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Doors Widen to the West: China's Entry in the World Trade Organization Will Ease Some Restrictions on Foreign Law Firms

Susan E. Vitale *

INTRODUCTION

In 1978, the People's Republic of China (China) officially opened its economy to Western business.¹ After more than two decades, China has been admitted to the World Trade Organization (WTO), thus completing its journey toward becoming an international economy.² Chinese and Western officials and commentators claim WTO accession is "a new stage" in China's opening its doors to the West (open door policy).³

An issue largely overlooked in the negotiations surrounding China's WTO accession was whether China will ease restrictions on foreign law firms. Currently, China severely limits the practice of foreign law firms. For example, China prohibits foreign law firms from interpreting Chinese laws and advising their clients on the

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1. Ji Chongwei & Sang Baichuan, *Commentary: Deng Xiaoping & China's Opening to the Outside World*, CHINA'S FOREIGN TRADE, July 23, 1997, available at 1997 WL 9917846. China's open door policy began with former leader Deng Xiaoping. *Id.* He revolutionized China with statements like "[i]t is an open world now, [a]ll peoples and countries need to learn merits and advanced technology from other peoples and countries." *Id.* He believed China "could not develop through conservatism and parochial arrogance, and closing the door would only leave [China] lagging further behind the world and the times." *Id.*

2. *Newscast: China Officially Enters World Trade Organization* (Minnesota Public Radio, Marketplace Morning Report, Dec. 11, 2001), available at 2001 WL 23999582 (stating that China officially entered the WTO on Dec. 11, 2001); see also *China reached the final and formal agreement for WTO accession*, CHINAONLINE NEWS, at <http://www.chinaonline.com/issues/wto/newsarchive/cs-protected/2001/september/Col091701.asp> (last visited Sept. 25, 2001).

3. *China committed to open economic policy after WTO entry: President*, CHINA DAILY, at <http://www.chinadaily.com.cn/highlights/wto/news/b15jiang.html> (last visited Sept. 3, 2001) (quoting China's President Jiang Zemin saying "with the country's entry into the WTO, China will enter a new stage of [opening up]").

application of those laws.⁴ Although WTO negotiations mentioned market access for foreign law firms in China, they did not fully grapple with this issue.⁵ Nonetheless, market access for foreign law firms will increase foreign investment in China.⁶ The resulting economic changes will spur a greater demand for legal professionals.⁷

This Note addresses the future of foreign law firms in China. Part I explores the current restrictions imposed on foreign law firms in China. For comparative purposes, Part II illustrates Japan's restrictions imposed on foreign lawyers and shows how Japan's accession to the WTO changed these restrictions. Part III discusses China's accession to the WTO, gives a brief overview of the general procedures required for a nation to join the WTO, and explores China's reasons for entering the WTO. This part also uses the United States to illustrate some of the reasons and concerns surrounding China's WTO entry and how these reasons may affect China's treatment of foreign law firms. Part IV analyzes what WTO entry may mean for foreign law firms in China. This part argues that some changes in China's treatment of foreign law firms may occur as a direct result of entry into the WTO, but that the vast majority of

4. Ministry of Justice, State Administration for Industry and Commerce, *Foreign Law Firms Establishing Offices in China Tentative Provisions*, 6 CHINA L. & PRAC. 7 (1992) [hereinafter *Tentative Provisions*].

5. See Wayne M. Morrison, *China-U.S. Trade Issues*, CRS ISSUE BRIEF IB91121, at 11 (Aug. 3, 2000). Opening market access for legal services is merely parenthetically mentioned as part of the bilateral negotiations between the United States and China. *Id.* The United States advocates "[e]nhanced market access, [legal] transparency, economic deregulation and investment decisions based upon market disciplines." *Rep. on Trade Expansion Priorities Pursuant to Exec. Order No. 13116*, 64 Fed. Reg. 24,439, 24,493 (May 6, 1999). The United States seeks to eliminate "China's multiple and overlapping barriers to U.S. exports of industrial goods, agricultural products and U.S. services." *Rep. on Trade Expansion Priorities Pursuant to Exec. Order No. 12901*, 62 Fed. Reg. 52,604, 52,607 (Oct. 8, 1997). The United States wanted "the Chinese government to develop an accession package that opens markets and commits China to create an environment conducive to international trade, requiring compliance with WTO rules and internationally accepted norms of transparency, predictability and the rule of law." *Id.* Likewise, China's President Jiang Zemin says China is "committed to the development of an open economy." *China committed to open economic policy after WTO entry: President, supra* note 3.

6. See generally State Councilor Wu Yi foresees economic openness after WTO entry, CHINAONLINE NEWS, at <http://www.chinaonline.com/issues/wto/currentnews/secure/B200091103.asp> (last visited Sept. 3, 2001) (discussing the future of foreign investment in China).

7. See Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275, 281 (1992).

changes will occur over time. Part V proposes some measures the United States could take in order to expedite market access for foreign law firms. Finally, Part VI concludes that while China will ease some restrictions immediately, the majority of limitations China imposes of foreign law firms will diminish as a result of China's increasing participation in the international marketplace.

I. CHINA'S CURRENT RESTRICTIONS ON FOREIGN LAW FIRMS

China officially opened its doors to foreign law firms in 1993, but these firms received less than a *carte blanche* welcome.⁸ China's Ministry of Justice and State Administration for Industry and Commerce still greet foreign firms with the policies outlined in "Foreign Law Firms Establishing Offices in China Tentative Provisions" (*Tentative Provisions*).⁹ The *Tentative Provisions* impose strict regulations limiting the practice of foreign law firms in China including: a strict governmental limit on the number of foreign firms allowed to set up a branch office in China; a geographical ban on those law firms that receive a license; prohibitions on a foreign firm's ability to interpret, advise, and issue opinions concerning Chinese laws; a ban on hiring Chinese lawyers; and severe restrictions on the chief representative(s) of foreign law firms.

8. Yujie Gu, Note, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 *DRAKE L. REV.* 173, 196 (1999). Gu suggests that China opened its doors to foreign law firms in 1992, but also states that China did not grant foreign law firms formal rights until 1993. *Id.* Gu also proffers that China allowed foreign law firms to enter in order to "allay investors fears" by presenting the "semblance of a sound legal system." *Id.* at 195 (quoting Matt Forney, *Outside the Law: Reform Reversals Hit Foreign Law Firms in China*, *FAR E. ECON. REV.*, Jan. 2, 1997, at 18). Foreign law firms entering China symbolize both China's movement towards opening its door to the West and reforming its legal profession. *Id.* at 196 (referring to *Overseas Law Firms Set up in China*, *ASIA INFO DAILY NEWS SERV.*, June 28, 1996, at 1, available in 1996 WL 10654306).

9. *Tentative Provisions*, *supra* note 4, at 7. See generally Patricia Ginsberg, Note, *An Ethical Dilemma of American Attorneys in China: The Conflict Between the Duty of Confidentiality to Clients and the Requirement of Disclosure to the Chinese Government*, 12 *INT'L L. PRACTICUM* 47 (1999) (discussing the *Tentative Provisions*, noting that they currently govern foreign law firms in China).

A. Licensing Issues for Foreign Law Firms in China

The *Tentative Provisions* outline the establishment and termination of legal business as well as the administration of foreign law firm offices.¹⁰ Pursuant to Article 2 of the *Tentative Provisions*, foreign law firms must obtain approval from the Ministry of Justice and register with the State Administration for Industry and Commerce before the Chinese government permits them to set up a satellite office.¹¹ Approval from the Ministry of Justice, however, is a limited privilege. For example, in 1993, the Chinese government mandated that no more than forty foreign law firms could establish a branch office in China, despite the numerous foreign law firms requesting market access.¹² The Ministry of Justice does not provide evaluative criteria for obtaining a license.¹³ Consequently, none of the foreign law firms know definitively what criteria China uses to determine their ability or inability to receive a license.¹⁴ This ambiguity occurs, in part, because the *Tentative Provisions* are not regarded as the “hard-line” rule, but rather “as a source of authority for the government to expel foreign firms should they choose to.”¹⁵ Article 26 supports this explanation, providing that “[t]he Ministry of Justice shall be responsible for the interpretation of these Provisions.”¹⁶

10. *Tentative Provisions*, *supra* note 4, at 7. The *Tentative Provisions*, effective until July 1, 1993, describe “the setting up and termination, legal business and administration of offices of foreign law firms in China.” *Id.*

11. *Id.*

12. Hongming Xiao, *The Internationalization of China’s Legal Services Market*, in 1 PERSPECTIVES 26, 28 (date unknown) (on file with author); *see also* Gu, *supra* note 8, at 199 (demonstrating that in 1996 two hundred foreign law firms witnessed China’s Ministry of Justice issue only fourteen licenses, of which American law firms received four).

13. Gu, *supra* note 8, at 207.

14. *Id.*

15. Edward A. Adams, *Firms Join Legal ‘Gold Rush’ in China*, N.Y.L.J., July 1, 1996, at 1 (discussing how the rules are not explicit guidance, as evidenced by firms operating unofficial offices in China with the full knowledge of the Chinese government, and stating that China is a country developing its ability to rule by law).

16. *Tentative Provisions*, *supra* note 4, at 7. Article 26 exhibits an expansion of the Chinese government’s authority rather than a limitation. Jerry B. Edmonds, *China Severely Restricts Foreign Law Firms*, NAT’L L.J., Feb. 21, 1994, at 12. These types of expansion provisions inhibit Western investors from believing that the Chinese government is moving away from a corrupt government and other governmental abuses of power. *See* Lee Hamilton, *Introduction to BEYOND MFN: TRADE WITH CHINA AND AMERICAN INTERESTS*, 1, 5 (James R.

Recognizing the fierce competition for these licenses, foreign law firms realize they must establish activity in China in order to obtain a license.¹⁷ Paradoxically, foreign law firms also recognize that operating an unofficial foreign law firm in China violates the *Tentative Provisions*.¹⁸ Nevertheless, some foreign law firms choose to violate the *Tentative Provisions* and establish unofficial satellite

Lilley & Wendell L. Willkie eds., The AEI Press 1994). Hamilton illustrates the problems China encounters when it does not govern its people by law. *Id.* Hamilton demonstrates that governmental abuses rule China in the absence of law. *Id.* He mentions governmental abuses such as “official corruption, absence of due process, torture and other forms of inhumane treatment of prisoners, the use of criminal sanctions against dissenters, and a politically biased ‘justice.’” *Id.* Traditionally, China is a pervasive government, particularly in the area of economic activity. See Jerome A. Cohen & John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 N.Y.L. SCH. J. INT’L & COMP. L. 345, 346 (1997). The Chinese government’s roles included “regulator, business operator, business owner, business partner, [and] sovereign borrower.” *Id.* at 348. “In the Communist era, the state has been the dominant economic actor. As a consequence, the development of law as a system of norms governing economic activity involving private parties was stunted for many years.” *Id.* at 346. Once Deng Xiaoping became the leader of China in 1978, he “made it clear that the construction of a legal system would be an indispensable element of the newly-proclaimed modernization policy.” *Id.* China’s enactment of recent legislation concerning its lawyers shows the continuing modernization of China’s legal system. Charles D. Paglee, *Law on Lawyers and Legal Representation*, CHINALAW WEB, at <http://www.qis.net/chinalaw/prclaw58.htm> (last modified Apr. 7, 1998) [hereinafter *Lawyers’ Law*] (translating Chinese law promulgated by the nineteenth meeting of the Eighth National People’s Congress Standing Committee on May 15, 1996). The purpose of the Law on Lawyers and Legal Representation is stated in art. 1:

to improve the system of legal representation, ensure that lawyers conduct their business in accordance with the law, standardize lawyers’ behaviour, protect the legitimate rights and interests of litigants, safeguard the correct enforcement of laws and bring into full play the positive role of lawyers in establishing a socialist legal system.

Id. The Eighth National People’s Congress also included a provision concerning legal ethics. In art. 3, the National People’s Congress states:

When setting up a practice, lawyers must abide by the Constitution and the law, and must scrupulously observe professional ethics and discipline. Lawyers who set up in practice must use facts as a basis and the law as criteria Lawyers who set up practice in accordance [with] the law are protected by the law.

Id. This development of lawyers using facts as a basis and the law as guidance illustrates a move toward China’s governing entirely by law. Chongwei & Baichaun, *supra* note 1.

Furthermore, the Chinese government realizes that WTO entry requires it to “revamp its rules in line with international ones. It will have to improve its laws and regulations, increase the transparency of its legal and administrative systems, and smooth its market order.” *China: WTO demands pain as price of gain*, CHINA DAILY, Apr. 25, 1999, available at 1999 WL 5969084.

17. See Gu, *supra* note 8, at 199-200.

18. *Id.*

offices in China.¹⁹

Successful law firms also hint that developing relationships (*guanxi*) with Chinese government officials helped them obtain a license.²⁰ For example, one American firm “regularly held training sessions for the Ministry of Justice Officials in its unofficial office in Beijing, teaching them how business transactions are structured, and hosted visiting dignitaries in Chicago.”²¹ These actions, albeit unofficial, help foreign law firms receive a license to practice law in China.²²

B. Geographical Ban

Even if a foreign law firm manages to obtain a license, it may set up only one branch office in China.²³ Under the *Tentative Provisions*, the foreign firm must choose from a restricted list of approximately fifteen cities.²⁴ Law firms typically prefer to locate a satellite office in

19. Ann Davis, *Shanghai Exit for Coudert*, NAT'L L.J., Jan. 30, 1995, at A6 (describing the Coudert Brothers' situation in 1995). The Coudert Brothers received a violation from the Ministry of Justice for having lawyers in two cities, violating the licensing and geographic regulations. *Id.* The Coudert Brothers, however, responded by sending their attorneys to an affiliate law firm in Hong Kong. *Id.* The firm does not plan to “curtail” its Shanghai business, but rather is requiring its affiliate office in Hong Kong to apply for a license to set up a branch office in Shanghai. *Id.* An official in the Ministry of Justice also noted that some foreign law firms set up unofficial offices in China. *China: Legal service sector to open wider to foreigners*, CHINA DAILY, Aug. 14, 1998, available at 1998 WL 7597299.

20. Davis, *supra* note 19, at A6. An official with the Administration for China Offices of Foreign Law Firms under the Ministry of Justice remarked, “[foreign law firms] must also come from countries with a good relationship with China.” *China: Legal service sector to open wider to foreigners*, *supra* note 19. According to the Ministry of Justice, foreign law firms are mainly from “Canada, Australia, Japan, Singapore, Britain, Germany, United States, and France.” XINHUA NEWS AGENCY, May 22, 1996, available at LEXIS, News Library, Xinhua File; see also CONCISE ENGLISH-CHINESE CHINESE-ENGLISH DICTIONARY 157 (Oxford University Press & The Commercial Press 1986) (defining the Chinese word *guanxi* as developing relationships or networking).

21. Adams, *supra* note 15, at 1 (discussing Altheimer & Gray’s activities for setting up a satellite office in China, as well as other American firms’ unofficial actions toward obtaining a license).

22. *Id.*

23. Gu, *supra* note 8, at 200.

24. See generally John Zarocostas, *China’s Services Offer Fails*, NAT'L L.J., Dec. 15, 1997, at A13 (discussing China’s offer to lift the geographical ban restricting foreign firms to limited cities during WTO-entry talks). Most firms are in major cities such as “Beijing, Tianjin, Shanghai, Guangzhou, Shenzhen, Haikou, Suzhou, and Qingdao.” *A Profile of China’s Legal Services Industry*, ASIA PULSE, Feb. 23, 1998, available at 1998 WL 2949839; see also Xiao,

either Beijing or Shanghai, cities included on the restricted list.²⁵ As the governmental hub of China, Beijing provides a “strategic location for seeking the approvals [from the Chinese government] required for investment projects and business transactions in China.”²⁶ Shanghai attracts foreign law firms as it is often considered the most important financial and commercial location in China.²⁷ The popularity of these cities, however, contributes to the shortage of office space and housing for foreign attorneys, in addition to high rent, creating further difficulties.²⁸

Foreign law firms attempt to circumvent the geographical ban by operating consulting firms in cities where their law firms are not licensed. For example, the American firm of Baker & Mackenzie operated a consulting firm, B & M China Consultants, Ltd., in Shanghai while simultaneously operating a law practice in Hong Kong.²⁹ Although Baker & Mackenzie maintained that their consulting firm did not employ lawyers, lawyers from their Hong Kong office occasionally utilized the Shanghai consulting office to conduct legal business.³⁰ China’s Ministry of Justice, therefore, closed the firm’s Shanghai “consulting” office.³¹ Like Baker & Mackenzie, however, other foreign firms operate consulting offices in China.³² These foreign firms also allow their lawyers to conduct legal

supra note 12, at 28 (listing other cities open to foreign law firms).

25. Steven Lozner, *PRC legal services—Foreign law firms continue to lay foundations*, 12 CHINA L. & PRAC., Apr. 1998, at 45, 46. “The foreign legal market now shapes up with 42 offices in Beijing, 32 in Shanghai, 12 in Guangzhou, and seven more covering Shenzhen, Tianjin, Qingdao, Haikou, and Suzhou. Of the 20 firms overall, ten will establish a branch in Shanghai, eight in Beijing, and one each in Tianjin and Qingdao.” *Id.* at 47.

26. *Id.* at 46.

27. Gu, *supra* note 8, at 200.

28. Adams, *supra* note 15. These costs are a combination of “[b]uilding relationships and opening offices Quality office space is at a premium, and U.S. expatriates generally receive housing subsidies, cost-of-living adjustments, and at least one paid trip home a year” *Id.* In a comparison between New York apartment rental prices and Beijing apartment rental prices, America’s Skadden Arps estimated that a New York apartment would be approximately two thousand dollars, while Beijing’s apartment would be approximately five thousand dollars. *Id.* Additionally, the combination of operating and living costs for foreign lawyers in either Beijing or Shanghai can reach approximately \$800,000 a year. *Id.*

29. Davis, *supra* note 19 (discussing Baker & Mackenzie’s attempt to bypass the one city rule). Baker & Mackenzie contend they did not violate the *Tentative Provisions*. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* (referring to the Coudert Brothers consulting office, which operated from 1984 to

business in the cities and offices where their consulting businesses are located, thus violating both the geographical ban and the licensing restriction.

C. Prohibition on Interpreting Chinese Laws

The *Tentative Provisions* prohibit foreign law firms from interpreting Chinese laws, issuing opinions concerning those laws, or acting as an agent when dealing with Chinese legal business.³³ China's prohibition against foreign firms interpreting Chinese laws and handling Chinese legal business forces Chinese clients to refer their grievances to Chinese law firms. Consequently, these restrictions protect China's legal profession and allow Chinese law firms to capitalize on the domestic legal market.³⁴

D. Foreign Law Firms Cannot Hire Chinese Lawyers or Take the Lawyer's Qualification Exam

Article 17 of the *Tentative Provisions* prohibits foreign law firms from hiring Chinese lawyers.³⁵ If foreign law firms employ Chinese lawyers, the *Tentative Provisions* require the Chinese lawyers to

1995); see also Gu, *supra* note 8, at 199-200.

33. *Tentative Provisions*, *supra* note 4, at 7. For example, art. 15 provides that foreign law firm may: (1) advise their clients on the "legislation of countries where its lawyers or its firm is permitted to practice and on relevant international treaties, international commercial law, and international practices"; (2) accept "a client's or a Chinese law firm's instruction to handle legal business in countries where the lawyers of its firm are permitted to practice"; and (3) act as an agent for "foreign clients, [instructing] Chinese law firms to handle legal business within China." *Id.* Despite the prohibition of foreign lawyers from "[practicing] or advising on mainland law, and from hiring local lawyers [Foreign law firms] do these things everyday." Collin Galloway, *Legal services Foreign lawyers constrained by protectionist regulations Foreign lawyers have to use unofficial means to satisfy business demand for their services*, S. CHINA MORNING POST, Aug. 13, 1998, at 4. Approved foreign lawyers advise clients about Chinese law. Adams, *supra* note 15; Sydney M. Cone III, partner at Cleary, Gottlieb, Steen & Hamilton, states "Since an essential function of the Chinese offices of foreign law firms is to interpret Chinese law to their clients, the apparent meaning of the regulations will be suspended in this respect [so long as the Ministry of Justice does not object] . . ." *Id.*; see also Gu, *supra* note 8, at 201 (citing Matt Forney, *Outside the Law: Reform Reversals Hit Foreign Law Firms in China*, FAR E. ECON. REV., Jan. 2, 1997, at 18).

34. See Lozner, *supra* note 25, at 50.

35. Edmonds, *supra* note 16, at 12.

surrender their license.³⁶ Additionally, the government prevents foreign lawyers from taking China's Lawyers' Qualification Exam to preclude foreign lawyers from involvement in Chinese litigation, which may encompass sensitive political issues.³⁷

E. Foreign Law Firms Must Submit Confidential Client Information to the Chinese Government

The Chinese government places restrictions on foreign law firms in their international business practice. The government requires foreign law firms to provide confidential client information in the form of client questionnaires.³⁸ Foreign law firms must provide "quarterly reports" detailing "client lists, locations of projects under consideration, affiliations with Chinese law firms, business reference lists, and the value of deals in negotiation."³⁹ These restrictions, however, also apply to Chinese lawyers as the Chinese government may request confidential information from Chinese lawyers.⁴⁰

36. Gu, *supra* note 8, at 200.

37. See Tamara Loomis, *China Trade; Lawyers Gear Up for China's Entry Into the WTO*, N.Y.L.J., July 6, 2000, at 5. The Chinese bar is effectively the Lawyers' Qualification Exam. *Id.* See also Xiao, *supra* note 12, at 30 (describing China's rationale for prohibiting foreign lawyers from taking the Lawyers' Qualification Exam).

38. Ginsberg, *supra* note 9, at 49.

39. Gu, *supra* note 8, at 186-87 (quoting *China Wants Lawyers' Confidential Info*, DOW JONES INT'L NEWS SERV., Sept. 18, 1996).

40. *Id.* (describing a hypothetical situation where the police demand lawyers' files and the lawyers are powerless to oppose). This law is closely analogous to the American Bar Association's (A.B.A.) Model Rule 1.6(a). Ginsberg, *supra* note 9, at 49. With regard to attorney-client relationships, "[a] lawyer should keep state secrets and a litigant's commercial secrets learned through conducting the business activities of a lawyer's practice, and should not disclose the privacy of litigants." *Lawyers' Law*, *supra* note 16, at art. 33. The *Lawyers' Law* suggests that China may allow attorney-client privilege in its legal system. *Id.* If China is granting this privilege, it will increase the candor between attorneys and clients. Ginsberg, *supra* note 9, at 50. If China can increase the candor involved in the legal profession, then attorneys will be better able to advise and counsel clients. *Id.* If attorneys are better legal counselors, then they come closer to becoming normative experts. See generally Clark, *supra* note 7, at 281-82 (discussing lawyers as normative experts). As a result of the changes in China's social and economic systems, normative ordering will be needed. Thus, the need for competent lawyers and enforced laws will become prevalent. This need will advance the legal profession and China's ability to rule by law significantly.

F. Restrictions Imposed on the Chief Representative(s) of Foreign Law Firms

In addition, the Chinese government places numerous restrictions on the foreign law firm's chief representative(s). For example, the chief representative(s) at a foreign law firm must have passports from the law firm's country of origin.⁴¹ Additionally, the chief representative(s) must have at least three years of practice experience in the firm's "home country" with no discipline record.⁴² Finally, the chief representative(s) must reside in China for more than 180 days each year "so that they will be covered by China's tax jurisdiction."⁴³

41. Gu, *supra* note 8, at 201-02 (citing Kathy Chen, *China Set to Impose Tough Rules on Foreign Law Firms*, EMERGING MARKET REP., Dec. 12, 1996).

42. *Id.*

43. Xiao, *supra* note 12, at 30. However, the restrictions on chief representative(s) may mirror the pre-existing practice of some foreign law firms. See Loomis, *supra* note 37. For example, some American firms send experienced lawyers to their branch offices in China, but the reasons for this practice may be independent of the restrictions. *Id.* Nicholas C. Howson, the chief representative of the branch office of Paul, Weiss, Rifkind, Wharton & Garrison, describes an important consideration when choosing the type of lawyers to send to a branch office in China. *Id.* Howson states that lawyers must have a "substantive knowledge of the legal systems of both countries." *Id.* As China's legal system is still developing, gaining substantive knowledge of the system can be difficult; however, "[l]awyers need to know what the regulation is, how it is articulated, how it is enforced and who enforces it." *Id.* The acquisition of such knowledge requires some practical experience. *Id.* This assertion is especially true when conducting research because "'China does not publish law in any central place.' Only experienced lawyers know where to seek out the laws and administrative procedures." Gu, *supra* note 8, at 206 (citing Victoria Slind-Flor, *China Lawyers Suddenly Find They Have Become a Very Hot Commodity*, NAT'L L.J., Nov. 29, 1993, at 26). Additionally, experienced lawyers arguably have a better understanding of "both the U.S. and Chinese business culture and political environment." Loomis, *supra* note 37. Yingxi Fu-Tomlinson, "a partner in the Shanghai office of Kaye, Scholer, Fierman, Hays, & Handler," contends that "one side may have a particular request which may sound totally absurd to the other party." Loomis, *supra* note 37. Therefore, an understanding of the business differences is helpful. For example, the Chinese "tend to bargain on price until the last minute." Loomis, *supra* note 37. Thus, practical considerations, rather than the restrictions, motivate some foreign law firms to send experienced lawyers to their China offices.

Conversely, other foreign law firms do not send experienced lawyers to their China offices because of the restrictions and other practical considerations. See Gu, *supra* note 8, at 203-04. For example, some American law firms hesitate to send their best lawyers away from domestic practice. Gu, *supra* note 8, at 203. Rolf R. Boer, "Chair of Foley & Lardner's international business practice and head of the management committee" states that "[t]alented lawyers don't want to work in small, ancillary U.S. firms, and frankly, we can't afford to send the best U.S. lawyers to foreign outposts because we need them for our domestic practice." Gu, *supra* note 8, at 203. Additionally, requiring senior attorneys to uproot themselves and their families is difficult. Douglas McCollam, *Let a Thousand Branch Offices Bloom*, AM. LAW., Nov. 2000, at

II. RESTRICTIONS IMPOSED ON FOREIGN LAW FIRMS IN JAPAN

In 1987 Japan re-opened its doors to foreign lawyers, however, Japan's regulatory provisions governing foreign lawyers remain the most restrictive to date.⁴⁴ The Japan Federation of Bar Associations (*Nichibenren*) developed the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (Law Number 66) to “‘promote stability in relation to international business law affairs,’ and ‘contribute to improvement in the handling, in foreign countries, of legal business concerning Japanese law’”⁴⁵ This law imposes stringent limitations on the qualifications of foreign lawyers in Japan, the naming of foreign law firms, the scope of a foreign lawyer's practice, the relationship foreign lawyers may have with Japanese lawyers (*Bengoshi*), and the disciplinary procedures governing foreign lawyers in Japan.⁴⁶

92, 98. Furthermore, young lawyers “are generally more willing to work in China.” Gu, *supra* note 8, at 203 (citing Victoria Slind-Flor, *China's Riches Lure Lawyers*, NAT'L L.J., Nov. 29, 1993, at 23, 26). Thus, the restrictions play a more invasive role for foreign law firms wanting to send young attorneys to their China offices.

Although young foreign lawyers are generally more willing to relocate to China, there is a growing concern among this group regarding their progress toward partnership if they practice at a foreign branch office. Gu, *supra* note 8, at 204. These young lawyers are afraid they will be forgotten or put at a disadvantage if they are practicing at “foreign outposts.” Gu, *supra* note 8, at 204. Moreover, the downsides to both the lawyers' quality of life, particularly if they lack linguistic proficiency, and the firm's effective and efficient practice may argue in favor of sending more experienced lawyers abroad. Gu, *supra* note 8, at 204.

44. Michael J. Chapman & Paul J. Tauber, Note, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, 960 (1995); see also Linda A. Cooper, *Is the Door Half Open or Half Shut? Japan's Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers*, 18 N. KY. L. REV. 417, 422-25 (1991) (discussing the law that re-opened Japan to foreign lawyers and the history behind Japan closing its doors to foreign lawyers).

45. J. Ryan Dwyer, III, Comment, *The Door Only Opens Out: Japan's Special Measures Law for Regulation of Foreign Attorneys*, 18 U. HAW. L. REV. 257, 265 (1996) (citation omitted); see Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers, Law No. 66, May 23, 1986, translated in LAW IN JAPAN, 193 (Daniel H. Foote et al. eds., Univ. of Tokyo Press 1988) [hereinafter *Law No. 66*].

46. Dwyer, *supra* note 45, at 266-77.

A. Qualifications

Before foreign lawyers may practice in Japan, they must apply for a license with the Ministry of Justice.⁴⁷ The *Nichibenren* requires a foreign lawyer requesting a license to have at least five years of legal practice in their home jurisdiction.⁴⁸ Additionally, the applicant cannot have a disciplinary record.⁴⁹ Moreover, the applicant's home jurisdiction must supply reciprocity by allowing *Bengoshi* to practice law in that jurisdiction.⁵⁰ Furthermore, approved applicants must register with *Nichibenren* and a local bar association, which subjects the foreign lawyer to the same "ethics rules, regulation and supervision" as *Bengoshi*.⁵¹

In 1995, an amendment relaxed the requirement that foreign lawyers practice law in their home jurisdictions for at least five years.⁵² The amendment allowed foreign lawyers who previously worked in Japan as legal trainees, employed by *Bengoshi*, to credit two of those years toward the five-year practice requirement needed to obtain a license.⁵³

47. Cooper, *supra* note 44, at 425-26.

48. *Law No. 66*, *supra* note 45, at ch. 3, § 10.1.1. The Japanese term for an approved foreign lawyer who is registered by the Ministry of Justice to practice law in Japan is *Gaikokuho Jimu Bengoshi*. *Id.* at ch. 1, § 2.0.3.

49. *Id.* at ch. 3, §§ 10.1.2.1-10.1.2.4. These sections preclude an applicant from having a disciplinary record including imprisonment, conviction for impeachment, and punishments delineated in *Bengoshi* law unless three years elapsed since the disciplinary punishment. *Id.*

50. *Id.* at ch. 3, § 10.2; *see also* Dwyer, *supra* note 45, at 266 (delineating the qualification requirements for foreign lawyers in Japan and stating that the *Law No. 66* requires reciprocity unless reciprocity would "violate an international treaty or agreement").

51. Shigeru Kobori, *Symposium: Paris Forum on Transnational Practice for the Legal Profession Discussion Papers*, 18 DICK. J. INT'L L. 109, 129-30 (1999). Kobori was the president of *Nichibenren*. *Id.* at 109. Kobori's article states that *Bengoshi* are required to register with *Nichibenren* and a local bar association, and, therefore, foreign lawyers should be compelled to register as well. *Id.* at 129. Kobori argues that foreign lawyers "must adhere to the ethical standards of the Host Country." *Id.*

52. Dwyer, *supra* note 45, at 268.

53. *Id.* Dwyer states that while this amendment does relax the original, rigid standard, it requires at least three years of experience practicing law. *Id.* This amendment forces foreign law firms to use more experienced attorneys in their satellite office, which results in higher salaried attorneys doing work which could be completed by newer associates. *Id.* at 269.

B. Residency Requirements and Foreign Law Firm Names and Number of Offices

Foreign lawyers licensed to practice law in Japan (*Gaikokuho Jimu Bengoshi*) must reside in Japan for one hundred eighty days each year.⁵⁴ In addition, foreign law firms must have a name consisting of the surname and given name of “one or more *Gaikokuho Jimu Bengoshi* who compose such office and shall not include the name of any other individual or organization.”⁵⁵ Furthermore, the *Nichibenren* restricts foreign law firms to only one satellite office.⁵⁶

C. Scope of Practice

The *Nichibenren* restricts the scope of foreign legal practice. First, foreign lawyers may only conduct legal business concerning the law of their home jurisdiction.⁵⁷ Second, the *Nichibenren* restricts foreign lawyers from providing legal “representation in regard to procedures before a court.”⁵⁸ For example, foreign lawyers may not represent clients in criminal cases.⁵⁹ Third, the *Nichibenren* precludes foreign lawyers from rendering opinions or interpretations on Japanese laws.⁶⁰ Fourth, the *Nichibenren* prohibits foreign lawyers from “[r]epresentation in the entrustment of the preparation of a notarial

54. *Law No. 66*, *supra* note 45, at ch. 4, § 48.1; *see also* Kobori, *supra* note 51, at 128 (reasoning that in order to satisfy the needs of clients in the host jurisdiction, “it is preferable that foreign lawyers reside in the Host Jurisdiction . . . and effective supervision cannot be expected if the foreign lawyers is not resident in that county”).

55. *Law No. 66*, *supra* note 54, at ch. 4, § 45.2.

56. *Id.* at ch. 4, § 45.5.

57. *Id.* at ch. 2, § 3.1. The exception to this restriction is if foreign lawyers have “substantial expertise” in the law of a country other than the lawyer’s home jurisdiction, then the foreign lawyer may be allowed to “provide legal services” regarding the laws of that second country. *See* Kobori, *supra* note 51, at 125-26.

58. *Law No. 66*, *supra* note 54, at ch. 3, § 3.1.1; *see* Kobori, *supra* note 51, at 125; *see also* *Law No. 66*, *supra* note 45, at ch. 3, § 3.1.4 (prohibiting foreign lawyers from “service of procedural documents for a court or administrative agency of a foreign country”).

59. *Law No. 66*, *supra* note 45, at ch. 3, § 3.1.2. This provision also prohibits lawyers from “acting as attending adult in a juvenile protection case, or assistance in a case of a demand for investigation regarding the extradition of a fugitive criminal.” *Id.*

60. *Id.* at ch. 3, § 3.1.3; *see* Kobori, *supra* note 51, at 125.

deed.”⁶¹ Fifth, foreign lawyers may not engage in the preparation of documents or the representation clients whose primary purpose concerns property in Japan, including industrial property and mining rights.⁶² When faced with cases concerning property rights situated in Japan, foreign lawyers must refer the cases to *Bengoshi*.⁶³ Finally, when a Japanese national is a party, foreign lawyers must work with or request advice from *Bengoshi* concerning family relations and inheritances governed by Japanese law.⁶⁴

D. Relationships with Bengoshi

Foreign lawyers cannot employ *Bengoshi*.⁶⁵ Traditionally, the *Nichibenren* did not permit foreign lawyers to form joint enterprises with *Bengoshi* for the purpose of sharing in profits or conducting legal business otherwise prohibited under Law Number 66.⁶⁶ The 1994 Amendment to Law Number 66, however, allows *Bengoshi* to employ foreign lawyers and allows “licensed foreign lawyers to engage in a ‘joint enterprise’ with a *Bengoshi* who has also been qualified for a minimum of five years.”⁶⁷

E. Disciplinary Proceedings

The *Nichibenren* subjects foreign lawyers to disciplinary action if they violate the law, violate the rules of the *Bengoshi* Association or *Nichibenren*, “[disturb] the order or . . . the reputation of the *Bengoshi* Association to which [they belong] or *Nichibenren*,” or act

61. *Law No. 66, supra* note 45, at ch. 3, § 3.1.5; see Kobori, *supra* note 51, at 125.

62. *Law No. 66, supra* note 45, at ch. 3, § 3.1.6; see Kobori, *supra* note 51, at 125.

63. *Law No. 66, supra* note 45, at ch. 3, §§ 3.2-3.2.3.

64. *Id.* at ch. 3, §§ 3.2-3.2.3; see Kobori, *supra* note 51, at 125.

65. *Id.* at ch. 4, § 49.1; see also Dwyer, *supra* note 45, at 273-74 (describing the limitations on foreign lawyers association with *Bengoshi*).

66. *Law No. 66, supra* note 45, at ch. 4, § 49.2. *Law Number 66* also prohibits a foreign lawyer from receiving “other profits gained by a specific *Bengoshi* in the performance of legal business.” *Id.* (emphasis added); see Dwyer, *supra* note 45, at 274.

67. Jason Comrie-Taylor, *The “Appropriate” Role for Foreign Trainees in Japan*, 15 UCLA PAC. BASIN L.J. 323, 345, 346 (1997) (stating that a joint venture is “solely contractual . . . and no form of single legal or judicial joint entity in which both the Japanese lawyers and foreign lawyers participate will be permitted”).

with “disgraceful conduct” either in or out of their practice.⁶⁸ *Nichibenren* handles the disciplinary action against foreign lawyers in Japan “based upon the decision of the *Gaikokuho Jimu Bengoshi* Disciplinary Action Committee.”⁶⁹ Disciplinary actions include the following: (1) warnings; (2) no more than two years suspension; (3) resignation; and (4) expulsion.⁷⁰ Furthermore, if foreign lawyers exceed the scope of practice permitted, penal actions may proceed against them.⁷¹

F. Amending Law Number 66

Even at the inception of Law Number 66 in 1987, the U.S. Trade Representative pushed for liberalization of the regulations governing foreign lawyers.⁷² Approximately five years later, Japan relaxed three of these regulations.⁷³ Scholars speculate that pressure from the United States contributed to Japan’s lifting these restrictions on foreign lawyers.⁷⁴ There is also a strong possibility that Japan’s desire to accommodate and encourage foreign investment led to liberalization of these regulations.⁷⁵ Japan’s membership in the

68. *Law No. 66, supra* note 45, at ch. 4, § 51.1 (emphasis added).

69. *Id.* at ch. 4, § 51.2 (emphasis added).

70. *Id.* at ch. 4, §§ 52.0.1-52.0.4.

71. *Id.* at ch. 6, § 63. For example, imprisonment “at hard labor for up to [two] years, or a fine of up to \$1,000,000” is a possible disciplinary action against foreign lawyers who exceed the scope of their practice. *Id.*; see also Dwyer, *supra* note 45, at 277.

72. Comrie-Taylor, *supra* note 67, at 343-44 (listing five areas the U.S. Trade Representative wanted liberalized including: (1) allowing U.S. law firms to hire *Bengoshi*; (2) allowing U.S. law firms to enter into partnerships with *Bengoshi*; (3) allowing U.S. law firms to use their firm names in Japan; (4) allowing U.S. lawyers to participate in arbitration proceedings in Japan; and (5) allowing foreign lawyers to credit years of legal work handled in Japan to the five-year qualification requirement).

73. *Japan: Legal controls anger foreign lawyers*, LAW. INT’L, May 1994, available at LEXIS, Country & Region Library, Japan Country File. The changes included “allowing foreign lawyers to use their home firm’s name,” to attach, at most, two years of those training years to the five-year qualification requirement, and to enter into joint enterprises with *Bengoshi*. *Id.*

74. See generally Comrie-Taylor, *supra* note 67, at 344 (citing the United States as the instigator of talks regarding the opening of legal markets in Japan).

75. See generally ASIA PULSE, *25% of Top Makers Dissatisfied with Lawyers*, Oct. 16, 1997, available at LEXIS, Country & Region Library, Japan Country File (reporting that experts agree Japan is deficient in its number of legal professionals, as it is the lowest among industrialized nations regarding the ratio of legal professionals to its population); David Hood, Comment, *Exclusivity and the Japanese Bar: Ethics or Self-Interest?*, 6 PAC. RIM. L. & POL’Y

General Agreement on Trade in Services (GATS) and WTO also provides an explanation for the amendment to Law Number 66 because accession to GATS or the WTO requires negotiations with member countries toward the goal of opening world markets.⁷⁶ Japan's membership in GATS and the WTO, however, does not supercede the other explanations mentioned for amending Law Number 66, despite the central goal of liberalizing world trade, which both of those organizations share.⁷⁷ Nevertheless, the amendments to Law Number 66 eased only a few restrictions since foreign lawyers re-entered Japan in 1987.

IV. CHINA'S ACCESSION TO THE WTO

The WTO is “the international agency that administers multilateral trade rules.”⁷⁸ When a country seeks membership in the WTO, “it submits a memorandum on its foreign trade regime and a WTO Working Party is formed”⁷⁹ The applicant country must satisfy both a “multilateral track involving the Working Party and WTO members” and a “bilateral track[] between the applicant country and the individual members” of the WTO.⁸⁰ The multilateral track's goal is to “[identify] elements of applicant's foreign trade regime that conflict with WTO obligations.”⁸¹ The bilateral track offers current members and the applicant country an opportunity to “negotiate market access commitments involving specific goods and services.”⁸² The applicant country must complete bilateral

J. 199 (1997) (stating that only two percent of Japanese candidates pass Japan's bar examination and as a result, the ratio of practicing lawyers to Japan's population is one lawyer for every 10,000 people, the lowest ratio in the industrialized world).

76. Jeanne J. Grimmert, *China's Accession to the World Trade Organization: Legal Issues*, CRS Rep. RL30175, at 3 (June 2, 2000).

77. See generally Robert F. Taylor & Philippe Metzger, *GATT and Its Effect on the International Trade in Legal Services*, 10 N.Y. INT'L L. REV. 1, 7 (1997) (stating that the aim of GATT and the WTO is liberalizing world trade, which includes legal services).

78. Wayne M. Morrison, *China and the World Trade Organization*, CRS Rep. RS20139, at 1 (Apr. 5, 2001).

79. Grimmert, *supra* note 76, at 3. The Working Party is the WTO entity that considers “the country's application.” *Id.*; see also H.R. DOC. NO. 103-316, at 1327 (1994).

80. Grimmert, *supra* note 76, at 3.

81. *Id.*

82. *Id.*

negotiations with all WTO members who request negotiations.⁸³ Additionally, the applicant country “must accept all WTO Multilateral Trade Agreements as a condition of their WTO membership.”⁸⁴ The applicant country is also given a “Protocol of Accession.”⁸⁵ For countries like China, which is a non-market economy, the Protocol “addresses issues specific to [the applicant country’s] economic conditions and may allow it to phase in certain obligations.”⁸⁶

In order to become a member, the applicant country must first persuade the Working Party.⁸⁷ Then, the Working Party submits a report discussing commitments agreed to by the applicant country and “a schedule of bilateral market access commitments for trade in goods and services.”⁸⁸ Finally, the highest authority in the WTO, the Ministerial Conference, makes the final decision on accession by a two-thirds majority vote.⁸⁹

A. China’s Reasons for Joining to the WTO

China’s motivation to join the WTO is, in part, to ensure “greater market access for [its] exporters and protection from unilateral trade sanctions.”⁹⁰ The WTO offers an improved “international trading environment for China,” and the WTO Dispute Resolution Process, which “provide[s] Chinese traders with opportunities to defend their own interests and resolve trade frictions more fairly.”⁹¹ Additionally,

83. Morrison, *supra* note 78, at 4.

84. Grimmett, *supra* note 76, at 3.

85. *Id.* Protocol of Accession is given to every applicant country, even those with a market economy. *Id.* at 3-4. The Protocol of Accession addresses “the particular rights and obligations of an acceding member.” *Id.*

86. *Id.* at 4.

87. Morrison, *supra* note 78, at 2.

88. *Id.*

89. *Id.* at 1.

90. *China: WTO demands pain as price of gain*, *supra* note 16 (quoting Zhang Hanlin, “a professor at the University of International Business and Economics”).

91. *Id.* China is arguably considered a developing nation. See Morrison, *supra* note 78, at 3; see also Sean Leonard, *When China Joins: The Power of WTO Dispute Resolution*, CHINA L. & PRAC., July-Aug. 2000, at 36. This status has implications for the Dispute Settlement Understanding (DSU), which guides the dispute resolution process. *Id.* The advantages to being a developing nation arise in the DSU’s “philosophy of sensitivity to, and accommodation of, the needs of developing country WTO members involved in trade disputes.” *Id.* at 37. This

membership in the WTO allows China to participate in the development of new WTO rules regarding trade.⁹² China's entry into the WTO assures permanent normal trade relations with the United States, which in turn will lead to greater American investment.⁹³ Thus, entry into the WTO will bring an improved international trading environment for China in the form of the WTO Dispute Resolution Process and participation in the development of new WTO trade rules. These developments, however, will not come without cost.

China's bilateral negotiations with the United States exemplify some of the concessions required of China, particularly concessions regarding legal services.⁹⁴ China's fledgling legal services industry inhibits the country from making meaningful concessions related to those during WTO accession negotiations.⁹⁵ China's characterization of its legal services industry as fledgling results from Chinese lawyers' "limited access to high-technology and world economics."⁹⁶ With the nation's change to a market economy, Chinese lawyers "are finding themselves outpaced by the fast development of a market-oriented and knowledge-based economy."⁹⁷ Thus, China argues that its lawyers are "no match for foreign competitors and will suffer from intensified competition on the domestic market."⁹⁸ WTO accession,

philosophy "extends from the initial negotiations of the parties through to the surveillance of compliance with the panel or Appellate Body decision resolving the dispute." *Id.* Moreover, before appointing a Dispute Settlement Board, the DSU requires WTO members to "give special attention to the particular problems and interests of developing country Members during consultations over a dispute." *Id.* Additionally, a developing nation is given additional time regarding dispute settlement consultations and the preparation and presentation of its argument. *Id.*

92. Wayne M. Morrison, *China's Economic Conditions*, CRS Rep. IB98014, at 15 (Apr. 13, 2001).

93. *Id.* at 14.

94. *See generally* Morrison, *supra* note 5, at 10-11 (summarizing the agreements China made with the United States in the course of their bilateral negotiations). The United States and China completed the bilateral agreement on November 15, 1999 concerning China's accession to the WTO. U.S.-China Relations Act of 2000, Pub. L. No. 106-286, § 202(8), 114 Stat. 880, 893 (2000).

95. *China: Geographic ban expected to end*, CHINA DAILY, May 3, 1999, at 1, available at 1999 WL 17779188. Wu Mingde, Deputy Director of the Ministry's Department of Lawyers and Notation, referred to the Chinese legal industry as a fledgling industry. *Id.* at 2.

96. *Id.* at 2.

97. *Id.*

98. *China: WTO demands pain as price of gain*, *supra* note 16, at 2.

however, requires China to “afford ‘national treatment’ to foreign firms.”⁹⁹ In an effort to strengthen such treatment, China’s bilateral agreement with the United States includes a requirement that China “open service sectors,”¹⁰⁰ including legal services.¹⁰¹ This agreement would allow China to remove restrictions on foreign services over time and gradually expand foreign ownership from sector to sector.¹⁰² Therefore, while current negotiations do not require China to make immediate concessions, China’s ability to protect its domestic industries with restrictive policies on foreign law firms is limited.¹⁰³

B. U.S. Response to China’s Accession to the WTO

The United States recognizes China as one of the fastest growing economies in the world that remains outside multilateral trade rules.¹⁰⁴ The United States also considers China an area where “extraordinary potential for growth exists.”¹⁰⁵ As a result, the United States considers “[pursuing] market-opening initiatives” in China a primary trade policy.¹⁰⁶

American law firms wanting to establish satellite offices in China will benefit from greater market access. While the Chinese legal profession is still “fledgling,” American law firms may gain a

99. See Morrison, *supra* note 78, at 3.

100. *Id.* at 4 (requiring China open its service sectors, but not expressly mentioning legal services); see also Morrison, *supra* note 5, at 10 (parenthetically mentions opening legal services as part of China’s agreement).

101. Morrison, *supra* note 5, at 11 (updating Morrison’s report entitled *China and the World Trade Organization*; *supra* note 78, at 4).

102. Morrison, *supra* note 5, at 10.

103. *Id.* at 10. China’s response to these negotiations was optimistic. *China: Tough bargaining ahead*, CHINA DAILY, Nov. 21, 1999, at 8, available at 1999 WL 30608199. Long Yongtu, China’s Vice-Foreign Trade Minister and Chief, described these bilateral negotiations as the most difficult his team experienced. *Id.* Although Yongtu believes that WTO accession could cause some negative impacts on domestic markets, he stated “the initiative in opening the [Chinese] market [to foreign competition] is firmly in the hands of the Chinese Government and enterprises.” *Id.*

104. Morrison, *supra* note 5, at 9-11; see also Morrison, *supra* note 93, at 13 (stating that China’s trade is “too significant to remain outside multilateral trade rules”).

105. *Rep. on Trade Expansion Priorities Pursuant to Exec. Order No. 12901*, *supra* note 5, at 52604; see also, *Rep. on Trade Expansion Priorities Pursuant to Exec. Order No. 13116*, *supra* note 5, at 24443 (discussing the benefits of China’s accession to the WTO).

106. *Rep. on Trade Expansion Priorities Pursuant to Exec. Order No. 12901*, *supra* note 5, at 52607.

competitive advantage.¹⁰⁷ George Haley, a San Francisco attorney with Pillsbury Madison & Sutro LLP who represents businesses in China, stated that “There’s money to be made for lawyers” in China.¹⁰⁸ By allowing foreign law firms greater market access, there are more opportunities for the firms to make money.

China’s compliance to its bilateral negotiations, however, is a concern for the United States. If China does not comply with its WTO commitments, then issues often overlooked, such as foreign law firms gaining market access in China, may be in jeopardy. Responsive to this concern, Shi Guangsheng, the Foreign Trade Minister and co-chair of the U.S.-China Joint Commission on Commerce and Trade, reaffirms the Chinese government’s commitment to acting in conformity with WTO requirements.¹⁰⁹ Additionally, China’s Premier Zhu Rongli reported that China’s ministry-level mediation agency helps to ensure China’s compliance to its WTO commitments.¹¹⁰

Congress found, in part, that China is “committed to eliminating significant barriers in the . . . services . . . [sector].”¹¹¹ Although this finding is positive for foreign law firms, Congress believes there is a need for effective monitoring and enforcement of China’s commitments under the WTO.¹¹² As a safeguard, Congress continues to appropriate funds to the Department of Commerce and the

107. See *China: Geographic ban expected to end*, *supra* note 97. Foreign firms, however, are arguably more established and have unique administrative systems. See Xiao, *supra* note 12, at 30.

108. Loomis, *supra* note 37.

109. *China: Normal trade relations with US emphasized*, CHINA DAILY, Apr. 8, 2000, at 1, available at 2000 WL 4115376.

110. *A promise made . . . China sets up ministry-level agency to make good on WTO vows*, CHINAONLINE NEWS, at <http://www.chinaonline.com/issues/wto/NewsArchive/2000/july/C00071306.asp> (last visited July 14, 2000). The goals of the agency are to receive complaints from foreign businesses and ensure that China fulfills all of its commitments under the WTO. *Id.*

111. U.S.-China Relations Act of 2000, Pub. L. No. 106-286, § 411(4), 114 Stat. 880, 901 (2000).

112. *Id.* at § 411(5); see also Geza Feketekuty & Peter Watson, *WTO realities after Chinese accession*, CHINAONLINE NEWS, at http://www.chinaonline.com/commentary_analysis/wtocom/NewsArchive/secure/2000/june (last visited June 2, 2000) (quoting James Sasser, former U.S. Ambassador to China “testifying before the Senate Finance Committee on March 23, 2000 that Chinese implementation of its WTO commitments will take a long time and be uneven”).

Department of State for “monitoring compliance by [China] with its commitments under the WTO” and providing Congress with annual reports on that compliance.¹¹³ Congress also plans to appropriate funds to the U.S. Trade Representative for additional staffing in “offices relating to the WTO and to different sectors of the economy, including . . . services . . . to monitor and enforce the trade agreement obligations of [China].”¹¹⁴ Finally, the Senate proposes that the WTO implement a “special multilateral process” that annually reviews China’s compliance with its WTO commitments.¹¹⁵

V. EFFECT OF CHINA’S WTO ACCESSION ON FOREIGN LAW FIRMS

China will relax some of its regulations on foreign law firms as a result of the negotiations required for WTO entry. This result will not, however, affect many of the most severe limitations. Nonetheless, these restrictions are more likely to diminish gradually rather than as a result of current WTO negotiations.

A. Changes in the Restrictions on Foreign Law Firms in China that Result Directly From WTO Accession

China’s Justice Minister Gao Changli claims that “‘after China joins the [WTO], the legal service sector in China will be further opened’ . . . ‘in accordance with WTO commitments.’”¹¹⁶ China

113. U.S.-China Relations Act of 2000 §§ 413(a)(1), (b)(1), 421(a). Congress will make these funds available beginning with the fiscal year 2001 and continuing “each fiscal year thereafter.” *Id.* at § 413(a)(1), (b)(1).

114. *Id.* at § 413(c)(4).

115. S. 2115, 106th Cong. § 6(a) (2000). The Senate wanted the WTO to implement “as part of the Trade Policy Review Mechanism of the World Trade Organization, a thorough review of China’s trade policies be conducted each year . . . [and] include onsite visits and active participation by representatives of [WTO] members.” *Id.* at § 6(b)(1), (3). Furthermore, the United States must deal with the issue of its credibility when enforcing China’s commitments under the WTO; thus, the Clinton Administration made threats of revoking China’s Normal Trade Relations status, but took no action on these threats. James R. Lilley, *Trade and the Waking Giant*, in BEYOND MFN: TRADE WITH CHINA AND AMERICAN INTERESTS, 36, 54 (James R. Lilley & Wendell L. Willkie eds., The AEI Press, 1994). China responded by hardening its position. *Id.* This reaction is a result of China’s philosophy of “a firing of empty canons,” regarding empty threats. *Id.* Thus, if the United States fears compliance from China, it must use tougher diplomacy. *Id.*

116. *Foreign Law Firms Establish China Branches*, XINHUA, June 8, 2000, available at

plans to lift three of the current restrictions on foreign law firms within one year of accession. In addition, China plans to lift the geographic ban on foreign law firms.¹¹⁷ Finally, China intends to remove the current limit on the number of foreign law firms allowed to establish branch offices¹¹⁸ and to increase the number of firms with more than one branch office in the country.¹¹⁹

The removal of these restrictions will benefit China because foreign law firms attract foreign investment to the nation.¹²⁰ Chinese commentators expect that WTO accession will bring China approximately twelve million jobs every year.¹²¹ Officials predict that legal professionals will be in demand.¹²² Currently, China has approximately 110,000 lawyers and 8,300 law firms.¹²³ Although these numbers reflect significant expansion in the Chinese legal profession over the past two decades, China still has gaps between the “demand and supply in terms of both quantity and quality. At present, there are only 0.7 lawyers for every 10,000 people in China.”¹²⁴ Thus, China may lift these restrictions in order to compensate for its limited number of legal professionals while simultaneously encouraging the foreign investment prompted by WTO accession.

LEXIS, News Library, Xinhua File (citation omitted).

117. *China opening up to foreign lawyers*, INT'L L. UPDATE, May 1999, available at LEXIS, News Library, Individual Publ'n File; see also Zarcostas, *supra* note 24 (stating China's plan is to lift its geographical ban on foreign law firms within one year of entry); *China: Legal service sector to open wider to foreigners*, CHINA DAILY, Aug. 14, 1998, available at 1998 WL 7597299 (stating that China plans to lift its geographical ban on foreign law firms when it is admitted to the WTO).

118. Zarcostas, *supra* note 24. Eighty is the current quota on foreign law firms allowed to set up branch offices in China.

119. *China: Legal service sector to open wider to foreigners*, *supra* note 117.

120. See *China: Legal service sector to open wider to foreigners*, *supra* note 117; see also *A Profile of China's Legal Services Industry*, *supra* note 24 (stating that the reason China initially allowed foreign law firms to have branch offices in China was because of foreign investors); *State Councilor Wu Yi foresees economic openness after WTO entry*, *supra* note 6.

121. *China: WTO entry to bring job opportunities*, CHINA DAILY, Nov. 26, 1999, at 6, available at 1999 WL 17783758 (referring to an article from Beijing Evening News).

122. *Id.*

123. *A Profile of China's Legal Services Industry*, *supra* note 24.

124. *Id.* The Chinese lawyer-client ratio is far below the United States ratio of thirty lawyers per ten thousand clients. *Id.*

B. Possible Changes in the Restrictions on Foreign Law Firms that Evolve From the Economic Changes Caused by the WTO

President Jiang Zemin supports a recent Asia-Pacific Economic Cooperation (APEC) declaration, which includes the statement, “As leaders, we accept responsibility for resisting protectionism [and] opening markets further”¹²⁵ The economic expansion resulting from China’s entry into the WTO and negotiations that continually push China toward resisting protectionism will catalyze a demand for China to create new laws and provide more competent legal professionals.¹²⁶ When China is able to resist protectionism, foreign law firms will then experience easier market access and more autonomy in the scope of their China practices.

As a logical corollary, China must first define the role of lawyers in its society before it can combat protectionism.¹²⁷ China’s lawyers began as “legal service worker[s] of the state,” but today, they carry the more independent title of “legal service worker[s].”¹²⁸ The *Law*

125. *China: WTO issues discussed*, CHINA DAILY, Sept. 14, 1999, at 2, available at 1999 WL 17782314.

126. *Id.*; see also *China: Lawyers May face WTO challenges*, CHINA DAILY, Jan. 10, 2000, at 3, available in 2000 WL 4114452 (referring to Duan Zhengkun, Vice-Minister of Justice in China, who defined China’s goals for its legal profession as: (1) “enhancing attorney competence;” (2) “expanding local law firms;” and (3) “improving the supervision of the legal profession”). The *Lawyers’ Law* encourages attorney competence by providing attorneys with more autonomy. See *Lawyers’ Law*, *supra* note 16, at art. 25. The *Lawyers’ Law* also expands local law firms by allowing lawyers to set up private law firms. *Id.* at arts. 16-17. Finally, the *Lawyers’ Law* improves the supervision of the legal profession by establishing a bar association that is both a legal entity and an organization where lawyers exercise self-discipline. *Id.* at arts. 37, 40. See generally Clark, *supra* note 7 (discussing reasons that catalyze the demand for lawyers in society).

127. See generally Clark, *supra* note 7, at 281 (postulating that the role of lawyers in society is “to create, find, interpret, adapt, apply and enforce rules and principles that structure human relationships and interactions”). The role of lawyers in normative ordering is composed of at least six areas: (1) advocating and lobbying for legislation or serving as legislators; (2) lobbying and advocating administrative rule-making; (3) private deal-making, such as negotiating and drafting agreements; (4) counseling and advising clients; (5) using alternative dispute resolution techniques, such as arbitration or mediation; and (6) litigation. *Id.* at 281-82.

128. Ma Chenguang, *Role of lawyers to be expanded*, CHINA DAILY, June 24, 1996, at 13 available at 1996 WL 8531404. In reviving the Chinese legal system, Communism was not lost. Ginsberg, *supra* note 9, at 48. Thus, the “Chinese perceived law as the government’s instrument for maintaining social order.” *Id.* As a result, the Chinese considered lawyers to be “legal services [workers] for the state.” *Id.* Lawyers were not “considered independent of the state and were not needed to protect the individual’s rights.” *Id.* at 49. As “state legal workers,” the Chinese government demanded lawyers “uphold the correct implementation of the law,

on *Lawyers and Legal Representation (Lawyers' Law)*, enacted in 1997, explains this change, as it replaced the *Interim Regulations of the People's Republic of China on Lawyers (Interim Regulations)*.¹²⁹ This evolution of China's legal professionals expands the role of lawyers in China's society.¹³⁰ Chinese lawyers also gain competence in areas such as private deal-making, counseling, and advising clients

while at the same time protect the interests of the state, the collective, and the citizens Consequently, lawyers enjoyed no professional autonomy from the politics and administration of the Chinese government." *Id.*

129. *Lawyers' Law*, *supra* note 16. The Eighth National People's Congress, in enacting the *Lawyers' Law*, abolished the *Interim Regulations* as the governing rules for Chinese lawyers. *Interim Regulations of the People's Republic of China on Lawyers* (Jan. 1, 1982), available at <http://www.qis.net/chinalaw/prclaw59.htm> [hereinafter *Interim Regulations*]; see also Ginsberg, *supra* note 9, at 48 (explaining Chinese attitudes on lawyers); Cynthia L. Baraban, *Inspiring Global Professionalism: Challenges and Opportunities for American Lawyers in China*, 73 IND. L.J. 1247, 1252-62 (1998) (discussing the evolution of China's legal profession).

130. See generally Clark, *supra* note 7 (discussing reasons attributed to the expansion of lawyers in society). For example, through the *Lawyers' Law*, Chinese lawyers may have "law offices financed by the state" or "establish [a] cooperative law office" or "set up a law office in partnership." *Lawyers' Law*, *supra* note 16, at arts. 16-18. In contrast, the *Interim Regulations* provided that "legal advisory offices shall be the business organizations for which lawyers perform their duties. Legal advisory offices shall be public institutions under the organizational leadership and professional supervision of the judicial administrative organs of the state." *Interim Regulations*, *supra* note 129, at art. 13. Thus, the Chinese government controlled the legal profession in the provisions of the *Interim Regulations* and did not provide lawyers with the option of entering into private practice.

Moreover, the *Interim Regulations* did not allow lawyers to find their own clients, or clients to choose their lawyers. *Id.* at art. 17. "The mandates for lawyers to handle cases shall be accepted and service fees collected exclusively by the legal advisory office. In the distribution of cases to lawyers, the legal advisory office shall, as best as possible and according to actual conditions, assign lawyers as requested by clients." *Id.*

By contrast, the *Lawyers' Law* allows lawyers to "accept appointment by citizens, legal persons and other organizations to act as their legal advisers." *Lawyers' Law*, *supra* note 16, at art. 25. Additionally, a client "who has commissioned a lawyer to handle a case for him or her may refuse to let the lawyer continue to defend or act as a representative for the case, or commission another lawyer to act as his or her defender or representative." *Id.* at art. 29. Thus, the *Lawyers' Law* gives attorneys more autonomy in choosing the clients they represent, and clients also possess more authority in choosing which lawyers represent them. A subset of Article 29 gives lawyers additional autonomy when it states:

After a lawyer accepts a commission to handle a case, he or she must not refuse to defend or act as a representative without good reason. However, if the case commissioned is illegal and if the client uses the services provided by a lawyer to conduct illegal activities or conceal a fact, a lawyer has the right to refuse to act as a defender or a representative for such a case.

Id.

by the increased autonomy the *Lawyers' Law* provides.¹³¹

China's lawyers, however, will not become legal experts overnight.¹³² This expertise will increase and evolve with the addition of laws and economic changes in Chinese society.¹³³ Consequently, China will protect its domestic legal market by retaining certain restrictions on foreign law firms.¹³⁴

The majority of foreign multinational companies choose foreign law firms to service their investment needs in China because of the host nation's lack of legal competence.¹³⁵ Foreign businesses prefer foreign law firms "because of their experience and training, which are needed for dealing with the complex legal issues of these clients."¹³⁶ The restrictions on chief representative(s) in foreign law firms, however, allow Chinese lawyers access to the management structure and legal skills of foreign law firms. The restrictions on the chief representative(s) also ensure an advanced skill level because the chief representative(s) must have at least three years of practical experience.¹³⁷ In addition, these restrictions ensure integrity because the chief representative(s) cannot have a discipline record.¹³⁸ Finally, the restrictions allow Chinese lawyers access to chief representative(s) by requiring that the chief representative(s) reside in China for more than 180 days.¹³⁹ Therefore, because the restrictions

131. See *Lawyers' Law*, *supra* note 16, at art. 25.

132. See *A Profile of China's Legal Services Industry*, *supra* note 24.

133. See generally Clark, *supra* note 7 (discussing areas of lawyers' expertise).

134. See Zarocostas, *supra* note 24. For example, China insists on continuing restrictions concerning the chief representative(s) of a foreign law firm and foreign law firms' hiring Chinese lawyers. *Id.* In addition, Wu Mingde, Secretary-General of the All-China's Lawyers Association (ACLA) stated "I am confident that the Chinese lawyers are capable of competing with their foreign counterparts . . . in view that foreign firms must co-operate with Chinese lawyers under many circumstances . . ." *Lawyers upbeat on WTO*, CHINA DAILY, at <http://www.chinadaily.com.cn/highlights/wto/news/b27lawyer.html> (last visited Nov. 27, 2000). Indeed, foreign law firms must co-operate with Chinese lawyers because foreign law firms, according to the *Tentative Provisions*, must give Chinese law firms legal business in China. *Tentative Provisions*, *supra* note 4, at art. 15.

135. Ginsberg, *supra* note 9, at 48.

136. *Id.*; see Collin Galloway, *supra* note 33, at 4. Galloway's editorial proffers that "mainland lawyers lack both the experience and depth of talent required to compete effectively with international counterparts." *Id.*

137. Gu, *supra* note 8, at 202.

138. *Id.*

139. Xiao, *supra* note 12, at 30.

on the chief representatives(s) have benefits, relaxation of the restrictions on chief representative(s) of foreign law firms is an unlikely result of China's entry to the WTO.

Lifting the prohibition on foreign law firms hiring Chinese lawyers, as a condition of China's accession to the WTO, is also unlikely. China must expand the number of its lawyers to successfully compete with foreign law firms. If China permitted foreign law firms to hire Chinese lawyers, then China would face the potential problem of losing many of its lawyers to foreign firms.¹⁴⁰

The likelihood of China's easing these restrictions on foreign law firms gradually, however, is high, particularly as Chinese lawyers advance their legal competence. As Japan demonstrated, the liberalization process merely chips away at the restrictions imposed on foreign lawyers rather than eliminates them as a condition of entry into the WTO. Moreover, the liberalization process occurs more as a result of economic factors than accession to the WTO. Thus, the international marketplace will reduce many of China's severe restrictions on foreign law firms.

VI. EXPEDITING MARKET ACCESS FOR FOREIGN LAW FIRMS IN CHINA

China's primary concerns are protecting its domestic legal market and membership in the WTO in order to encourage foreign investment. The United States must address these issues to expedite market access for foreign law firms. Three distinct measures exercised by the United States may open China's doors to foreign law firms. First, the United States, as well as foreign law firms, can encourage skill-exchange between foreign lawyers and Chinese lawyers. Secondly, in addition to monitoring and enforcing China's WTO commitments, the United States can also help China develop its laws and market economy. Finally, the United States can make market access for foreign law firms a primary focus of continuing WTO negotiations. Taking these steps helps China develop while

140. See also Gu, *supra* note 8, at 202 (reasoning that foreign law firms cannot hire Chinese lawyers because the Chinese government fears that foreign law firms would hire "away the best Chinese lawyers").

simultaneously pushing China towards allowing market access for foreign legal services.

A. Encouraging Skill-Exchange Between Foreign Lawyers and Chinese Lawyers

As mentioned earlier, China expects the demand for legal professionals to rise significantly with its WTO entry. In response, China hopes to allow some form of “internship” for Chinese lawyers in foreign law firms.¹⁴¹ Additionally, American lawyers realize that “China is recognizing the benefits of skill-exchange expertise, which is crucial to the development of a modern and competitive business infrastructure.”¹⁴² Thus, American law firms as well as the U.S. government could successfully encourage skill-exchange as a mechanism for Chinese lawyers to develop increased competence.

Such an internship would allow Chinese lawyers to experience the management structure of foreign law firms and the legal skills of foreign lawyers. Furthermore, the skill-exchange program would not threaten China’s future legal system, as the United States does not immediately press China to lift the restriction on foreign law firms hiring Chinese lawyers.¹⁴³ Thus, China may effect some concessions in the area of legal services as result of skill-exchange programs, thereby increasing lawyer competence in China. Foreign multinational companies may be more likely to seek the assistance of Chinese lawyers as their level of competence increases. Consequently, by effectively lessening one of China’s principal concerns, the United States would be in a better position to push toward greater market access in China.

141. Chris Klein, *China Relents on Its Law Firm Rules*, NAT’L L.J., Dec. 30, 1996, at A7. Nicholas Howson proposed this idea of allowing Chinese lawyers to stay with foreign firms for a period of time. *Id.* China’s Vice-Minister of Justice, Duan Zhengkun “[hopes] that increasing contact with overseas law firms . . . will bring China’s legal profession to a new stage of development.” *China: Lawyers may face WTO challenges*, *supra* note 126.

142. Rozner, *supra* note 25, at 50.

143. Morrison, *supra* note 78, at 2-3. Although, the United States argued that the “Chinese government policies [are] designed to protect and promote domestic industries.” *Id.* at 2.

B. United States Helps China Develop Laws and Market Economy

Congress statutorily mandated that developing China's ability to rule by law and encouraging the creation of democratically implemented laws are goals of the U.S. Congressional-Executive Commission on China.¹⁴⁴ Congress also authorized the Secretary of State to establish programs that aid China in developing its laws, legal system, and civil society¹⁴⁵ and the U.S. Trade Representative "to prevent . . . market disruption."¹⁴⁶ Preventing market disruption requires both helping China develop its market economy and legal system, while concurrently monitoring these developments.

The United States' aid to China's developing market economy and legal system, combined with the monitoring and enforcement techniques implemented by Congress, will expedite China's development as a reformed country. The faster China develops, without compromising the quality of development, the further the United States can advance negotiations to ease restrictions on foreign law firms in China.

C. Making Market Access for Foreign Law Firms the Chief Negotiation Topic

Currently, market access for foreign law firms in China is a secondary focus for the United States.¹⁴⁷ China's key concerns of protecting its legal service market and developing its market economy partially prevent the United States from demanding China open its doors to foreign legal services. As the United States addresses China's concerns, through skill-exchange programs, developing China's legal system and market economy, and monitoring and enforcing China's WTO commitments, China will be more willing to negotiate for greater access for foreign law firms. In addition, concentrating on China's primary fears allows the United States to make market access for foreign law firms a focal point as

144. U.S.-China Relations Act of 2000, Pub. L. No. 106-286, § 302(c)-(d), 114 Stat. 880, 896-97 (2000).

145. *Id.* at § 511(c).

146. *Id.* at § 421(j).

147. *See Morrison, supra* note 5, at 11.

negotiations with China continue, which will also expedite market access in this area.

CONCLUSION

China is now a member of the WTO. WTO negotiations, however, have ignored market access for foreign law firms in China.¹⁴⁸ Although China's accession to the WTO will bring greater market access for some foreign legal services, many restrictions on foreign law firms are likely to remain for several years. The immediate easing of certain restrictions as a condition of WTO accession merely begins the process of opening China's legal services market to foreign law firms. Thus, while the WTO may effect some direct changes in the restrictions on foreign law firms in China, the greatest results will evolve from China's increased participation in the international marketplace.

148. *Id.* at 110. Legal services is parenthetically mentioned as part of the bilateral negotiations between the United States and China. *Id.*