Will China Prevail over the Current WTO

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I. INTRODUCTION

Since its admission to the World Trade Organization ("WTO") in 2001, China has been in the process of complying with the commitments required by the accession agreement.¹ This paper addresses the following question: As China and other developing countries come to play a more prominent role in today's global economy, will Western industrialized countries adapt to this change or will they use the WTO to suppress China's ascension to power? This paper will explore three different factors for the existing tension in the WTO between China and developed democratic countries like the United States. The arguments are as follows: 1) China's legal system is founded upon very different principles and historical traditions than those of the United States; 2) the different legal systems have led to different interpretations of China's obligations under the WTO; and 3) developing countries are unfairly repressed by developed countries within the WTO.

The respective positions of the main players involved are highlighted

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¹ The Economist Intelligence Unit, Library of Congress, China Country Profile, 4-34 (2007) (China's entry into the World Trade Organization ("WTO") in 2001 was marked by further economic liberalization measures that China had committed to in the accession accords. WTO membership has sparked an increase in foreign investment, rising from US $38.4-billion in 2000 to US $79.1-billion in 2005, and thereby reversing the fall in foreign direct investment inflows occurring in the aftermath of the 1997-98 Asian market crisis.)
in the recent WTO dispute between China and Western developed countries over Chinese restrictions on foreign financial information service providers. This paper will use the WTO dispute as a case study illustrating how the three factors listed above have played into and given rise to the controversy.

II. CHINA'S LEGAL HISTORY

To appreciate China's position on implementation within the WTO, it is helpful to understand China's attitude on law and to appreciate its legal history. Although China's modern legal system began only thirty years ago, China's legal culture is among the world's most ancient. By 2000 B.C., a mature language had developed in Beijing and shortly thereafter, law. By 536 B.C., China had developed its first body of statutory law, the Xingding Code. From the Han Dynasty (206 BC to AD 220) to the early modern period, China was among the most technologically advanced countries in the world. The critical distinction between Western law and Chinese law is the concept of rule of law versus rule by law, respectively. Rule of law entails a situation where all members of a state are subject to the law regardless of status. Rule by law refers to a situation where the state uses law merely as a tool to justify its actions, where the highest rank of state leadership is exempt from the law. As shown below, China's legal culture has been and is still characterized by rule by law despite recent efforts to navigate towards a system of rule of law.

During China's 2,000-year-long imperial era, the legal system remained largely static. The emperor was above the law—he reserved the right to alter the law at any time by imperial decree. Today, while the National People's Congress ("NPC") is theoretically the supreme organ of the government under China's constitution, in reality the Chinese Communist Party ("CCP") is the one that sets the policy and possesses the ability to remove NPC statesmen. The capitalist revolution has borne limited democratic fruits due to the fact that economic reforms greatly outpace any political and legal reforms. The CCP appears to be resisting

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3. Id.
5. Milkwick, supra note 2, at 297 (italics added).
6. Id. (italics added).
7. China Country Profile, supra note 1, at 6-8.
8. See generally Leontine D. Chuang, Investing in China's Telecommunications Market: Reflections on the Rule of Law and Foreign Investment in China, 20 NW. J. INT'L L. & BUS. 509 (2000). This is especially true where the laws have little relevance to the economy.
change and is instead clinging onto the vestiges of what some call "democratic dictatorship."\textsuperscript{9} The late Deng Xiaoping aptly characterized the resistance to change by stating that "one must feel for rocks while crossing a river."\textsuperscript{10}

China has seen four major regime changes since the People's Republic of China ("PRC") was founded in 1949, each regime governed respectively by Mao Zedong, Deng Xiaoping, Jiang Zemin, and Hu Jintao. Mao Zedong’s rule can be likened to the rule of the emperors who reigned centuries before him. During Mao’s administration, there was an absence of statutes governing even the elementary crimes of murder, theft, and rape.\textsuperscript{11} Crimes were still tried under the general Statute on Punishment for Counterrevolutionary Activity, created in 1951.\textsuperscript{12} Furthermore, as it often happened, CCP policy would control when statutory authority was found lacking.\textsuperscript{13} What Mao did accomplish was to end a long tradition of feudalism, China’s opium addiction, and diplomatic embarrassment at the hands of “Western imperialists.”\textsuperscript{14} Thus, while Mao certainly rid China of some of its most burdensome evils, he failed to establish consistent adherence to constitutional law, above and beyond CCP policy.

With the second regime, Deng Xiaoping ushered in a new era with the 1982 Constitution, which eliminated some of the Maoist ideology so prevalent in the 1978 Constitution. Although the CCP still held sole oversight power, it appeared to begin following a trend where it was relinquishing power to the state’s other legislative organs in more significant and meaningful ways, with more authority being delegated them.\textsuperscript{15} The 1980s were a time of stimulating change as legal education was starting to flourish and the economy was developing at an unprecedented rate.\textsuperscript{16} A corpus of civil law containing a small chapter regarding the “application of laws to civil matters involving foreign elements” was formed.\textsuperscript{17} Thus, Deng concluded a thirty-year hiatus on international trade and bestowed greater authority and legitimacy to state organs other than the CCP.

The third regime was led by Jiang Zemin, beginning in 1993. Following the Tiananmen Square event under Deng, Jiang launched a new

\begin{itemize}
\item \textsuperscript{9} Milkwick, supra note 2, at 290.
\item \textsuperscript{10} \textit{Id.} at 291.
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} \textit{Id.} at 79.
\item \textsuperscript{14} Milkwick, supra note 2, at 291.
\item \textsuperscript{15} \textit{Id.} at 295.
\item \textsuperscript{17} \textit{Id.} at 450-51.
\end{itemize}
concept involving a “rule of law” regime where he stated the “the Party should never replace the government and override law.” Although public administration had become more regular and more Chinese were made aware of what the law was, the repression of the Falungong was a counterpoint to the regime’s legal evolution. Having been compared to the Tiananmen massacre, the Falungong repression has been said to show China’s adamant intent to maintain the status quo in terms of political power.

Lastly, Hu Jintao is the present CCP Secretary General of the fourth regime, coming into power in 2003. Thus far, Hu’s leadership is most notable for bringing about China’s accession into the WTO. Such accession has produced a profound impact on the country’s legal reform. For example, WTO admission provided a strong incentive for the government to enact state-owned enterprise reform in the quest to prepare China’s industry for the further liberalization measures as promised in its WTO commitments. While China’s admission into the WTO is indeed a great leap forward in its legal evolution there are still practical and difficult implementation issues for a country steeped in the tradition of centuries of powerful unitary rule by law.

As shown China’s modern legal system has different roots from the Western legal system which make a transition to rule of law more difficult and complex. China’s long historical experience involving rule by law will inevitably affect its understanding and application of a modern legal system governed by rule of law. In contrast, the U.S. Constitution was adopted in the early years of the country’s establishment and U.S. law was initially largely derived from English common law. The crafting of English common law began as early as the twelfth and thirteenth centuries. Much of Germany and France’s civil law was established during the eighteenth and nineteenth centuries.

China has stated that while it will look to the legal systems of the West for guidance, it will develop a Chinese socialist legal system with Chinese characteristics. Some scholars have argued that the word “law”

19. Falungong is a religious movement with millions of followers that experienced its height of popularity in China in the latter part of the 1990s. When thousands of Falungong members gathered around a government building to protest the government’s criticism of their religion, the government arrested and allegedly tortured many of the organization’s leaders. RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 91-93 (2002).
20. Milkwick, supra note 2, at 299-300 (“[l]ts economy would approach capitalism, but politically, it would remain communist.”).
23. Id. at 124.
24. State Council Information Office, China’s Efforts and Achievements in Promoting the Rule of
in Western languages in fact has four different interpretations in Chinese.\textsuperscript{25} They include \textit{li} ("order"), \textit{li} ("rules of propriety"), \textit{fa} ("human made laws").

\textit{and zhi} ("control").\textsuperscript{26} All of these definitions can be seen in how China has been advancing its legal system and implementing its international obligations. Western definitions of law are more singular and less encompassing.

Thus, the U.S. and other Western European countries have had centuries of practicing and solidifying a culture and legal system of rule of law. As one scholar as cautioned, in order to develop a balanced and reasonable understanding of China’s legal system we must recognize that there is no single path to development and there is no "one-size fits all" approach to rule of law.\textsuperscript{27}

III. DIFFERENT LEGAL SYSTEMS LEAD TO DIFFERENT INTERPRETATIONS

Due to the different foundations and ideas supporting China’s legal system, it is inevitable that it should engender dissimilar interpretations about what certain legal obligations mean.

An example of differing interpretations is that regarding what the legal limits of censorship are under the WTO. For the most part, the question has been avoided due to a mutual sense among major trading nations that censorship is not to be equated with a trade barrier under the General Agreement on Trade in Services ("GATS") and that it falls outside the scope of the WTO’s concerns.\textsuperscript{28} Despite this tacitly understood sense, there lacks strong textual support for a blanket claim that WTO scrutiny does not apply to censorship.\textsuperscript{29} This lack of textual support is particularly potent when a country uses censorship to create trade discrimination limiting market access.

The GATS focuses on anti-discrimination and market access rules. With respect to discrimination, GATS focuses on (1) discrimination between exporting countries, and (2) discrimination between local and imported products. In terms of market access, GATS creates a framework for market access commitments allowing service providers access to the domestic market. Thus, GATS allows countries to individually agree on


26. \textit{Id}.


29. \textit{Id}.
different degrees of market access obligations in an ongoing, sector-by-sector basis. This means that the actual commitments to liberalize trade in services are a complex, country and sector specific pattern.

GATS also contains a set of exceptions describing what countries may or may not do notwithstanding the GATS rules. The selected exceptions that follow are the apparent authority for the as yet untested theory that censorship is not to be considered a trade barrier under GATS. The two most relevant ‘general exceptions’ for trade in information services for the purposes of this paper include the following: exceptions of measures that are “(1) necessary to protect public morals or to maintain public order; or (2) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement.”

To reduce abuses of the use of the GATS exceptions, it has a ‘chapeau’ that limits the use of exceptions to circumstances where the laws at issue “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . , or a disguised restriction on trade in services.” There are also limits on the public order exception as suggested in footnote five of GATS which states, “[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” Therefore, as appealing as the exceptions may seem, they also do not provide a carte blanche to engage in any activity and invoke the protection of the exceptions. Nonetheless, the word “necessary” has been construed by Korean Beef and other cases, to convey a less-restrictive-means test, involving the question “whether a less WTO-inconsistent measure is reasonably available” to maintain public order or to protect public morals.

An example of a point of tension between the U.S. and China that has been exacerbated by China’s entry into the WTO is the two countries’ differing definitions of appropriate censorship. China has passed a number of measures limiting the Chinese public’s access to foreign news. Xinhua News Agency is China’s official news agency as well as its largest news provider. Xinhua is also a major organ of the CCP central committee and one of China’s chief vehicles for propaganda. The Agency has long acted

30. Id. at 271.
31. Id. at 274.
33. Id.
34. Id.
35. Id. at 1178 n.12.
37. Tony Walker, China Threatens Flow of Business Information, FINANCIAL TIMES, Jan. 18,
as the sole intermediary between foreign news agencies and the Chinese media regarding the distribution of both news and economic information to ensure that sensitive content is censored prior to reaching the general audience.38

An illustrative example of Xinhua’s integral role in the Chinese government is the headline in a 1993 news article entitled, “How Xinhua is Pulling [Hong Kong] to China: The News Agency is Midwife of the Colony’s Return to the Motherland.”39 The article observes how in Hong Kong, Xinhua was the face of the Chinese central government, noting how the regime rarely does anything unintentionally.40 Moreover, when China was still a diplomatic pariah, it was Xinhua’s foreign affairs department that met with diplomatic representatives of countries with which China had no formal ties.41 Xinhua exercised a monopoly over the distribution of Western news agency material until the 1980s.42 The agency’s senior officials are drawn from the upper echelons of the CCP.43

However, this domination of the news market was weakened by technological advances such as satellite communications and a surge in demand for business information. In 1996, Xinhua had tried to implement controls and hefty fees on foreign news agency sales to various Chinese financial institutions but ultimately abandoned efforts after strong protests from U.S. and European Union (“E.U.”) trade negotiators. It is easy to see how the broad concerns of Chinese law which include social order, stability and propriety is a uniquely sovereign concern that at the very least is justified under the GATS exceptions.

From the viewpoint of China, protecting the public morals and the developing domestic information industries from excessive foreign competition may be deemed “fundamental interests of society” warranting censorship. From the viewpoint of the U.S. and E.U. however, such protection is seen as unnecessary, overly broad and in violation of GATS agreements to liberalize the market. What is important to recognize is that there may be legitimate differences in values and opinions at stake and reasonable people may reach very different conclusions over certain issues. Such difference in values will not evaporate simply because the two parties

40. Id.
41. Id.
43. Holberton, supra note 39.
are now part of the same international organization.

IV. THE CURRENT WTO STRUCTURE IS UNFAIR

In addition to some scholars questioning the benefits of adopting a Western and especially an American legal system at the expense of China's traditional system, there is the argument that the WTO is unfairly structured to favor the Western developed countries. The WTO is a rule-based system where members subscribe to common rules regarding international trade. Some critics complain that such rules are a type of world government that limits national sovereignty. Developing countries complain that the system is based more on power than on rules—that the powerful nations make the rules at the WTO (just as they do at the IMF and World Bank, the two other institutions of global economic governance).

They further argue that because of their market power, the dominant developed nations are able to act unilaterally to avoid the rules to promote their own interests and protect their own markets. In other words, rather than helping to balance the playing field for the less powerful, the rule-based WTO functions to maintain privilege and power. Developing country advocates have argued that international economic regimes reinforce unequal allocations of wealth both within national economies and among nations. Additionally, scholars have noted the failure of the free trade movement to maximize the welfare of societies in general.

The foremost complaint in this arena is that the organization attempts to treat all members alike without recognizing the handicaps of these different groups of countries. Specifically, there are aspects of the WTO agreements that are disadvantageous to the developing countries. These include the issue of intellectual property rights as well as the exclusion of

46. Id.
47. Id.
48. Id.
developing States from some developed nations’ markets through the use of non-tariff measures. These disadvantaged nations are then required to open up markets to imports from developed industrialized nations and provide intellectual property protection for technology originating in the industrialized States.

Another common criticism is the lack of transparency—that only insiders make and judge the rules.\(^{52}\) It most often refers to the lack of openness in the process of rule making and dispute settlement in the WTO. Such complaints are routinely coupled with criticism that the WTO is not participatory. This lack of transparency will only serve to make all members but the most powerful uneasy.

Consequently, it should not be a surprise that the WTO has become an organization that the developing country members have grown to distrust. A primary reason is the suspicion of the agenda of the developed nations who are the initiators of the concept of globalization.\(^{53}\) The distrust is exacerbated by the fact that developing states end up simply producing primary goods for export to the developed nations, which are resold to them at high cost after some value has been added in the developed States.\(^{54}\) The developing country’s government is then required to institute a liberal deregulated economy without protection of the productive or service sectors of the economy. This is all supposedly targeted towards creating an open and competitive economy. Deregulation may only mean that the market or economy of the developing State is taken over by imports to the detriment of the local producer or service provider. Hence, the tension between China as a developing country and the Western developed countries within the WTO should be apparent, especially as China seeks to become one of the main WTO power players.

V. CASE STUDY: 2008 WTO DISPUTE THAT CHINA IS ILLEGA LY Restricting Foreign Financial Information Service Providers in China

We now look at how China’s admission into the WTO has intersected with the tension inherent in China’s goals of continued economic and legal advancement while remaining a relatively controlled Communist State. In March 2008, after months of failed negotiating, The U.S. and E.U. filed a complaint with the WTO against China regarding Chinese restrictions on foreign financial information service providers, allegedly in violation of its

\(^{52}\) Barry, supra note 45.
\(^{53}\) O.A. Odiase-Alegimenlen, supra note 51.
\(^{54}\) Id.
WTO accession commitments.  

A. BACKGROUND TO THE WTO DISPUTE

As part of its WTO accession agreements, China committed to the substantial opening of a broad range of service sectors via the elimination of many existing market access restrictions in sectors such as banking, insurance, telecommunications, and professional services. While China did adhere to openings required by its WTO accession agreement, it would often erect terms of entry that were so high or cumbersome so as to prevent or dishearten foreign suppliers from gaining market access. Additionally, according to the American Chamber of Commerce’s 2006 White Paper, China’s current regulations prohibit foreign individuals and companies from providing investment advice onshore. The members of the American Chamber of Commerce believe that allowing international players to conduct advisory services onshore can only be beneficial to the local investment environment’s growth and development.

While it is easy to assume a critical approach to China’s varying degrees of compliance in certain sectors, one should remember the lingering historical challenges as well as the difficulty of adapting a Communist country accustomed to exercising a heavy regulatory hand to rapid economic growth. China has experienced a roughly 9 percent economic growth per year since the country’s move away from central planning in 1978. This growth has not been without its own growing pains. China experienced how volatile that expansion could be in various boom-bust cycles between 1978 and 2000 and officials have been wary against guarding against such further damaging episodes. It comes as no great surprise that the leaders of China have experienced some struggles with balancing the domestic interests of maintaining stable economic liberalization and international obligations to remove market access restrictions.

57. Office of the U.S. Trade Representative, supra note 56, at 129.
59. Id. (“AmCham members believe that allowing international players to conduct advisory services onshore will help educate local investors, upgrade the industry’s research capabilities, and discipline listed companies, while gradually raising overall market confidence.”).
60. China Country Profile, supra note 1, at 43.
61. Id.
The U.S. and the E.U. formally initiated WTO dispute settlement proceedings against China on March 3, 2008, for what Washington and Brussels claim are China’s “illegal restrictions on foreign financial information service providers.”\(^{62}\) The U.S. and the E.U. submitted separate requests for WTO consultations with China.\(^{63}\) The WTO has an agency called the Dispute Settlement Body (“DSB”). If consultations and conciliation or mediation fail to resolve problems between members after sixty days, a complaining party can ask the DSB to establish a panel comprised of qualifying experts who are not citizens of the countries to the dispute.\(^{64}\) After hearing the arguments, the panel then issues a report of its findings and it recommends that the member “withdraw the offending measure” if it finds a violation.\(^{65}\) The finding is adopted sixty days after the report has been circulated to the members unless the DSB decides by consensus not to adopt the report.\(^{66}\) On the other hand, a disputing party may choose to resort to the standing Appellate Body established by the DSB comprised of a three-person group selected from the seven-member Appellate Body of the WTO.\(^{67}\) The Appellate Body’s finding will be adopted by the DSB and “unconditionally accepted by the parties to the dispute” unless it is decided otherwise by the DSB by consensus.\(^{68}\)

1. China’s Contested 2006 Administration Measure issued by Xinhua News Agency

What is at issue is the September 2006 administrative measure entitled, “Measures for Administering the Release of News and Information in China by Foreign News Agencies” (hereinafter “2006 Measure”), issued by China’s state-owned Xinhua News Agency prohibiting foreign financial information services such as Bloomberg, Dow Jones Newswires, and Reuters from establishing a commercial presence in China and hindered their ability to sell their services directly to Chinese domestic clients.\(^{69}\)

The 2006 Measure regulates the “release of news and information in China by foreign news agencies and the subscription of such news and

\(^{63}\) Id.
\(^{64}\) DETLEV F. VAGTS, WILLIAM DODGE & HAROLD HONGJU KOH, TRANSNATIONAL BUSINESS PROBLEMS 136 (4th ed. 2008).
\(^{65}\) Id.
\(^{66}\) Id.
\(^{67}\) Id. (explaining that the seven-member Appellate Body within the WTO serve four-year terms subject to a one-time reappointment).
\(^{68}\) Id.
\(^{69}\) Pruzin & McLaughlin, supra note 62.
information by users in China and to promote the dissemination of news and information in a sound and orderly manner."\(^\text{70}\) Its application to the release of all "news and information," spreads a wide net. Further, the broad scope of materials falling within the ambit of the general category of "information" is neither defined nor limited in the 2006 Measure. The absence of a clear definition or any attempt at a definition was likely intentional so as to leave within the regulatory authority of the state-owned Xinhua all "information" transmitted by foreign news agencies. Whatever other purposes might arguably be veiled behind the stated purpose, the "sound and orderly" ideal finds strong roots in China, especially since the CCP takeover. To support this, Qin Gang, a foreign ministry spokesman, said that the new rules were intended to promote "healthy and orderly" dissemination of news, while "protecting the lawful rights and interests of foreign news agencies and their domestic clients."\(^\text{71}\) He added, “This is an internal affair of China.”\(^\text{72}\)

Foreign news agencies are defined as including “other foreign entities of the nature of a news agency that release news and information products.”\(^\text{73}\) This conveniently places foreign financial information service providers under the umbrella of a Xinhua regulation. Such foreign news services are to operate subject to the approval of Xinhua News Agency and through an agent designated by Xinhua.\(^\text{74}\) As of the end of February 2008, the only agent designated by Xinhua was a Xinhua affiliate.\(^\text{75}\) Moreover, Xinhua recently initiated its own financial information service in direct competition with foreign suppliers, “Xinhua ‘08.”\(^\text{76}\) The 2006 Measure also prohibits foreign news agencies from “directly solicit[ing] subscription” of their news and information services in China.\(^\text{77}\) This was a tightening of the requirements since prior to the 2006 Measure, foreign agencies were permitted to distribute news and data directly to government approved clients such as banks and large companies.\(^\text{78}\)

A list of ten categories delineate what material may not be included in


\(^{72}\) Id.


\(^{74}\) Id.


\(^{76}\) Puzin & McLaughlin, supra note 62.

\(^{77}\) Measures for Administering the Release of News and Information in China by Foreign New Agencies, supra note 73.

\(^{78}\) Dickie, supra note 71.
news and information released by foreign news agencies in China. Examples of such prohibited content include information that "endanger China's national security, reputation, and interests" or "spread false information, disrupt China's economic and social order, or undermine China's social stability." These exceptions tend to support China's argument that it is simply trying to continue to encourage economic growth and investment in the country, only in a more structured and controlled manner involving State oversight.

Penalties are imposed upon violating foreign entities. Based on the merits of each case, Xinhua is given the authority to issue a variety of sanctions ranging from giving warnings to suspending or canceling its qualifications as a foreign news agency for releasing news and information in China. Essentially, the violations comport with the two main requirements mandating Xinhua approval and banning direct solicitation in China.

2. Xinhua's Role

To date, Xinhua has only approved one company to act on its behalf with respect to approving the news provided by foreign financial service providers. That company is called the China Economic Information Service ("CEIS"), a subsidiary of Xinhua News Agency itself. The 2006 Measures issued by Xinhua required Reuters Group PLC, Bloomberg LP, Dow Jones & Co., and other foreign financial information service companies to sell their products through the CEIS. This step essentially negated a painstakingly negotiated deal from a decade earlier between Chinese and U.S. officials that had only required that foreign financial information service providers register themselves and their clients with

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79. Measures for Administering the Release of News and Information in China by Foreign News Agencies, supra note 72. Information may not contain any of the following that serves to: "(1) violate the basic principles enshrined in the Constitution of the People's Republic of China; (2) undermine China's national unity and sovereignty . . . ; (3) endanger China's national security, reputation, and interests; (4) violate China's religious policies . . . ; (5) incite hatred and discrimination among ethnic groups, undermine their unity, infringe upon their customs and habits or hurt their feelings; (6) spread false information, disrupt China's economic and social order, or undermine China's social stability; (7) propagate obscenity and violence, or abet crimes; (8) humiliate or slander another person . . . ; (9) undermine social ethics or the fine cultural traditions of the Chinese nation; and (10) include other banned content by Chinese laws."

80. Id. The types of violations are listed as follows: "(1) Releasing news and information beyond the scope of business as approved in the approval document; (2) directly soliciting subscription of news and information services, or doing so in disguised form; and (3) distributing news and information which contains material specified in Article 11 of these Measures."


82. Id.
Xinhua. Xinhua News Agency created “Xinhua 08” eight months after the 2006 Measures were announced. “Xinhua 08” is supposed to be a real-time financial data service claimed to supply data for more than 20 major exchanges in China as well as overseas.\(^8\) Basically, this means that Xinhua News Agency is both an industry player and an industry regulator. This dual role ostensibly creates a regulatory conflict of interest in Western perceptions, but for China it is only a natural outgrowth of a more heavily regulated, socialist legal system.

The government in China has insisted that it merely wants a “level playing field” in the information market arena, and it disclaims any intention to restrict the flow of financial information or to discriminate against foreign companies.\(^8\) Xinhua’s president, Tian Congming, is said to have placed a priority on the agency’s effort to make its economic information products able to compete internationally and eventually to even replace the services of Reuters in the domestic market.\(^8\)

However, thus far Xinhua has not taken action against any of the international agencies’ financial news arms, despite the fact that they have refused to abide by the new 2006 Measures and are not operating with valid business licenses.\(^8\) The lack of enforcement action may perhaps be construed as a possible indication of China’s hesitancy or rethinking of its 2006 Measure or China may simply be giving the U.S. and E.U. some time to reflect on the fact that it is dealing with a government based on historically different foundations. At the least, it gives some hope of sort of conciliatory settlement amongst the main players in the dispute.

B. THE U.S. AND THE E.U. ARGUE CHINA IS NOT LIVING UP TO ITS WTO PROMISE

Washington argues that China made a commitment in its 2001 WTO accession agreement to remove market access limitations relating to “provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services” upon its entrance into the WTO.\(^8\) European Trade Commissioner, Peter Mandelson, said in a statement on March 3, 2008, that “[c]ompetitive and open financial services information markets are the lifeblood of a strong financial sector, but China’s rules have tipped the balance against foreign companies.”\(^8\) Mandelson’s concern appears to be not only for the

\(^{83}\) Id.
\(^{84}\) Id.
\(^{86}\) Id.
\(^{87}\) Pruzin, supra note 55.
\(^{88}\) Pruzin & McLaughlin, supra note 62.
continued growth and competitiveness of China's financial sector but also for more fair treatment of foreign financial companies in order to ensure their continued viability in China's domestic financial sector.

On March 3, 2008, U.S. Trade Representative Susan Schwab declared that "[i]t is not in China's interest to restrict access to the high-quality, comprehensive financial information provided by foreign service suppliers. Financial market professionals in domestic and foreign banks, investment firms, and other businesses in China need real-time access to this information from diverse sources—foreign and domestic—in order to make effective business decisions." The new 2006 rules effectively gave Xinhua a chokehold on the multi-million dollar business of providing financial information to China's financial institutions (i.e., banks, brokerages). As seen here, much of the persuasive argument from U.S. officials stems from the idea that it is in China's own best interest to comply with its WTO commitments.

The U.S. and the E.U. further argue that these restrictions violate China's commitments under the WTO's General Agreement on Trade in Services (GATS). Here, the argument is that China violates GATS by discriminating between local and imported [financial information] services by not complying with its market access obligations, thereby resulting in foreign providers operating at a competitive disadvantage.

When the 1996 Measures curbing market access to foreign financial information service providers was initially passed, it was argued by the West that commercial, not political, motives were most influential in the decision. The argument stated as its foundation that by acquiring the right to "supervise" foreign agencies' operations, Xinhua was able to insist on a share of their local revenues. However, when the 2006 Measures were passed, a Xinhua employee declared that if the Xinhua designated regulatory affiliate, CEIS, makes any profit it will only be passed directly onto the central government and Xinhua itself will not receive any of the profits. Even assuming this to be true, Xinhua is a state-owned news agency and as such Xinhua still benefits even if it does not directly receive the profits garnered from supervising foreign economic agencies.

C. CHINA REPLIES IT IS PROVIDING FOR SOUND AND ORDERLY NEWS DISSEMINATION

The Chinese government has justified the 2006 Measures as necessary

89. Id. at 329.
90. Id.
92. Dickie, supra note 38.
to standardize the distribution of information by foreign news agencies and to counter "a near monopoly" over financial information by developed countries. The September 10, 2006, People's Daily said that the Measures are meant to "promote the dissemination of news and information in a sound and orderly manner." Premier Wen Jiabao has defended the 2006 Measures restrictions, calling the negative response to the rules simply a "misunderstanding" and in turn, affirming that "China will strive to ensure that the flow of financial and economic information will not meet any obstruction." Given the existing criticism by developing countries that the WTO lacks transparency and is favorable to developed countries, it is not difficult to understand why China would argue that its efforts to counter a near monopoly of its foreign financial information is reasonable.

In an attempt to bring some levity to the situation, Mr. Yuan Xiaoping, a senior official of Xinhua, dismisses the accusation that Xinhua's combined role as rival and regulator might jeopardize the flow of financial information by saying, "I wouldn't have to wait for foreign agencies to complain. Our domestic financial enterprises would criticize us to death. They'd bash our heads in with hammers." The different responses illustrate some of the different cultural influences embedded in the dispute. For China, at least partially, the issue stems from the view that as a country it should be able to dictate to some extent what content it will permit to reach the general population.

A Chinese foreign ministry spokesman, Mr. Qin Gang, replied in 2006 to Western criticism of the 2006 Measures by saying, "There is no such thing as absolute freedom in any country. Rights and freedom are always exercised within a legal framework." The irony of this statement in response to American disapproval must be apparent. Nonetheless, what China is arguing with respect to rights being exercised within a legal framework is not necessarily in direct contradiction to what the US and E.U. are stating, which is that China abide by the international legal framework provided for in the WTO via its accession agreements. China is thus delegated the arduous task of finding a solution that enables it to exercise its sovereign power and authority to govern and protect China in the face of rapid economic development within the larger international laws created by powerful Western countries.

93. New Measures Increase Xinhua Control Over Foreign News Sources, supra note 69.
95. New Measures Increase Xinhua Control Over Foreign News Sources, supra note 69.
97. Dickie, supra note 38.
1. China Argues That What Is Truly At Dispute Is The Definition of a "News Agency"

China declares that despite their claims to be financial information providers or financial service companies, China believes the outlets in question are in reality news agency services and that China has made no WTO accession commitment on opening up its market to news agency services in general. While this latter argument is true, it may be a difficult position to maintain if foreign financial information service providers like Bloomberg are truly conveying nothing more than purely financial, investment related information. Moreover, China specifically agreed in its WTO accession agreements to liberalize market access for the "provision and transfer of financial information, and financial data processing and related software by supplier of other financial services." Interestingly though, foreign companies have complained that Xinhua has been using its regulatory authority to increase control over content distribution and expanding the definition of "wire service" to establish a monopoly on the dissemination of financial and sports news. This raises a few issues, not least of which is the concern the U.S. and E.U. have regarding the incompatible dual role of Xinhua as both regulator of and industry player in financial information services. While the Chinese government may simply be trying to maintain its control over increased access to foreign information and public opinion, the fact remains that China will not be able to feasibly retain the same level of control over importation of information as it may have been able to prior to becoming a major global participant.

The director the Central Propaganda Department has supposedly appealed to CCP’s propagandists to thwart the "Western enemy forces ... from using their economic and technical superiority [from] carry[ing] out ideological infiltration and cultural expansion" in order to Westernize and divide China. Such strong statements by an active arm of the Chinese government is strong indication of the continued, longstanding mistrust of Western motives, recognizing the large but now somewhat narrower gap in ideology and culture particularly noticeable in the economic arena. Formally, China has argued that the 2006 Measures requiring operation through a designated agent is meant to facilitate access by helping foreign

98. Pruzin & McLaughlin, supra note 62.
100. New Measures Increase Xinhua Control Over Foreign News Sources, supra note 69.
101. Id. (banning the general distribution of foreign newspapers, news magazines, and television programs by the government).
102. Id.
news providers comply with Chinese laws and regulations.\textsuperscript{103}

Here again we see the shift in focus to how China's laws may be more readily complied with, rather than what the U.S. and E.U. are arguing, which is the compatibility of certain Chinese laws with the larger stage of international law. The continued mistrust of Western motives is perhaps a sentiment shared by most developing countries when considering the stringent rules-based WTO created by Western powers to serve their needs.

The U.S. mission in Geneva has rejected China's reasoning that the financial information suppliers fall under the category of general news agencies. The mission has stated, "[s]uppliers of financial information services provide a specialized service to these clients incorporating the news, data, analysis, and commentary that they require to make fast and effective business and investment decisions. This is not like general broadcast or general news services to the public at large."\textsuperscript{104} It is arguable that this statement by the U.S. mission in Geneva supports its position that suppliers of financial information are distinct from general news providers and China's argument that the financial information services are in fact news agencies.

From China's perspective, it can be argued that suppliers of financial information are merely a special and particularized subset within the broader category of general news services. That by virtue of its narrow focus and purpose, it more nearly qualifies as a financial service provider (i.e., a bank or insurance company) than as a news agency. Alternatively, China may argue that by the very definition given by the U.S., suppliers of financial information admit to incorporating news into its services. It would not be untenable for China to reason that in an area so intricately connected with the general news and where a fair portion of the information related concerns events that would be broadcasted by general news agencies, such financial information suppliers fall closer on the spectrum to a news agency. However one argues China's position and rationale, it will be no easy feat to successfully circumvent China's accession agreement to broaden market access for foreign financial services since they were accorded their own separate category apart from "news agencies." What is really at issue is whether the U.S. and E.U. will judge China by its overall WTO compliance or this specific dispute involving news censorship that China feels requires some protection from foreign competition.

\begin{footnotes}
\item[103] Pruizin & McLaughlin, \textit{supra} note 62.
\item[104] \textit{Id.}
\end{footnotes}
2. WTO Accession—Censorship Issue

Perhaps the most disconcerting and solid issue upon which the U.S. and E.U. may stand upon is that, in its accession agreement, China committed that, for the services included in its Services Schedule, the "relevant regulatory authorities would be separate from, and not accountable to, any service suppliers they regulated, with two specified exceptions." Of the services included in the Services Schedule, and not listed as an exception, is the "provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services." As noted earlier, the state-owned Xinhua News Agency, is not only a major market competitor of the foreign financial information service providers in China, it is also the regulator of such foreign providers. As early as 2005, U.S. and other foreign financial information service providers protested the conflict posed by the overlap and sought the establishment of an independent regulator.

Now, WTO panels and Appellate Bodies face the unappealing task of trying to decide when a given part of China’s system of information control represents a measure that combats the type of threat stated immediately above. This question is especially difficult if the censored content is potentially more of a threat to the CCP or to a favored local company as is the case here. Here we see how Eastern and Western tensions come to a head when a Western dominated international organization is called to judge upon the necessity of another country’s protectionist measures according to its Western values and legal interpretations.

From China’s viewpoint, the 2006 Measures merely involve the continuation of a system of government oversight and not as erecting a trade barrier in violation of either its 2001 WTO accession agreements or its GATS obligations. For China, the protection of its people via ensuring social stability and order and maintaining national security by filtering the voluminous amount of information entering the country suffice as a “fundamental societal interest.” Furthermore, it may be that in the areas where China has agreed to liberalize, China has plans for a more gradual overall liberalization. However, the last point may be difficult for China to argue considering that the 2006 Measures are in fact slightly stricter than the 1996 Measures that were in place at the time of China’s 2001 accession to the WTO. Still, if China could successfully argue that a GATS

106. Id. at 133.
107. Id. at 133.
exception applies, it may affect how the WTO panel construes the 2006 Measures in light of China's accession commitment to liberalize the market."^109

VI. IMPLICATIONS FOR FUTURE U.S. AND CHINA BUSINESS RELATIONS

As of early March 2008, the 2006 Measures were already creating business uncertainty as well as concerns about future commercial development for U.S. companies in China.\textsuperscript{110} Unlike a typical participant within a domestic system, China possesses more power to either ignore or to terminate its GATS commitments as it sees fit.\textsuperscript{111} There is no police force or other enforcement arm to the WTO to compel China to observe world trade law.\textsuperscript{112} In fact, China could very well announce that it will no longer honor specific GATS commitments. Whether China can feasibly engage in such an act and not suffer any consequences depends upon international relations rather than physical coercion. If a WTO member fails to change its law to comply with a final report, it must consult with the injured party and attempt to reach an agreement on an appropriate compensation amount.\textsuperscript{113} Failing such an agreement, the injured party has the option of retaliating by suspending its own trade obligations to the offending party.\textsuperscript{114}

While there may be the possibility that the WTO panel will announce that the filtering of content is presumptively allowed, such likelihood remains dim at this point. Furthermore, the strong possibility of retaliation measures by members of the WTO pending the outcome of a panel decision unfavorable to China if China subsequently refuses to alter its regulatory measures will provide strong incentive for the U.S. and China to settle their dispute. The threat of having to compensate the injured party and the potential for broken relationships among powerful international economic players should provide enough incentive to all parties involved to reach an amicable compromise that addresses the concerns of the parties while remaining palatable as well.

Whatever the U.S. and E.U. may think of China's demonstrated concern over maintaining social and economic stability and order, they cannot deny that they are legitimate interests of a country wishing to

\textsuperscript{110} Pruzin & McLaughlin, \textit{supra} note 62.
\textsuperscript{111} Wu, \textit{supra} note 28, at 284
\textsuperscript{112} Id. at 284-85.
\textsuperscript{113} DODGE, \textit{supra} note 64, at 132.
\textsuperscript{114} Id.
remaining Communist while adapting to and facing the challenges of rapid economic growth in a country of around 1.3 billion people. Earlier this year, Premier Wen Jiabao declared that the decline of the dollar and a global economic slowdown will "add to China's already daunting economic challenges this year" and make 2008 an especially difficult year for the central government to preserve stable economic growth. The country has witnessed five years of double-digit economic growth and the recent rapid inflation has some analysts claiming that China is overheating.

At the same time, China must recognize the commitments it made in both the GATS and its WTO accession agreements however legitimate its concerns are over maintaining order and stability. It must decide how much of the 2006 Measures comprise true need versus simply a preferable level of control over domestic well-being and competition. The burden on the Western developed countries in the WTO are much greater. They must deal with the criticism levied at them as the creators of the WTO regarding its lack of transparency and its rules-based system favoring developed countries. They must also learn to exercise more flexibility and understanding when dealing with countries, like China, who have vastly different legal backgrounds and systems of government and recognizing them as legitimate.

VII. CONCLUSION

In sum, while China may argue that its 2006 Measure is justified in regulating the release of news and information in China by foreign news agencies to promote the dissemination of news in a sound and orderly manner, it will need to arrive at an understanding with the U.S. and E.U. regarding their differing interpretations involving censorship and legal tradition. China does bring a compelling argument to the table regarding national protection and the need to foster its own fledgling industries in the wake of its economic boom. After all, the argument is that the currently dominating Western countries were allowed to develop in a protectionist environment and so should China. As persuasive as its need for security may be, China’s WTO accession agreements require that China must at the very least establish an independent regulatory agency in regulating foreign financial information suppliers.

The truth of the matter is that as sovereign States, it cannot be the case that nations will simply open up their borders to every good and service

116. Id.
attempting entry. China need not relinquish all of its control over telecommunications, for no country is quite that generous or naïve. For now, the U.S. and the E.U. should settle for more relaxed regulations in China established by an independent regulatory body while still complying with its literal WTO commitments. In doing so, the U.S. and E.U. will be acknowledging the growing international presence of China and allow China to carve out a position of power among them. This is not to say that disputes over censorship versus GATS obligations and freedom of speech will no longer be issues, but rather that such tensions will continue to reemerge and that Western attitudes toward socialist systems of government must change.

China will learn to play ball with the established international economic organization created by Western countries with Western notions, but in the process it will also transform the WTO through its participation and counter-demands. As China rises, global economic institutions with the traditional Western slant in views must learn to accommodate and share power with a wholly different culture rich in history and values of its own. All countries have interests to serve which are contrary to their international obligations and it is important that these interests do not conflict substantially with the WTO Agreements. But, industrialized nations must acknowledge and make allowances reflecting the inequality in the trade relationships between themselves and developing countries such as China. The inability of developed nations to recognize the limitations developing countries face, and the insistence on complete liberalization, smacks of hypocrisy. Western legal scholars should cease to measure China’s legal system against the standards of an often idealized version of liberal democratic rule of law that does not exist in reality anywhere.