China’s Accession to the WTO

On November 11, 2001, the fourth WTO Ministerial Conference at Doha, Qatar, approved the terms of China’s accession to the WTO (World Trade Organization), and China deposited its instrument of ratification. China became the 143rd member of the WTO on December 11, 2001. China’s accession package, including the Report of the Working Party on China’s Accession, the Protocol of Accession, and the schedules and annexes to the Protocol, is more than 800 pages long and addresses issues, sectors, and import opportunities that are of great interest to foreign investors.

This package is the culmination of a 15-year negotiation process. The changes China’s WTO accession will entail, both for China and for the world trading community, are immense. Domestically, China must make major legislative and policy changes to bring its laws and foreign investment regime into conformity with the WTO. By joining the WTO and making these necessary internal changes, China will become part of a rules-based, multilateral trading system. It will be a more transparent and easier market for foreign investors and sellers of goods and services to navigate. World trade will change by the integration of such a major player into the community.

In its WTO accession documents, China has agreed to make binding commitments on tariffs, liberalize the service sector, increase transparency, and make changes that will facilitate doing business there.

What is the WTO?

The WTO is set out in four major agreements and in several additional agreements and decisions covering specific industries or issues. The major agreements are the General Agreement on Tariffs and Trade (GATT), covering trade in goods; the General Agreement on Trade in Services (GATS), covering the service sector; the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and the Understanding on Rules and Procedures Governing the Settlement of Disputes. Issues covered by the additional documents include, for example, technical barriers to trade, customs valuation, and import licensing procedures.

The agreements on goods and services each consist of a main text outlining general principles and obligations, annexes covering listed products or service sectors, and the schedules of commitments of individual country members.

The underlying principles of the WTO are transparency, most favored nation (MFN), and national treatment. Under the principle of MFN, a member country should treat all its trading partners within the WTO equally. National treatment requires, in the case of goods, that imported goods, once they enter a member country, should be treated no less favorably than domestically produced goods. The application of national treatment in services under GATS is narrower. A member only has to give national treatment to services where it has made a commitment to do so.
How will China's Accession to the WTO Affect your Business in China?

China has posed a dilemma for business for years. The market has been too large to ignore, but frustratingly difficult to enter and navigate. Lack of transparency, closed sectors, and rules designed to keep foreigners out of many lucrative but underdeveloped business activities have dogged foreign investors since China announced the opening of its economy in 1979. China's WTO accession will rationalize China's business environment in a number of ways, a few of which are discussed below.

Entering the Market. Establishing a company in China has been a challenge for foreign investors on two fronts. First, many industries have been closed to foreign investment, especially in the service sector. This should improve, as China has committed to open more industries following WTO accession. Second, the foreign trade regime itself has been a barrier. It has been difficult for foreign investors to get information on, or participate directly in, the approval process. This should become easier. Upon accession, China must have in place a mechanism by which individuals or companies can bring problems with discriminatory application of the foreign trade regime, or with enforcement of China's WTO commitments, to the attention of the central government, which then must refer the matter to the appropriate authorities. Under this mechanism, the investor will receive a written response as to the authority's decision and actions. This should facilitate entering the Chinese market.

Access to Information. Not all of China's laws and policies are publicly available, which has made it difficult for foreign investors to structure their projects. Under the WTO, China has undertaken to address this problem by publishing information, including all legislation dealing with trade in goods, services, TRIPS, or forex control, information on goods subject to state pricing, information on review of administrative actions, lists of entities responsible for approval of imports and exports, notices on technical regulations and standards, a list of government authorities responsible for approving or regulating services sectors, and investment licensing procedures and conditions. China must provide additional information to the WTO or to committees under the WTO on a regular basis pursuant to a transitional review mechanism.

In addition, China has undertaken to set up one or more inquiry points where any individual, entity, or WTO member country can obtain information on laws or regulations relating to foreign trade or investment, including forex and TRIPS, and contact details for government departments responsible for implementing such laws or regulations. This increased transparency will make it easier for foreign investors to do business in China and will help ensure that China implements its WTO obligations.

TRIMS. Formerly, foreign-invested companies in China were required to comply with obligations on technology transfer and forex balancing, and to satisfy export obligations and minimum PRC domestic content requirements. Foreign investment legislation set out these requirements, and approval authorities often required that a company's constitutional documents include provisions on these matters. These types of requirements are not allowed under the WTO's Agreement on Trade-Related Investment Measures ("TRIMs") because they distort and restrict trade. In anticipation of its WTO entry, China amended the laws and regulations on foreign investment to remove provisions that contravene TRIMs. In addition, the Protocol of Accession provides that contractual provisions imposing such requirements will not be enforced, which clarifies the standing of approved contracts with such provisions.

Trading, Distribution, and After-Sales Service. As a rule, foreign-invested companies in China are only allowed to import goods for their own use and
to export their own production. Further, companies have not been allowed to distribute their products in China or provide after-sales service for products sold in China. The restriction on trading has made it impossible for foreign companies to conduct business in China as they do elsewhere and is inconsistent with GATT. Therefore, China has agreed to phase out the restriction on trading over a three-year period, starting with its date of accession. After three years, all companies in China, including domestic companies, will be granted the right to trade.

Distribution and after-sales service are covered by the GATS. China has committed to open distribution in stages within one, three or five years after accession, depending on the product, by allowing foreign investors to set up distribution joint ventures. Foreign-invested companies in China will be allowed to distribute products they have manufactured in China and to provide after-sales service for these products or for services they themselves have provided, starting upon accession.

Protection of Intellectual Property. Despite international pressure, China continues to have a poor record on protecting intellectual property rights ("IPR"), and piracy is widespread. It is unlikely that China's WTO accession will lead to an immediate improvement in protection of IPR. However, China must make a number of positive changes to its intellectual property laws and practices in order to become TRIPS compliant, which should make enforcement easier.

TRIPS covers trademarks, including service marks, geographical indications, industrial designs, patents, layout designs of integrated circuits, and undisclosed information, including trade secrets. TRIPS, like the other WTO documents, is built on the principles of MFN and national treatment. TRIPS incorporates the major international intellectual property agreements, including the Paris Convention and the Berne Convention, while providing for higher standards in some cases.

China's obligations under TRIPS arise upon accession, and revisions to China's Patent, Copyright and Trademark Laws took effect earlier this year. Amendments to all three laws, for example, provide for damages based on the losses suffered by the rights holder rather than the infringer's profits, where appropriate. They also provide for statutory damages where losses are difficult to determine, broader access to judicial review of administrative decisions, and the right to apply to the People's Court for preliminary injunctions to prevent damages caused by infringement. The revised Patent Law sets stricter standards for compulsory licensing and improves patent prosecution procedures. The Copyright Law was amended by adding provisions in a number of areas, such as the rights of reproduction, right to lease, and the right to disseminate through information networks. Amendments to the Trademark Law clarify the protection of three-dimensional and geographical symbols, and well-known trademarks.

In the Report of the Working Party, China has committed to providing effective civil enforcement procedures for IPR holders. The revisions to the Patent, Copyright and Trademark Laws, if enforced by the administrative agencies and the courts, should give IPR holders additional tools to stop infringers.

Selling or Bringing Products into China

The GATT provides the general principles governing trade in goods, including MFN, which prohibits a member from discriminating between products originating within different WTO members, and national treatment, which prohibits a member from treating imported products less favorably than domestic products. Basic premises of the GATT are that tariffs should be the only measure to protect domestic industry from foreign imports, and that tariffs should be progressively reduced.
China has agreed to bind tariffs for all products in its market schedule of goods, meaning that the tariffs will not rise above the bound rate. Pursuant to the market access schedules, China’s average tariffs on industrial goods will be cut from the current rate of 15.3 percent to 8.9 percent by 2006 and will range between zero and 47 percent. Upon accession, China will be part of the Information Technology Agreement (“ITA”), under which China will eliminate tariffs on scheduled information technology products and all other duties and charges for ITA products. By 2005, the average tariff on agricultural products will drop from the current 22 percent to 15 percent and range between zero and 65 percent.

The import process will be simpler and more transparent. As a WTO member, China has committed to phase out most quantitative restrictions such as import licenses, quotas, and tendering requirements. Where quotas are retained, China will publish details on allocations and the application procedure at least 21 days before commencement of the application period. Similarly, China will publish in the MOFTEC Gazette a list of the government bodies that are authorized to issue import licenses. Revisions to the Customs Law, which came into effect this year, are intended to bring it into compliance with WTO, including by providing for valuation based on transactional value. The changes will help foreign producers get their goods into China more quickly and under a more predictable procedure.

The Agreement on Technical Barriers to Trade permits regulations to protect the health or life of plants, animals, or people, or to protect consumers or the environment, provided that imported products are treated no less favorably than domestic products. Upon accession, China must publish adopted and proposed standards, regulations, and procedures and must put in place procedures and timeframes for public comment on proposed standards. Further, China has committed to utilizing international standards where practicable. These measures will facilitate importing into China.

Commodities inspection of imported products has been a serious problem for sellers of goods into China, with complex and inconsistent procedures. Further, the commodities inspection system potentially discriminated against foreign products in that different bodies inspected imported and domestic commodities. Earlier this year, China merged the two bodies in anticipation of its WTO accession. China has also undertaken to bring other conformity assessment procedures in line with the requirements of the Agreement on Technical Barriers to Trade upon accession.

Changes in Access to the Service Sector

The GATS covers trade in services and, like the GATT, is based on the principles of MFN and national treatment. While MFN applies to all services, the GATS, unlike the GATT, requires national treatment only where a country has made specific commitments.

China has committed to increasing transparency in its regulation of the service sector, to publishing information on the licensing system and the approval process, to ensuring that the licensing system is not itself a barrier to trade, and that the regulatory authorities are separated from the entities they regulate, and to allow greater freedom in selection of a Chinese partner.

GATS covers four different types of trade in services:

1. Services supplied from one country to another, called “cross-border supply”
2. “Consumption abroad” where a consumer or firm consumes the services in the country of the supplier
3. Services provided through an office in the consumer’s country, or “commercial presence”
4. Services provided by individuals traveling to the consumer country to provide services, or “presence of natural persons”

The most dramatic commitments are those relating to commercial presence (category 3), because investment in a “commercial presence” service company was extremely restricted in the past. The opening of certain sectors will be phased in over a number of years and/or in terms of the proportion of foreign ownership allowed. For example, in telecoms, one of the priority sectors, upon accession foreign investors will be permitted to establish joint ventures to provide value-added telecommunications services in Beijing, Shanghai, and Guangzhou, with foreign ownership in the joint venture limited to 30 percent. Within one year after accession, 14 cities will be added, and foreign ownership can be as high as 49 percent. For basic telecoms, foreign investors will be allowed to take up to a 30 percent stake in joint venture companies that provide services in and between Beijing, Shanghai, and Guangzhou. Within a year of accession, foreign ownership as high as 49 percent will be allowed, and the area will be extended to allow services in and between the 14 additional cities. Within two years, the allowed foreign ownership will increase to 50 percent, and there will be no geographic restrictions.

China has committed to opening up several other service sectors to foreign investment, including construction and engineering, distribution, retailing, environmental services, the financial sector, the travel industry, various transport sectors, etc. The scheduled opening of these sectors will allow companies to plan their investments in China better. Further, with more service providers in areas such as logistics, doing business in China will become easier.

Implementation

China's commitments under its WTO accession documents are broad and, if fully implemented, will bring about astounding changes in China. All WTO members are subject to regular reviews by the Trade Policy Review Body. China, given its importance in world trade, will be subject to a transitional review mechanism. Within one year of accession, the WTO General Council, the councils under the GATT, GATS, and TRIPS, and 13 additional committees will review China's implementation of the WTO and the Protocol of Accession. Annexes 1A and 1B to the Protocol detail the information China must provide as part of the transitional review. This review will take place annually for eight years and on the 10th year or earlier.

As a member of the WTO, China will be subject to—and may itself bring actions under—the WTO's dispute settlement mechanism. This operates on a government-to-government level and therefore may not be practical for most disputes. However, individuals can raise issues at the relevant enquiry points in China or with their own governments.

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With China's formal accession to the WTO, doing business in China in general should become easier, more transparent, and more like doing business in other parts of the world. As China transforms its laws and institutions to implement its obligations under the WTO, the business landscape in China will undergo fundamental changes. We believe these changes will be positive. There no doubt will be disputes as to implementation. However, the Report on the Working Party, the Protocol of Accession, and the schedules are comprehensive documents that, together with the WTO agreements, clarify what we can expect in China. The certainty, transparency, and greater openness will be a great improvement.
Further Information
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