Substantive Proposals for Cooperation*

Most international trade goods are carried aboard ships sailing to and from the ports of trading nations.¹⁵⁴ As the demand for larger, faster, and more efficient ships grows, coastal states will need to deepen channels and incorporate state-of-the-art technical systems to provide for vessel safety and cargo handling efficiency.¹⁵⁵ The United States may have to supply regulatory and financial assistance to its private sector to help U.S. ports stay competitive.¹⁵⁶ China anticipated and prepared for changes that could affect its maritime industry after joining the WTO.¹⁵⁷ Competitive pressure from other maritime services providers may encourage both the United States and China to resume talks on maritime issues, including access to and use of ports and port facilities.

Admittedly, bilateral treaties can cause problems.¹⁵⁸ For example, when a foreign-flagged vessel voluntarily enters a port, that vessel becomes subject to the laws and regulations of the host country.¹⁵⁹ Although host states rarely interfere with foreign-flagged vessels voluntarily in port,¹⁶⁰ they may exercise their authority and apply the provisions of a treaty to a visiting vessel even though the flag state of the visiting vessel is not a party to that treaty.¹⁶¹ Such actions may include restricting use of port facilities and services. Consequently, while a bilateral agreement may eliminate trade barriers between the parties to the agreement, it can create barriers for others.¹⁶² Although a multinational

¹⁵⁴ Williams, *supra* note 1.

¹⁵⁵ CICIN-SAIN & KNECHT, *supra* note 105, at 213-14.

¹⁵⁶ *Id.*

¹⁵⁷ See McKay, *supra* note 3.

¹⁵⁸ *Fading Borders*, *supra* note 57.

¹⁵⁹ McDorman, *Port State Control*, *supra* note 53, at 212. Except when an emergency threatens the safety of the vessel or when the vessel is government owned and operated and, therefore, entitled to diplomatic immunity. *Id.* at 210.

¹⁶⁰ *Id.* at 211.

¹⁶¹ *Id.* at 212.

¹⁶² See Baldemor, *supra* note 91, at 126-29; McDorman, *Port State Control*, *supra* note 53, at 212.

accord is needed to establish standards to eliminate or prevent the creation of barriers,¹⁶³ an agreement between the United States and China could set an example of appropriate standards and, with their extensive influence on the maritime services industry,¹⁶⁴ provide impetus for an international accord. China and the United States have their lapsed agreement as a starting point and the experience of recent WTO trade negotiations to help them avoid the pitfalls of prior bilateral accords.

Given the importance of maritime trade to their economies, both China and the United States should make the resumption of negotiations a priority. The U.S. waterborne cargo industry alone contributes seventy-eight billion dollars each year to the United States' Gross Domestic Product.¹⁶⁵ China's shipping industry is just as critically important to its economy. Nearly 90% of the goods China imports and exports arrive or leave through Chinese ports.¹⁶⁶ Moreover, approximately \$100 billion in bilateral trade passes between the U.S. and China annually.¹⁶⁷ Both nations have a strong financial interest in improving relations and reducing conflict. Because both economies would benefit from the increased trade that would follow, China and the United States should build upon the foundation of trust laid during their successful WTO trade negotiations and schedule talks on a maritime transport services agreement.¹⁶⁸

¹⁶³ Baldemor, *supra* note 91, at 126-29. An international trade organization like the WTO could provide an unbiased forum for conflict resolution. *See id.*

¹⁶⁴ *See Fading Borders, supra* note 57; Schmertz & Meier, *supra* note 51; *see generally* CICIN-SAIN & KNECHT, *supra* note 153, at 213; MO, *supra* note 5, at 2.

¹⁶⁵ CICIN-SAIN & KNECHT, *supra* note 105, at 213.

¹⁶⁶ MO, *supra* note 5, at 2.

¹⁶⁷ *See* Mathews, *supra* note 84; Sansbury, *supra* note 8.

¹⁶⁸ *See* Bacon, *supra* note 11, at 369. After more than thirteen years of negotiations, the United States and China signed a bilateral trade accord. *Id.* United States' participation as principal negotiator in the WTO accession process initially troubled some WTO members because of a U.S. tendency to link trade issues to political concerns. Similarly, frequent postponements by the Chinese made them appear reluctant to conclude a bilateral accord; domestic bureaucratic restraints and difficulties obtaining high-level attention to issues requiring action by someone with decision-making authority may have caused delays. *See* Stuart Harris, in CHINA RISING: NATIONALISM AND INTERDEPENDENCE 146 (David S. G. Goodman & Gerald Segal eds., 1997). Conservative members of the Chinese Communist Party may have delayed acceptance of trade concessions they interpreted as threatening party control. Obviously, the crackdown on dissidents at Tian An Mien in 1989 and the 1994 bombing of the Chinese embassy strained relations. *See also* Bacon, *supra* note 11, at 372-73 (quoting Stephen J. Yates, *Join the WTO, But Real Work Lies Ahead*, Heritage Found. Exec. Mem., available at <http://www.heritage.org/library/excmemo/em638.html> (Dec. 9, 1999)); Stephen H. Dunphy, *Yearly Fight on China Trade Is Now One-Time, Winner-Take-All Battle*,

Along with other maritime nations, China has called for the resumption of WTO negotiations on maritime transport services. Before the Seattle meeting of the WTO, the Organization for Economic Cooperation and Development (OECD) met with several non-OECD members including China.¹⁶⁹ The conference drafted a statement of maritime transport principles it hoped would influence WTO negotiators.¹⁷⁰ While the statement did not legally bind any of the participants, it did voice support for policies designed to safeguard the rights of foreign shipping services providers to non-discriminatory access and treatment while using a host state's ports and port facilities.¹⁷¹ China's participation demonstrates both its interest in maritime services negotiations and its belief that the WTO is a proper forum for an agreement.

Several members of the WTO have called for the resumption of talks and are hoping to include the issue of maritime services within the framework of current negotiations to harmonize shipping, port use, and service standards with GATS rules on most favored nation status.¹⁷² The

SEATTLE TIMES, Dec. 26, 1999, at 1. China could have entered the WTO without an agreement with the United States, but it needed permanent normal trade relations (PNTR) status to keep U.S. markets open and, as a consequence, offered significant concessions. Joe Papovich, Remarks at the Symposium held by the Federal Bar Association's Corporate and Association Counsel's Division on Government Corporate Dialogue, *in* 47 JUL FED. LAW. 35, 37 (2000). American business leaders urged acceptance. Since the United States markets were already open, they believed China's accession could disproportionately benefit the United States by opening Chinese markets to U.S. companies. Even though critics question China's ability or willingness to implement WTO regulations, Congress granted China PNTR status. Bacon, *supra* note 11, at 445.

A refusal would have forced U.S. companies to compete without the advantages enjoyed by companies in WTO countries that had extended PNTR status. Mongelluzzo, *Cargo Expected*, *supra* note 100, at 16. A rejection could have caused the reform-minded Chinese leadership to "lose face" with their peers. Conservative leaders, fearful of the effect concessions might have in opening China to foreign influence, would have pointed to the failure to reach an agreement as evidence of a U.S. policy to manipulate and weaken China, and the negotiated market access concessions would have disappeared.

¹⁶⁹ *Covenant on Maritime Transport Code*, BUS. LINE, Nov. 26, 1999, available at 1999 WL 28945566 [hereinafter *Covenant*]; see also Tony Gray, *OECD Boosts Maritime Liberalization Plans*, LLOYD'S LIST, Nov. 18, 1999, available at 1999 WL 29120632.

¹⁷⁰ *Covenant*, *supra* note 169; see also Gray, *supra* note 169. The riots in Seattle effectively ended any hopes of an agreement.

¹⁷¹ *Covenant*, *supra* note 169; see also Gray, *supra* note 169.

¹⁷² Zarocostas, *supra* note 152. Most favored nation status is the same as Permanent Normal Trade Relations.

United States has agreed to participate, but U.S. maritime industry executives and labor unions are urging the government not to make any GATS commitment.¹⁷³ The United States has resisted including maritime issues within GATS, because members of the U.S. Maritime Coalition feel their inclusion would undermine U.S. cabotage laws and restrict the power of the Federal Maritime Commission.¹⁷⁴ The Council of European and Japanese National Shipowners Associations has indicated, however, that their countries would agree to a request by the United States to retain its cabotage law.¹⁷⁵ Moreover, China and the United States already agree on the need for cabotage laws, the U.S. and Chinese positions on cabotage are essentially the same.¹⁷⁶ Article 4 of China's Maritime Code states that only ships flying the national flag of China may provide maritime transport and towage services between Chinese ports.¹⁷⁷ Consequently, the cabotage issue should not hinder U.S. participation in bilateral talks with China on port access and use of port facilities. Given that several WTO members have indicated a willingness to compromise on the issues that led to the suspension of previous talks, the next round may prove more successful. Therefore, China and the United States should reexamine their positions, resume talks, and draft an agreement that, while extending national treatment to each nation's carriers, still protects both countries' vital national interests.

IV. CONCLUSION

The world economy is so closely integrated that circumstances affecting one nation often affect several others. To prevent conflicts over port access and use of port facilities from disrupting the flow of trade, an

¹⁷³ *Id.*

¹⁷⁴ Freudmann, *supra* note 111. The United States walked away from the NGMTS talks in 1996 because of what it termed the poor quality of offers, but critics argue it was because the United States wanted to protect its right to retaliate unilaterally against nations it believed might harm U.S. interests. In particular, it has been suggested the United States wants to protect the Jones Act, which restricts U.S. coastal trading to U.S. owned, built and crewed vessels (cabotage). *Id.* Recently, the U.S. Maritime Administration stated that cabotage laws were critical to every nation's security. *Fading Borders*, *supra* note 57. The U.S. Maritime Coalition is comprised of shipowners, shipyard owners and seafarers' labor unions. See Freudmann, *supra* note 111; *Don't Dodge Talks*, J. COM., Jan. 18, 2000.

¹⁷⁵ *Fading Borders*, *supra* note 57.

¹⁷⁶ See *id.*

¹⁷⁷ *MCPRC*, *supra* note 5; see *MO*, *supra* note 5, at 430.

international maritime services agreement is needed. An agreement between the United States and China could lead the way.

Xiao Yang, President of the Supreme People's Court, recently emphasized the importance of providing an appropriate legal environment for foreign investors in light of China's entry into the WTO and the opening of its markets to foreign investment.¹⁷⁸ Recognizing the importance of maritime transport services to international trade and China's development, Yang promised that Chinese courts will pay special attention to maritime cases.¹⁷⁹ China has changed its maritime court system,¹⁸⁰ loosened the restrictions on foreign-owned, shipping industry branch offices,¹⁸¹ and proposed amendments to its Maritime Code.¹⁸² China has also taken a fresh look at port access and the use of facilities,¹⁸³ since shipping and port firms are expected to be among the biggest beneficiaries of China's entry into the WTO.¹⁸⁴ Chinese efforts to effect needed changes, improve shipping services procedures, and negotiate trade agreements reveal a new openness to constructive criticism and offer encouragement for a renewal of U.S.-China bilateral negotiations on port services.

The U.S. and Chinese economies are becoming increasingly interdependent.¹⁸⁵ Because of their mutual interests in trade¹⁸⁶ and since

¹⁷⁸ *Courts Getting Tougher*, *supra* note 6. The President of the Supreme People's Court is China's equivalent to the Chief Justice of the U.S. Supreme Court.

¹⁷⁹ *Id.*

¹⁸⁰ *Maritime Courts Shift*, *supra* note 10. See MO, *supra* note 5, Chapter Thirteen provides a detailed description of the structure of the Maritime Courts, resolution of maritime disputes, and the framework and procedures of the Chinese Maritime Arbitration Commission.

¹⁸¹ Clarke, *supra* note 6.

¹⁸² *Maritime Lawsuits*, *supra* note 4. The current Maritime Code went into effect in 1993. However, recent increases in admiralty actions have made new procedures for handling lawsuits necessary, particularly with the rise in the number of foreigners filing cases. See *id.* Prior to July 1, 2000, provisions of the CPC governed maritime litigation. See CPC, *supra* note 36. The CPC did not adequately address the needs of maritime law; however, consequently, a Maritime Procedure Law was enacted. See MPL, *supra* note 4; Claire Morgan, *New China Maritime Law to Impact on Shipping Litigation*, LLOYD'S LIST INT'L, June 28, 2000, at 6, available at 2000 WL 22739609; Kevin Li, *Beijing Move to Harmonise Ship Arrest Rules and Procedures*, LLOYD'S LIST INT'L, Mar. 1, 2000, at 6, available at 2000 WL 6439488.

¹⁸³ Flynn, *supra* note 7.

¹⁸⁴ McKay, *supra* note 3.

¹⁸⁵ See Mathews, *supra* note 84; Sansbury, *supra* note 8.

bilateral negotiations are generally more productive and manageable than multinational conferences, they should renew efforts to negotiate a maritime services accord. The United States and China are already working together to improve customs and freight forwarding procedures.¹⁸⁷ Because shipping and port service industries are such critically important components of both economies,¹⁸⁸ the United States and China need to make bilateral maritime services negotiations a priority. Successful negotiations could provide numerous opportunities for growth. Any agreement between the United States and China, however, would need to take into account the present economic status of both parties and provide for any difficulties that might arise from disparities between what is desired and what each participant is capable of achieving.¹⁸⁹

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¹⁸⁶ See Mathews, *supra* note 84; Sansbury, *supra* note 8.

¹⁸⁷ *Getting the Goods Through: The Shanghai Model Port Project and Chinese Customs Procedures*, in EAST ASIAN EXEC. REP., Mar./Apr. 1999, available at 21 No. 2 E. Asian Exec. Rep. 17. A group of private companies with ties to APEC formed a partnership with the Chinese government and the U.S. Customs Service to create the Shanghai Model Port Project which they hope will improve and streamline the customs process, eliminate troublesome delays, reduce costs, and promote greater precision in setting delivery schedules. Officials of the U.S. Customs Service will train and help Shanghai Customs officers develop a new automated goods and documents processing system that China plans to use as the model for an integrated national system. *See id.*

¹⁸⁸ See CICIN-SAIN & KNECHT, *supra* note 105, at 213; MO, *supra* note 5, at 2.

¹⁸⁹ The United States and China should not let the recent conflict in the South China Sea deflect them from maintaining and improving trade relations. *See* Steven Mufson & Thomas E. Ricks, *China Standoff Strengthens Hard-Liners in U.S.*, WASH. POST, reprinted in THE HONOLULU ADVERTISER, Apr. 12, 2001, at A12 (discussing the tragic collision in the South China Sea between a U.S. EP-3E surveillance aircraft and a Chinese fighter jet, the subsequent forced landing on the American plane on Hainan island, and the temporary Chinese refusal to return the U.S. aircrew). This unfortunate incident only serves to emphasize the lack of an open dialogue on issues concerning the two nations. Better communications procedures and a positive attitude toward resolving potential conflicts are needed to avoid further misunderstandings.

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