

WHY CHINA OPPOSES HUMAN RIGHTS IN THE WORLD TRADE ORGANIZATION

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China and other developing countries oppose the introduction of human rights at the workplace into the WTO while some developed countries argue that human rights obligations should be explicitly included in the WTO as a criterion of fair trade. While this is often framed as a debate about human rights, dignity, freedom, and respect, the debate, at least as between the United States and China, is really an economic debate masked as a moral or ethical one.

The economic debate concerns whether the United States can use trade remedies within the WTO to neutralize two major rights and benefits that China enjoys under the WTO: the “no-quotas” rule – the right to be free from total or partial trade bans on its imports – and the right to tariffs bound under the General Agreement on Tariffs and Trade (GATT), which are at historically low levels. The ability to enjoy these two major benefits is essential to China’s mercantilist strategy, which is to pursue economic growth through exports to the United States and other foreign markets. Until China joined the WTO in 2001, it was made to endure an annual review of its human rights record as a condition of receiving these trade benefits from the United States. Now that China is a WTO member, China has a legal right to these benefits. The debate over whether human rights at the workplace should be included in the WTO is, at its essence, a debate over whether now that China has joined the WTO, the United States can use human rights violations under WTO law as a justification for trade restrictions that neutralize or limit these benefits that allow China to aggressively export its products to the United States.

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1. INTRODUCTION

When the People's Republic of China (PRC or China) applied for accession to the World Trade Organization (WTO) in 2001, the United States supported China's entry after arguments by President Clinton to the U.S. Congress that China's WTO accession would have a profound effect in promoting greater political

liberties and recognition of basic human rights in China.¹ The basic premise behind this argument was that exposure to free trade and exchanges with other nations would help develop China's private industries, loosen the control of the massive state owned enterprises (SOEs) that dominate the PRC economy and thereby erode the power of the Communist Party, China's paramount leader, which controls China's SOEs.² Loosening of Party control over the economy, according to this argument, would inevitably lead to greater economic and political freedoms.³ In the decade since China's accession in 2001, however, while the industrial output of SOEs has declined significantly and the role of China's private sector has risen sharply in importance,⁴ China's human rights policies have not progressed,⁵ but rather, according to the views of many observers, have hardened.⁶ Moreover, in 2012,

¹ See *Chinese Politics and the WTO: No Change*, ECONOMIST, Dec. 10, 2011, <http://www.economist.com/node/21541461> (noting that Clinton persuaded Congress to allow China into the WTO based on arguments that such entry would have a profound effect on human rights).

² Inside the Communist Party, a small core elite, the Political Bureau of the Party or Politburo, which consists of about fourteen to twenty-four members, makes all of the important political and legal decisions in China. The inner circle of the Politburo, the Politburo Standing Committee, consisting of four to six members, is the true power elite in China. In Chinese politics, the general rule is that the smaller the group, the more powerful and elitist it is. See DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 127 (2nd ed. 2009) [hereinafter CHOW, *LEGAL SYSTEM OF CHINA*]. The Communist Party is in theory subject to the law, see XIANFA [CONSTITUTION] art. 5, § 6 (1982) (China) ("No organization or individual is privileged to be beyond the Constitution or the law."), but in reality, the Party is China's *de facto* ruler, controlling all of the organs of government power by placing Party cadres in key positions, and in doing so, acting above the law. See CHOW, *LEGAL SYSTEM OF CHINA* at 119, 132-34 (explaining how a small group of elite members of the Communist Party uses its political clout to fill government positions).

³ See CHOW, *LEGAL SYSTEM OF CHINA*, *supra* note 2, at 132.

⁴ See *id.* at 24-25 (showing a significant drop in output from SOEs following the implementation of economic reforms in China, which reflects the growing role of private enterprises in Chinese economy).

⁵ See *Chinese Politics and the WTO*, *supra* note 1 (noting that a decade after China's admission into the WTO, "China's disappointed liberals no longer suggest that freer trade will speed political reform").

⁶ See *World Report 2012: China*, HUM. RTS. WATCH, Jan. 2012, <http://www.hrw.org/world-report-2012/world-report-2012-china> (stating that, despite the growing legal awareness among citizens, the Chinese government's overt hostility towards genuine judicial independence undercuts legal reform); *Annual Report: China 2013*, AMNESTY INT'L (May 23, 2013),

China's leadership faced a once in a decade transition.⁷ The Communist Party seemed intent on demonstrating that it was still in firm control over the country and tightened its grip over any opposition.⁸ By most accounts, WTO membership has not had the intended effect of promoting human rights in China.⁹

The failure of China to make meaningful progress in human rights through its participation in the global trading system has prompted some to call for the inclusion of explicit and affirmative human rights obligations that would be binding on all WTO members and the World Trade Organization itself.¹⁰ The present official position of the WTO is that it is a forum for trade negotiations and liberalization and is not a proper forum for

<http://www.amnestyusa.org/research/reports/annual-report-china-2013> (articulating how Chinese authorities maintained a stranglehold on political activists, human rights defenders, and online activists).

⁷ See Jeremy Page, *China Party Meets to Anoint Next Leaders*, WALL ST. J. (Nov. 8, 2012, 10:54 AM), <http://online.wsj.com/article/SB10001424127887324073504578104570581719786.html> (describing the prelude to China's decennial transition of power in 2012).

⁸ See Brian Spegele & Paul Mozur, *China Tightens Grip Ahead Before Meeting: Ahead of Party Congress, Crackdown Targets Taxi Windows, Efforts to Scale 'Great Firewall,' Knives in Stores and on Trains*, WALL ST. J. (Nov. 10, 2012, 5:52 PM), <http://online.wsj.com/article/SB10001424052970204707104578092461228569642.html> (depicting the Communist Party's efforts to marshal its vast security apparatus ahead of a once-a-decade shuffle of its leaders).

⁹ See *China, The WTO, and Human Rights: Hearing Before the Subcomm. on Int'l Operation & Hum. Rts. Of the H.R. Comm. on Int'l Relations*, 106th Cong. 32 (1999) (statement of Stephen Rickard, Director Of Amnesty International USA, Legislative Office, Washington, D.C.) (providing examples of how trade agreements have not had the intended effect on China's human rights progress).

¹⁰ See, e.g., Ernst-Ulrich-Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights Law into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002) (advocating for a complementary "Global Compact" between the U.N. and worldwide organizations, such as the WTO, as to integrate universal human rights into the law and practice of intergovernmental organizations); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. OF INT'L ECON. L. 19 (2000) (stating that the non-economic values of WTO law are no less important than the economic welfare effects of liberal trade and that the WTO should become an advocate of human freedom more generally). For an extended discussion of human rights in international trade, see generally HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier et al. eds., 2005) and 5 THE WORLD TRADE FORUM: INTERNATIONAL TRADE AND HUMAN RIGHTS - FOUNDATIONS AND CONCEPTUAL ISSUES (Frederick M. Abbott et al. eds., 2006).

recognizing or promoting human rights.¹¹ This position means the WTO and its agreements create no explicit human rights obligations with respect to trade and that it may not be possible to raise the impact on human rights directly as relevant considerations in WTO trade disputes.¹² The present position of the WTO, of course, does not mean that WTO members could not change this position to include human rights in the purview of the WTO if enough political support existed among WTO members for such a change.¹³

The issue of whether to explicitly include human rights into the WTO is, not surprisingly, a highly charged and controversial issue. On the one hand, proponents of this position call for the WTO to

¹¹ See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 26 (2d ed. 2012) [hereinafter CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*]. It is ironic that human rights in the form of rights protecting employees in the workplace played a prominent role in the Havana Charter, which was signed in 1948 to create the International Trade Organization (ITO), as one of the Bretton Woods institutions that along with the World Bank and International Monetary Fund would form the fundamental institutions of international economic law after the Second World War. *Id.* at 18. Chapter II of the Havana Charter is entitled "Employment and Economic Activity." Article 7 of Chapter II addresses fair labor standards as follows:

The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

U.N. Havana Charter art. 7, para. 1. If the ITO had been created then fair labor standards would have become an obligation of the multilateral trading system and a violation of these standards would have been a justification for a trade restriction. However, the ITO failed to win approval due mainly to opposition by the U.S. Congress, and the Havana Charter never came into legal effect. See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 18. After the failure of the Havana Charter, many other attempts were made to introduce human rights into the WTO, but none succeeded. *Id.* at 369.

¹² For the implications of this position, see *infra* Part 6 (suggesting that the present position appears to be a significant victory for China, as it is now protected against the use of human rights at the workplace and labor conditions as a justification for the imposition of trade sanctions within the WTO by member countries, such as the United States).

¹³ There would likely be strong opposition to such a change. See *infra* Part 6.

adopt an explicit Declaration on Human Rights and its link to international trade.¹⁴ On the other hand, opponents argue that including human rights norms in the WTO would be a serious mistake.¹⁵ Inserting human rights into the WTO would inevitably result in the imposition of the Western norms of developed countries, such as the United States and certain countries of Europe, on developing countries, such as China, which are at a different level of economic development and have vastly different ethical norms and expectations.¹⁶ Some countries view the imposition of such norms as an invasion of their sovereignty.¹⁷ Opponents also argue the WTO would collapse under the weight of having to solve all of the world's problems.¹⁸ If human rights are explicitly linked with trade and brought into the purview of the WTO, then many other social issues may also become linked with trade and will overwhelm the WTO. The great majority of WTO members, including China, strongly oppose including human rights in the WTO.¹⁹

Although the debate is often framed as one of conflicting values and of institutional resources and competence, this Article argues that debate concerning human rights in the trade relationship between the United States and China is, in reality, a debate over a narrow economic and legal issue masked as a

¹⁴ A draft declaration on human rights is contained in the Sixth Report of the International Trade Law Committee of the International Law Association, Report of the 70th ILA Conference. INT'L LAW ASS'N, BERLIN CONFERENCE REPORT (2004), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/24>.

¹⁵ See, e.g., Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 Eur. J. Int'l L. 815 (2002) (rejecting the proposal to enforce human rights through the WTO since human rights law has a significantly different ideological underpinning than international trade law).

¹⁶ Floris van Hees, Master's Thesis, *Protection v. Protectionism: The Use of Human Rights Arguments in the Debate for and Against the Liberalization of Trade*, ABO 2004, at 22-23 (stating that considering human rights during trade negotiations can be seen to distort the pursuit of equal rules for all).

¹⁷ Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence*, IDLO VOICES OF DEV. JURIST PAPER SERIES, no. 2, 2005, at 16-17 (explaining that the obligation to consider the promotion of human rights when acting in international organizations does not authorize the extraterritorial enforcement of national laws, as such enforcement would violate the national sovereignty of other states).

¹⁸ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 11, at 369.

¹⁹ See *id.*

general debate over moral, ethical, and institutional issues. What may have once been a genuine debate over the use of trade aimed to encourage the expansion of human rights and political freedoms in China has now been transformed into a debate over the use of human rights by the United States to justify the imposition of trade restrictions on imports from China and possibly other low cost manufacturing nations, such as Vietnam.²⁰ As we shall see further below, in the years from the late 1980s to 2001 during which China was negotiating the conditions of its entry into the WTO with the United States and other WTO members, the United States viewed the use of trade benefits as a catalyst to promote human rights and political reform in China.²¹ Today, the debate over the use of human rights in the WTO concerns whether human rights can be used to justify trade restrictions.²² In other words, human rights have gone from being a 'carrot' linked to trade benefits to a potential 'stick' in the growing number of trade disputes between the United States and China. At its most basic level, the issue of the use of human rights in the WTO can be narrowed to a single, technical legal issue: can the United States use human rights to impose trade restrictions that offset or neutralize China's comparative advantages in low manufacturing costs that give Chinese goods imported into the United States a competitive price advantage over similar U.S. goods.²³ The most vociferous proponents of this issue, U.S. manufacturing industries, while raising this as a human rights workers' issue at the workplace, do not really care about the rights of workers in China.²⁴ Instead, U.S.

²⁰ See *infra* Part 5.

²¹ See THOMAS LUM, CONG. RESEARCH SERV., RL34729, HUMAN RIGHTS IN CHINA AND U.S. POLICY 30 (2011), available at <http://www.fas.org/sgp/crs/row/RL34729.pdf> (asserting that progress in human rights represents a test of the success of U.S. engagement with China).

²² See *infra* Part 6.

²³ See *infra* Part 6.

²⁴ The proliferation of 'codes of conduct' adopted by U.S. companies and these codes' relative toothlessness illustrates this point. According to the World Bank:

[T]here are an estimated 1000 codes in place globally The plethora of codes reflects the multitude of actors involved in this movement, each of whom have distinct - and often competing - values and priorities. The specific working conditions of individual industries also plays an important role in the issues highlighted by codes.

manufacturing industries wish to find a way to neutralize the substantial cost advantages enjoyed by China's manufacturing industries that can be attributed at least in part to low standards of worker safety and rights.²⁵ The issue is a narrow, technical issue, but has significant real world implications for U.S.-China trade. Allowing the use of human rights at the workplace (and possibly beyond) to justify a trade restriction would open a powerful new front to the ongoing trade battles between the United States and China. If human rights at the workplace are recognized as a criterion of fair trade, the United States may impose trade restrictions in the form of quotas (i.e. quantitative restrictions)²⁶ and countervailing duties (i.e. additional tariffs)²⁷ on imports from China. Stripped of all of its rhetoric about moral and institutional issues, this one issue, the availability of the use of quotas and countervailing duties against imports from China to offset China's

Codes of Conduct, WORLD BANK, <http://webcache.googleusercontent.com/search?q=cache:S98sRejnwS4J:web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTLM/0,,contentMDK:20312955~isCURL:Y~menuPK:1245933~pagePK:148956~piPK:216618~theSitePK:390615,00.html+&cd=1&hl=en&ct=clnk&gl=us> (last visited Sep. 29, 2013). See also Robert J. Rosoff, *Beyond Codes of Conduct: Addressing Labor Rights Problems in China*, CHINA BUS. REV. (Mar. 1, 2004), <http://www.chinabusinessreview.com/beyond-codes-of-conduct/> (describing the means by which Western businesses are addressing labor rights violation in Chinese factories). Historically, codes of conduct have been adopted to appease consumers, but enforcement of the codes is not always a priority. "[M]any codes use vague language, and for certain rights, codes often do little more than ask for compliance with the supplier countries' domestic laws. Most notably, codes of conduct often lack clear language on the freedom of association and wages, and frequently defer to domestic law." Andrew Herman, Note, *Reassessing the Role of Supplier Codes of Conduct: Closing the Gap Between Aspirations and Reality*, 52 VA. J. INT'L L. 445, 450-451 (2012) (footnote omitted).

²⁵ To the extent the low cost of Chinese goods is the result of poor standards of worker safety and rights, codes of conduct may attempt to compel an increase in the cost of goods concurrent with an improvement of worker rights and working conditions. American consumers, for their part, seem willing to accept moderately higher prices as the codes of conduct originated in response to American consumer demand generated through exposé campaigns concerning worker conditions. Herman, *supra* note 24, at 450 (explaining that codes of conduct may be voluntary in a legal sense, but exposé campaigns, at least initially, led to their adoption by Western companies).

²⁶ See *infra* Part 5.1 (discussing quotas and their treatment under the WTO). Quotas are generally prohibited under the WTO unless a trade justification can be established. *Id.*

²⁷ See *infra* Part 5.2 (discussing countervailing duties). Countervailing duties cannot be lawfully imposed under WTO law unless certain conditions indicating unfair trade practices are present. *Id.*

low labor costs, is the most important consequence of the debate between the United States and China over human rights in the WTO.²⁸

This article examines the debate over the inclusion of human rights in the WTO and will argue that the debate is in fact an economic debate, and not a moral, ethical, or institutional competence debate as so many have commonly framed the issue. Part 2 of this Article discusses the history of the controversy over human rights between the United States and China and how during this phase trade benefits were used as a 'carrot,' but created lingering resentments on the part of China. Part 3 discusses how the debate about human rights changed as soon as China gained entry into the WTO and was guaranteed certain trading rights and privileges under the WTO. Part 4 explains how including human rights at the workplace within the WTO will allow the United States to neutralize and offset the advantages obtained by China through accession to the WTO. Part 5 examines the validity of the arguments that human rights at the workplace can be used to justify trade restrictions under current WTO law. Part 6 examines the viability of measures that could be used by the United States in response to the violation of human rights in the workplace by China. Finally, Part 7 draws some conclusions on how a debate over moral and political rights became transformed into a debate over the availability of trade sanctions against China.

2. HISTORY OF CHINA'S PRE-WTO ACCESSION AND HUMAN RIGHTS

In 1946, in the aftermath of the Second World War, a small group of nations, led by the United States, met in Bretton Woods, New Hampshire and began to put into place the multilateral institutions that would serve as the foundation for the modern multilateral trading system.²⁹ To jumpstart the post-war international trade in goods, several countries formed the General

²⁸ See *infra* Part 5 (examining the validity of the arguments that human rights at the workplace can be used to justify trade restrictions under current WTO law).

²⁹ See JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* 200 (4th ed. 2002) (describing how the objectives of the Bretton Wood Conference were carried out with the emergence of institutions such as the World Bank, IMF, GATT, and its successor – the WTO).

Agreement on Tariffs and Trade ("GATT"),³⁰ a multilateral agreement designed to reduce tariffs among its contracting parties.³¹ Draconian tariffs, i.e. taxes imposed on imports at the border that must be paid before the goods can enter the internal market, had created high protectionist barriers during the 1930s that led to economic tensions and mistrust among nations.³² For example, the United States passed the Smoot-Hawley Tariff Act of 1930, which imposed tariffs on imports that averaged fifty-three percent of the value of the import.³³ Other nations erected similarly high tariff barriers in response.³⁴ The intended effect of these actions was to prevent trade, as nations viewed each other with a mutual lack of trust.³⁵ This mistrust was one of the contributing factors that led to the Second World War.³⁶ A lesson learned from this era of disastrous economic and political policies is that when economic tensions exist, military conflicts will soon follow.³⁷ The GATT – and its sister Bretton Woods institutions the World Bank, a lending institution to help rebuild Europe;³⁸ the International Monetary Fund, an organization to help facilitate

³⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

³¹ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 11, at 26 (explaining that the GATT's overarching purpose was to "liberalize trade in goods among members by instituting non-discriminatory tariff-treatment among members, prohibiting most import quotas, and requiring national treatment of imported products once they had cleared customs at the border").

³² *Id.* at 18.

³³ *Id.* See also Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930) (providing an example of high tariffs on imports).

³⁴ CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW *supra* note 11, at 18.

³⁵ See U.S. Trade Policy Since 1934 in THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS, Inv. No. 332-325, USITC Pub. 4094 (Aug. 2009), available at [http://www.usitc.gov/research_and_analysis/documents/US_trade_policy_since1934_\(IR6%20pub4094\).pdf](http://www.usitc.gov/research_and_analysis/documents/US_trade_policy_since1934_(IR6%20pub4094).pdf) (providing an overview of U.S. trade policy since 1934 and summarizing the literature on the economic effects of these policy changes on the United States).

³⁶ See *id.* at 67 ("[B]eggary-neighbor' policies that followed World War I . . . were thought to have led to the economic inequities and resulting resentments that contributed to the start of World War II.').

³⁷ See *id.*

³⁸ Today, the work of the World Bank focuses primarily on alleviating poverty by making concessionary loans (i.e. loans with favorable terms) or outright grants to developing countries. CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 11, at 19.

money flows and exchangeability of currency;³⁹ and the International Trade Organization, designed to ease trade barriers like tariffs,⁴⁰ – were designed to “avoid the disastrous economic policies” that led to the war.⁴¹ Free trade through lower tariffs would enhance cooperation among nations and reduce tensions, foster cooperation, and avoid conflict and mistrust.⁴² Although the World Bank and the IMF won quick approval, the ITO never gained approval due to opposition by the United States.⁴³ The ITO was intended to administer the GATT and, as a result of the ITO’s demise, the GATT became a self-administering treaty for nearly fifty years with a skeletal staff in Geneva.⁴⁴

2.1. *China and the GATT 1947*

In 1947, China was one of the original twenty-three signatories of the GATT, but China soon withdrew from the GATT in 1950.⁴⁵

³⁹ The IMF facilitates money flows by discouraging currency devaluations and by encouraging the free convertibility of currencies. If Country A holds a large quantity of Country B’s currency due to trade and Country B devalues its currency by fifty percent, Country A’s holdings have just lost half their value. The IMF discourages this type of devaluation, which occurred with frequency and particular viciousness during the period in the 1930s that led up to the Second World War. *Id.* at 19-20. The IMF works closely with the World Bank and the WTO. *See id.* at 18–21 (explaining that the IMF, World Bank, and WTO are “affiliate[] institutions”).

⁴⁰ *See id.* at 18 (“The ITO was to reduce trade barriers and to provide rules for international trade.”).

⁴¹ *Id.*

⁴² *See id.* at 36–37 (citing the “long-standing [philosophical] idea that trade promotes peace among nations”).

⁴³ In 1994, the WTO came into existence assuming, in many ways, the role originally intended for the ITO. *Id.* at 28.

⁴⁴ *See* Gabrielle Marceau, *General Presentation of the WTO Agreement*, U.N. TREATY COLLECTION, 2005, at 1, available at http://legal.un.org/avl/pdf/ls/Marceau_RelDoc4.pdf (illustrating the impact of the lack of the ITO on the GATT).

⁴⁵ *See* Press Release, World Trade Org., WTO Successfully Concludes Negotiations on China’s Entry (Sep. 17, 2001), available at http://www.wto.org/english/news_e/pres01_e/pr243_e.htm (providing background information on China’s entry into the GATT and WTO). China was undergoing a civil war during this period. Under the Nationalist (Guomindang) Government, led by Chiang Kai-shek, China was a founding member of the GATT; however, the Communist Government, led by Mao Zedong, assumed power in 1949 vanquishing the Guomindang, which then fled to the island of Taiwan, where it claims to this day that it is the government of the Republic of China. *See* CHOW, LEGAL SYSTEM OF CHINA, *supra* note 2, at 12-13. On May 5, 1950, the Guomindang withdrew from the GATT. *See* Protocol Modifying part II and article XXVI of the

In the immediate aftermath of the Second World War and beginning in 1946, China was plunged into an all-out civil war between a Nationalist government backed by the United States and a Communist insurgency led by Mao Zedong.⁴⁶ After Mao vanquished the Nationalists and declared the founding of the PRC, China withdrew from the GATT.⁴⁷ For the first few decades after its founding, China did not have any significant trade with other nations (with the exception of the Soviet Union).⁴⁸ China chose instead to rely on a policy of self-reliance, asceticism, and self-sacrifice.⁴⁹ National purification and the continuing pursuit of revolutionary ideals, not economic development, were the priorities of the nation.⁵⁰ This period in China's history was also marked by intermittent spasms of immense social upheaval and turmoil as Mao, China's paramount leader, used periodic political terror campaigns to root out and destroy his enemies and to

General Agreement on Tariffs and Trade, at 24 n.1, Mar. 24, 1948, 55 U.N.T.S. 196, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%2062/v62.pdf> ("China . . . by virtue of signature on 21 April 1948 of the Protocol of Provisional Application, notified the [U.N.] Secretary-General . . . on 6 March 1950 of the withdrawal of such application. . . . [T]his notice of withdrawal became effective on 5 May 1950."); CRAIG VANGRASSTEK, WORLD TRADE ORG., THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION 141 (2013), available at http://www.wto.org/english/res_e/booksp_e/historywto_e.pdf ("China was among the original contracting parties to GATT. The entry of this agreement into force coincided with the final stages of the Chinese Revolution, however, and the deposed Kuomintang government declared China's withdrawal from GATT after it took refuge on the island of Taiwan."). China requested and was granted observer status in the GATT in 1982. KONG QINGJIANG, CHINA AND THE WORLD TRADE ORGANIZATION: A LEGAL PERSPECTIVE 5 (2002). China then attempted to resume active status in the GATT on the grounds that the Guomindang's withdrawal was null and void, *id.*, but this issue became moot when China decided to join the WTO. Negotiations for China's entry into the WTO began in 1987 and China became a member in 2001.

⁴⁶ See CHOW, LEGAL SYSTEM OF CHINA, *supra* note 2, at 12–13 (discussing the historical context of China's civil war).

⁴⁷ See WTO Successfully Concludes Negotiations on China's Entry, *supra* note 45 (explaining the background behind China's withdrawal from the GATT).

⁴⁸ See DANIEL C.K. CHOW & ANNA M. HAN, DOING BUSINESS IN CHINA: PROBLEMS, CASES, AND MATERIALS 15 (2012) [hereinafter CHOW & HAN, DOING BUSINESS IN CHINA] (describing the state of China's foreign trade during the period from 1949 to 1978).

⁴⁹ See *id.*

⁵⁰ See generally *id.* at 15–17 (explaining the pursuit of revolutionary ideals through the Cultural Revolution).

consolidate his power.⁵¹ But these chaotic policies also had disastrous effects on China's economy, which hardly progressed at all after the founding of the new nation.⁵² After Mao's death in 1976, China's Party elders were shocked and embarrassed by China's extreme poverty in comparison to its Asian neighbors, Hong Kong, Taiwan, and South Korea, all of which were far ahead in economic development.⁵³ After a period of political in-fighting, China's new paramount leader, Deng Xiaoping, declared that the focus of the nation would shift from the pursuit of revolutionary ideals to economic development.⁵⁴ China began its watershed open door policy of trading with other nations that has led, in the span of just three decades, to one of the world's most vibrant and powerful economies.⁵⁵

After economic reforms were adopted in 1978, China soon began to experience rapid and continuing growth in its exports.⁵⁶ China purposefully pursued a "mercantilist" strategy, a web of policies designed to spur exports, which would earn revenues, a catalyst of domestic economic growth.⁵⁷ After adopting its open door policies, China soon realized that its lack of membership in the GATT stood as a barrier to the pursuit of its mercantilist goals because GATT promised significant benefits for the trade in goods for its contracting parties.⁵⁸ All contracting parties to the GATT had agreed to tariff schedules with rates that were very low by comparison to the historically high pre-GATT rates, but only

⁵¹ See CHOW, *LEGAL SYSTEM OF CHINA*, *supra* note 2, at 15-19 (illustrating the turmoil China experienced under Mao's leadership, including the Great Leap Forward and the Cultural Revolution).

⁵² See CHOW & HAN, *DOING BUSINESS IN CHINA*, *supra* note 48, at 16-17 (outlining a series of disastrous political movements between 1949 and 1978 which caused significant setbacks to China).

⁵³ CHOW, *LEGAL SYSTEM OF CHINA*, *supra* note 2, at 27.

⁵⁴ See *id.* at 27-36 (explaining the processes and results of the reforms China went through in efforts to rebuild its economy).

⁵⁵ *Id.*

⁵⁶ See CHOW & HAN, *DOING BUSINESS IN CHINA*, *supra* note 48, at 28 (illustrating rapid GDP growth from 1985 to 2008).

⁵⁷ See, e.g., Heide B. Malhotra, *China's Mercantilist Strategy Creates Imbalances*, *THE EPOCH TIMES* (Mar. 10, 2010), <http://www.theepochtimes.com/n2/business/china-mercantilist-strategy-31133.html> (criticizing the harmful effects of China's strategy on the United States).

⁵⁸ See *infra* Part 3.2 (stating that the promised benefits of GATT include the "no quotas" rule and the right to GATT bound tariffs).

GATT parties were entitled to these rates as a matter of right.⁵⁹ For example, the United States calculates tariffs on imports based upon the Harmonized Tariff Schedule of the United States (HTSUS) and predecessor versions.⁶⁰ The HTSUS has two columns. Column 1 contains the GATT rates and special free trade agreement rates,⁶¹ while Column 2 contains the pre-GATT rates of the 1930 Smoot-Hawley Tariff Act with prohibitively high rates averaging fifty-three percent of the value of the import.⁶² Under the Most Favored Nation (MFN) principle contained in GATT Article I, all GATT

⁵⁹ See GATT, *supra* note 30, at art. II: 1(a)-(b) (providing that a WTO member cannot impose a tariff on imports higher than that set forth in its GATT schedule. This obligation extends, however, only to imports from other WTO members. Non-WTO members have no legal right to the GATT tariff rates).

⁶⁰ HTSUS is based upon the Harmonized Tariff System (HTS) developed by the World Customs Organization (WCO) located in Brussels, Belgium. The WCO works closely with the WTO to develop agreed upon customs classifications. The WCO developed the HTS and most WTO members have agreed voluntarily to adopt the HTS into their domestic law. The HTS classifies goods into twenty-two categories called Sections, which are further split into chapters. Under the HTS, each tariff classification is given a six digit number. The first two digits identify the chapter; the first four digits identify the chapter and heading within the chapter; and the first six digits identify the chapter, the heading, and the subheading for the good. Most countries impose tariffs at the eight digit level, meaning that all countries adopting the HTS have agreed to have uniformity in tariff classifications up to the six digit level for all products, and variations for each nation occur at the eight digit level where the tariff is imposed. The amount of the tariff also varies depending upon each nation's GATT tariff schedules, which were individually negotiated with all WTO members. Each country adopts the HTS with variations into its own domestic law. For example, the United States has adopted the HTS, with variations unique to the United States, as the HTSUS. CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 11, at 188 (explaining logistics of the HTS and the HTSUS). See Harmonized Tariff Schedule of the United States 2013, USITC Pub. 4368 (2013), available at <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1300htsa.pdf> (presenting the Harmonized Tariff Schedule).

⁶¹ The special rates are those for free trade areas that are even lower than GATT rates. GATT Article XXIV allows WTO members to create free trade areas and customs unions that have preferential tariff rates lower than general GATT rates. See GATT, *supra* note 30, at art. XXIV. For example, the United States, Canada, and Mexico have created a free trade area, the North American Free Trade Agreement (NAFTA), under which the tariffs for most goods are zero. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993) (providing an example of a free trading block).

⁶² See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 146-47 (2d ed. 2010) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS] (providing a representative sample of the differences between the GATT rates in Column 1 and the Smoot-Hawley Tariff Act rates in Column 2).

contracting parties were entitled to the Column 1 GATT rates while non-GATT parties were subject to the Column 2 rates, unless the country in question had separately concluded a bilateral treaty with the United States or the United States had otherwise agreed to extend MFN treatment to that country.⁶³ In this sense, the MFN principle is a misnomer since it does not signify privileged treatment.⁶⁴ Rather, MFN means equal treatment for all GATT parties (i.e. all GATT parties receive GATT tariff rates) and is the norm, not an exception.⁶⁵ The United States now eschews the use of the MFN term and prefers instead to use the term “Normal Trade Relations” (NTR) when referring to countries that receive MFN GATT rates.⁶⁶ An overwhelming majority of the United States’ trading partners receive the GATT tariff rates, while only a few pariah nations are subject to the Column 2 rates.⁶⁷ The most important consequence of MFN in this context was that GATT parties, entitled to MFN treatment as a matter of right, received the much lower GATT tariff rates from the United States.⁶⁸ However, non-GATT parties, such as China, which are not otherwise entitled to MFN treatment through a separate treaty, did not receive the GATT tariffs for its imports into the United States.⁶⁹ This posed a potentially significant trade barrier for China.

⁶³ See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 188 (commenting on the tariff rates applied to goods from WTO members, non-WTO members, and “countries that enjoy preferences”).

⁶⁴ See *id.* at 129 (remarking how the MFN principle “is sometimes taken as a principle of favoritism, but rather it is a principle of non-discrimination”).

⁶⁵ See Jialin Zhang, *U.S.–China Trade Issues After the WTO and the PNTR Deal: A Chinese Perspective*, HOOVER ESSAY IN PUBLIC POLICY, no. 103, 2000, at 1, 20, available at http://media.hoover.org/sites/default/files/documents/epp_103b.pdf (describing the MFN not so much as a special treatment, but as “a global standard for normal trade” which entails reciprocal obligations).

⁶⁶ See CHOW & SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS*, *supra* note 62, at 145; see also Zhang, *supra* note 65, at 1 (using the term “normal trade relations” instead of the MFN term to describe the U.S.’s relations with China).

⁶⁷ See generally CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 189-93 (noting that a great majority of the United States’ trading partners enjoy Column 1 rates, and since 2000 the United States has pursued free trade agreements all over the world).

⁶⁸ See *id.* at 129 (“MFN in the context of the WTO requires that a WTO member must give equal treatment concerning trade advantages to all other members . . .”).

⁶⁹ *Id.*

2.2. *China and the Period Leading up to its WTO Accession*

By the 1980s, with the start of the Uruguay Round of negotiations among all GATT parties—the most ambitious and lengthy negotiations in history⁷⁰—it soon became clear that a new, larger, and more ambitious multi-lateral organization, the World Trade Organization, would be approved.⁷¹ The WTO would not only incorporate and administer the GATT (reissued as GATT 1994), but also would include agreements on services (the General Agreement on Trade in Services (GATS)) and intellectual property (the Agreement on Trade-Related Intellectual Property Rights (TRIPS)).⁷² Furthermore, the WTO would administer a dispute settlement system under the Dispute Settlement Understanding (DSU).⁷³ China immediately recognized that it could never become a significant international trading nation without joining the WTO.⁷⁴ In 1987, after many years of informal talks, China officially began to negotiate with the United States and with other WTO members regarding its accession to the WTO.⁷⁵ The negotiation process would take almost fifteen years to complete as the United

⁷⁰ See *Understanding the WTO: The Uruguay Round*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Nov. 20, 2013) (describing the complicated nature of the Uruguay Round).

⁷¹ See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 18 (asserting that due to opposition from the U.S. Congress, the International Trade Organization, one of the proposed Bretton Woods institutions, was never approved. In many ways, the World Trade Organization assumes the role that was contemplated for the ITO).

⁷² See *id.* at 28.

⁷³ See Marrakesh Agreement Establishing the World Trade Organization, Annex II, Apr. 15, 1994, 1867 U.N.T.S. 154 (establishing a refined dispute settlement system).

⁷⁴ See Tony Saich, *China as a Member of the WTO: Some Political and Social Questions*, Harvard Asia Pacific Review, Jan. 2002, at 1, 3-6, available at <http://www.hks.harvard.edu/fs/asaich/China%20and%20the%20WTO.pdf> (enumerating five principle factors why China desired to join the WTO, including its aspirations to be a major international player, desire to offer input on decisions affecting its interests, and economic benefits).

⁷⁵ See Press Release, World Trade Organization, WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001), available at http://www.wto.org/english/news_e/pres01_e/pr243_e.htm (indicating that negotiations for accession began in 1987).

States and other parties placed many demands on China as conditions of accession to the WTO.⁷⁶

Before China finally acceded to the WTO in 2001, China's imports were not entitled to the United States' GATT rates as a matter of right.⁷⁷ Rather, the United States agreed to extend the GATT rates to China based upon an annual approval of MFN status by the U.S. President.⁷⁸ This approval was conditioned on an annual review of China's human rights record.⁷⁹ The United States had a statutory basis in place for this conditional grant of MFN status to China.⁸⁰ In 1971, the United States had passed the Jackson-Vanik amendment as part of the 1974 Trade Act in order to pressure the Soviet Union to allow Soviet Jews to emigrate to the United States or Israel.⁸¹ The Jackson-Vanik amendment granted MFN treatment to the Soviet Union conditioned upon either an annual certification issued by the U.S. President attesting to the Soviet Union's compliance with the amendment or a Presidential waiver excusing the application of the statute due to such factors as progress in human rights.⁸² Although the Jackson-Vanik

⁷⁶ The negotiations culminated in China's Protocol of Accession, which set forth the conditions (and internal changes) for China's accession to the WTO. *See generally*, World Trade Organization, Ministerial Decision of 10 November 2001, WT/L/432 (2001) [hereinafter *Accession of the People's Republic of China*] (outlining China's assumed obligations and rights upon entering the WTO).

⁷⁷ *See* L. Jay Kuo, *Farewell to Jackson-Vanik: The Case for Unconditional MFN Status for the People's Republic of China*, 1 *ASIAN L.J.* 85, 108 (1994) (tracing the beginning of extensions of MFN status to China from 1979 when President Carter issued the first executive waiver with respect to China's compliance with the Jackson-Vanik amendment, prompted by a bilateral trade agreement between China and the U.S. signed earlier in the year).

⁷⁸ *Id.*

⁷⁹ *See id.* at 110 (exploring the human rights motivational factor behind the Jackson-Vanik Amendment, which technically requires the President to report to Congress annually only with respect to China's emigration record).

⁸⁰ *See generally* Freedom of Emigration in East-West Trade, 19 U.S.C. § 2432 (2006) (differentiating countries ineligible for normal trade relations from countries not covered in Column 1 of the Tariff Schedules).

⁸¹ The Jackson-Vanik amendment was enacted into law as part of Title IV of the 1974 Trade Act, Pub. L. No. 93-618, 88 Stat. 2056, signed into law on Jan. 3, 1975 by President Gerald Ford. *See* Thomas J. Probert, *The Innovation of the Jackson-Vanik Amendment*, in *HUMANITARIAN INTERVENTION: A HISTORY* 323 (Brendan Simms & D.J.B. Trim eds., 2011) (attributing the *raison d'être* of the Jackson-Vanik amendment to a desire to promote ease of emigration for Jews in the USSR).

⁸² *See generally* 19 U.S.C. § 2432, *supra* note 80.

amendment was directed at the Soviet Union, it was drafted in general language that did not limit its application to any particular country.⁸³ The United States began to apply the Jackson-Vanik amendment to China, requiring an annual certification of compliance or a presidential waiver in order for China to receive MFN status, i.e. access to the GATT tariff rates in Column 1 of the HTSUS.⁸⁴ The stakes were high for China because the imposition of the much higher Column 2 Smoot Hawley tariff rates would have a serious negative impact on China's ability to export goods to the United States. In addition, if China did not receive MFN treatment for its imports, the United States would have no obligation to permit entry of the goods at all.⁸⁵ In other words, China's lack of MFN treatment would have allowed the United States to impose a quota in the form of a total or partial ban on Chinese imports. The United States would not be subject to any disciplinary measures under the GATT or the WTO for imposing the draconian Column 2 Smoot Hawley tariffs or a ban on imports with respect to China because China was not a GATT contracting state or a member of the WTO.⁸⁶ Because China was outside of the

⁸³ See Kuo, *supra* note 77, at 104 (explaining that Jackson-Vanik amendment provisions applied to all nations not receiving MFN treatment from the United States, and that although this was mainly directed towards the USSR at the inception of the amendment, its applicability to China was within its legislative bounds).

⁸⁴ See *id.* at 101-03 (summarizing the Trade Act of 1974 and describing the process by which a country may conditionally qualify for MFN status).

⁸⁵ GATT Article XI contains a general prohibition of quantitative restrictions or quotas. Since China was not a member of the GATT or WTO until 2001, China had no right to the benefits of Article XI as a matter of GATT or WTO law. If the United States imposed a quota on imports from China, the matter would be a bilateral political and economic issue between the United States and China outside of the GATT or WTO framework because China was not a member of either treaty. If China were able to obtain MFN treatment from the United States, however, China would be entitled to the benefit of Article XI since under MFN, the United States would have to extend the same benefits to China that it extends to all other GATT countries, which includes the benefit of the no-quotas rule of GATT Article XI.

⁸⁶ The WTO has a dispute settlement mechanism that replaces the procedures under the GATT. See CHOW AND SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 63-64. The WTO can authorize the aggrieved party to undertake retaliation in the form of countermeasures, which can be in the form of increased tariffs on imports from the offending country. See *id.* at 68. To use the WTO dispute settlement mechanism, however, a nation must be a member of the WTO. See *id.* at 63 ("[W]hen a state becomes a member of the WTO, it automatically submits to the jurisdiction of the WTO dispute settlement system. The WTO also

GATT and WTO, these economic issues were purely bilateral trade and thus the two countries were free to come to their own arrangements independent of the multilateral trade treaties.

Though the Jackson-Vanik amendment was intended to review emigration policies, the amendment when applied to China took the form of an annual general review of China's human rights policies in which the President would issue a waiver after a congressional review and "approval" of China's human rights record.⁸⁷ China's annual Jackson-Vanik amendment review hence became a ritual in which the United States would criticize China's human rights record, give lectures to China on its many deficiencies, and make threats, but ultimately would agree to extend MFN treatment to China for another year.⁸⁸ In return, China would endure the humiliation of the annual ritual in stoic silence and make a few symbolic humanitarian gestures during the period of review, such as releasing high profile political dissidents from imprisonment.⁸⁹ But China never implemented any major reforms in human rights as a result of these reviews⁹⁰ (nor has China ever forgotten the humiliation of its annual "review").⁹¹

carries automatic penalties that apply if the WTO member does not comply with a final ruling under the WTO dispute settlement system.").

⁸⁷ See Kuo, *supra* note 77, at 110 (discussing how the process of extending MFN status to China under the Jackson-Vanik Amendment allowed Congress to pass a resolution of disapproval, which it used "as a 'dumping ground' for its grievances against China").

⁸⁸ See Alan S. Alexandroff, *Concluding China's Accession to the WTO: The U.S. Congress and Permanent Most Favored Nation Status for China*, 3 UCLA J. INT'L L. & FOREIGN AFF. 23, 32 (1998) (noting that the initial three-year bilateral trade agreement granting China MFN status, which went into effect on February 1, 1980, has since been extended five times).

⁸⁹ See *China Releases 3 Prisoners in Gesture to U.S.*, N.Y. TIMES, Feb. 5, 1994, <http://www.nytimes.com/1994/02/05/world/china-releases-3-prisoners-in-gesture-to-us.html> (reporting a case where China released three political prisoners apparently in response to a threat by the United States to withhold favorable trade status for China in the following year if its human rights record was not improved).

⁹⁰ See generally U.S. DEP'T OF STATE, CHINA HUMAN RIGHTS PRACTICES, 1994 (1995), available at http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_eap/China.html (detailing a list of ongoing human rights abuses that occurred during 1994, ranging from restriction of population mobility and violation of freedom of expression, to the more egregious cases of torture, extrajudicial imprisonment, and disappearances).

⁹¹ This observation is based upon the author's own discussions in China with academics and government officials. Many in China remain sensitive to how the

During the 1990s, Congress attempted to introduce specific human rights criteria in the annual review, but this proposal was rejected.⁹² In 2001, China formally acceded to the WTO and became entitled to MFN treatment under GATT Article I and to the United States' GATT tariff rates in Column 1 of the HTSUS as a matter of right under WTO law.⁹³ After 2001, China no longer had to suffer through an annual MFN review under the Jackson-Vanik amendment and the legislation became irrelevant to China.⁹⁴

3. BENEFITS OF CHINA'S WTO MEMBERSHIP

China's membership in the WTO entitles China to full WTO rights and benefits (and obligations), which are too numerous to discuss in detail here. For the purposes of this article focusing on China's exports, the most important rights and benefits are set forth below.

3.1. *The Right to Lowest GATT Bound Tariffs from any WTO Member*

Under GATT Article I, China is entitled as a matter of right to the GATT low tariff rates under the MFN principle for all its exports to the United States and to all other WTO members.⁹⁵ The

United States used the Jackson-Vanik annual review. Common perception at the time was that the annual review was used by the U.S. government as an opportunity "to criticize Beijing's violation of human rights" and to "bash" China. See James A. Dorn, *Time to Repeal the Jackson-Vanik Amendment*, CATO INSTITUTE, JAN. 14, 1999, <http://www.cato.org/publications/commentary/time-repeal-jacksonvanik-amendment>.

⁹² See VLADIMIR N. PREGELJ, CONG. RESEARCH SERV., RL30225, MOST-FAVORED-NATION STATUS OF THE PEOPLE'S REPUBLIC OF CHINA 4 (2001) (describing an attempt that was made to condition China's MFN annual renewal on "China's adherence to the Universal Declaration of Human Rights, release of and accounting for Chinese citizens imprisoned . . . for the nonviolent expression of political and religious beliefs, ensuring humane treatment of prisoners by allowing access to [Chinese] prisons by . . . human rights organizations," though, in the end, all of these conditions were rejected by the U.S. Congress).

⁹³ See generally, *Accession of the People's Republic of China*, *supra* note 76 (serving as the formal instrument that entitles China to accession to the WTO and detailing obligations and rights China assumes as a result of the accession).

⁹⁴ See generally DAVE CAMP, RUSSIA & MOLDOVA JACKSON-VANIK REPEAL ACT OF 2012, H.R. REP. NO. 112-632 (2012) (abolishing the Jackson-Vanik amendment which appeared to have lost all relevance after the disintegration of the Soviet Union and upon China's accession to the WTO). The bill was passed on November 16, 2012.

⁹⁵ GATT, *supra* note 30 (providing the relevant section of Article 1: General Most-Favoured Nation Treatment: "With respect to customs duties and charges

MFN principle means that China is entitled to the lowest tariffs granted by any WTO country to any other WTO country.⁹⁶ For example, if the United States grants a low tariff on a product imported from any WTO country in the absence of a special bilateral free trade pact,⁹⁷ then the United States is required under the MFN principle to grant the same low tariff on like products imported from China, immediately and unconditionally.

Under GATT Article II, the United States cannot unilaterally raise its tariffs or impose additional tariffs on top of the GATT rates.⁹⁸ For example, if the United States unilaterally and suddenly raised its tariffs on imports of textiles from China above its GATT rate by any amount, the United States would be in violation of GATT Article I and GATT Article II, and would be required by the

of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties).

⁹⁶ See *id.* at art. III (requiring that, with few exceptions, member nations reflect equal treatment in their internal taxation and regulation schemes with respect to fellow member nations). See also CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 130 (providing an example of how GATT Article 1: General Most-Favoured Nation Treatment functions).

⁹⁷ See *id.* at art. XXIV (creating an exception for free trade agreements, which are permitted to create preferences that do not need to be extended under MFN to all WTO members). For example, under the North American Free Trade Agreement, almost all goods travel duty free between the United States, Mexico, and Canada. Under an exception to MFN contained in Article XXIV, the members of NAFTA are not required to extend duty free treatment to goods from other WTO members.

⁹⁸ See *id.* at art. II ("Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate schedule annexed to this Agreement."). The effect of GATT Article II 1(a) is to "bind" all tariffs and to treat all commitments in each country's GATT schedule as a ceiling for tariffs. The United States could not therefore impose a tariff rate that is higher than the GATT rate set forth in its schedule on an import from China without violating GATT Article II 1(a). See also *id.* at art. XXVIII (providing a procedure for changing agreed upon GATT tariff rates, but it is time consuming and requires consultations with other WTO members).

WTO to withdraw the tariff increase.⁹⁹ Under some circumstances, however, if China engages in certain defined unfair trade practices, the United States would be entitled to impose additional tariffs as an authorized trade remedy.¹⁰⁰ A later section of this Article 101 will set forth the unfair practice that justify trade restrictions in detail and the remedies that are available.

3.2. The "No-Quotas" Rule

China enjoys a second WTO trade right that directly benefits its export trade. Under GATT Article XI,¹⁰² WTO members are generally prohibited from imposing quantitative restrictions or quotas on imports from China. For example, suppose that the United States imposes a quota that no more than one million laptop computers can be imported from China in any single year. Prior to China's entry to the WTO in 2001, nothing would prevent the United States from imposing such a quota and the issue would be a diplomatic economic and trade issue between China and the United States. After China's accession to the WTO in 2001, however, the quota is prohibited under GATT Article XI unless certain exceptions defined under Article XX of the GATT are present, and the United States can carry the burden of justifying

⁹⁹ Under the WTO dispute settlement system, when the WTO panel, which functions like a trial court, or the appellate body, which functions like an appeals court, finds a WTO violation, the body will "recommend" that the offending WTO member bring the non-conforming measure into conformity. See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 64. The WTO goes to great lengths to avoid litigious and adversarial sounding language, reflecting its diplomatic roots. In general, WTO members almost always abide by decisions of the WTO dispute settlement body due to peer pressure, political necessity, and the desire for the WTO to be able to continue to function effectively. The WTO dispute settlement system is considered to be one of the WTO's outstanding successes. See *id.* at 63.

¹⁰⁰ See *infra* Part 5.2.

¹⁰¹ See *infra* Part 5.1.

¹⁰² GATT Article XI: General Elimination of Quantitative Restrictions provides the following, in part:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, *supra* note 30, at art. XI.

the quota under GATT Article XX, the exceptions provision.¹⁰³ Otherwise, the United States would be required by the WTO to withdraw the quota.¹⁰⁴ Part 5 of this Article will set out these exceptions under GATT Article XX in detail and discuss how they are interpreted by the WTO.¹⁰⁵

The benefits of the WTO discussed above mean that China's exports to the United States are protected as follows: first, China's exports are entitled to the lowest GATT rates that the United States gives to any other country under the MFN principle contained in GATT Article I;¹⁰⁶ second, the United States cannot unilaterally increase these rates or impose extra tariffs without a justification from the United States that China has engaged in certain prohibited forms of unfair trade practices;¹⁰⁷ and, third, China's exports to the United States cannot be subject to quantitative restrictions – quotas – without some trade justification, cognizable under the WTO, from the United States.¹⁰⁸ These rules – access to the most favorable or lowest GATT tariff rates and the general “no-quota” rule – provide access for Chinese imports to the U.S. market and allow China to fully pursue its aggressive mercantilist strategy of domestic growth based upon exports to the United States, the European Union, and other WTO countries around the world.¹⁰⁹ Both of these benefits, so important to support China's mercantilist strategy, were available to China for the United States only after enduring an embarrassing and humiliating annual review by the United States prior to China's entry into the WTO.¹¹⁰ Today, these benefits are available to China as a matter of WTO law.

¹⁰³ GATT Article XIX allows a temporary ban on imports when there is a sudden surge of imports that might harm unsuspecting domestic industries. These measures, called “safeguards,” are allowed only under certain conditions and are temporary in nature. See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 373.

¹⁰⁴ See *supra* text accompanying note 101 (listing Art. XI's prohibition on quotas).

¹⁰⁵ *Infra* Part 5.1.

¹⁰⁶ *Supra* text accompanying note 98.

¹⁰⁷ See *id.*

¹⁰⁸ *Supra* text accompanying note 103.

¹⁰⁹ See *supra* Part 2.1 (detailing the history of China and its membership, and lack of membership, in GATT).

¹¹⁰ See *supra* Part 2.2 (detailing the circumstances surrounding China's accession in the WTO).

4. NEUTRALIZING CHINA'S COMPARATIVE ADVANTAGE IN GOODS

China's entry into the WTO with the attendant access to the trade protections and benefits of the WTO, along with its aggressive mercantilist strategies, has resulted in a spectacular growth of China's export trade to the United States and other countries in the world.¹¹¹ The growth of China's export trade, however, has some negative repercussions for the United States as further discussed below.

4.1. *The U.S. Trade Deficit with China*

In 1985, when China was preparing to enter into negotiations for accession to the WTO, the United States had a trade deficit of zero for the trade in goods with China.¹¹² By 2011, the trade deficit had mushroomed to approximately \$295.5 billion.¹¹³ That same year, total imports from China to the United States were \$393.3 billion,¹¹⁴ whereas U.S. exports to China were only \$103.9 billion,¹¹⁵ so China is earning net revenues of nearly \$300 billion a year in its trade with the United States. Negative perceptions of China's trade practices are also fueled by a widespread belief among U.S. politicians and the public that China cheats in trade through the use of various unfair or illegal tactics.¹¹⁶ The worrisome concern

¹¹¹ See CHOW & HAN, *DOING BUSINESS IN CHINA*, *supra* note 48, at 28, 36 (supplying figures and analysis of China's recent expansive trade growth, especially with the United States).

¹¹² WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33536, *CHINA-U.S. TRADE ISSUES* 1, 3 (2012).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Aaron Back, *China Stands Firm Against U.S. on Trade*, WALL ST. J. (March 14, 2012, 7:00 AM) <http://online.wsj.com/article/SB10001424052702303863404577280894205257130.html> (describing how both U.S. presidential candidates in 2012 responded to the "[c]riticism of Chinese trade practices . . . heating up in the U.S." by taking strong positions against China's trade practices); Senator Bob Casey, *For American Jobs, China's Cheating on Rare Earth Trade Must End*, THE HILL'S CONGRESS BLOG (Mar. 23, 2012, 1:29 PM), <http://thehill.com/blogs/congress-blog/foreign-policy/217845-for-american-jobs-chinas-cheating-on-rare-earth-trade-must-end> (stating that the WTO found China to have broken many commitments and that the "United States must stop China's cheating"); Bob Davis & Tom Orlik, *Bucking Trend, U.S.-China Trade Gap Grows*, WALL ST. J. (July 10, 2012, 7:50 PM), <http://online.wsj.com/article/SB10001424052702303292204577516673966206002.html> (explaining that U.S. politicians and the public perceive that China cheats in trade by using

over the deficit, further deepened by a widespread belief that China cheats, has led the U.S. government to launch an all-out assault on imports from China using whatever trade remedies are available to stem the influx of Chinese goods and to decrease the trade deficit or at least to slow down its continuing growth.¹¹⁷

4.2. *Neutralizing China's Comparative Advantages Through Trade Remedies*

Although experts dispute the causes of the U.S. trade deficit with China, one major factor is the low cost of labor in manufacturing in China.¹¹⁸ The average hourly wage of a factory worker in China is \$1.36 per hour while the average hourly wage for a factory worker in the United States is \$23.32.¹¹⁹ These statistics indicate that the hourly wage of a factory worker in the United States is seventeen times that of a worker in China; moreover, China has other immense trade advantages including a massive supply of driven, capable workers willing to work long hours under precarious conditions and willing to do tedious, repetitive factory manufacturing work at a fraction of the cost of a U.S. counterpart.¹²⁰ Such a cost advantage for Chinese workers

various unfair or illegal tactics); Peter Navarro, *U.S. Trade Policy: America's Unequal Trade Relationship With China*, L.A. TIMES, June, 21, 2011, <http://articles.latimes.com/2011/jun/21/opinion/la-oe-navarro-trade-china-20110621> (insinuating that China "cheats" and directly writes "China uses unfair trade practices to way war on [the U.S.] manufacturing base").

¹¹⁷ See *infra* Part 5.2 (analyzing, in depth, methods to equalize or decrease China's trade advantages, including additional tariffs for human rights violations).

¹¹⁸ See Michele Nash-Hoff, *U.S.-China Trade Deficit Cost More Than 2.1 Million Manufacturing Jobs*, HUFFINGTON POST: THE BLOG (Sep. 6, 2012, 12:03 PM), http://www.huffingtonpost.com/michele-nashhoff/uschina-trade-deficit-cos_b_1855285.html (identifying the lower manufacturing wages of Chinese workers, a result of the extensive suppression of labor rights, as a contributing factor to the U.S.-China trade deficit).

¹¹⁹ See Bonnie Kavoussi, *Average Cost Of A Factory Worker In The U.S., China And Germany*, HUFFINGTON POST (Mar 8, 2012, 3:36 PM), http://www.huffingtonpost.com/2012/03/08/average-cost-factory-worker_n_1327413.html (blaming, in part, the loss of almost three million U.S. manufacturing jobs on the lower average hourly wages of Chinese factory workers).

¹²⁰ Admittedly, this labor supply trend may be declining, though it is not certain when the economic effects will be felt. See Yukon Huang & Clare Lynch, *Where Have China's Workers Gone?*, BLOOMBERG (Mar. 6, 2013, 6:55 PM), <http://www.bloomberg.com/news/2013-03-06/where-have-china-s-workers->

seems to be impossible to overcome in the United States by making adjustments in the U.S. workplace. But what if the United States was able to demonstrate that China cheats in creating such low costs and then was able to use trade laws to neutralize these advantages enjoyed by China? Suppose that the United States could impose a permanent ban on imports from China in certain areas, such as textiles (e.g. clothing and footwear) or impose a quota – an upper limit – on the amount of imports from China in industries where U.S. industries are struggling to compete? In addition, what if the United States could impose an extra tariff on Chinese imports that could offset the cost advantages in labor enjoyed by China? Suppose that the United States could impose an additional tariff equivalent to the difference in the labor costs between China and the United States of producing a good that would then have the result of equalizing the labor costs in China and the United States. If it is able to do so, the United States will have removed what is commonly viewed as China's greatest competitive advantage over the United States and U.S. goods would become immediately more competitive.¹²¹ The “playing field” would be leveled, according to the proponents of this view, and over time, fewer Chinese goods will be imported and the trade deficit will begin to decline.¹²²

The availability of these remedies – extra tariffs in the form of countervailing duties to offset China's labor cost advantages and import bans in industries where the United States is particularly vulnerable – lie at the heart of the debate over the use of human rights in the WTO.

From China's perspective, a view shared by many developing countries, low manufacturing costs are a legitimate comparative advantage that should not be eroded by trade remedies. China views itself at a different stage of economic development than the

gone.html (“China's large pool of surplus labor has fueled its rapid industrial growth. Now this ‘demographic dividend’ may be almost exhausted.”). The International Monetary Fund suggests the effects of such a shortage, however, will not be felt until between 2020 and 2025, while another view holds that “China's surplus labor is still plentiful, given that about 40 percent of the labor force is still underutilized in the rural sector, mostly in agriculture, which accounts for only 10 percent of gross domestic product.” *Id.*

¹²¹ See *infra* Part 5.2 (providing further analysis about potential options available to the United States to decrease China's trade advantage).

¹²² *Infra* Part 5.2.

United States. Although China's economy is now the second largest in the world, China is still firmly in the ranks of low income countries and except for a small class of elites, China remains a poor country overall, with large rural areas that are extremely poor.¹²³ The standard of living in China for the vast bulk of its population cannot realistically be compared to that of the United States.¹²⁴ China and other developing countries believe that it is not realistic or fair to expect them to implement labor conditions similar to those of countries at a far more advanced stage of development.¹²⁵ China (and other developing countries) also find arguments linking human rights to trade in the WTO to be hypocritical on the part of developed countries.¹²⁶ These

¹²³ CHOW & HAN, *DOING BUSINESS IN CHINA*, *supra* note 48, at 20.

¹²⁴ See *id.* (comparing income and other living standard statistics from China, "the first developing country to become a global economic power," to other leading world powers).

¹²⁵ H.E. Vice Minister Long Yongtu, who is Head of the Chine Delegation of the WTO, stated:

As we have emphasized consistently at various occasions in the past, although great progress has been made on China's economic development in the past two decades, we still firmly believe that China is a developing country. The position we have taken to accede to the WTO as a developing country is not only a reflection of the actual economic level of China at the present stage, but also our political choice.

Long Yongtu, Vice Minister and Head of the Chinese Delegation, Meeting of the Working Party on the accession of China to the World Trade Organization, WORLD TRADE ORG. (July 4, 2001), http://www.wto.org/english/news_e/news01_e/china_longstat_jul01_e.htm. The question of China's status as developing or developed for purposes of trade commitments remains. See Joost Pauwelyn, *The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes*, 22 REV. EUR. COMMUNITY & INT'L ENVTL. L. 29, 31-32 (2013) ("Under some WTO agreements . . . China explicitly agreed to forego certain phase-in periods normally granted to developing countries. . . . China considers itself to be a developing country, whereas other WTO members . . . have contested that China automatically benefits from all developing country provisions . . .").

¹²⁶ Professors Anu Bradford & Eric A. Posner observe:

The United States and other Western democracies have long predicted that China's receptiveness to economic globalization and liberal market institutions would spur political change in China. Yet the link between economic liberalization and democratization in China has proved to be elusive. China has enjoyed economic benefits from liberal international institutions while resisting any political liberalization that was expected to follow from its increasing international engagement. The Chinese government has also nurtured a sentiment among its citizenry that Western-style democracy would be unsuitable for China's current economic conditions. According to the government, embracing civil and

arguments are viewed by China and other developing countries as thinly veiled excuses for eroding their trade advantages created by low cost manufacturing.¹²⁷ These considerations suggest that China will strongly oppose any attempts to include human rights at the workplace rights in the WTO.

From the United States' perspective, China has cheated in creating low cost manufacturing advantages. The United States feels justified in using any means possible to neutralize these unfair practices that harm the United States by contributing to an increase in its trade deficit with China.¹²⁸ As the next parts of this Article will demonstrate, introducing human rights as a fair trade criterion into the WTO would make such new remedies available to the United States. Given the intense U.S. concerns over its trade deficit with China, such new weapons could be very appealing to the United States. This is really the crux of the debate over whether to include human rights in the WTO. The next sections now turn to these issues in detail.

5. THE USE OF HUMAN RIGHTS IN THE WORKPLACE TO CURTAIL TRADE FROM CHINA AFTER CHINA'S ENTRY INTO THE WTO

Part 4 sets forth the major benefits to China when it joined the WTO: legal protection against the unilateral imposition of quotas and the imposition of tariffs above the GATT bound rates on imports. As the earlier discussion has indicated, during the period prior to China's entry into the WTO, China's trade relations with the United States were conditioned upon an annual review of China's human rights record.¹²⁹ During this period, if the United States had imposed trade sanctions such as quotas and tariffs on

political rights incorporated in international human rights treaties would destabilize Chinese society and endanger its pursuit of economic welfare for the benefit of its citizens.

Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1, 33-34 (2011)

¹²⁷ *Id.*

¹²⁸ See, e.g., William McQuillen, *Obama Targets China with Enforcement Group Aimed at Unfair Trade Practices*, BLOOMBERG (Jan. 24, 2012, 9:36 PM), <http://www.bloomberg.com/news/2012-01-25/obama-vows-to-get-tough-on-trade-enforcement-help-u-s-companies-compete.html> ("It's not fair when foreign manufacturers have a leg up on ours only because they're heavily subsidized," Obama said.)

¹²⁹ See *supra* Part 2.2.

imports as punishment for China's human rights violations, there was no remedy available to China within the multilateral trading system; this would have been a bilateral trade and diplomatic issue left up to China and the United States to settle on their own and, at this time, the United States had the far larger economy and much greater economic power.¹³⁰ How has this situation changed after China's entry into the WTO? Are there legal avenues under the WTO that could potentially allow the United States to impose quotas and tariffs above the agreed upon GATT rates on China for violations of human rights? This Part now examines the provisions of the WTO that could potentially serve to neutralize the trade advantages that China has obtained through its WTO entry.

5.1. The General Exceptions Provision and the Justification of Trade Bans

When the GATT was adopted in 1947, the drafters believed that it was important to include a provision that recognized "linkages" between trade and civil society issues.¹³¹ This provision, GATT Article XX, known as the general exceptions provision, recognized that trade could result in harmful effects on civil society and thus recognized certain instrumental values that would serve as exceptions that would justify restrictions on trade. Note carefully that the effect of a measure falling under Article XX is that it is a *justified* restriction on trade;¹³² the measure can stand permanently and the trade restriction does not ever have to be removed.

To understand how introducing human rights into the WTO would create new trade weapons for the United States, it is necessary to review Article XX and how it operates to justify trade restrictions. GATT Article XX provides:

¹³⁰ See WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33534, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES, (Sept. 5, 2013), available at <http://www.fas.org/sgp/crs/row/RL33534.pdf>; Jack L. Hervey, *Foreign Trade and the U.S. Economy*, CHICAGO FED LETTER, no. 91, Mar. 1995, at 1, available at http://www.chicagofed.org/digital_assets/publications/chicago_fed_letter/1995/cflmarch1995_91.pdf.

¹³¹ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 11, at 299-300 (discussing the enumerated general exceptions that permit restrictions on trade).

¹³² See *id.*

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.¹³³

If a trade restriction falls within any of the categories listed in (a)-(f) and also satisfies the requirements of the introductory paragraph, called the "chapeau," then the trade restriction is justified under Article XX as an exception to any trading rights set

¹³³ See GATT, *supra* note 30, at art. XX (listing the exceptions to trade restrictions).

forth under any of the other provisions in GATT.¹³⁴ As an example of how Article XX works in practice, in the *EC-Asbestos* case,¹³⁵ the European Communities (EC) imposed a total trade ban on imports of asbestos-containing products from Canada. The EC invoked Article XX(b), the exception for measures “necessary to protect human, animal or plant life or health.”¹³⁶ Note that the EC imposed a complete trade ban – a quantitative restriction of zero. A quota of zero (or a quota of any kind) would normally be in violation of GATT Article XI, which sets forth a general prohibition of quotas. However, the EC’s trade ban or quota of zero was justified under Article XX(b) because the EC demonstrated that allowing the imported asbestos products, which had been demonstrated by scientific evidence to cause various respiratory diseases, would harm the health and safety of consumers in the EC.

In the *Shrimp/Turtle* case,¹³⁷ the WTO Appellate Body upheld a total trade ban on imported shrimp based on environmental concerns under Article XX(g).¹³⁸ In that case, the United States had

¹³⁴ The chapeau “looks like boilerplate that is too general to have any effect,” but such a description is untrue. CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 300. In fact, the chapeau played a key role in the *Shrimp/Turtle* cases involving environmental protection discussed *infra* note 137. The jurisprudence concerning the interpretation of the chapeau, although important, is not central to the argument in this article.

¹³⁵ See Appellate Body Report, *European Communities – Measure Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) (providing an example where the exceptions listed in Article XX of the GATT was invoked and justified).

¹³⁶ See GATT, *supra* note 30, at art. XX(b).

¹³⁷ See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle*] (introducing the break through case where environmental concerns were accepted as a justifiable excuse for trade restrictions).

¹³⁸ *Shrimp/Turtle* reversed a longstanding attitude of indifference in the WTO to environmental concerns. See *id.* In an earlier line of cases, decided during the 1990s, the GATT reached results that drew intense criticism from environmental groups that the GATT was insensitive to environmental concerns. In *Tuna/Dolphin I*, a 1991 GATT dispute, the United States imposed a ban on imports of tuna caught using a method that also killed dolphins. Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R (Sep. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1991). Mexico challenged the trade ban as in violation of GATT Article XI, which, as we have seen earlier, prohibits the use of quotas. *Id.* The United States attempted to justify the ban on the basis of Article XX(g) as a measure “relating to the conservation of exhaustible natural resources.” *Id.* The GATT panel rejected the argument by the United States on two grounds which

imposed a ban on imports of shrimp caught using methods that also killed turtles.¹³⁹ Although the Appellate Body rejected the U.S. ban on the facts of the case, the Appellate Body drew a roadmap for how the United States could justify a trade ban based on Article XX(g). The Appellate Body in *Shrimp/Turtle* found that the U.S. measures that banned shrimp imports unless they were caught using a "Turtle Excluded Device" (TED) could meet the requirements of Article XX(g) as "relating to conservation of exhaustible natural resources."¹⁴⁰ The turtles qualified as an "exhaustible natural resource" and under the facts of the case itself, the actual U.S. measures were objectionable because the United States had not attempted to negotiate with specific countries, such as Thailand, on accepting the measures.¹⁴¹ Instead, the United States had attempted to impose the same measures on all countries without leaving room to account for differences among countries.¹⁴² The Appellate Body's decision, however, pointed the way to a successful defense of the measures if the United States gave each country an opportunity to negotiate over the measures rather than unilaterally imposing the measures. Using this

enraged environmentalists: (1) the capture methods were a process, procedure, and method (PPMs) that did not affect the product itself – the tuna – and PPMs are not within the scope of GATT Article XX, the general exceptions provision; the capture methods killed dolphins but did not affect the tuna itself; only capture methods that had some direct effect on the physical characteristics of the product could be considered to be within GATT Article XX; and (2) the ban imposed by the United States had an extraterritorial effect, i.e. the ban was intended to influence the conduct of foreign nations and was not limited to affecting conduct within the territorial limits of the United States. *Id.* Any trade measure that was to be justified under GATT Article XX had to be limited in its territorial effect to the nation imposing the measure. *Id.* In *Tuna-Dolphin II*—decided three years later, in 1994—the GATT Panel rejected the U.S. trade ban on even stronger terms. Panel Report, *United States—Restrictions on Imports of Tuna*, DS29/R (Jun. 16, 1994). The GATT seemed to foreclose the possibility of using environmental concerns to justify a trade restriction and enraged environmentalists. This is why the *Shrimp/Turtle* case is viewed as a break through and could set a precedent for other civil society concerns to be imported into GATT Article XX.

¹³⁹ See generally *Shrimp/Turtle*, *supra* note 137.

¹⁴⁰ See *id.* ¶¶ 135–42 (stating the requirement under Article XX(g) that a measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources).

¹⁴¹ See *id.* ¶¶ 161–76 (discussing whether U.S. measures were applied in a manner that constituted unjustifiable discrimination between countries where the same conditions prevail).

¹⁴² See *id.*

procedure, the United States, after unsuccessful negotiations, later imposed a total trade ban on shrimp from Malaysia that Malaysia then challenged in the WTO.¹⁴³ The Appellate Body upheld the U.S. trade ban on Malaysia.¹⁴⁴ The United States was entitled to, in effect, impose a total trade ban and use the ban to pressure its trading partners to accept environmental standards established by the United States.

The discussion above indicates that the general exceptions provision that recognizes linkages between civil society issues and trade could potentially be used to justify a trade ban based upon non-trade concerns, such as human rights at the workplace, and to pressure U.S. trading partners, such as China, to accept U.S. labor standards. The United States could argue that the ban is justified under several provisions of the GATT Article XX general exceptions provision. For example, the United States could argue that the imports are the result of prison labor (Article XX(e)), labor under dangerous work conditions that pose a threat to human health and safety (Article XX(b)), or labor under oppressive conditions that violate public morals (Article XX(a)). This Article postpones a detailed examination of the viability of these arguments under these provisions until Part 6 below,¹⁴⁵ but, for now, this discussion indicates that potential mechanisms exist within the WTO that would allow the United States to neutralize one of the major trade benefits that China has obtained through its entry into the WTO: the 'no-quotas' rule.

5.2. Subsidies and Countervailing Duties

As we have already noted, a second major benefit of China's accession to the WTO is the right to MFN treatment and GATT bound tariffs, i.e. China's imports are entitled to the lowest tariffs that are imposed by the United States on any country.¹⁴⁶ Are there any remedies under the WTO that would allow the United States

¹⁴³ See Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 148, WT/DS58/AB/RW (Nov. 21, 2001) (noting that United States had the flexibility to consider the particular conditions prevailing in Malaysia if, and when, Malaysia applies for certification to export).

¹⁴⁴ See *id.*

¹⁴⁵ See *infra* Part 6.

¹⁴⁶ See *supra* note 96 and accompanying text.

to impose additional tariffs, above GATT bound rates, based upon human rights violations that would then also neutralize this advantage that China has obtained through accession to the WTO? Such a remedy does potentially exist in the form of a countervailing duty, an extra tariff that can be imposed on top of an existing GATT tariff if certain conditions indicating unfair trade exist. This remedy could neutralize China's other great advantage in international trade under the WTO: access to GATT tariff rates for goods that are produced as a result of low cost manufacturing, which gives these goods a comparative price advantage.

5.2.1. WTO Law Relating to Subsidies

GATT Article VI¹⁴⁷ and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement or SCM)¹⁴⁸ allow a country to impose a countervailing duty (i.e. an additional tariff) to offset the effect of a subsidy granted by a foreign government to exports.¹⁴⁹ A subsidy is a financial contribution made by a government to a domestic industry.¹⁵⁰ The payment of a financial contribution by a government to a domestic producer can give the producer a competitive price advantage in manufacturing products for export.¹⁵¹ The advantage is derived not by efficiencies of the producer but through a payment by the government. The subsidized products are then exported to an importing nation. The subsidized exports will enjoy a competitive price advantage that

¹⁴⁷ See GATT, *supra* note 30, at art. VI (contains the original provision authorizing the use of countervailing duties to offset subsidies. When the WTO was established in 1995, the parties believed that it was necessary to elaborate on GATT Article XVI and enacted the WTO Agreement on Subsidies and Countervailing Measures.).

¹⁴⁸ See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Text - Results of the Uruguay Round 164 (1999), 1869 U.N.T.S. 164 [herein after SCM].

¹⁴⁹ See GATT, *supra* note 30, at art. VI: 3 (discussing countervailing duties).

¹⁵⁰ See SCM, *supra* note 148, at art. 1.1 (defining a subsidy to include a "government practice [that] involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential transfers of funds or liabilities (e.g. loan guarantees)").

¹⁵¹ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 11, at 494-95 ("Due to the cost advantage that [a] subsidy provides, a foreign company might be able to export its goods at artificially low prices to [an] importing country.").

may then harm the domestic industries of the importing nation.¹⁵² Under the SCM, the importing nation is entitled to challenge the practices of providing subsidies directly in the WTO¹⁵³ or to impose a countervailing duty to offset the effect of the subsidy,¹⁵⁴ i.e. if the foreign government provides a payment of fifteen dollars for each export, the importing government is allowed to impose a countervailing duty of fifteen dollars.¹⁵⁵ The imposition of the fifteen dollar countervailing duty will offset the benefit of the fifteen dollar government subsidy; the net effect of the countervailing duty is to increase the price of the import to consumers in the importing country and will have an overall effect of reducing demand and, as a result, the volume of imports will decline.¹⁵⁶

¹⁵² *See id.*

¹⁵³ *See SCM, supra* note 148, at art. 4 (remedies to prohibited subsidies).

¹⁵⁴ *See GATT, supra* note 30, at art. VI: 3 (discussing countervailing duties). When subsidized products are being imported into the United States, the United States has the option of either imposing a countervailing duty (the unilateral remedy) under GATT Article VI: 3 or challenging the subsidization within the WTO itself (the multilateral remedy) under SCM Article 4. The option of pursuing either the unilateral remedy or the multilateral remedy is possible only when the subsidized product is imported into the country imposing the duty. For example, if China is providing a government subsidy to products that are imported into the United States, the United States can impose a countervailing duty to offset the effects of the subsidy or can forgo the countervailing duty and challenge the act of subsidization directly within the WTO. But now suppose that China is providing a subsidy to a product that is not being exported to the United States but to a third country, such as Japan. In this case, the United States cannot impose a countervailing duty as there are no imports from China on which such duties can be imposed. Note that U.S. producers might still be harmed in this scenario. If U.S. producers also export to Japan, then U.S. exports might be harmed by the subsidized exports from China in the Japanese market. In this scenario, the United States could have to challenge the subsidization within the WTO but cannot use the unilateral remedy of imposing countervailing duties.

¹⁵⁵ *See id.* (limiting amount of countervailing duties to amount of determined foreign subsidy).

¹⁵⁶ Using the unilateral remedy of imposing a countervailing duty does not result directly in the removal of the subsidy but does result in additional revenue to the importing country and a reduction in demand for the goods. This decline in demand might induce the country providing the subsidy to withdraw it. Using the multilateral remedy, i.e. challenging the subsidization in the WTO, would, if successful, result in a withdrawal of the subsidy.

5.2.2. Low Cost Labor and Unsafe Work Conditions as Subsidies

Before a countervailing duty can be imposed under WTO and U.S. law, the United States must first demonstrate that a contested measure or practice qualifies as a subsidy. To qualify, the measure must meet three requirements: the measure must (1) be a financial contribution or income support by a government;¹⁵⁷ (2) confer a benefit, not available on the market;¹⁵⁸ and (3) be "specific."¹⁵⁹ A financial contribution does not have to be a payment but can be the result of the non-enforcement of a law that results in a financial benefit to the domestic company.¹⁶⁰ Although China has extensive labor laws designed to protect workers, these laws are often ignored by employers and not enforced by government officials. For instance, China has laws that limit the workweek to no more than eight hours a day and forty-four hours a week on average.¹⁶¹ Yet, workers routinely work sixty to eighty hours a week in many export-oriented factories with yearly hours worked per employee as high as 4,000 hours in some enterprises.¹⁶² Although the extra hours during the workday and the sixth day of work should qualify for a higher wage per hour as overtime, no extra wages beyond the regular wage are normally provided.¹⁶³ Employers tell

¹⁵⁷ See SCM, *supra* note 148, at art. 1.1(a)(1)-(2).

¹⁵⁸ *Id.* at art. 1.1(b).

¹⁵⁹ *Id.* at art. 2.

¹⁶⁰ See Appellate Body Report, *United States – Tax Treatment for Foreign Sales Corporations*, ¶¶ 90-101, WT/DS108/AB/R (Feb. 24, 2000) (*adopted* Mar. 20, 2000) (holding that there is a "financial contribution" by a government pursuant to SCM to Article 1.1(a)(1)(ii) where government revenue that is otherwise due is foregone or not collected).

¹⁶¹ See Labor Law of the People's Republic of China (Revised) (中华人民共和国劳动合同法) (promulgated by the Standing Committee of the Nat'l People's Cong., Jul. 5, 1994, effective Jan. 1, 1995), art. 36 (providing an example where the non-enforcement of the laws result in a benefit to domestic companies).

¹⁶² See Judith Banister, *Manufacturing Compensation in China: Manufacturing Earnings and Compensation*, MONTHLY LABOR REVIEW, Aug. 2005, at 22, 28, available at <http://www.bls.gov/opub/mlr/2005/08/art3full.pdf> (estimating the labor compensation of manufacturing employees in China in 2002).

¹⁶³ See Chen Xin, *Survey: Many Bosses Don't Pay Holiday Overtime*, CHINA DAILY (Oct. 16, 2012), http://www.chinadaily.com.cn/business/2012-10/16/content_15820789.htm ("The survey, conducted by micro-blogging platform Sina Weibo, polled 9,224 netizens, and found 73 percent of respondents claimed they worked from Sept 30 to Oct 7 but did not receive overtime pay."). October 1 is celebrated as National Day in China because Mao Zedong declared

employees ahead of time of these conditions, and many employees gladly accept these conditions due to China's intensely competitive marketplace.¹⁶⁴ In addition, although employers are required to provide a safe working environment, many workers toil under dangerous conditions that often result in injuries and fatalities.¹⁶⁵ It was common until recently for companies to keep a fund to compensate relatives of employees who suffered fatalities at work.¹⁶⁶ Illegal discrimination in the workplace, particularly against women, continues to go on with impunity.¹⁶⁷ The United States could argue that the non-enforcement of labor laws by PRC authorities confers a financial benefit to the employer that is not otherwise available. In the market, assuming enforcement of labor laws, workers would be paid more in the form of overtime wages, the workplace conditions would be safer, and the work environment less hostile. Not having to pay employees overtime wages, to provide safe working conditions, and to provide a positive workplace environment result in lower costs to the Chinese employer, which constitutes a financial benefit.

The subsidy must also be "specific" in the sense that it cannot be generally available.¹⁶⁸ For example, the PRC government provides paved public roads and highways used by companies to transport goods to ports where the goods are then exported. If the PRC government did not provide paved roads, then the companies would have to expend their own funds to create useable highways or might have to spend extra funds to purchase special vehicles

the founding of The People's Republic of China on October 1, 1949. The entire first week of October is usually celebrated as a holiday in China. Anyone working during the week should receive overtime pay.

¹⁶⁴ This observation is based upon the author's own field research in China.

¹⁶⁵ See *Foxconn Factory Explosion in China Kills Three*, BBC NEWS (May 20, 2011, 2:02 PM), <http://www.bbc.co.uk/news/business-13476800> (describing an explosion at an iPad production factory in China which injured three).

¹⁶⁶ This observation is based upon the author's own knowledge and experience living and working in China as in-house counsel for a multinational company.

¹⁶⁷ See Christine M. Bulger, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345 (2000), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1174&context=twlj> (describing the ineffectiveness of many of China's laws that are meant to afford women equal employment opportunity).

¹⁶⁸ See SCM, *supra* note 148, at art. 2 (issuing the criteria for determining whether or not a subsidy is specific).

capable of moving goods using unpaved roads. But paved public roads are not considered to be a subsidy since they are generally available to the public;¹⁶⁹ everyone can use the paved roads and so they are considered to be the provision of government services that is part of the sovereign function of the government. The 'specificity' test draws the line between a prohibited subsidy and the legitimate exercise of sovereign authority to regulate, tax, and provide public services. Under WTO law, however, subsidies used to support exports are considered to be "red light" subsidies and are specific *per se*¹⁷⁰ because export subsidies are among those that cause the worst trade distortions.¹⁷¹ Since export subsidies are deemed to be specific as a matter of law, the United States may be able to make the case that lax enforcement of labor laws by the PRC government authorities constitutes an illegal subsidy that can be offset by the imposition of a countervailing duty.

5.2.3. *The United States and Double Remedies Against Imports from China*

The use of countervailing duties against imports from China to offset low labor costs seems consistent with the current aggressive U.S. stance in trade with China. On March 30, 2007, the U.S. Department of Commerce ("Commerce") reversed a longstanding policy that countervailing duties do not apply to non-market economies ("NMEs") by imposing countervailing duties on imports of high-gloss paper from China.¹⁷² The prior policy, which was affirmed by the landmark case of *Georgetown Steel Corp v.*

¹⁶⁹ See *id.* at art. 2.1(a) (providing that "[w]here the granting authority . . . explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific").

¹⁷⁰ See *id.* at art. 3.1(a) (holding that subsidies that are contingent upon export performance are prohibited).

¹⁷¹ See General Agreement on Tariffs and Trade art. XVI, § B, 2-3, Apr. 15, 1994, 1867 U.N.T.S. 187, available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_06_e.htm#article16 (describing the potential harm of export subsidies and recommending that contracting parties should seek to "avoid the use of subsidies on the export of primary products").

¹⁷² See U.S. DEP'T OF COMMERCE, CHINA CVD FACT SHEET (2007) (announcing its "affirmative preliminary determination in the countervailing duty (CVD or anti-subsidy) investigation on imports of coated free sheet paper from China").

United States,¹⁷³ was based upon the idea that a countervailing subsidy provides a benefit to an exporter that is not available in the market. This analysis requires a basic comparison between what the government has provided and a market-based benchmark. Because there is no market-based benchmark in an NME, such as China's economy, there is no way to make this comparison. For this reason, Commerce refused to apply countervailing duties to imports from China and other NMEs. In 2007, however, Commerce reversed this longstanding policy on the grounds that China is no longer truly an NME but is a "mixed" economy with sophisticated marketing and manufacturing techniques.¹⁷⁴ Although Commerce's change in position does not single out any NME, the greatest impact of the change, of course, is on goods from China, and few people would doubt that the real target of the change in policy were Chinese imports.

In 2011, in *GPX International Tire Corp. v. United States*,¹⁷⁵ the United States Court of Appeals for the Federal Circuit ruled that, consistent with the holding in *Georgetown Steel*, Congress had amended the U.S. subsidies and countervailing duty laws to exclude their applications to NMEs.¹⁷⁶ Although Commerce has some discretion in applying the countervailing duty laws, Commerce has no authority to disregard clear congressional intent that the countervailing duty laws do not apply to NMEs. The court of appeals concluded, "We affirm the holding of the [Court of International Trade] that countervailing duties cannot be applied to goods from NME countries."¹⁷⁷

¹⁷³ See generally, *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) (upholding the Department of Commerce's decision that section 303 of the Tariff Act of 1930 does not apply to nonmarket economies).

¹⁷⁴ See CHINA CVD FACT SHEET, *supra* note 172 ("In this preliminary determination, Commerce explains that *Georgetown Steel* no longer applies to China of [sic] because of the vast differences between the characteristics of the non-market economies of the 1980s Soviet-bloc countries and China's economy today.").

¹⁷⁵ See generally, *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011) (holding that the Department of Commerce was barred from imposing countervailing duties on non-market economy goods).

¹⁷⁶ See *id.* at 745 (affirming the holding from the lower court).

¹⁷⁷ See *id.* The Federal Circuit Court of Appeals remanded the case to the trial court to consider several constitutional challenges raised by the importers and producers and exporters of tires from China. On remand, the Court of International Trade considered several arguments that the 2012 Countervailing Duty Law was unconstitutional, including claims that the law as applied to these

In the aftermath of *GPX International*, on March 13, 2012, President Obama signed into law “An Act to Apply the Countervailing Duty Provisions of the Tariff of 1930 to Non-Market Economy Countries, and for Other Purposes.”¹⁷⁸ The law reversed the decision of *GPX International* and applied countervailing duties to imports from China retroactive to 2006. The law also affirms yet another controversial U.S. trade practice: applying countervailing duties and anti-dumping duties at the same time to the same imports from China. An anti-dumping duty is an extra tariff that is applied to imports that are sold at artificially low prices in the import market.¹⁷⁹ As in the case of subsidies, WTO members believed that it was necessary to expand and elaborate upon GATT Article VI and enacted the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994) (hereinafter “Anti-Dumping Agreement”).¹⁸⁰ Suppose, for example, that a product is sold in China for twenty-five dollars and is sold in the United States for ten dollars. The product is being “dumped” at artificially low prices in the United States.¹⁸¹ The dumped products might harm competitors in the United States, and then once a market niche is created, the exporter might raise prices or lower the quality of the exports.¹⁸² To offset the harm created by the dumped product, the

importers and exporters violated the Due Process Clause. The importers and exporters argued that the 2012 Countervailing Duty Law changed the law mid-stream in the course of a pending action against them. The Court of International Trade rejected all of these constitutional arguments. *See generally*, *GPX Int'l Tire Corp. v. United States*, 893 F. Supp. 2d 1296 (Ct. Int'l Trade 2013). The constitutional arguments, even they had been upheld, would not have affected the validity of the 2012 CVD Law. This result would indicate that the law is now settled that CVDs can be applied to imports from China. The Court of International Trade further remanded the case to the Commerce Department for the consideration of technical issues of CVD law. *See id.* at 1327-38.

¹⁷⁸ *See generally*, An Act to Apply the Countervailing Duties Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for Other Purposes, Pub. L. No. 112-99, 126 Stat. 265 (2012).

¹⁷⁹ *See* GATT, *supra* note 30, at art. IV, part 1, art. 2 (authorizing the imposition of an anti-dumping duty equal to the margin of dumping to offset or prevent dumping).

¹⁸⁰ *Id.*

¹⁸¹ *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 11, at 443 (“Dumping occurs when a product is sold in the export market at a price that is lower than the price at which it is sold in the home market.”).

¹⁸² *See id.* at 445 (describing the harms dumping causes in the export market).

importing nation is allowed under WTO law to apply an anti-dumping duty equal to the margin of dumping to offset its harmful effects.¹⁸³ In the example above, the margin of dumping is fifteen dollars (twenty-five to ten dollars) and the United States could impose an anti-dumping duty of fifteen dollars to offset the margin of dumping.¹⁸⁴ The United States has begun to impose both countervailing duties and anti-dumping duties at the same time and on the same imports from China.¹⁸⁵ Subsequently, China challenged this practice as the imposition of 'double remedies' at the WTO. In *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*,¹⁸⁶ the Appellate Body held that in assessing both dumping and countervailing duties on the same products from China without having assessed whether double remedies would result from such concurrent duties, was inconsistent with Article 19.3 of the SCM.¹⁸⁷

¹⁸³ See GATT, *supra* note 30, at art. VI: 2 ("In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."); see also Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"), pt. 1, art. 1. (setting guidelines describing circumstances under which anti-dumping measures shall be applied).

¹⁸⁴ The example given in the text is a simplified example of dumping, involving one single transaction. Of course, most dumping cases are complex because they involve different costs added into the sales price, many numbers of sales, and different models of the same product that require sophisticated methodologies for determining the margin of dumping. See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 454-56 (describing calculations of the margin of dumping).

¹⁸⁵ See Dukgeun Ahn & Jieun Lee, *Countervailing Duty Against China: Opening a Pandora's Box in the WTO System?* 8-10 (Univ. of Mich. Gerald R. Ford Sch. of Pub. Policy, Discussion Paper No. 615, 2011), available at <http://www.fordschool.umich.edu/rsie/workingpapers/Papers601-625/r615.pdf> (describing changes in the Department of Commerce's policy of CVD laws as they relate to Chinese trade).

¹⁸⁶ See Appellate Body Report, *United States - Definitive Dumping and Countervailing Duties on Certain Products from China*, ¶¶ 205-206, WT/DS379/AB/R (Mar. 25, 2011) (finding that the U.S. Department of Commerce acted inconsistently with SCM Article 19.3 by declining to address China's concern that imposing both anti-dumping and countervailing duties on the same products could constitute a double remedy).

¹⁸⁷ See Agreement on Subsidies and Countervailing Measures art. 19.3, Apr. 15, 1994, 1869 U.N.T.S. 164 ("[An imposed] countervailing duty shall be levied . . . on a non-discriminatory basis on imports . . . found to be subsidized and causing injury, except as to imports . . . which have renounced any subsidies in question or from which undertakings under . . . this Agreement.").

In response, the March 13, 2012 Public Law 112-99 signed by President Obama states that when Commerce applies both countervailing duties and anti-dumping duties to a particular case, and if Commerce can reasonably detect any double counting, then Commerce should reduce the duties to the extent that would compensate for the double counting.¹⁸⁸ In other words, the United States still intends to impose both anti-dumping and countervailing duties on the same goods and at the same time, but will take into account the WTO's concern by eliminating double counting, in cases where it is possible.

5.2.4. *Likelihood of Use of Countervailing Duties for Labor Conditions*

The point of this discussion about double remedies—the possibility of imposing antidumping and countervailing duties at the same time and on the same goods—is to indicate the current hostile mood and aggressive attitude that the United States holds towards imports from China.¹⁸⁹ It is no exaggeration to say that

¹⁸⁸ Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, § 2, 126 Stat. 265 (2012). See also Appellate Body Report, *United States - Countervailing and Anti-Dumping Measures On Certain Products From China: Request for Consultations by China*, WT/DS449/1 (Sept. 20, 2012), available at [http://www.worldtradelaw.net/cr/ds449-1\(cr\).pdf](http://www.worldtradelaw.net/cr/ds449-1(cr).pdf).

¹⁸⁹ There is also the possibility of a third remedy—safeguards—that the United States might use against China simultaneously with anti-dumping and countervailing duties. Under the WTO, safeguards are temporary measures, such as higher tariffs, which can be imposed when there is a sudden influx of imports that might cause harm to a domestic industry. The trade is fair in the sense that the surge of imports is not due to some unfair trade practice but to efficiencies so that is why the measures are temporary; safeguards are meant to give the domestic industry some 'breathing room' to adjust to sudden new competition. In the past, the United States has not hesitated to impose safeguards on top of existing anti-dumping duties. In 2002, President Bush imposed safeguards on steel imports that were already subject to anti-dumping duties. Not only were the safeguards imposed on top of existing anti-dumping duties, but the safeguards were also imposed on virtually all steel products, many of which were from China. Many countries reacted with shock to the scope and severity of the U.S. safeguards and immediately raised their own steel tariffs on the expectation that steel imports would be diverted from the United States to their markets. A number of countries, including China, also immediately challenged the U.S. safeguards in the WTO. In the Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248, 249, 251, 252, 253, 254, 258, 259/AB/R, adopted on December 10, 2003, the WTO rejected many of the U.S. safeguards on other grounds, but the WTO did not definitely preclude the use of safeguards and anti-dumping duties at the same time. The use of

the United States appears to be using whatever tools and means that are available to stem the influx of imports from China and to slow down the growth of the trade deficit.¹⁹⁰ These efforts are further fueled by a pervasive perception by the U.S. government and the general populace that China regularly cheats in trade in order to encourage exports at the expense of the United States.¹⁹¹ The combination of these factors suggests that the United States would most likely not hesitate to use human rights obligations as a means to impose an additional countervailing duty for the low labor costs that can be viewed as the result of a subsidy by the PRC

safeguards against China is a special issue because in its Protocol of Accession, the agreement governing the conditions of granting China's accession to the WTO, China agreed to permit the United States to single out goods from China for safeguards. *See generally*, Ministerial Conference Accession of the People's Republic of China: Decision of November 10, 2001, ¶ 16, WT/L/432 (Nov. 23, 2001) (stating that there were special safeguard mechanisms to be put into place for products of Chinese origin). Under the Protocol, the United States can impose safeguards only against goods from China. *Id.* This practice is inconsistent with the WTO's rules of non-discrimination that would normally require the United States to impose safeguards on all like goods from all countries as opposed to singling out some countries for safeguards while exempting other countries even though they export similar goods to the United States. In other words, China agreed to allow its imports to be singled out by the United States for discriminatory treatment in the use of safeguards. This special safeguard expires on Dec. 11, 2013. *See id.* ("Application of this Section shall be terminated 12 years after the date of accession.").

¹⁹⁰ *See infra* Part 5.2.3. The United States' insistence on pursuing double remedies for the same imports - both anti-dumping and countervailing duties - is an example of the aggressive U.S. attitude in pursuing trade sanctions against China. There is even the possibility of a third remedy being imposed on goods from China, i.e. safeguards, which are also additional tariffs on top of existing countervailing and antidumping duties. *See supra* note 189 and accompanying text. This creates the possibility of triples remedies being imposed on the same imports from China. In March 2002, President Bush ordered the imposition of safeguards on top of existing anti-dumping duties on steel imports from a number of countries. Many countries were genuinely shocked by the severity of the double remedies imposed by the United States. *See CHOW AND SCHOENBAUM, INTERNATIONAL TRADE LAW, supra* note 11, at 390. The possibility of triple remedies against imports from China is an indication of just how aggressive the United States stance could become in order to stem the influx of Chinese imports.

¹⁹¹ *See Bloomberg View: Smart Trade With China*, BLOOMBERG BUS. WK. (Nov. 1, 2012), <http://www.businessweek.com/articles/2012-11-01/bloomberg-view-smart-trade-with-china> (describing what practices China uses to manipulate trade with the United States).

government.¹⁹² The recent conduct and attitude of the United States toward China indicate that the United States will take an aggressive approach to seeking trade remedies China.¹⁹³ The next part of this Article assesses the viability of these options.

6. THE LEGAL VIABILITY OF IMPOSING A TRADE BAN OR
COUNTERVAILING DUTIES BASED UPON VIOLATIONS OF HUMAN
RIGHTS AT THE WORKPLACE

The discussion in Part 5 of this article describes the potential options available to the United States to blunt the two major advantages that China's export trade has obtained through its WTO accession. Prior to China's WTO accession, as detailed in an earlier section, the United States could impose any trade ban or any form of higher tariffs without any constraints created by the multilateral trading system.¹⁹⁴ Such trade ban or any form of higher tariffs would be a purely bilateral trade issue between China and the United States, and during most of this period the United States had the much larger and more powerful economy and greater negotiation leverage. By 2013, China's economic development, fueled by exports, had leapfrogged many other countries and placed China now as the second largest economy in the world.¹⁹⁵ Some experts predict that China will even surpass the United States as the world's largest economy in as short a period as twenty years.¹⁹⁶ Can the United States stem the explosive growth of China by blunting the trade advantages that China obtained as a matter of right when it joined the WTO? Or does China's accession

¹⁹² See *supra* notes 186-188 and accompanying text (describing certain measures the United States has taken to in effect circumvent the low tariff rates Chinese exports enjoy as a result of its accession to the WTO).

¹⁹³ See *supra* note 190 and accompanying text.

¹⁹⁴ See *supra* Part 2: Introduction (indicating that prior to China's accession to international trade agreements, the US was able to impose tariffs as it saw fit).

¹⁹⁵ See *China Overview*, WORLD BANK, <http://www.worldbank.org/en/country/china/overview> (last visited Oct. 20, 2013) ("With a population of 1.3 billion, China recently became the second largest economy and is increasingly playing an important and influential role in the global economy.").

¹⁹⁶ See Chris McGreal, *China's Economy to Outgrow America's by 2030 as World Faces 'Tectonic Shift'*, THE GUARDIAN (Dec. 10, 2012, 3:38 PM), <http://www.guardian.co.uk/world/2012/dec/10/chinese-economy-america-tectonic-shift> ("China alone will probably have the largest economy, surpassing that of the United States a few years before 2030 . . .").

to the WTO preclude the United States from using human rights at the workplace as a means to place trade restrictions on China?

To find the answer, we need to look no further than the 1996 Singapore Ministerial Declaration issued by all members of the WTO at the conclusion of the first meeting of all WTO members:

We renew our commitment to the observance of internationally recognized core labor standards. The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. . . . We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO Secretariat and ILO Secretariats will continue their existing collaborations.¹⁹⁷

Although the Singapore Ministerial Declaration may seem to promote workers' rights, a careful examination of this language makes clear several basic points. The most important of these points is that workers' rights are not within the purview of the WTO but within the jurisdiction of the ILO. If workers' rights are not within the recognized scope of the WTO, then worker's rights cannot be brought up within any of the WTO agreements as a basis for the justification of a trade restriction. In other words, it is not possible to assert workers' rights as a justification for a trade ban under Article XX of the GATT, the general exceptions provision.¹⁹⁸ Suppose, for example, that a WTO member believed that imposing a trade restriction was necessary to protect Chinese workers from poor working conditions and that this fell under Article XX(a) as a measure "necessary to protect public morals,"¹⁹⁹ or under Article XX(b) as a measure "necessary to protect human . . . life or health."²⁰⁰ The response to such claims would be that in

¹⁹⁷ See Ministerial Conference, *Singapore Ministerial Declaration of 13 December 1996*, ¶ 4, WT/MIN(96)/DEC (Dec. 18, 1996) (indicating that labor standards should not be used as the basis for trade restrictions).

¹⁹⁸ See *supra* note 133 and accompanying text (noting that labor standards do not form a basis for an exception on trade prohibition bans).

¹⁹⁹ GATT, *supra* note 30, at art. XX(a).

²⁰⁰ *Id.* at art. XX(b).

accordance with the Singapore Ministerial Declaration, these provisions contained in Article XX cannot be interpreted to include factors relating to 'labor standards' because these matters are outside the scope of the WTO and must be asserted within the ILO. Of course, the United States is free to assert these allegations against China in the ILO, but the ILO is a toothless organization with no enforcement power, so raising such concerns in the ILO will not result in any meaningful consequences.²⁰¹ Moreover, because the Singapore Ministerial Declaration states that the ILO is the proper organization with which to raise these concerns, it is not possible to assert a violation of an 'obligation' under the ILO in the WTO as the basis of a WTO trade restriction.

What about GATT Article XX(e) permitting trade restrictions "relating to the products of prison labor"?²⁰² Could this exception also be extended to other conditions of enslavement, such as child labor or labor of workers that have, as a practical matter, no choice but to work under oppressive conditions? The answer, again, would appear to be no. GATT Article XX(e) permitting trade restrictions for prison labor was enacted in 1947 as part of the original GATT and the concern at the time was with the cheap cost of prison labor,²⁰³ which was common during this period in world history.²⁰⁴ The concern behind the prison labor exception was not based upon work conditions in prisons for prisoners. The Singapore Ministerial Declaration on its face refers to "core labour standards," which seems to encompass work conditions and, for this reason, both child laborers and workers who toil under oppressive conditions without any real choice would fall outside the scope of Article XX(e).²⁰⁵ Under the Singapore Ministerial

²⁰¹ See INT'L ORG. OF EMP'RS, THE EVOLVING DEBATE ON TRADE & LABOUR STANDARDS 2 (2006), available at http://www.wto.org/english/forums_e/ngo_e/posp63_ioe_e.pdf (indicating that linkages between trade and labor standards have "proven unworkable").

²⁰² GATT, *supra* note 30, at art. XX(e).

²⁰³ See CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 11, at 369 ("While GATT Article XX(e) allows for import restrictions on goods produced by forced labor, the underlying rationale for this exception is an economic one based on the cost advantages created by forced and prison labor.").

²⁰⁴ See generally Jackson Taylor Kirklín, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 COLUM. L. REV. 1048, 1052-55 (2011) (briefly describing the history of prison labor in the U.S. and citing the 1929 Hawes-Cooper Act regulating prison labor).

²⁰⁵ See *Singapore Ministerial Declaration*, *supra* note 197, ¶ 4.

Declaration, the appropriate forum in which to assert these concerns is the ILO, not the WTO.²⁰⁶

Turning now to the issue of countervailing duties imposed on China to offset the 'subsidy' created by non-enforcement of laws leading to lower labor costs, the Singapore Ministerial Declaration appears to offer a clear answer to this issue as well. Poor working conditions tolerated by governments are within the purview of the ILO, not the WTO, and thus cannot be raised as a justification for the imposition of a countervailing duty under the SCM. In other words, work conditions are simply not a factor that can be considered in applying the SCM. The Singapore Ministerial Declaration goes further to emphasize that "[w]e reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question."²⁰⁷ This statement appears to reinforce the rejection of the use of poor work conditions as a justification for the imposition of an extra tariff in the form of a countervailing duty to offset the cost advantage.

This analysis suggests that the current position of the WTO appears to be a significant victory for China and other developing countries, which are now protected against the use of human rights at the workplace and labor conditions as a justification for the imposition of trade sanctions within the WTO by member countries, such as the United States. China gained these benefits as a matter of right when it acceded to the WTO.²⁰⁸ Note that there is nothing inherent in the language of Article XX, the general exceptions provision of the GATT, or in the SCM that would prevent the consideration of work conditions as a justification for a trade restriction.²⁰⁹ What stands as a legal bar is the Singapore Ministerial Declaration itself that declares that human rights at the workplace are outside the scope of the WTO.²¹⁰ What will be necessary to overturn the current position? It would appear that

²⁰⁶ *Id.* (indicating that although the WTO and ILO will collaborate, the ILO is "the competent body to set and deal with these standards").

²⁰⁷ *Id.*

²⁰⁸ See *supra* Part 3 (noting that China gained the ability to be free of these restrictions upon joining the WTO).

²⁰⁹ See GATT, *supra* note 30, at art. XX; SCM, *supra* note 148.

²¹⁰ See *Singapore Ministerial Declaration*, *supra* note 197, ¶ 4.

only a document of a similar legal status, such as a second Ministerial Declaration, could reverse the current position set forth by the Singapore Ministerial Declaration. This is now the real battleground in the WTO: whether and how to reverse the ban on the use of human rights at the workplace set forth in the Singapore Ministerial Declaration. Whether this action will occur in the near future is a matter of political will within the WTO but it does not appear that such will is present.²¹¹ Such a course of development is difficult to predict with any confidence, but it is possible to state without much doubt that China and many other developing countries would strongly oppose any move to introduce human rights in the workplace (or in any other context) in the WTO as they will perceive such a move as an attempt to erode their comparative trade advantages.

7. CONCLUSION

The issue of whether to include human rights in the WTO is a controversial one with many different sides to the debate.²¹² Aside from all of the obfuscating rhetoric about humanitarian concerns, the real issue is whether to make human rights into a criterion of fair trade in the WTO that would justify trade restrictions in the form of trade bans or higher tariffs. Between the United States and China, the debate, due to reasons of history and current economic conditions, has taken on some especially sharp points of disagreement, tension, and vitriol. During the period leading up to China's accession to the WTO, China was made to endure over a decade of a humiliating annual lecture and review of its human rights record as a condition for renewal of its MFN trading rights

²¹¹ As a practical matter, a ministerial declaration would require a consensus of all of the trade ministers of each WTO member. For its entire history, the WTO, and its predecessor the GATT, has used a principle of consensus in making decisions in the GATT/WTO. See generally Mary E. Footer, *The Role of Consensus in GATT/WTO Decision-making*, 17 NW. J. INT'L L. & BUS. 653 (1997) (discussing the history and role of consensus decision making in the GATT and WTO). In this context, consensus does not mean unanimity, but only that no country objects. Under the political culture of the WTO, it would be possible for a small minority of WTO countries or even one country to block the adoption of a ministerial declaration recognizing human rights as a criterion of fair trade that can be used to justify a trade restriction. *Id.*

²¹² See *supra* notes 125 & 128 and accompanying text (indicating that politicians and others have weighed in with varying viewpoints).

under the Jackson-Vanik amendment.²¹³ It is doubtful that China has forgotten being placed in the position of a supplicant dependent upon the largesse of the United States. China's leaders are now very sensitive to the perception that they are being bullied by the United States (or any other country)²¹⁴ and show an inclination to aggressively assert rights in a manner that is commensurate with China's growing economic and political stature in the modern world.²¹⁵ By joining the WTO, China is now protected under the 'no-quotas' rule of the GATT and is entitled under MFN to the lowest tariffs given by the United States to any other nation.²¹⁶ These two benefits, hard fought gains after enduring more than a decade of bullying by the United States under the Jackson-Vanik amendment review, are essential to protect China's mercantilist strategy to spur economic growth by promoting its export trade to the fullest extent possible. Whether China's mercantilist strategy is a prudent internal economic policy or helpful to global trade is beside the point; China wants the ability to pursue it aggressively and to the full extent permitted by WTO law. On the other side, the United States finds itself at the short end of an ever widening trade deficit with China with the result that China owns more and more of the U.S. economy as China is using its export earnings to buy U.S. assets in the form of government securities²¹⁷ and equities.²¹⁸ While this concern with the trade deficit is grave in its own right, the severity of the

²¹³ See *supra* Part 2.2.

²¹⁴ See Thomas J. Christensen, *The Advantages of an Assertive China: Responding to Beijing's Abrasive Diplomacy*, BROOKINGS INST., March/April, 2011, available at <http://www.brookings.edu/research/articles/2011/03/china-christensen> (documenting the instances in which sensitivity to a perception of being bullied has played out in geopolitical affairs).

²¹⁵ See *id.* (indicating the ways in which China's leaders have been more assertive on the world stage based on an "an exaggerated sense of China's rise in global power").

²¹⁶ See *supra* Part 3: Introduction (noting that China is now entitled to these benefits as a result of accession to the WTO).

²¹⁷ See CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW*, *supra* note 11, at 45-46, 48 (analyzing policies by China which may prevent the U.S.-China trade deficit from naturally correcting itself).

²¹⁸ See Chuin-Wei Yap, *Smithfield Deal Signals China's Need for Meat, Dairy, Other Food Buys*, WALL ST. J. (May 30, 2013, 10:40 AM), <http://online.wsj.com/article/SB10001424127887324682204578514730858156190.html> (documenting the growing trend of Chinese firms purchasing U.S. food assets).

concern is exacerbated by a widespread perception that China cheats in many ways in order to promote its exports, including by tolerating illegal work conditions and failing to enforce labor laws that create even lower labor and manufacturing costs that make it impossible for U.S. producers to compete with China.²¹⁹

The concerns of the United States have created a generally hostile mood and attitude towards China in the U.S. Congress and among many other public and private sectors of the United States. The result of this attitude is a search for aggressive trade remedies and sanctions that can be used to blunt China's export trade to the United States, a desire made more intense by the perception that China is cheating. This article has examined whether the United States can use human rights at the workplace as a tool to justify a trade restriction against imports from China. The conclusions reached herein are as follows: prior to China's entry into the WTO, the United States could have imposed just about any type of trade restriction – a total or partial ban (quota), non-GATT tariffs, or a combination of these remedies against China without any constraints created by the WTO or its predecessor entities. However, this situation changed dramatically once China acceded to the WTO in 2001. Under current WTO law, in the view of the author, it would not be possible to justify a trade restriction either in the form of a trade ban or increased tariffs in the form of countervailing duties based upon China's human rights record at the workplace. It would take a new Ministerial Declaration that would repeal the Singapore Ministerial Declaration to change this current state of WTO law.²²⁰

Finally, the debate about whether to include human rights in the WTO, although often framed as an issue of human dignity, freedom, and respect, is, at least in the debate between the United States and China, really an economic debate. On the one hand, labor unions in the United States, if they were being honest, would acknowledge that they do not really care about the health, safety, and well-being of the average Chinese factory worker who may

²¹⁹ See *China Trade and Jobs*, CAMPAIGN FOR AMERICA'S FUTURE, http://ourfuture.org/smart_talk/china-trade-and-jobs (last visited Nov. 21, 2013) (stating that "'China cheats' resonates with voters because it is true" and describing the various unlawful practices used by China to promote its exports and noting that China is guilty of "repeated trade violations").

²²⁰ See *supra* Part 6 (analyzing the role of workers' rights in global trade regimes).

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work under oppressive conditions and in an unsafe workplace environment. To argue otherwise would be flatly disingenuous. Their real concern is with the low costs of manufacturing in China that create a competitive advantage that appears impossible to overcome. On the other hand, Chinese government officials, if they were being honest, would admit that they are not really concerned about protecting Chinese sovereignty in resisting attempts by the United States to impose western labor standards on China. Their real concern is with keeping labor costs low, by any means possible, to sustain China's cost advantages in its exports. For both countries, the real issue is an economic one of whether China (and other developing countries) should be able to fully exploit a comparative advantage in low labor costs or whether advanced developed countries should be able to neutralize such comparative advantages through trade remedies such as quotas or increased tariffs. Framing this issue as an economic and trade debate would remove some of the high emotions and political posturing that tends to cloud the debate when it is framed as one about national sovereignty, human dignity, freedom, and respect.