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## China's Accession to the World Trade Organization: Legal Issues

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## **ABSTRACT**

This report discusses the interaction of international and U.S. domestic law with regard to the accession of the People's Republic of China (PRC) to the World Trade Organization (WTO), with an emphasis on the extension of nondiscriminatory treatment to the products of the PRC. The report provides background on the WTO accession process and accession negotiations involving the PRC, discusses domestic statutory requirements affecting U.S. trade with China, examines some domestic legal implications of the PRC accession to the WTO, and describes 106<sup>th</sup> Congress legislation addressing PRC accession. This report will be updated as events warrant.

# China's Accession to the World Trade Organization: Legal Issues

## Summary

The People's Republic of China (PRC) applied to resume membership in the General Agreement on Tariffs and Trade (GATT) in 1986 and continues to negotiate its accession to GATT's successor, the World Trade Organization (WTO). A country may join the WTO on terms agreed by the applicant and WTO Members if two-thirds of Members approve the country's accession agreement. A Member may "opt out" of WTO relations with another country by invoking Article XIII of the WTO Agreement, its "non-application" clause. The United States and the PRC agreed to bilateral terms for the PRC's accession in November 1999.

U.S. trade relations with the PRC are primarily governed by Title IV of the Trade Act of 1974. Section 402 of the Act (Jackson-Vanik Amendment) prohibits the extension of nondiscriminatory trade treatment and other commercial benefits to the PRC unless it meets freedom-of-emigration requirements or the requirements are annually waived. The PRC is also subject to nonmarket trade remedy provisions in Title IV and elsewhere. Section 1106 of the Omnibus Trade and Competitiveness Act requires the President to make determinations as to the restrictive trade impact of a "major foreign country's" use of state trading companies before the country accedes to the WTO. Absent express legislative conditions or prohibitions, the President generally may approve the accession of countries to international organizations to which the United States belongs, invoking authority under the international agreement underlying U.S. participation as well as his constitutional foreign affairs authority. There is no statutory prohibition on U.S. approval of the PRC's accession to the WTO nor an express legislative requirement that the President necessarily obtain statutory authorization before the United States may support this action. As a WTO Member, the United States must grant immediate and unconditional most-favored-nation (MFN) treatment to like products of other WTO Members as to tariffs and other trade matters. Application of Title IV to a WTO Member is inconsistent with U.S. WTO obligations because of the conditions that it attaches to the grant of MFN treatment to the country's goods. Were the PRC to accede to the WTO and were its accession terms not to permit the United States to derogate from MFN obligations, the United States would need to invoke Article XIII of the WTO Agreement or risk violating its MFN obligation as it pertains to the PRC.

**H.R. 4444** (Archer), passed the House May 24, authorizes the President to extend nondiscriminatory treatment to the PRC's goods and in effect to render Title IV inapplicable to the PRC once it became a WTO Member, provided the President certifies to Congress that the PRC's accession terms are at least equivalent to those contained in the November bilateral agreement. It also authorizes remedies for market disruption and trade diversion resulting from surges of Chinese goods; establishes a governmental commission to monitor human rights practices in China; provides for monitoring China's compliance with its WTO obligations; creates a task force focused on forced labor imports from China; and addresses several other China-related issues. **S. 2277** (Roth), reported from the Senate Finance Committee May 25, contains Title IV termination provisions that mirror those in the House bill. This report will be updated as events warrant.

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# China's Accession to the World Trade Organization: Legal Issues

This report discusses the interaction of international and U.S. domestic law with regard to the accession of the People's Republic of China (PRC) to the World Trade Organization (WTO), with an emphasis on the extension of nondiscriminatory treatment to the products of the PRC. The report provides background on the WTO accession process and accession negotiations involving the PRC, discusses domestic statutory requirements affecting U.S. trade with China, examines some domestic legal implications of the PRC accession to the WTO, and describes 106<sup>th</sup> Congress legislative proposals addressing PRC accession.<sup>1</sup>

## Background

China was an original signatory to the General Agreement on Tariffs and Trade (GATT) and acceded to the GATT Protocol of Provisional Application, the legal instrument through which the GATT entered into force, on May 21, 1948. After mainland China was taken over by a Communist government in 1949, the Nationalist government in Taiwan (calling itself the Republic of China) withdrew from the GATT, effective May 5, 1950, because it could no longer carry out GATT obligations with regard to the mainland.<sup>2</sup> The Nationalist government of Taiwan was accorded observer status in the GATT in 1965, a status withdrawn by the GATT Contracting Parties in 1971 after the United Nations recognized the Communist government of the PRC as the sole legal Chinese representative in the United Nations and terminated the representational rights of the Nationalists.<sup>3</sup>

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<sup>1</sup> For additional information and background, see W. Morrison, *China and the World Trade Organization*, CRS Report RS20139; C. Hanrahan, *Agriculture and China's Accession to the World Trade Organization*, CRS Report RS20169; W. Morrison, *China-U.S. Trade Issues*, CRS Issue Brief IB91121; W. Morrison, V. Pregelj, K. Dumbaugh, & J. Grimmett, *Most-Favored Nation Status and China: History, Current Law, Economic and Political Considerations, and Alternative Approaches*, CRS Report 96-923E (November 19, 1996).

<sup>2</sup> For background on the GATT participation of China and Taiwan, see Herzstein, "China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade," 18 *L. & Pol'y Int'l Bus.* 371 (1986); Ya Qin, *China and the GATT: Accession Instead of Resumption*, 27 *J. World Trade* 77 (1993)[hereinafter cited as Ya Qin].

<sup>3</sup> Ya Qin, *supra* note 2, at 80; GATT; World Trade Organization, *Analytical Index: Guide to GATT Law and Practice* 1095 (updated 6<sup>th</sup> ed. 1995)[hereinafter cited as *GATT Analytical Index*]. GATT parties had agreed to follow the decisions of the United Nations on what they considered "essentially political matters." *GATT Analytical Index*, *supra*, at 1095.

In 1980, the PRC officially notified the GATT of its interest in participating in the organization and sent an official to the GATT for a commercial policy training course.<sup>4</sup> The PRC was granted observer status in 1982 and became a participant in the Arrangement Regarding International Trade in Textiles (Multifibre Arrangement) the following year.<sup>5</sup> In June 1986, the PRC communicated to the GATT General Council that it wished to resume the seat held by the Republic of China.<sup>6</sup> The PRC was allowed to participate in the Uruguay Round negotiations<sup>7</sup> and a GATT Working Party on the PRC's application was established in 1987.<sup>8</sup> The group temporarily slowed its work following the Tiananmen Square events of 1989, but resumed active consideration of the accession in 1992.<sup>9</sup> The PRC did not obtain its objective of concluding accession negotiations by the end of the Round, an action that would have enabled it to become an original member of the WTO.<sup>10</sup> China has also expressed interest in entering the WTO as a developing country, which would allow it to avail itself of a number of benefits, including, for example, longer compliance periods, special considerations in dispute settlement, and advantages under Article XVIII and Part IV of the GATT 1994.<sup>11</sup>

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<sup>4</sup> *Id.* at 80-81.

<sup>5</sup> *Id.* at 81; J. Jackson, W. Davey & A. Sykes, *Legal Problems of International Economic Relations* 1153 (3d ed. 1995)[hereinafter cited as Jackson, Davey & Sykes].

<sup>6</sup> GATT, *GATT Activities 1987*, at 108 (1988).

<sup>7</sup> *Id.*; Ya Qin, *supra* note 3, at 81. The GATT Ministerial Declaration on the Uruguay Round provided that negotiations were open to, inter alia, "countries that have already informed the Contracting Parties, at a regular meeting of the Council of Representatives, of their intention to negotiate the terms of their membership as a contracting party. Ministerial Declaration of 20 September 1986, Part I, ¶ F(a)(iv), GATT, *GATT Activities 1986*, at 24-25 (1987).

<sup>8</sup> GATT, *GATT Activities 1987*, at 108 (1988).

<sup>9</sup> GATT, *GATT Activities 1989*, at 130-31 (1990); GATT, *GATT Activities 1990*, at 132 (1991); GATT, *GATT Activities 1991*, at 94-95 (1992).

<sup>10</sup> GATT, *GATT Activities 1993*, at 105 (1994). Under Article XIV:1 of the WTO Agreement, the PRC would have to have been a contracting party to the GATT 1947 before the WTO Agreement entered into force, and, as such, would then have had two years to join the WTO as an original member. *Id.*

<sup>11</sup> G. Holliday, *China and the General Agreement on Tariffs and Trade*, CRS Rept. 94-723E (Sept. 12, 1994), at 13-18; Blumenthal, "Applying GATT to Marketizing Economies: The Dilemma of WTO Accession and Reform of China's State-Owned Enterprises (SOEs)," 2 J. Int'l Econ. L. 113, 118-119 (1999). Article XVIII of the GATT 1994 addresses governmental assistance to economic development. Part IV of the GATT 1994, an amendment added in 1965, recognizes the special economic needs of developing countries and asserts the principle of non-reciprocity. Under this principle, developed countries forgo the receipt of reciprocal benefits for their negotiated commitments to reduce or eliminate tariffs and restrictions on the trade of less developed WTO Member countries. For background, see J. Grimmett, *Free Trade Areas, Developing Country Preferences and the WTO*, CRS Report 96-488A (May 30, 1996).

## WTO Accession

Accession to the World Trade Organization (WTO) is governed by Article XII of the Agreement Establishing the World Trade Organization (WTO Agreement), which provides that:

Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade and the Multilateral Trade Agreements annexed thereto.<sup>12</sup>

Decisions on accession are taken by the WTO Ministerial Conference, which must approve the applicant's accession agreement by a two-thirds majority of the WTO Members.<sup>13</sup> A country's Protocol of Accession enters into force 30 days following the date it is signed by the acceding government.<sup>14</sup>

As a matter of practice (as originated in the GATT and generally followed by the WTO), after a country notifies the WTO that it wishes to become a WTO Member, it submits a memorandum on its foreign trade regime and a WTO Working Party is formed to consider the country's application.<sup>15</sup> Accession negotiations take place on two tracks: (1) a multilateral track involving the Working Party and WTO Members, aimed at identifying elements of applicant's foreign trade regime that conflict with WTO obligations, and (2) a bilateral track, between the applicant country and those individual Members wishing to negotiate market access commitments involving specific goods and services.<sup>16</sup> While countries acceding to the WTO must accept all WTO Multilateral Trade Agreements as a condition of their WTO membership, the particular rights and obligations of an acceding Member are spelled out in its Protocol of Accession, which includes tariff obligations undertaken by the applicant and, when

<sup>12</sup> Agreement Establishing the World Trade Organization, Art. XII:1.

<sup>13</sup> While GATT parties and now WTO Members generally take decisions by consensus — that is, without formal objection (see WTO Agreement, Art. IX:1), votes are ordinarily taken on accessions. GATT Analytical Index, *supra* note 3, at 1098-99. In practice, however, WTO Members also try to reach consensus on this matter — that is, seek an accession agreement to which all Members will consent.

<sup>14</sup> WTO Agreement, Art. XIV:1; Art. II:2; *GATT Analytical Index*, *supra* note 3, at 1019.

<sup>15</sup> *GATT Analytical Index*, *supra* note 3, at 1019. For descriptions of WTO accession procedures, see *id.* at 1018-20; World Trade Organization, "Accession to the World Trade Organization; Procedures for Negotiations under Article XII; Note by the Secretariat," WT/ACC/1, March 24, 1995, and "Technical Note on the Accession Process; Note by the Secretariat," WT/ACC/7/Rev.1, November 19, 1999 [<http://www.wto.org>]; *Accession of China and Taiwan to the World Trade Organization; Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 104<sup>th</sup> Cong., 2d Sess. 36-38 (1996) (testimony of Ambassador Charlene Barshefsky)[hereinafter cited as Barshefsky Testimony]; W. Morrison, *China and the World Trade Organization*, CRS Report RS20139, at 1-2.

<sup>16</sup> Barshefsky Testimony, *supra* note 15, at 37.

the country is a nonmarket economy, addresses issues specific to its economic conditions and may allow it to phase-in certain obligations.<sup>17</sup> When all negotiations are concluded, the Working Party submits its report to the General Council, along with a draft Decision and Protocol of Accession, to which is annexed the applicant's Schedule of Concessions.<sup>18</sup> If the WTO General Council decides to adopt the report and to approve the texts of the Decision and Protocol, an accession decision is then taken by the WTO Ministerial Council.<sup>19</sup>

If a current or prospective WTO Member does not wish to enter into WTO Agreement with another country, it may invoke Article XIII, the "non-application clause" of the WTO Agreement. This Article provides that the WTO Agreement and the WTO Multilateral Trade Agreements will not apply between two Members if either of the Members, at the time either becomes a Member, does not consent to the application.<sup>20</sup> When one of the countries involved is a country acceding to the WTO under Article XII, the country that does not consent to the application must notify the WTO before the approval of the accession agreement by the Ministerial Conference.<sup>21</sup> If any WTO Member so requests, the WTO Ministerial Conference may review the operation of Article XIII "in particular cases" and "make appropriate recommendations."<sup>22</sup>

Even though the two countries involved may as a matter of practice or bilateral arrangement accord each other trade benefits that are equivalent to those accorded WTO Members, the invocation of the clause would mean that the countries may not claim WTO benefits from one another as a matter of right under the WTO. Nor could the parties invoke WTO dispute procedures since the WTO Dispute Settlement Understanding applies only to disputes brought pursuant to the consultation and dispute settlement provisions of WTO agreements.<sup>23</sup> Past GATT practice shows that some GATT parties have voted in favor of the accession of a particular country to the GATT at the same time invoked the GATT non-application clause with respect to the same country.<sup>24</sup>

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<sup>17</sup> Jackson, Davey & Sykes, *supra* note 5, at 306-307, 1150-55; J. Jackson, *The World Trading System* 285-92 (1989).

<sup>18</sup> *GATT Analytical Index*, *supra* note 3, at 1019. Applicant countries negotiate a Schedule of Concessions and Commitments for the GATT 1994 and a Schedule of Specific Commitments for the General Agreement on Trade in Services.

<sup>19</sup> *GATT Analytical Index*, *supra* note 3, at 1019.

<sup>20</sup> WTO Agreement, Art. XIII:1.

<sup>21</sup> WTO Agreement, Art. XIII:2.

<sup>22</sup> WTO Agreement, Art. XIII:3.

<sup>23</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 1:1.

<sup>24</sup> *GATT Analytical Index*, *supra* note 3, at 1033. The United States invoked Article XXXV, the non-application clause of the GATT, with respect to Romania and Hungary and invoked Article XIII of the WTO Agreement with respect to Mongolia. These countries have since been removed from Title IV pursuant to legislation, and the United States now engages in full WTO relations with them. Currently the United States invokes Article XIII of the WTO



The United States and the PRC agreed to bilateral terms for the PRC's WTO accession November 15, 1999.<sup>25</sup> This agreement was publicly released by the United States March 14, 2000. The PRC is continuing to negotiate the multilateral terms of its accession as well as other bilateral WTO accession agreements.

## **Domestic Law Governing U.S. Trade Relations with China**

United States trade relations with the People's Republic of China are primarily governed by Title IV of the Trade Act of 1974, 19 U.S.C. §§ 2431 *et seq.* Ordinarily, the United States extends nondiscriminatory treatment to the products of all foreign countries pursuant to § 126 of the Trade Act of 1974, which mandates such treatment unless otherwise provided by law.<sup>26</sup> Section 401 of the Act, 19 U.S.C. § 2431, requires the President to continue to deny nondiscriminatory treatment to the products of countries whose products were not eligible for nondiscriminatory tariff treatment on the date of enactment (*i.e.*, January 3, 1975), except in accordance with the terms of Title IV.<sup>27</sup> At the time, China's MFN status had been suspended as of September 1, 1951, pursuant to § 5 of the Trade Agreements Extension Act of 1951,

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<sup>24</sup> (...continued)

Agreement with respect to the Kyrgyz Republic. *See infra* note 59.

Presumably, two WTO Members that do not apply WTO agreements between themselves may decide that their trade relations are to be governed by a separate bilateral agreement. If the parties to such a bilateral agreement accord each other trade treatment that is more favorable than the treatment the parties accord to other WTO Members under WTO agreements, the parties may be obliged under MFN obligations in the GATT 1994 or other WTO agreements, as appropriate, to accord that more favorable treatment to other WTO Members.

<sup>25</sup> Agreement on Market Access Between the People's Republic of China and the United States of America, November 15, 1999, reprinted in *Inside U.S. Trade*, March 15, 2000 [hereinafter cited as U.S.-PRC Market Access Agreement].

<sup>26</sup> Trade Act of 1974, P.L. 93-618 (Trade Act), § 126, 19 U.S.C. § 2136. Section 126 provides that "[e]xcept as otherwise provided in this Act or in any other provision of law, any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this title [Title I of the Trade Act] shall apply to products of all foreign countries, whether imported directly or indirectly." Section 1105(a) of the Omnibus Trade and Competitiveness Act of 1988 made this section applicable to trade agreements entered into under § 1102 of the OTCA, *i.e.*, the Uruguay Round agreements. Congress has also withdrawn the most-favored-nation status of a particular country (*e.g.*, Serbia and Montenegro). Act of October 16, 1992, P.L. 102-420.

<sup>27</sup> The term "nondiscriminatory treatment" refers to most-favored-nation (MFN) treatment, or what is now called "normal trade relations" (NTR) in U.S. statutes. *See* P.L. 105-206, § 5003 (changing statutory terminology) and Trade Act of 1974, P.L. 93-618, § 601(9), 19 U.S.C. § 2481(9)(defining "nondiscriminatory treatment" for Trade Act purposes).

which required the President to suspend such status of the Soviet Union and all countries of what was then the Sino-Soviet bloc.<sup>28</sup>

Section 402 of the Act, 19 U.S.C. § 2432 (Jackson-Vanik Amendment), places freedom-of-emigration requirements on the extension of trade benefits to the nonmarket economy (NME) countries. It provides that the products of an NME country may not receive nondiscriminatory treatment, the country may not participate, directly or indirectly, in any U.S. Government credit, credit guarantee or investment guarantee program, and the President may not conclude a bilateral commercial agreement with the country, unless the President determines that the country complies with statutory standards as to freedom-of-emigration or the President waives these prohibitions and requirements.

If the President makes a determination that the country is in compliance, he must report to Congress on the nature of the country's compliance with each of the freedom-of-emigration standards set forth in the Act, and must update the reports at six-month intervals (on or before June 30 and December 31 of each year) so long as trade or financial benefits are extended or a bilateral commercial agreement is in effect.<sup>29</sup> While the initial determination of compliance neither requires congressional approval nor is subject to congressional disapproval, trade benefits provided pursuant to such a determination will be denied if a joint resolution disapproving the President's December 31 report is enacted into law within 90 days of session after the report is submitted to Congress, a period extendable by 15 days of session if the President vetoes the measure.<sup>30</sup> The disapproval resolution is subject to specific expedited legislative procedures.<sup>31</sup>

Alternatively, the President may waive § 402 prohibitions and requirements annually.<sup>32</sup> For each country to which a waiver is intended to apply, the President must report to Congress that he has determined that the waiver "will substantially promote the objectives" of § 402 and that "he has received assurances that the emigration practices of that country will henceforth lead substantially to the achievement" of these objectives.<sup>33</sup> A waiver will continue in effect for 12 months unless a joint resolution disapproving the waiver authority for the particular country is enacted into law within the end of the 60-calendar-day period beginning on the day the previous waiver would have expired, or a period 15 calendar days longer if the President vetoes the measure.<sup>34</sup> A § 402 disapproval resolution is also subject to

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<sup>28</sup> Ch. 141, 65 Stat. 73.

<sup>29</sup> Trade Act, § 402(b), 19 U.S.C. § 2432(b).

<sup>30</sup> Trade Act, §§ 154(b), 407(c)(2), 19 U.S.C. §§ 2194(b), 2437(c)(2). The resolution must be enacted within 90 session days or within 15 session days after the receipt of the veto, whichever is later.

<sup>31</sup> Trade Act, §§ 152, 407(c)(3), 19 U.S.C. §§ 2192, 2437(c)(3).

<sup>32</sup> Trade Act, § 402(c)(2), (d), 19 U.S.C. § 2432(d).

<sup>33</sup> Trade Act, § 402(d), 19 U.S.C. § 2432(d).

<sup>34</sup> Trade Act, § 402(d)(1), (2)(A), 19 U.S.C. § 2432(d)(1), (2)(A). The resolution must be  
(continued...)

specific fast-track procedures.<sup>35</sup> Termination of waiver authority applicable to the country that is the subject of the joint resolution goes into effect 60 days after the joint resolution is enacted into law.<sup>36</sup> The President may also terminate a waiver at any time by Executive Order.<sup>37</sup>

The statute authorizes the President to extend nondiscriminatory treatment to the products of a Title IV country by proclamation, but he may do so only if the United States and the country have entered into a bilateral commercial agreement containing statutorily-prescribed provisions, and Congress approves the agreement and the extension of nondiscriminatory treatment by a joint resolution enacted into law.<sup>38</sup> Among other provisions, the agreements are limited to an initial period of 3 years and may be renewed for 3 year periods thereafter according to their own terms, provided the President determines that reciprocal trade benefits are being provided.<sup>39</sup> The application of nondiscriminatory treatment is limited to the period during which United States obligations are in force under the agreement.<sup>40</sup> The President may suspend or withdraw the extension of nondiscriminatory treatment pursuant to the proclamation at any time.<sup>41</sup>

The United States entered into a bilateral commercial agreement with China in 1979.<sup>42</sup> The agreement entered into force February 1, 1980, following the President's issuance of a Jackson-Vanik waiver and Congress' approval of the agreement by concurrent resolution. The agreement was last renewed in 1998. The President has issued a § 402 waiver with regard to the PRC each year since 1979. To date, no waiver extension has been disapproved for the PRC despite frequent attempts to do so.

Current law also authorizes the President to proclaim an increase in the duty imposed on any product of a country (other than a WTO Member) if he determines that it "is not according adequate trade benefits to the United States, including substantially equal competitive opportunities for the commerce of the United States"

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<sup>34</sup> (...continued)

enacted within 90 calendar days or within 15 calendar days after the receipt of the veto, whichever is later.

<sup>35</sup> Trade Act, §§ 153, 402(c)(3), 19 U.S.C. §§ 2192, 2437(c)(3).

<sup>36</sup> Trade Act, § 402(d)(2)(B), 19 U.S.C. § 2432(d)(2)(B).

<sup>37</sup> Trade Act, § 402(c)(3), 19 U.S.C. § 2432(c)(3).

<sup>38</sup> Trade Act, §§ 404, 405, 407(c), 19 U.S.C. §§ 2434, 2435, 2437(c).

<sup>39</sup> Trade Act, § 405(b)(1), 19 U.S.C. § 2435(b)(1).

<sup>40</sup> Trade Act, §§ 404, 405, 407(c), 19 U.S.C. §§ 2434, 2435, 2437(c).

<sup>41</sup> Trade Act, § 404(c), 19 U.S.C. § 2434(c).

<sup>42</sup> Agreement on Trade Relations Between the United States of America and the People's Republic of China (U.S.-PRC Agreement on Trade Relations), signed July 7, 1979, 31 U.S.T. 4651. The United States has also entered into a number of other trade-related agreements with the PRC. These may be accessed at [<http://www.mac.doc/tcc/treaty>] under the heading for the People's Republic of China.

and consults with the House Ways and Means and Senate Finance Committees. The President must terminate any duty increase no later than the date on which the WTO Agreement enters into force for the targeted country.<sup>43</sup>

Section 406 of the Trade Act of 1974, 19 U.S.C. § 2436, provides a remedy for market disruption caused by imports from a Communist country, defined as “any country dominated or controlled by communism.” The provision requires the International Trade Commission, upon petition, promptly to “make an investigation, with respect to imports of an article that is the product of a Communist country, whether market disruption exists with respect to an article produced by a domestic industry.” Market disruption exists “whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.”<sup>44</sup> If the required findings are made, the President may impose duties or quantitative restrictions, or both, on the product involved. The statute prescribes procedures similar to those of Section 201, the domestic safeguard procedure against injurious import surges, but unlike the latter, contains a lower standard of injury and shorter procedural deadlines, and may apply to imports from only one country rather than on a nondiscriminatory basis.<sup>45</sup>

U.S. antidumping law also contains special provisions for the consideration of actions by nonmarket economy (NME) countries, including an alternate means of ascertaining the fair value of goods from a nonmarket economy for purposes of determining whether goods are dumped, if such determination cannot be made in any of the regular ways.<sup>46</sup> Under current antidumping law, once the Commerce Department determines a country is an NME, the determination remains in force until revoked by the Department and is not subject to judicial review in appeals of agency

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<sup>43</sup> Uruguay Round Agreements Act (URAA), P.L. 103-465, § 111(c), 19 U.S.C. § 3521(c). The statute sets forth the ceiling to which the duty may be raised and provides that the President must terminate the duty on the earlier of the date set forth in the proclamation terminating the duty or the date the WTO Agreement enters into force for the country involved. The Uruguay Round Statement of Administrative Action states that § 111(c) “is meant to provide the President with tariff authority he can use if a country attempts to ‘free-ride’ on U.S. benefits conferred under the WTO by delaying its entry into that body. In the absence of the authority provided by section 111(c) U.S. law would generally require imports from such countries to be subject to the more favorable WTO rate of duty.” H.Doc. 103-316, v. 1, at 702 (1994).

<sup>44</sup> Trade Act, § 406(e)(2)(A), 19 U.S.C. § 2436(e)(2)(A).

<sup>45</sup> While some 13 cases have been initiated under § 406, import relief has been imposed infrequently under this provision. *See generally* Feller, *U.S. Customs and International Trade Guide* § 20.02 (1999). In “Ammonium Paratungstate and Tungstic Acid from the People’s Republic of China” (1987), the President directed that an orderly market agreement between the United States and the PRC be negotiated and implemented. 52 Fed. Reg. 23087, 29367, 37275 (1987).

<sup>46</sup> Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, § 1316, *amending* Tariff Act of 1930, §§ 773(c), 771(18), 734(l), 19 U.S.C. §§ 1677b(c), 1677(18), 1673c(l).

actions.<sup>47</sup> The Department has treated the PRC as an NME country in all past antidumping investigations.<sup>48</sup>

With regard to WTO accession, Congress has directed the Executive Branch to take certain actions when a state trading regime is in the process of acceding to the WTO, as well as when the WTO is acting with regard to the admission of any new member country. Section 1106 of the Omnibus Trade and Competitiveness Act of

<sup>47</sup> Tariff Act of 1930, § 771(18), 19 U.S.C. § 1677(18).

<sup>48</sup> See Int'l Trade Administration, "Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Synthetic Indigo from the People's Republic of China," 64 Fed. Reg. 69723, 69725 (1999). In the just-cited antidumping proceeding, the Department of Commerce (DOC) rejected respondents' claim that economic changes in the PRC warranted revocation of the PRC's status as an NME. *Id.* Respondents may also ask the Department to treat a specific industry as a market-oriented industry (MOI) and thus use standard antidumping rules for calculating the normal value of the subject imports. To qualify as an MOI, three conditions must be met:

- (1) For the merchandise under review, there must be virtually no government involvement in setting prices or amounts to be produced;
- (2) The industry producing the merchandise under review should be characterized by private or collective ownership; and
- (3) Market-determined prices must be paid for all significant inputs, whether material or non-material (e.g., labor and overhead), and for all but an insignificant portion of all the inputs accounting for the total value of the merchandise under review. "Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat from the People's Republic of China," 62 Fed. Reg. 41347, 41353 (1997).

While U.S. countervailing duty (CVD) law has been held not to apply to imports from NME countries (*Georgetown Steel Corp. v. United States*, 80 F.2d 1308 (Fed. Cir. 1986), holding that the now-repealed § 303 of the Tariff Act of 1930 did not apply to nonmarket economies), the Department of Commerce will nonetheless apply CVD law to imports from NME countries if the goods under investigation are produced by an MOI, using the same test described above. The Department has stated that the concerns of the court in the *Georgetown Steel* case, namely that the kinds of distortions that the CVD law was designed to remedy can only occur in a market economy, do not arise where an MOI is involved. *E.g.*, "Preliminary Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans from the People's Republic of China," 57 Fed. Reg. 10011 (1992). In practice, the United States has primarily used antidumping law to address unfair trade practices involving the PRC.

U.S. countervailing duty law, set forth at 19 U.S.C. §§ 1671 *et seq.*, requires the imposition of countervailing duties on imports if: (1) DOC determines that the imports have been subsidized and (2) the International Trade Commission determines that such imports have caused material injury to a domestic industry. The material injury test, which is required by WTO agreements, does not apply unless the foreign country involved is a WTO Member; the country has undertaken obligations substantially equivalent to those contained in the WTO Agreement on Subsidies or Countervailing Measures; or there is an agreement in force between the country and the United States in which unconditional most-favored-nation treatment must be applied to goods imported into the United States and the agreement does not expressly allow other specified actions. U.S. CVD law was revised in the 1994 Uruguay Round Agreements Act to conform with provisions in WTO agreements; § 303 of the Tariff Act, the statute at issue in *Georgetown Steel*, was repealed in the same statute.

1988 (OTCA), 19 U.S.C. § 2905, provides that before any “major foreign country” accedes to the WTO agreement, the President must determine (1) whether state trading enterprises account for a significant share of the exports of that country or the goods of that country that are subject to competition from goods imported into that country; and (2) whether those state trading enterprises unduly burden and restrict, or adversely affect, U.S. foreign trade or the U.S. economy or are likely to result in the same.<sup>49</sup> If both of these determinations are affirmative, the President is to reserve the right of the United States to withhold application of the WTO Agreement until (1) the foreign country enters into an agreement with the U.S. regarding commercial practices of the trading enterprises and market access for U.S. firms or (2) a bill approving the application of the WTO Agreement between the United States and the foreign country involved is enacted into law. The President may submit the draft of a bill approving the application of the WTO Agreement to the Congress, which bill will be granted expedited legislative consideration.

In addition, § 122 of the Uruguay Round Agreements Act requires the United States Trade Representative (USTR) to consult with the Senate Finance Committee and the House Ways and Means Committee before any vote is taken by the WTO Ministerial Conference relating to the accession of a state or separate customs territory to the WTO Agreement if the action (1) would substantially affect U.S. rights or obligations under the WTO Agreement or another multilateral trade agreement or (2) potentially entails a change in Federal or State law.<sup>50</sup> Not later than 30 calendar days after the end of any calendar year in which the Ministerial Conference takes such an action, the USTR must report to the Committees as to whether the United States intends to invoke Article XIII of the WTO Agreement and must consult with the Committees promptly thereafter.<sup>51</sup>

## **PRC Accession: Implications for Domestic Law**

In the absence of an express legislative condition or prohibition, the President as a general rule may approve or direct the U.S. approval of the accession of countries to international organizations to which the United States belongs, invoking his power under the international agreement underlying U.S. participation in the organization (so long as the agreement is in force and effect for purposes of U.S. law), and his constitutional authority under Article II to conduct foreign affairs.<sup>52</sup> Currently, there

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<sup>49</sup> The term “major foreign country” is not defined in the statute. The term “state trading enterprise” is defined at § 1107(6) of the OTCA, 19 U.S.C. § 2906(6), and includes the agencies, instrumentalities, or administrative units of a foreign country, as well as business firms which are substantially owned or controlled by a foreign country or a governmental sub-unit and is granted, either formally or informally, any special or exclusive privilege by that foreign country or sub-unit.

<sup>50</sup> URAA, § 122(b), 19 U.S.C. § 3532(b).

<sup>51</sup> URAA, § 122(c), 19 U.S.C. § 3532(c).

<sup>52</sup> See generally Henkin, *Foreign Affairs and the United States Constitution* 249, 263 (2d ed. 1996) and American Law Institute, *Restatement (Third) of the Foreign Relations Law of the*

is no express legislative prohibition on U.S. approval of the PRC's accession to the WTO nor is there an express legislative requirement that the President necessarily obtain legislative approval before the United States may vote in favor of this action.<sup>53</sup> While affirmative presidential determinations under § 1106 of the OTCA may result in legislative action, the President has the discretion under the statute to make negative determinations as to the matters covered, thus requiring no further action on the part of the President or the Congress. Moreover, even if the President makes affirmative determinations, he may resolve the situation by entering into an agreement with the country concerned.<sup>54</sup>

As a Member of the WTO, the United States is a party to the General Agreement on Tariffs and Trade 1994 (GATT 1994), which obligates it to grant immediate and unconditional most-favored-nation treatment to the products of all other WTO Members with regard to tariffs, import and export charges, rules and formalities governing imports and exports, and internal taxes and regulations.<sup>55</sup> The United States is subject to MFN obligations in other WTO agreements as well.<sup>56</sup> The Title IV regime is inconsistent with MFN obligations when applied to a WTO Member falling within the scope of Title IV because of the conditions that Title IV attaches to the grant of nondiscriminatory treatment to that country's goods.<sup>57</sup>

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<sup>52</sup> (...continued)

*United States*, §§ 111, 303 [hereinafter cited as *Foreign Relations Restatement*]; cf. 14 M. Whiteman, *Digest of International Law* 99-101 (1970).

<sup>53</sup> Compare North American Free Trade Agreement Implementation Act, P.L. 103-182, § 108(a)(statutory congressional approval of the NAFTA entered into with Canada and Mexico “may not be construed as conferring congressional approval of the entry into force of the Agreement for the United States with respect to countries other than Canada and Mexico”). Given the Congress' express constitutional authority to impose tariffs, to regulate foreign commerce, and to enact all laws that are “necessary and proper” to execute these powers, there would not appear to be a constitutional impediment to such a legislative prohibition or requirement. A discussion of this issue may be found in Reich, “Foreign Policy or Foreign Commerce?: WTO Accessions and the U.S. Separation of Powers,” 86 *Geo. L. J.* 751 (1998).

<sup>54</sup> This provision, as originally contained in S. 490, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., the Omnibus Trade Act of 1987, was intended to address congressional concerns about “countries, particularly non-market-economies, that have applied or are considering applying for admission to membership in the GATT [and that] engage in state trading practices” and “to give the United States leverage, through the possible withholding of agreement to their accession to the GATT, to gain commitments from them that they will bring these practices into line with international commitments.” S.Rept. 100-71, at 44-45 (1987).

<sup>55</sup> General Agreement on Tariffs and Trade 1994 (GATT 1994), Art. I:1.

<sup>56</sup> See, e.g., Agreement on Technical Barriers to Trade, Art. 2.1

<sup>57</sup> See, e.g., “Belgian Family Allowances; Report adopted by the Contracting Parties on 7 November 1952 (G/32), GATT, Basic Instruments and Selected Documents (BISD), 1<sup>st</sup> Supp. at 59, 60, ¶ 3; “United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil; Report by the Panel adopted on 19 June 1992,” GATT, BISD, 39<sup>th</sup> Supp., at 128, 150, ¶ 6.9-6.14 (1993); “Indonesia – Certain Measures Affecting the Automobile Industry; Report of the Panel,” WT/DS54R et al., at ¶ 14.143 (adopted July 23, 1998); “European Communities – Regime for the Importation, Sale and Distribution of

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Given current law, were the PRC to become a WTO Member and were the terms of the PRC's WTO accession not to allow the United States to derogate from its MFN obligations in some way, the United States would need to invoke Article XIII, the WTO Agreement's non-application clause, or risk a violation of its unconditional MFN obligation as it would pertain to the PRC.<sup>58</sup> In order to make U.S. law

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<sup>57</sup> (...continued)

Bananas; Complaint by the United States; Report of the Panel," WT/DS27/USA, May 22, 1997, ¶¶ 7.188-7.195 (adopted, as modified by Appellate Body Report, September 15, 1997).

See also "Canada – Certain Measures Affecting the Automotive Industry; Report of the Panel," WT/DS139/R, WT/DS142/R, February 11, 2000, ¶¶ 10.18-10.50.

For further discussion, see "Questions Regarding Accession of the People's Republic of China to the World Trade Organization," March 23, 2000, memorandum prepared by the American Law Division of the Congressional Research Service, released with client consent (available from the American Law Division, CRS). See also Rhodes & Jackson, "United States Law and China's WTO Accession Process," 2 J. Int'l Economic Law 497, 504 (1999).

<sup>58</sup> Mere U.S. approval of the PRC's accession would not appear to be sufficient to render Title IV ineffective with respect to the PRC. While the President may be viewed as entering into a pre-authorized international agreement with or involving the PRC when it accedes to the WTO (here, an agreement authorized by the legislation approving the Uruguay Round agreements), and, further, a U.S. treaty or international agreement generally supersedes a prior inconsistent federal statute (e.g., *Head Money Cases*, 112 U.S. 580 (1884)), the *Foreign Relations Restatement* notes that authorization by Congress to enter into an agreement that supersedes inconsistent federal law "is not to be lightly inferred." *Foreign Relations Restatement*, *supra* note 52, § 115, Comment c. Moreover, where a treaty or international agreement is treated as non-self-executing, the prior inconsistent statute would not be superseded until the treaty or international agreement provisions is implemented, an action that would take place on the date that the implementing legislation or other implementing action (i.e., administrative action within the scope of current law) took effect. *Id.*

Legislative history indicates that the Uruguay Round Agreements are non-self-executing for purposes of domestic law and thus that Congress would need to enact any statutory changes required to implement these agreements. H.Rept. 103-826, Pt. I, at 25 (1994). This non-self-executing status also extends to future developments, such as amendments and dispute settlement results inconsistent with U.S. statutes. *Id.* Implementing legislation for earlier trade agreements — namely, the GATT Tokyo Round agreements and U.S. free trade area agreements — had provided that U.S. laws are to prevail over any conflicting provision of the agreements, treatment which Congress considered to be "consistent with the congressional view that necessary changes in Federal statutes should be specifically enacted, not preempted by international agreements." *Id.* To this end, Congress made clear in the Uruguay Round implementing legislation as well that "no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." URAA, § 102, 19 U.S.C. § 3512(a).

Other statutory provisions may be implicated by the PRC's accession, notably § 406 of the Trade Act, providing a remedy for market disruption by Communist countries, and various provisions of the Tariff Act of 1930, providing for special economic analysis for dumping from nonmarket economy (NME) countries. See text at *supra* notes 44-48. As noted earlier, the latter would apply to the PRC so long as the Department of Commerce does not revoke its current determination that China is an NME country. The November 1999 U.S.-PRC WTO accession agreement contains rights and obligations regarding use by the United States

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consistent with these WTO obligations, Congress would need to remove the PRC from the Title IV regime or to authorize the President to take action having this effect once the PRC becomes a WTO Member.<sup>59</sup> It is unlikely that the simple prohibition of Title IV disapproval resolutions would be sufficient to satisfy U.S. MFN obligations since the PRC's MFN status would still be subject to periodic extension or termination (or both) by the President, and would thus remain conditional.

Once the PRC was removed from Title IV, it would henceforth be entitled to nondiscriminatory trade treatment under § 126 of the Trade Act of 1974.<sup>60</sup> At the

<sup>58</sup> (...continued)

of product-specific safeguards employing the § 406 standard, as well as its use of current NME methodology in future antidumping cases involving the PRC. See sections titled "Protocol Language" in U.S.-PRC Market Access Agreement, *supra* note 25. The November 1999 Agreement also contains provisions regarding methodologies for determining subsidy benefits and the provision of subsidies to state-owned enterprises which the United States has indicated it will use when it applies its CVD law to the PRC. See sections titled "Protocol Language" in U.S.-PRC Market Access Agreement, *supra* note 25, and White House, China Trade Relations Working Group, "Summary of U.S.-China Bilateral WTO Agreement," February 2, 2000, "Antidumping and Subsidies Methodology" and "State-Owned and State-Invested Enterprises" [<http://www.chinapntr.gov/bilatsumm.htm>]. For further discussion, see W. Cooper, *Trade Remedies and the U.S.-China Bilateral WTO Accession Agreement*, CRS Report RS20570.

<sup>59</sup> In granting nondiscriminatory trade treatment to the products of Estonia, Latvia, and Lithuania in 1991, Congress made Title IV inapplicable to these countries 15 days after enactment. P.L. 102-182, § 103. In authorizing nondiscriminatory trade treatment for the products of then Czechoslovakia (now Czech Republic and Slovak Republic) and Hungary, Congress authorized the President to determine that Title IV as a whole no longer applied to these countries and to then proclaim the extension of unconditional MFN treatment to their products. Once the proclamation went into effect, the countries would be permanently removed from the Title IV regime. P.L. 102-182, § 2. The same legislative approach was taken with respect to the extension of nondiscriminatory trade treatment to the products of Bulgaria (P.L. 104-162), Romania (P.L. 104-171), and Mongolia (P.L. 106-36).

Except for Lithuania, all of the above-cited countries are WTO Members. Currently, the only Title IV countries that are also WTO Members are Cuba and the Kyrgyz Republic (Kyrgyzstan). The United States invoked Article XXI, the GATT national security exception, with regard to its trade embargo with Cuba. *GATT Analytical Index*, *supra* note 3, at 605. It invoked Article XIII of the WTO Agreement with regard to the Kyrgyz Republic; the President has also made a determination that the country is in compliance with Jackson-Vanik requirements. Legislation authorizing the extension of MFN status for Kyrgyzstan outside Title IV (H.R. 434, § 302) was signed by the President May 18, 2000. See generally V. Pregelj, *Most-Favored-Nation (Normal-Trade Relations) Policy of the United States*, CRS Issue Brief IB93107, at 5.

Focusing on domestic procedures, legislation removing the PRC from Title IV could nonetheless allow the consideration of a § 402 or § 407 disapproval resolution between the time of enactment and the date the PRC acceded to the WTO in certain circumstances. This may occur if the legislation did not make Title IV immediately inapplicable to the PRC or, were it to authorize the removal of the PRC from Title IV at the time of accession, it did not prohibit the use of Title IV disapproval resolution procedures in the interim.

<sup>60</sup> See *supra* note 26. The PRC would also be eligible for U.S government credits, credit  
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same time, the U.S.-PRC bilateral commercial agreement entered into under Title IV would still presumably remain in effect for its current 3-year term (ending January 31, 2001), albeit in a modified state. As described in the *Restatement (Third) of Foreign Relations Law*, the rights of parties under successive international agreements relating to the same subject matter are as follows:

(1) When an agreement specifies that it is subject to an earlier or later agreement, the provision of that other agreement prevail.

(2) When all parties to the earlier agreement are also parties to the later agreement, the earlier agreement applies only to the extent that its provisions are compatible with those of the later agreement.<sup>61</sup>

Under the latter principle, to the extent that the provisions of WTO agreements in force between the PRC and the United States and the U.S.-PRC bilateral commercial agreement address the same subjects, any provisions of the former that are inconsistent (that is, generally more strict) than those contained in the latter would ordinarily apply between the two countries. The bilateral agreement allows either party may notify of its intent to terminate the agreement at least 30 days before the end of the term, however, and, if requested by the other party, must consult for purposes of reviewing the operation of the agreement.<sup>62</sup> The agreement may also be renegotiated to take into account the WTO participation of the parties and the rights and obligations that flow from that participation.<sup>63</sup>

## 106<sup>th</sup> Congress Legislation

**H.R. 4444** (Archer)(by request), passed the House May 24, would allow the PRC to be removed from the Title IV regime once it became a WTO Member. The bill would authorize the President to determine that the Title should no longer apply to the PRC, and, after making the determination, to proclaim the extension of nondiscriminatory treatment to PRC products. Before making the determination, however, the President would be required to transmit a report to Congress, pursuant to § 122 of the Uruguay Round Agreements Act, certifying that “the terms and conditions for China’s accession to the WTO are at least equivalent to those agreed between the United States and China on November 15, 1999.” The extension of nondiscriminatory treatment under the bill could not go into effect until the effective

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<sup>60</sup> (...continued)

guarantees, and investment guarantees without the necessity of a § 402 determination or annual waiver, though it would still be subject to any restrictions in the credit and guarantee programs themselves.

<sup>61</sup> *Foreign Relations Restatement*, *supra* note 52, § 323. This section is based on Article 30(2) and (3) of the Vienna Convention on the Law of Treaties, 63 Am. J. Int’l L. 875, 884 (1969).

<sup>62</sup> U.S.-PRC Agreement on Trade Relations, *supra* note 42, Arts. X:2, X:4.

<sup>63</sup> *Note*, for example, the U.S.-Bulgaria Agreement on Trade Relations and the U.S.-Romania Agreement on Trade Relations [<http://www.mac.doc/tcc/treaty>].

date of the PRC's accession to the WTO; once such treatment went into effect, Title IV would cease to apply to that country.

The bill also contains a § 406-style remedy for market disruption caused by surges of PRC imports into the United States, as well as a provision to remedy any significant trade diversion into the United States in the event one or more of the following is alleged: the PRC has taken action to prevent or remedy market disruption in a WTO Member other than the United States; a WTO Member other than the United States has withdrawn concessions or otherwise limited imports to prevent or remedy market disruption; or a WTO Member other than the United States has applied a product-specific safeguard within the meaning of the PRC's WTO accession agreement. The bill also establishes a congressional-executive commission to monitor human rights practices in China; authorizes funds for monitoring the PRC's compliance with its WTO obligations; requires the USTR to submit a report to Congress annually on PRC compliance; establishes mechanisms focused on monitoring and effectively prohibiting Chinese imports made by forced or prison labor; authorizes rule of law training programs related to activities in China; expresses the sense of Congress regarding Taiwan's timely accession to the WTO; and authorizes China-focused international broadcasting funds.

**S. 2277** (Roth), reported from the Senate Finance Committee May 25, contains authorities to extend nondiscriminatory trade treatment to the PRC and to terminate the application of Title IV that mirror those in the House bill.

Also introduced in the 106<sup>th</sup> Congress, 2d Session, is **S. 2115** (Baucus), which would provide for U.S. monitoring and enforcement of the PRC's compliance with its WTO commitments and encourages institution-building in China necessary for the country to carry out its WTO obligations. A number of earlier 106th bills also address China's WTO accession. **H.R. 577** (Bereuter) would provide the President with authority to raise tariffs on PRC-origin goods based in part on the PRC's progress in acceding to the WTO and would exempt the PRC from Title IV of the Trade Act once it became a WTO Member. **H.R. 884** (Gephardt), **S. 742** (Grassley), and **S. 743** (Hollings) would require that the President first obtain congressional approval before the United States may support the PRC's admission into the WTO.<sup>64</sup> **H.R. 884** and **S. 743** would also require that the United States withdraw from the WTO if the PRC becomes a WTO Member without U.S. support.

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<sup>64</sup> A floor amendment offered by Mr. Hutchinson to S. 544, the Emergency Supplemental Appropriations Act for FY1999, that would have required congressional approval before the United States could support the PRC's accession, was tabled March 18, 1999, by a vote of 69 to 30. 145 Cong. Rec. S2902-S2910, S2915 (daily ed. March 18, 1999).

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