

THE GLOBAL ECONOMY AND THE ON-LINE WORLD: CONSEQUENCES OF WTO ACCESSION ON THE REGULATION OF THE INTERNET IN CHINA

ALEX WYATT*

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I INTRODUCTION

When 10 000 members of the Falun Gong sect descended on Zhongnanhai¹ for a silent protest in April 1999, it came as a complete surprise to China's leaders. It also horrified them — with the tight integration of the State into almost every aspect of Chinese life,² they simply could not understand how a protest of such magnitude could have been arranged without Governmental knowledge.³ There seemed only one explanation: the sect members had organised their protest using the Internet, that vast, notoriously unregulatable,⁴ product of the digital age. The size of the protest underlined the potential of the new medium as a forum for political discussion and disturbances — a clear threat to the power base of the Chinese Communist Party ('CCP'). The CCP reacted swiftly and brutally in response to this threat, completely shutting down

* BSc (Hons), LLB (Hons) (Melbourne); Rhodes Scholar 2001, M Phil candidate in Modern Chinese Studies (Oxon).

¹ Zhongnanhai is the area in central Beijing where the headquarters of the Chinese Government are housed.

² The State controls all work units in China and all Chinese citizens rely on their work unit for services such as housing, education, retirement benefits, health care and child care: Sylvia Ostry, 'China and the WTO: The Transparency Issue' (1998) 3 *UCLA Journal of International Law and Foreign Affairs* 1, 2–3.

³ Hong Kong Voice of Democracy, *Beijing Leaders Shocked by Falun Gong Protest* (1999) <http://www.democracy.org.hk/EN/apr1999/mainItd_16.htm> at 23 September 2002.

⁴ Alex Wyatt, 'Net Users Cry Foul over Uncertain Censorship Laws' (1998) 1 *Scientific Software* 8, 8.

Chinese access to the Internet the day after the protest.⁵ Even when the Internet reopened three days later, access to all Falun Gong websites had been blocked.⁶

The closure and subsequent censoring of the Internet in the wake of the Falun Gong protest is indicative of the uneasy relationship between the CCP and the Internet. On the one hand, the Government has vigorously encouraged the use of the Internet and its assimilation into Chinese society, seeing the new technology as a fundamental part of its modernisation drive.⁷ Yet on the other hand, widespread use of the Internet violates the fundamental Leninist requirement that the State must tightly control the flow of information and ideas to the people.⁸ The CCP's contemporaneous devotion to Leninism and modernisation has meant that the Government's regulatory approach to the Internet has been somewhat inconsistent and contradictory. Indeed, it has been asserted that China is 'embarking on the information superhighway with one hand on the wheel and the other hand on the plug'.⁹

So far, China has managed to monitor and control the Internet without severely hindering the economic development it promises.¹⁰ However, this delicate balancing act is clearly threatened by the external disciplines that will be enforced against China in the wake of its accession to the World Trade Organization ('WTO') in late 2001. Due to the recent explosion in the amount of international trade and business on-line, the Internet is increasingly coming within the scope of the WTO trade rules, which require free and open access to the markets of member nations. The purpose of this paper is to examine the regulations currently used by China to monitor, control and censor the Internet, and to determine whether these regulations are consistent with current WTO rules. It will be shown that regulations governing the Internet in China can be divided into two categories: first, laws forbidding the use of the Internet for any political or illegal purpose ('censorship laws'); and secondly, regulations which China has enacted to enforce these censorship laws. It will be argued that although the censorship laws themselves may be WTO-compliant, some of the

⁵ For reasons that will become apparent through the course of this paper, the three day shutdown of the Internet was not reported in the official Chinese media. However, there is a plethora of anecdotal evidence that suggests that the shutdown did occur. The author has spoken with a student from Beijing University, who confirmed that the entire Internet in China was shutdown for three days after the Falun Gong protest. The name of the student is suppressed for obvious reasons.

⁶ Jonathan Dube, *Falun Gong Says Government Hacked Sites* (1999) <<http://abcnews.go.com/sections/tech/DailyNews/falunweb990806.html>> at 23 September 2002.

⁷ In 1993 the Government declared the Internet a 'Golden Project'. 'Golden Projects' are special Government projects which are afforded higher priority than other Government initiatives: Jane Black, *Golden Projects* (1997) <<http://news.com.com/2009-1033-200931.html>> at 23 September 2002. The Internet 'Golden Project' — the 'Golden Bridge Project' — consisted of a number of high-priority proposals to develop information infrastructure in China. For example, the Government has installed telephone lines in 33.84 million houses in the past three years: Scott Feir, 'Regulations Restricting Internet Access: Attempted Repair of Rupture in China's Great Wall Restraining Free Exchange of Ideas' (1997) 6 *Pacific Rim Law and Policy Journal* 361, 365–6.

⁸ Richard Cullen and Pinky Choy, 'The Internet in China' (1999) 13 *Columbia Journal of Asian Law* 99, 99.

⁹ John Taylor, 'The Internet in China: Embarking on the "Information Superhighway" with One Hand on the Wheel and the Other Hand on the Plug' (1997) 15 *Dickinson Journal of International Law* 621, 621.

¹⁰ Cullen and Choy, above n 8, 100.

regulatory tools China uses to enforce the censorship laws may be WTO-noncompliant.

Part II of this paper examines the WTO, its trading rules and the issues involved in China's accession. Part III will analyse the WTO-compliance of the various laws and regulations used to control the Internet in China. Part IV will consider the enforceability of WTO rulings in China. It will be concluded that whilst China will be able to continue its political censorship of the Internet after WTO accession, many of the laws it has previously used to help enforce this political censorship may have to be substantially modified to avoid the wrath of the WTO.

II CHINA AND THE WTO

The WTO was established in 1995¹¹ as the successor to the GATT.¹² The main function of the WTO is 'to ensure that trade flows as smoothly, predictably and freely as possible'.¹³ It achieves this aim by using a powerful dispute resolution mechanism to enforce compliance with multilateral trade agreements and commitments signed by member nations.

A *China's Entry into the WTO*

China was a founding member of the GATT. However, after the establishment of the People's Republic of China ('PRC') in 1949, the Nationalist Government withdrew to Taiwan, from where it continued to occupy the 'China seat' on the GATT until late 1950, when the Nationalists unilaterally withdrew, leaving the GATT with no Chinese representation.¹⁴

Since 1986, when the PRC first signaled its intention to retake the Chinese seat on the GATT, China has made continuous efforts to gain admission first to the GATT and later to the WTO.¹⁵ After successful admission to other major global organisations such as the International Monetary Fund ('IMF') and the World Bank, accession to the WTO was seen as the final step towards China resuming what it considers to be its rightful place 'at the table of great trading nations'.¹⁶ Unfortunately for the Chinese Government, which was relying on WTO accession to add momentum to its modernisation program, accession negotiations continually stalled throughout the 1980s and 1990s. Whilst there were obviously some political reasons for this, most notably the Tiananmen

¹¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*Marrakesh Agreement*').

¹² Prior to 1995, the GATT was the custodian of the *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948). After 1995, the WTO maintains GATT obligations in force through the *Marrakesh Agreement*, above n 11, annex 1A (*General Agreements on Tariffs and Trade*) 1867 UNTS 190.

¹³ WTO, *The WTO in Brief* <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm> at 23 September 2002.

¹⁴ Thomas Man, 'National Legal Restructuring in Accordance with International Norms: GATT / WTO and China's Foreign Trade Reform' (1997) 4 *Indiana Journal of Global Legal Studies* 471, 473.

¹⁵ *Ibid* 474.

¹⁶ WTO, 'Director-General Moore Welcomes US-China Deal, But More Work Remains on China's Entry' (Press Release No 148, 15 November 1999) ('Press Release No 148').

Square bloodshed of 1989 and other human rights issues, the most enduring hurdle to Chinese accession was a legal one: China simply could not convince existing WTO member nations that it had adequate administrative, legal and economic structures in place to allow it to carry out its obligations as a WTO member properly.¹⁷

Happily, after 15 years of negotiations, the difficulties were finally overcome and China became the 143rd member of the WTO on 11 December 2001,¹⁸ one month after existing WTO members formally approved its accession bid at the WTO's Ministerial Conference in Doha, Qatar.¹⁹ The substance of China's accession is contained in the bilateral trading accords China signed with many WTO member nations in exchange for their support of its accession bid. The most critical of these accords was the US-China agreement of November 1999.²⁰ In this US-China accord, China made a wide range of commitments, including a reduction of its average industrial tariff from 35 per cent to 10 per cent, a phasing out of protectionist quotas and import substitution schemes, a phasing out of rules preventing foreign investment in the finance and technology sectors, and the adoption of stringent judicial review procedures for trade-related administrative decisions.²¹

B Obligations of WTO Member Nations

To ensure that global trade is as fair and open as possible, WTO member nations have negotiated a number of international trading rules. The WTO rules consist of about 60 general agreements and a number of separate schedules, in which individual members make certain market-specific commitments by which they must also abide.²² The various pre-accession bilateral accords China has signed with WTO member nations will eventually become multilateral WTO schedules. This means that all promises China has made in its effort to gain

¹⁷ Jeffery Gertler, 'The Process of China's Accession to the World Trade Organization' in Frederick Abbott (ed), *China in the World Trading System: Defining the Principles of Engagement* (1998) 67–8. Gertler lists the key accession requirements as:

- 1 transparency and predictability of foreign trade regimes,
- 2 non-discrimination both in relation to border measures and internal measures,
- 3 the rule of law,
- 4 primacy of international commitments over domestic law,
- 5 effective dispute settlement,
- 6 effective access to open and secure markets,
- 7 and the adoption of disciplines to promote undistorted competition should be promoted and nurtured.

¹⁸ WTO, *2001 News Items* (2001) <http://www.wto.org/english/news_e/news01_e/news01_e.htm> at 23 September 2002.

¹⁹ WTO, 'WTO Ministerial Conference Approves China's Accession' (Press Release No 252, 10 November 2001).

²⁰ The US-China bilateral accord was signed on 15 November 1999: WTO, Press Release No 148, above n 16.

²¹ US Department of State, *Summary of US-China Bilateral WTO Agreement* (2001) <<http://usinfo.state.gov/regional/ea/uschina/pntr.htm>> at 23 September 2002.

²² For a brief introduction to the WTO agreements see WTO, *The WTO in Brief: The WTO Agreements* <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm> at 23 September 2002 ('*WTO Agreements in Brief*').

admission to the WTO will become fully-enforceable undertakings after accession.²³

However, it would be completely impractical to expect each member nation to make market-specific commitments relating to every single sphere of global trade. As such, the schedules are supplemented by general agreements, which set out the basic principles of free trade.²⁴ These general agreements, to which all nations must adhere, were most recently redrafted at the 1986–1994 Uruguay Round of negotiations and now cover approximately 30 000 pages.²⁵ Most of the general principles can be found in the 1994 *General Agreement on Tariffs and Trade*.²⁶ Article XIII of the GATT outlines the key concept of non-discrimination, which provides that all member nations must be treated equally in trade. The GATT, via the ‘national treatment’ measures of article I, also forces member nations to extend the ambit of past trading agreements to apply to all member nations, not just the original contracting parties. Furthermore, in keeping with its charter of ensuring that ‘trade flows as smoothly, predictably and freely as possible’, article XI of the GATT outlaws all non-tariff barriers to trade, such as import quotas and licences, meaning that barriers to trade are only permitted in the transparent and predictable format of up-front tariffs or duties. Once all restrictions are ‘tariffed’ in this way, the WTO then acts as a forum for member nations to bargain with one another to reduce their tariffs. Fortunately for recently-admitted nations such as China, developing countries are given some flexibility in implementing these obligations.²⁷

Whilst the GATT is the oldest and arguably the most important of the WTO agreements, it deals only with trade in goods, and is now complemented by the *General Agreement on Trade in Services* (‘GATS’).²⁸ The broad principles of the GATT and the GATS are supplemented by the market-specific schedules discussed above and also by various annexes, which give additional detail to the principles applied to certain goods/services. The WTO trading system also contains agreements dealing with rules for trade and investment in ideas and creativity.²⁹ The broad principles of these rules are outlined in the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (‘TRIPS’).³⁰ As yet, there are no schedules or annexes which supplement TRIPS. Finally, the WTO agreements also include the *Understanding on Rules and Procedures Governing*

²³ US Department of Commerce, *China Trade Relations Working Group: A Summary of the US-China Bilateral WTO Agreement* (2000) <<http://www.ogc.doc.gov/ogc/legreg/testimon/106s/daley0411attachment.htm>> at 23 September 2002.

²⁴ WTO, *WTO Agreements in Brief*, above n 22.

²⁵ *Ibid.*

²⁶ The GATT consists of the text of the original *General Agreement on Tariffs and Trade*, above n 12, together with a number of instruments and decisions of the contracting parties to GATT as maintained in force by the *Marrakesh Agreement*, above n 11, annex 1A (*General Agreements on Tariffs and Trade*) 1867 UNTS 190.

²⁷ WTO, *The WTO in Brief: Developing Countries* <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr04_e.htm> at 23 September 2002 (‘*Developing Countries in Brief*’).

²⁸ *Marrakesh Agreement*, above n 11, annex 1B (*General Agreement on Trade in Services*) 1869 UNTS 183.

²⁹ WTO, *WTO Agreements in Brief*, above n 22.

³⁰ Opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995).

the Settlement of Disputes ('DSU'),³¹ which provides the ground rules for the WTO's dispute resolution mechanism. This mechanism will be examined in Part IV of this paper.

Due to the fact that the Uruguay Round concluded before the boom in Internet trading, the member nations did not expressly consider how the free trading principles outlined in the WTO agreements would apply to electronic commerce ('e-commerce'). As such, the WTO Secretariat commissioned a study, *Electronic Commerce and the Role of the WTO*, which was completed in March 1998.³² The report concluded that products which are bought and paid for over the Internet, but delivered physically, are subject to existing WTO rules on the trade of goods.³³ However, the WTO Secretariat believed that the situation was more complex for products which are delivered electronically, such as audio clips, software or financial data. Whilst the report suggested that such transactions may fall within the existing rules on the provision of services in the GATS, it acknowledged the need for further research and clarification on this issue.³⁴

This need for further clarification led to the WTO member nations adopting a *Declaration on Global Electronic Commerce* on 20 May 1998.³⁵ In this declaration, member nations undertook to continue their existing practice of not imposing customs duties on electronic transmissions.³⁶ This undertaking will preserve the global nature of the Internet by ensuring that it will not be any more expensive to visit an overseas website as it is to visit a local one. The declaration also stated that the 'grey areas' of WTO regulation of e-commerce would be discussed and clarified at the next meeting of the Ministerial Council in Seattle in late 1999.³⁷ Unfortunately, history shows that the Seattle meeting was a 'debacle',³⁸ with a mixture of anti-globalisation protests, stubborn leadership and division amongst members causing the round to be abandoned.³⁹ The disaster in Seattle leaves the WTO without a specific agreement relating to trade on the Internet. The WTO will have to continue to regulate e-commerce by inference and extrapolation of the existing principles of free trade expounded in the GATT and the GATS.

III REGULATION OF THE INTERNET IN CHINA

Unfortunately, the assortment of policies and regulations governing the Internet in China are disorganised, inconsistent and confusing.⁴⁰ This is

³¹ *Marrakesh Agreement*, above n 11, annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401.

³² WTO, 'Study from WTO Secretariat Highlighted Potential Trade Gains from Electronic Commerce' (Press Release No 96, 13 March 1998).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ WTO, *Declaration on Global Electronic Commerce*, WTO Doc WT/MIN(98)/DEC/2 (1998).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ 'After Seattle: A Global Disaster', *The Economist* (London, UK), 11–17 December 1999, 17, 18–19.

³⁹ *Ibid.*

⁴⁰ Vivienne Bath, 'E-Commerce in China — Is China Ready to Do E-Business?' (Breakfast seminar at the British Chamber of Commerce in Hong Kong, 8 June 2000).

primarily due to the fact that no single authority seems to control the Internet in China. Rather, a whole range of Government agencies, including the State Council,⁴¹ the Ministry of Information Industry ('MII'), the State Secrets Bureau ('SSB'), the Ministry of Public Security ('MPS') and the State Administration for Industry and Commerce, appear to have power to proclaim laws relating to the Internet.⁴² Inevitably, regulations from these various sources conflict with one another in some areas, meaning that the law relating to the Internet in China is unclear. The major regulations governing the Internet in China are discussed in the text below, with particular emphasis on whether those regulations are compliant with the WTO agreements. Laws forbidding the use of the Internet for political and illegal purposes will be discussed first, followed by an examination of the regulatory tools China has enacted to help enforce these laws.

A *Regulations Prohibiting Use of the Internet for Political and Illegal Purposes*

Despite its recent drive towards economic liberalisation, China is still the largest one-party state the world has ever seen.⁴³ One of the major ways the CCP retains its iron-grip on power is by strictly adhering to the fundamental Leninist principle that the State must control all forms of the media, which has been interpreted to include the Internet.⁴⁴ The CCP's commitment to applying Leninist principles to the Internet was made clear in 1996 when Li Peng, Premier of China at that time, noted that 'we absolutely cannot permit unconditional influx of Western-polluted information into China; we must lose no time in taking concrete measures'.⁴⁵ Since Li Peng's statement, China has imposed many restrictions on the use of the Internet, designed to prevent the influx of Western ideas and to ensure that the only news and information provided to the people is that which is vetted by the State.

The two most important regulations are the *Computer Information Network and Internet Security, Protection and Management Regulations* ('CINISPM Regulations')⁴⁶ and the *State Secrecy Protection Regulations for Computer Information Systems on the Internet* ('State Secrecy Regulations').⁴⁷

The *CINISPM Regulations* are general and expansive. The main enforcement provision, article 5, imposes criminal liability for such wide-ranging Internet offences as subversion,⁴⁸ terrorism,⁴⁹ destroying public order,⁵⁰ displaying

⁴¹ The State Council is the executive branch of the National People's Congress: *Constitution of the People's Republic of China* arts 57, 85.

⁴² Bath, above n 40.

⁴³ Cullen and Choy, above n 8, 100.

⁴⁴ *Ibid* 99.

⁴⁵ Feir, above n 7, 376.

⁴⁶ Approved by the State Council on 11 December 1997 and promulgated by the MPS on 30 December 1997. English translation available at <<http://www.qis.net/chinalaw/prclaw54.htm>> at 23 September 2002.

⁴⁷ Promulgated and issued by the State Secrecy Bureau and took effect on 1 January 2000. English translation available at <http://www.novexc.com/state_secretary_internet.html> at 23 September 2002.

⁴⁸ *CINISPM Regulations*, above n 46, art 5(1)–(2).

⁴⁹ *Ibid* art 5(7).

⁵⁰ *Ibid* art 5(5).

pornography,⁵¹ and harming national unification.⁵² Crucial terms such as ‘public order’ are not defined in the regulations, and it is likely that such terms will be construed very widely to enable the CCP to silence anybody it perceives to be a threat to its power base.⁵³ One such person is Shanghai entrepreneur, Lin Hai, who was convicted of subversion and jailed for two years because he supplied 30 000 Chinese email addresses to a pro-democracy online magazine in the US.⁵⁴

In contrast to the general nature of the *CINISPM Regulations*, the *State Secrecy Regulations* focus more explicitly on censoring the information which is transmitted via the Internet in China. Article 8 dictates that all information to be displayed on the Internet must pass various security checks and an approval process before it can be uploaded.⁵⁵ Furthermore, article 7 states that ‘any information concerning state secrets shall not be stored, processed or transmitted via computer systems with Internet access’.⁵⁶ The term ‘state secret’ has traditionally been very widely construed in China, allowing the SSB to incarcerate various journalists and opponents of the CCP.⁵⁷ This was exemplified in the summer of 1993, when a speech of Secretary-General Jiang Zemin was leaked to a Hong Kong newspaper before it was delivered. The speech was considered a ‘state secret’ by the court and the person responsible for the leak was sentenced to life imprisonment.⁵⁸

China’s censorship of the information flow on the Internet has outraged human rights activists all over world, who see the *CINISPM Regulations* as a ‘shameful violation of freedom of speech’.⁵⁹ Some of these activists have opined that China’s recent entry into the WTO will force the CCP to relax its Internet censorship laws in order to comply with the WTO agreements. Such a contention is not without some merit. Indeed, it is conceivable that some free-trading WTO members may consider mounting a challenge to the Chinese regulations before a WTO Dispute Settlement Body (‘DSB’). In such a challenge, it would probably be argued that by imposing such tight restrictions on the Internet, the CCP is stifling the development of an on-line community in China and therefore denying overseas online retailers access to Chinese consumers. The challenge would be based on the argument that by censoring many of the most popular uses of the Internet, like reading overseas news and opinions, the regulations reduce the number of Chinese people on-line and therefore create a non-tariff barrier to overseas trade by limiting the number of Chinese consumers exposed to email and other Internet advertising techniques employed by overseas businesses.

⁵¹ Ibid art 5(6).

⁵² Ibid art 5(3). This provision sends a clear message to the independence movement in Taiwan and the separatist movements in Xinjiang and Tibet.

⁵³ China Online, *Internet Censored Further in China* (2001) <<http://www.chinaonline.com>> at 23 September 2002.

⁵⁴ Martyn Williams, *China Sentences Internet Dissident to 2 Years Jail* (1999) <<http://exn.ca/Stories/1999/01/20/03.asp>> at 23 September 2002.

⁵⁵ *State Secrecy Regulations*, above n 47, art 8.

⁵⁶ Ibid art 7.

⁵⁷ China Online, *Internet Censored Further in China*, above n 53.

⁵⁸ Feir, above n 7, 372–3.

⁵⁹ Williams, above n 54.

It is clear that this argument relies on the preliminary finding of fact that the Chinese regulations have actually stymied the growth of the Internet in China. Unfortunately for human rights activists around the world, the statistics, which show the number of Internet users in China growing by over 300 per cent a year,⁶⁰ seem to suggest the opposite. Indeed, the Internet is growing faster in China, with all its Leninist censorship and restrictions, than it is in the world's largest democracy, India.⁶¹ Consequently, any argument suggesting that the regulations have restricted the growth of the Internet in China, and therefore constitute a non-tariff barrier to international trade, seems likely to fail because the evidence suggests that no such inhibition of growth has occurred.

Furthermore, even if the DSB were to find that the censorship laws limited the growth of the on-line community in China, it is still highly unlikely that they would be deemed to be contrary to the WTO trading rules. This is because the censorship laws, despite any impact they may have on Internet growth rates, are essentially political in nature: they ban material which is deemed by the Chinese Government to be objectionable or unfit for public consumption. Any effect the regulations may have on the market access of overseas businesses is incidental; the clear focus of the provisions is on social policy, not trade. The WTO is a trading organisation, and its various norms and rules relate primarily to issues of international trade. Whilst in some situations social and economic policy may be difficult to separate, laws which clearly focus on issues of social policy and control have generally been considered to be outside the bounds of the WTO charter, which is to ensure that trade flows as smoothly, predictably and freely as possible.⁶²

This distinction between a nation's trading regime and its social policy was illustrated recently when both Australia and the United States enacted laws censoring the Internet. The Australian *Broadcasting Services (Online Services) Amendment Act 1999* (Cth) and the American *Communications Decency Act of 1996* (US)⁶³ were both enacted without even a passing comment regarding the WTO compliance of the laws.⁶⁴ Like the Chinese regulations, both the American and Australian laws prohibit uses of the Internet considered by the Government to be objectionable or socially undesirable. Indeed, the only

⁶⁰ The January 2000 report of the China Internet Network Information Centre revealed that at the end of 1999, China had 8.9 million Internet users, up from 2.1 million at the end of 1998 and 620 000 at the end of 1997: China Internet Network Information Center, *Semiannual Survey Report on the Development of China's Internet* (2000) <<http://www.cnnic.net.cn/develst/repindex-e.shtml>> at 23 September 2002.

⁶¹ Cullen and Choy, above n 8, 100.

⁶² In 2001 three former directors-general of the GATT or WTO issued a statement declaring that '[t]he WTO cannot be used as a Christmas Tree on which to hang any and every good cause that might be secured by exercising trade power': WTO, *Joint Statement on the Multilateral Trading System* (2001) <http://www.wto.org/english/news_e/news01_e/jointstatdavos_jan01_e.htm> at 23 September 2002. Cf Steve Charnovitz, 'Triangulating the World Trade Organization' (2002) 96 *American Journal of International Law* 28.

⁶³ The *Communications Decency Act of 1996* (US) is Title V of the *Telecommunications Act of 1996*, Pub L No 104-104, 110 Stat 56.

⁶⁴ The *Communications Decency Act of 1996* (US) was eventually struck down for constitutional reasons unrelated to WTO compliance: *Reno v American Civil Liberties Union*, 521 US 844 (1997). For an overview of the *Communications Decency Act of 1996* (US) see Center for Democracy and Technology, *An Overview of the Communications Decency Act (CDA)* (1997) <<http://www.cdt.org/speech/cda>> at 23 September 2002.

difference between the Western laws and the Chinese laws is that the Chinese definition of socially undesirable encompasses a wider range of actions — the Chinese Government holds the view that ‘destroying the order of society’⁶⁵ and ‘inciting to overthrow the government’⁶⁶ are socially undesirable, whereas the Australian Government restricts its definition of socially undesirable to X-rated pornography, detailed instruction in matters of crime and the incitement of racial hatred.⁶⁷ Other than a different definition of socially undesirable activity, the Chinese censorship laws are no different from those enacted in Australia.

One of the core functions of any government is to weigh up the plethora of relevant considerations to formulate an appropriate legislative response to issues of social policy. These considerations vary hugely between the different nations of the world. It is therefore highly unlikely that any international body, least of all a trade-focused body such as the WTO, would seek to interfere with the Chinese Government’s appraisal of what is and what is not ‘socially undesirable’. It would indeed be incongruous if the WTO, or any international body, were to rule that some measures of social control on the Internet, like prohibiting the disruption of public order in China, were a barrier to trade, whilst other social control measures, like banning extreme pornography in Australia, were not a trade barrier. It is therefore the contention of this paper that both the *CINISPM Regulations* and *State Secrecy Regulations* censoring the Internet in China are WTO-compliant as they fall outside the ambit of the WTO trading rules.

B *Regulatory Tools for Enforcing Internet Censorship in China*

Whilst China’s Internet censorship laws may be WTO-compliant, enforcing those laws is another matter altogether. The Internet simply does not lend itself to convenient censorship or monitoring. Unlike traditional forms of media, such as radio and television, which have a relatively small number of broadcasters, the Internet allows every single user to utilise the medium to broadcast material.⁶⁸ Consequently, any Internet user is able to broadcast an anti-socialist message on a bulletin board, send an email inciting the overthrow of the government or display sexually explicit material on a website or newsgroup. It is simply not practical to monitor every single email sent, every message displayed in a chat room or every piece of information contributed to a newsgroup or website.

The Chinese Government’s response to the inherently uncontrollable nature of the Internet has been twofold. First, the CCP has greatly publicised the punishments handed out to Internet dissidents who have been caught and brought to justice, in an attempt to make their censorship provisions more effective by ‘instilling fear in the hearts of the citizenry’.⁶⁹ Secondly, and crucially, the CCP has enacted various additional laws to give the State many of the regulatory tools and powers needed to monitor and censor the Internet effectively. These

⁶⁵ *CINISPM Regulations*, above n 46, art 5(5).

⁶⁶ *Ibid* art 5(2).

⁶⁷ See Des Butler and Sharon Rodrick, *Australian Media Law* (1999) 327–31.

⁶⁸ Wyatt, above n 4, 8.

⁶⁹ Feir, above n 7, 379–80.

regulations, and their possible noncompliance with the WTO agreements, are discussed in the remainder of this section.

1 Encryption Regulations

Encryption is a process whereby the source text is scrambled and then sent across the Internet to the recipient, who is the only person who possesses the key to unscramble the transmitted text and recover the original source document.⁷⁰ This means that anybody who intercepts the message on its way to the intended recipient will only receive a pile of scrambled ‘gibberish’.⁷¹ Without such technology, e-commerce would not be possible as people would be too afraid to use the Internet to transmit sensitive personal information, such as a credit card number, for fear it may be intercepted and misused.

However, in addition to scrambling confidential information, encryption has also been used to circumvent Internet censorship regulations all over the world. By encrypting all their email messages, Internet outlaws can send pornographic, politically undesirable or otherwise illegal material over the Internet without fear of governmental filters intercepting the messages — without the recipient’s private encryption key, the government filters see only scrambled text. It is likely that the Falun Gong sect organised their April 1999 protest by email messages encrypted via the PGP algorithm,⁷² ensuring that CCP Internet monitors knew nothing of the protest.

Recognising that their censorship laws could be easily circumvented by the unchecked use of encryption technology, the CCP issued the *Regulation of Commercial Encryption Codes* (‘*Encryption Regulations*’) on 7 October 1999.⁷³ The clear intention of these regulations is to ‘make it easier for the government to track the use of encryption in China’,⁷⁴ thus making it easier for the Government to enforce its Internet censorship laws. This intention is realised by granting the State complete control over the production,⁷⁵ maintenance,⁷⁶ and scientific research⁷⁷ of domestic encryption products. Moreover, to prevent people from using foreign encryption products which the CCP does not control

⁷⁰ Alex Wyatt, ‘A Small Step for E-Commerce’, *The Age* (Melbourne, Australia), 16 February 1999, IT 13.

⁷¹ There are many different encryption algorithms used to perform this ‘scrambling’ process. The algorithms fall into two categories, symmetric and asymmetric, with examples including triple DES encryption (used by the US military) and full 128-bit encryption (used by Netscape Communicator version 4.7). See Gregory White et al, *Voice and Data Security* (2001); Alfred Menezes, Paul van Oorschot and Scott Vanstone, *Handbook of Applied Cryptography* (1997).

⁷² PGP stands for ‘Pretty Good Privacy’, an encryption algorithm developed by Phil Zimmermann in the early 1990s: see <<http://www.philzimmermann.com>> at 23 September 2002. For a description of PGP see William Stallings, *Protect Your Privacy: The PGP User’s Guide* (1995).

⁷³ State Council Order No 273, proclaimed 7 October 1999 (PRC). English translation available at <http://www.novexc.com/encrypt_code_law.html> at 23 September 2002.

⁷⁴ ‘China Censors Internet Regulations: Experts Wonder If Communist Party Can Squelch E-Speech, If Commerce Will Be Chilled’, *The Mercury News* (San Jose, US), 27 January 2000, 1A.

⁷⁵ *Encryption Regulations*, above n 73, art 3.

⁷⁶ *Ibid* art 16.

⁷⁷ *Ibid* art 3.

so extensively, articles 13 and 14 of the *Encryption Regulations* completely prohibit the sale or use of ‘foreign encryption products’ in China.⁷⁸ Additionally, in a further move to track Chinese use of encryption products, article 15 of the *Encryption Regulations* requires all companies, organisations and individuals who use encryption products in China to register, informing the Government of the exact nature of the encryption products they use.⁷⁹

The *Encryption Regulations* clearly give the Chinese Government power to enforce the censorship laws discussed above. However, the compliance of the *Encryption Regulations* with the WTO agreements is, at best, questionable. The primary concern is that articles 13 and 14 effectively block access to the domestic Chinese market by foreign producers of encryption products. This refusal to allow foreign encryption products into China seems to be clearly contrary to article XI of the GATT, which expressly forbids all regulatory and other non-tariff barriers to trade:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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.⁸⁰

China may argue that its *Encryption Regulations* do not fall within the ambit of article XI of the GATT, because the Government has recently exhibited a willingness to exempt some foreign companies from articles 13 and 14. This entails making the foreign company an authorised producer of encryption products, so that it is eligible to sell encryption products in China under article 14.⁸¹ However, to gain such an exemption, foreign companies must provide the domestic firms distributing their product in China with access to valuable technology such as patented source codes.⁸² This leaves foreign firms extremely vulnerable to the possibility of the source code of their algorithm being leaked into the public domain. If this were to occur, the foreign encryption algorithm would become useless, as hackers throughout the world would be able to decode credit card numbers and other sensitive pieces of information encrypted using the leaked algorithm. Many foreign companies would be unlikely to risk their entire business in this way simply to enter the Chinese market.⁸³

It is unlikely that a DSB would accept that this so-called willingness to grant exceptions is sufficient to make the *Encryption Regulations* compatible with article XI of the GATT. Indeed, the exemption process itself may be contrary to the WTO trading rules. The *WTO Agreement on Technical Barriers to Trade*⁸⁴

⁷⁸ Ibid art 13 prohibits the sale of foreign encryption products, whilst art 14 prohibits the use of foreign encryption products by ‘any work units or individuals’.

⁷⁹ Ibid art 15. Foreign consulates are exempted from the registration requirements.

⁸⁰ GATT, above n 26, art XI(1).

⁸¹ Bath, above n 40, 8–9.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ *Marrakesh Agreement*, above n 11, annex 1A (*Agreement on Technical Barriers to Trade*) 1868 UNTS 120.

prohibits regulations which ‘create unnecessary obstacles to trade’⁸⁵ or ‘give domestically produced goods an unfair advantage’.⁸⁶ Given that the process which foreign firms must follow to become a ‘designated producer’ is so arduous and fraught with danger, it is highly likely that a DSB would rule that the exemption process was an ‘unnecessary obstacle to trade’.

Therefore, despite the Government’s willingness to grant exceptions occasionally, it seems clear that the Chinese *Encryption Regulations* are contrary to the WTO rules of free trade. Consequently, it is submitted that the Chinese Government will soon have to redraft its rules relating to encryption in order to avoid the wrath of the WTO.

Similar reasoning applies to the Ministry of Culture’s 27 March 2000 *Circular on Relevant Issues Concerning the Online Business of AudioVisual Products* (‘*Audio-Visual Provisions*’).⁸⁷ These provisions make it illegal for Chinese consumers to purchase encrypted audio-visual products, such as movie clips and MP3 audio files,⁸⁸ from overseas producers.⁸⁹ The provisions are clearly an attempt to prevent Western audio-visual material, which may include anti-socialist news clips or videos, from entering China cloaked in the scrambled anonymity provided by encryption algorithms such as MP3. Like the *Encryption Regulations* examined above, the *Audio-Visual Provisions* are likely to be WTO-noncompliant because of their prohibition on foreign imports.

2 Registration Requirements

Another tool the Chinese Government uses to enforce its censorship laws is the requirement that all users of the Internet in China register with the police and pay an Internet registration fee. Chapter II of the *CINISPM Regulations* dictates that ‘all work units and individuals to whom information is provided’ over the Internet must register and pay the appropriate fee within 30 days of first use.⁹⁰

It may be argued in a WTO forum that by imposing these onerous registration procedures on new users, the regulations are restricting the growth of the on-line community in China and thus denying overseas online retailers access to Chinese consumers. However, there is no evidence that the growth of the Internet in China is being restricted and thus it is unlikely that a DSB would accept such an argument, meaning that the registration procedures would be outside the ambit of the WTO agreements.⁹¹

Consequently, unlike the *Encryption Regulations*, it seems that the registration procedures are almost certainly WTO-compliant. As such, it is highly likely that despite China’s recent accession to the WTO, the Government

⁸⁵ Ibid art 2.2.

⁸⁶ WTO, *Trading Into the Future — Non-Tariff Barriers: Technicalities, Red Tape, Etc* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm> at 23 September 2002.

⁸⁷ Issued by the Ministry of Culture on 27 March 2000. English translation available at <<http://estore.chinaonline.com/cironrelico.html>> at 23 September 2002.

⁸⁸ MP3 is an encryption and compression algorithm used to scramble and compress audio-visual material which is delivered online.

⁸⁹ *Audio-Visual Provisions*, above n 87.

⁹⁰ *CINISPM Regulations*, above n 46, arts 10, 12.

⁹¹ See above n 60 and accompanying text.

will continue to aid the enforcement of its Internet censorship laws by requiring that all Internet users register with the police.

3 *A Single International Gateway to the Internet*

For many years China's Internet industry has been particularly unwelcoming to foreign enterprises, with non-Chinese investment in Chinese Internet businesses being absolutely prohibited.⁹² However, with China's recent accession to the WTO, this prohibition has been overturned. Under the US-China bilateral accord, foreign investors are able to hold a 30 per cent equity share in Chinese Internet businesses. This will be increased to a 40 per cent share one year after accession, and then further increased to a 50 per cent share, plus management control, two years after accession.⁹³ Yet despite this significant change, it is possible that China's Internet industry may not be sufficiently welcoming to foreign investment to avoid conflict with the WTO agreements. The problem arises as a result of the *Measures on the Regulation of Public Computer Networks and the Internet* ('*Network Regulation Measures*'),⁹⁴ which dictate how the Internet in China is set up.

Under the *Network Regulation Measures*, there is only one Internet gateway in China and that gateway is controlled by ChinaNet, a company under the control of the MII.⁹⁵ This means that the MII is able to monitor all information transmitted via the Internet in China. Furthermore, by placing a filter on the Internet gateway, the MII is able to block access to certain websites.⁹⁶ This explains why several liberal-minded US websites, such as the *Economist*, *Time Magazine*, the *Wall Street Journal* and *The New York Times*, can sometimes not be accessed from an Internet terminal in China;⁹⁷ they have been filtered out by the MII. Furthermore, the MII can completely shut down the Internet in China simply by deactivating the Internet gateway — anecdotal evidence suggests this is exactly what the MII did in 1999 in the wake of the Falun Gong protests.⁹⁸ These examples show that the Chinese Government is quite prepared to exercise its power over the MII gateway to prevent people from using the Internet for 'socially undesirable' purposes. It is therefore apparent that the single-gateway structure of the Internet in China is another powerful tool to help the Government enforce the Internet censorship laws.

In most Western nations, there is a multitude of Internet gateways, many of which are owned by private companies that have no association with the

⁹² This prohibition is based on the inclusion of telecommunications networks on the 'Prohibited List' on the *Industrial Catalog Guiding Foreign Investment*: see The American Chamber of Commerce — People's Republic of China, *China's New Catalog Guiding Foreign Investment* (2002) <<http://www.amcham-china.org.cn/publications/brief/document/LegalBrief06-02.htm>> at 23 September 2002.

⁹³ US Department of State, above n 21.

⁹⁴ Proclaimed 9 April 1996 (Ministry of Post and Telecommunications, predecessor of MII), revised 20 September 1999 (MII) (PRC). English translation available at <http://www.chinaonline.com/issues/internet_policy/regulations/c9091709.asp> at 23 September 2002.

⁹⁵ Bath, above n 40, 2–3.

⁹⁶ Feir, above n 7, 376–7.

⁹⁷ *Ibid.*

⁹⁸ See above n 5.

government.⁹⁹ Consequently, the fact that the Chinese Government has the power to shut down China's Internet completely at a moment's notice is something that makes foreign investors very uncomfortable. This is an understandable sentiment: a three or four day shut down of the Internet could result in a huge amount of lost income for ISPs and other foreign-owned Internet businesses in China.

This overriding Governmental power to shut down the Internet clearly gives rise to an unstable business environment, which discourages many overseas investors from becoming involved in China's Internet industry. Indeed, if the matter were brought before a DSB, it is possible that discouraging foreign investment in this way may be seen as a protectionist measure which reduces the access of foreign companies to the Internet market in China. If this argument were to be accepted, the *Network Regulation Measures* would be contrary to article XI of the GATT and therefore WTO-noncompliant. However, it is submitted that the DSB would be unlikely to accept the argument that an unstable business environment is a non-tariff barrier to trade. One of the key concepts of the WTO trading scheme is the 'national treatment' principle set out in articles I and III of the GATT. This principle dictates that only laws which 'discriminate against foreigners or foreign products' are barriers to international trade;¹⁰⁰ laws which make it difficult for both domestic and foreign companies to do business are outside the ambit of the WTO agreements. As the instability caused by the Government's power to shut down the Internet affects both foreign and Chinese Internet companies, it seems foreign investors are not singled out for unfair attention. Therefore, the *Network Regulation Measures* are likely to be compliant with WTO rules.

Curiously, whilst the instability caused by the Government's overarching powers is almost certainly not a barrier to trade, the actual exercise of that overarching power may be in violation of the WTO rules. By shutting down the Internet, China would be preventing its people from using the Internet to do e-commerce with overseas businesses. As such, they would be forced to do their business with local providers with whom they can interact without having to use the Internet. In this way, shutting down the Internet may be seen as a protectionist measure which favours domestic businesses and thus violates the 'national treatment' principle of the GATT. Consequently, it can be seen that if the Falun Gong incident had occurred after China's accession to the WTO, any Governmental shut-down of the Internet could well have been a violation of the Government's obligation to abide by the WTO principle of 'national treatment'.

If this hypothetical, future violation were to come before a DSB, China would be certain to point to the 'safeguard' exception to the 'national treatment' principle. This exception, which is set down in the *WTO Agreement on Safeguards*,¹⁰¹ permits 'emergency trade restrictions designed to safeguard domestic interests'.¹⁰² To invoke this defence effectively, China would need to convince the DSB that the Internet shutdown was 'designed to safeguard

⁹⁹ Wyatt, above n 4, 8.

¹⁰⁰ Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd ed, 1999) 29.

¹⁰¹ *Marrakesh Agreement*, above n 11, annex 1A (*Agreement on Safeguards*) 1869 UNTS 154.

¹⁰² *Ibid* art 2.

domestic interests'. The success of such a claim would obviously depend on the evidence regarding the reasons for the hypothetical Internet shutdown.

Therefore, it appears that whilst the *Network Regulation Measures* are WTO-compliant in themselves, exercising the power to shutdown the Internet may, depending on the reasons for the shutdown, be a violation of the WTO rules.

IV ENFORCEABILITY OF WTO RULINGS

This paper has focused on the question of whether China's Internet laws and regulations comply with the WTO agreements. However, all discussion regarding the possible WTO compliance of China's regulatory regime would be superfluous if China were to decide simply to ignore any adverse WTO rulings. As such, it is necessary to examine the way in which WTO rulings are implemented in order to determine whether China is likely to comply with rulings handed down by the WTO.

The DSU, which is part of the basic framework of the WTO,¹⁰³ sets out the structure of the WTO's dispute resolution mechanism. Unlike the 'toothless' dispute resolution mechanism which operated during the GATT years,¹⁰⁴ the WTO mechanism is a strong and legalistic rule-based system with a well-defined process used to implement its rulings.¹⁰⁵

WTO disputes generally involve the DSB making a ruling regarding the compliance of a particular law or provision with the WTO agreements. In the event of an offending measure, the DSB releases a recommendation which proposes how the offending nation may bring its laws into line with the WTO agreements.¹⁰⁶ The offending nation is then given 30 days to state whether it intends to implement the recommendation.¹⁰⁷ If immediate compliance is not practical, the DSB may grant an extension of not more than 15 months.¹⁰⁸ The experience of the past few years under the DSU has indicated that most countries comply with the recommendations within the appropriate time frame. However, if it is found that the offending nation has not implemented the DSB recommendations, a graded system of sanctions may apply. As a first possibility, the parties may agree on some sort of compensation to be paid by the offending nation.¹⁰⁹ If the parties cannot agree on the appropriate form of compensation, the DSB is required to authorise trade sanctions against the offending nation.¹¹⁰ Usually, the sanctions will apply in the same sector in which the offending provision was found. However, if this is impractical or insufficient, sanctions in other sectors may be imposed.¹¹¹

¹⁰³ See above n 31 and accompanying text.

¹⁰⁴ Patrick Specht, 'The Dispute Settlement Systems of WTO and NAFTA: Analysis and Comparison' (1998) 27 *Georgia Journal of International and Comparative Law* 57, 72-5.

¹⁰⁵ *Ibid* 77-90.

¹⁰⁶ DSU, above n 31, art 19(1).

¹⁰⁷ *Ibid* art 21(3).

¹⁰⁸ *Ibid* art 21(3)(c). Article 21(4) allows the 15 month period to be extended subject to an agreement between the disputing parties.

¹⁰⁹ *Ibid* art 22(1).

¹¹⁰ *Ibid* art 22(2).

¹¹¹ *Ibid* art 22(3).

The threat of WTO-authorized trade sanctions will be a powerful incentive for China to comply with DSB rulings.¹¹² Indeed, the primary motivation for China joining the WTO was to expand its economy by increasing its level of international trade; enduring WTO-approved trade sanctions would hardly be the way to achieve this goal. Furthermore, if China were to flaunt the WTO obligations and attract trade sanctions, the adverse rulings would represent a failure in China's drive to economic modernisation. This could be very damaging politically to the CCP's leaders. Most Chinese would see the imposition of sanctions as humiliating and, consequently, such an event would almost certainly reduce the support for the CCP's policies of globalisation and economic reform.

It must also be noted that post-Mao China has a strong record in the global community. The World Bank often cites China as a 'model member', which has complied with its obligations in an exemplary manner since accession in the early 1980s.¹¹³ The perception of China in the IMF is much the same.¹¹⁴ There seems no reason why China would comply with its IMF and World Bank obligations, yet show recalcitrance towards the WTO. Indeed, with the continued CCP emphasis on economic modernisation, and the powerful threat of WTO-authorized trade sanctions, China's incentive to become a model WTO member seems even greater than its incentive to abide by the rules of the World Bank and IMF.

Consequently, it is submitted that China is almost certain to comply with its WTO obligations, meaning that the WTO-compliance of its regulatory regime is an issue of paramount importance now that it has finally been admitted.

V CONCLUSION

Now that China has eventually been accepted into the WTO, many of its laws will need to be reviewed to investigate possible nonconformance with WTO rules and regulations. This paper has examined whether WTO accession will force China to modify its regulatory approach to the Internet. It has been shown that the Chinese regulations which prohibit political and other illegal uses of the Internet are almost certainly compliant with WTO rules. However, some of the laws and practices used by China to enforce its censorship of the Internet may not be so compliant. The *Encryption Regulations*, the *Audio-Visual Provisions* and possibly the MII's *Network Regulation Measures* will need to be reviewed. Failure to do so may cause other WTO members to challenge the laws using the WTO's dispute resolution mechanism, an action which could result in WTO-approved trade sanctions being imposed against China, something that the PRC can definitely not afford at this stage of its economic modernisation program.

¹¹² The United States-China Business Council, *Questions and Answers: US-China WTO Agreement* <<http://www.uschina.org/public/wto/b4ct/qanda.html>> at 23 September 2002.

¹¹³ Margaret Pearson, *China's Track Record in the Global Economy* (2000) <<http://www.chinabusinessreview.com/0001/pearson.html>> at 23 September 2002.

¹¹⁴ *Ibid.*