Maritime Policy in China after WTO: Impacts and Implications for Foreign Investment

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I

INTRODUCTION

With two years’ experience in the World Trade Organization (“WTO”),1 China is now working on revising its maritime policy not only to carry on its commitments, but to pave the way for further negotiation on the WTO Maritime Agreement. As trade is forecast to expand exponentially, no industry will be more affected than shipping, particularly as the rising volumes will be accompanied by a sharp increase in competition when overseas companies swarm in for a share of the Chinese market. In 2002, China ranked fourth in importance among maritime countries and territories, after Greece, Japan and Norway in terms of dead weight tonnage.2 The growth in volume of China’s waterborne cargo in 2002 kept pace with that of the national economy. Nationwide, the overall volume of cargo moved by waterway transport reached 1420 million tons, and the turnover of cargo reached 2751.06 billion ton/km, increases of 6.8% and 5.9% respectively since 2001. Three hundred million tons were carried by ocean shipping and the cargo turnover in ocean shipping reached 2173.27 billion ton/km. Thus the waterways volume and turnover amounted to 9.6% and 54.5% respectively of the volume and turnover for China’s entire transport system.3 The figure

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1 After fifteen years of negotiation, China officially became the 143rd member of the World Trade Organization (WTO) on December 11, 2001.


3 Ministry of Communications (“MOC”), 2002 Report on China’s Shipping, People’s Communication Press.
above shows the increasing trend in the volume of China’s waterborne transportation and proves that China plays an important role in the world shipping industry.

Currently there are operating in China twenty-two wholly foreign-owned shipping companies, seventy-one foreign-owned shipping company branches, and more than 900 representative offices of foreign shipping companies. These enterprises have already participated directly in the competitions for port loading & unloading, shipping transportation, interior container transportation, international freight forwarding, freight agency, and others.

With China now a full member of the WTO, and its economy one of the few bright spots in the otherwise unrelieved regional gloom, there are high hopes that the industrial awakening of this vast country will continue apace. Overseas shipping companies have long been waiting for the day on which China entered the WTO, because they are certain that China’s WTO accession will provide tremendous commercial opportunities. What is the real impact of China’s WTO accession on foreign shipping operators? Will they really get more opportunities to enter China’s shipping market?

This paper first reviews the shipping law of China before China’s entry into the WTO. There follows an analysis of the change in this law in accordance with the WTO classification of maritime transport services, i.e., inter-

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4 Id.
5 Id.
national shipping services, port services, and auxiliary services. Then the impact of this change on foreign shipping operators is analyzed.

II

CHINA’S PRE-WTO SHIPPING LEGAL SYSTEM

With respect to China’s trade in services, the shipping sector was the most liberal sector before the WTO accession. Most specific regulation and practice already satisfies WTO requirements. As classified by the WTO, the category of maritime transport services has three parts: maritime transport services, maritime auxiliary services, and port services, and the analysis that follows is organized in the same tripartite fashion.

A. Maritime Transport Services

1. Commercial Presence

In China, foreign investors are permitted to engage in the businesses of maritime transportation, coastal transportation, and inland waterway transportation by establishing a Contractual Joint Venture or Equity Joint Venture, but foreign investors may not hold more than 49% of the resultant shares.

Foreign shipping companies, in accordance with bilateral governmental agreements, are permitted to canvass for cargo, sign the parent company’s bill of lading, settle freights, and conclude contracts for transportation service and other businesses allowed by China’s laws and regulations. By the end of 2001, more than 110 companies and their affiliates had been authorized by competent authorities to establish wholly foreign-owned shipping companies, and another approximately 120 companies have been allowed to run businesses as joint ventures.

2. Access to the Cargo Transportation Market

Preference cargo follows from “the reservation for transportation on national flag vessels, of all or a portion of all oceanborne cargo which moves

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7 Id.
in international trade either as a direct result of government’s involvement or indirectly because of the financial sponsorship of a program or guarantee provided by the government.”\footnote{Maritime Administration, U.S. Department of Transportation, Maritime Administration and Cargo Preference § B, available at http://www.marad.dot.gov/offices/cargopref/carprefweb.html. See, e.g., 46 U.S.C. App. § 1241(b).} China removed such measures from its domestic law in 1988, so that it is no longer necessary that domestic carriers transport some share of domestic cargoes. Seven\footnote{Zaire, Algeria, Argentina, Bangladesh, Thailand, Brazil, and U.S.A.} of fifty-one bilateral maritime agreements between China and other countries provide for cargo sharing, but, because of the practical difficulties in implementing such agreements, China officially undertook\footnote{MOC, Note on Maritime Meeting between China and European Community.} in 1996 that it would not include the regulation of cargo sharing in future bilateral maritime agreements and it has adhered to this commitment since.

Article 2 of the United Nations Convention on a Code of Conduct for Liner Conferences incorporates the 4:4:2 principle for cargo sharing.\footnote{UNCTAD, Convention on a Code of Conduct for Liner Conferences, U.N. Doc. TD/CODE/11/REV.1 (1974), 13 I.L.M. 917, (1974) at item 4.} China is also a party to this convention, but no Chinese shipping companies have yet participated in any liner conference. Hence, the principle of cargo sharing in this convention has not been applied in practice either. These two examples show that, when compared with other sectors of commerce in China, the maritime sector is relatively open.

\textbf{B. Port Services}

By the end of 2001, China had opened more than 140 ports to foreign-flag vessels. Foreign tramps are at liberty to enter these ports. If a shipping company wants to offer liner service for a particular sea route, it must acquire in advance the approval of the Ministry of Communications, but this prerequisite applies as well to domestic carriers as to foreign carriers. At ports in China, foreign vessels have been afforded national treatment in all services, including, e.g., utilization of port equipment and supply of fuel and water. Since 1992, foreign vessels have been assessed the same port charges as national vessels. Although foreign fleets do not enjoy, without the approval of competent authorities, the right of cabotage, they may gain entry even to this market by establishment of a joint venture. According to the Regulation
of Vessels Registration Administration, “vessels owned by China-foreign joint ventures shall register in China and hang a Chinese flag,”12 so any foreign maritime service provider may engage in China’s coastal transportation by simply establishing a commercial presence.

As of the end of 2000, shipping companies from more than thirty different countries had carved out routes for their container liners to and from China’s ports. Among China’s approximately 3000 near-sea shipping lines and 700 ocean-going shipping lines, overseas shipping companies accounted for 48% and 70% respectively, which, to some extent, reflected the active participation of foreign maritime service providers.

Additionally, the State Council promulgated in 1985 the Interim Regulation on Preferential Measures for Sino-Foreign Invested Ports, which allowed foreign interests to invest in container ports through joint ventures or tenancies. As of the end of 1998, construction in fifty-nine ports had been approved, financed by means of equity or contractual joint ventures with an invested amount of US$ 2.6 billion. In these ports, about forty container berths are managed by Sino-foreign joint ventures through tenancy. At present, almost all of the major container ports in China have been developed with the investment of foreign capital.

C. Auxiliary Services

Since the early 1990s, China has promulgated quite a few regulations and administrative rules regarding services auxiliary to shipping. The Ministry of Foreign Trade and Economic Cooperation (“MOFTEC”) issued the Regulation on the Approval of Foreign-invested International Freight Transport Agency in 1996, which allowed foreign providers to engage in the business of international freight transport agency through joint venture.13 From 1990 to 1998, the Ministry of Communications (“MOC”) and MOFTEC promulgated several regulations in succession, to form an ever clearer image of the businesses of freight and shipping agency in international and domestic waterway transport market. These regulations included MOC’s Regulation on the Administration of International Shipping Agency (1990), MOFTEC’s Rules on the Approval of International Freight Transport Agency with Foreign Investment (1995), and amendments to MOC’s

12Regulation of the People’s Republic of China on the Administration of Vessel Registration art. 2.
13See art. 4. This regulation also regulates a capital ceiling for foreign providers, which is no more than 49%.
Regulation on the Administration of Waterway Transportation (1997), MOC’s Implementing Rules for the Regulation on the Administration of Waterway Transportation (1998), and MOC’s Regulation on the Administration of Waterway Transport Services (1998). Through these regulations and rules, foreign service suppliers were authorized to invest in these businesses by means of equity joint ventures or contractual joint ventures.

By the State Council’s amendment in 1998 of the Regulation on the Administration of International Oceanborne Container Transport, foreign interests were also allowed to invest, through joint venture, in that business. Such joint ventures were permitted to engage in freight loading and discharging, storage, container consolidation, etc. In 1997, MOC and the Ministry of Railway opened this business even wider to foreign investors, jointly issuing the Regulation on the Administration of International Container Multi-Modal Transport. By the end of 1998, more than twenty Sino-foreign joint container transport companies and three hundred Sino-foreign joint international freight transport agencies had been approved by the competent authorities.

Foreign shipping companies first established wholly foreign-owned container transport service companies in 1996. By 1999, four such companies had been approved with twenty-two affiliates in the coastal cities. The scope of the business of these companies includes booking, consolidation, storage, issuance of the freight receipt, collection of transport charges and expenses for other approved services, maintenance of containers and other equipment, conclusion of truck transport service contracts, etc.

D. National Treatment

1. Taxation

Before China joined the WTO, foreign-invested shipping enterprises in China not only enjoyed tax treatment generally equal to that of national enterprises, they also enjoyed certain exclusive preferences. For example, enterprises with foreign investment owed income tax at the rate of 30% on the taxable income of their establishments engaged in production or business operations in China. Local enterprises, on the other hand, owed at the rate of 33%.14 If foreign investors chose to establish their enterprises in certain regions (e.g., Special Economic Zones, Economic and Technological

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14Income Tax Law for Enterprises with Foreign Investment art. 5.
Development Zones, or coastal cities), they would enjoy a reduced rate of 15% or 24%. Furthermore, if foreign investors invested in specified sectors (e.g., high technology, production-oriented industry, etc.), they could be exempted from tax liabilities for the first three years following establishment and then have tax levied at a rate of only 15% in the fourth and fifth years of operation.

2. Subsidies

Subsidies that reduce the operational cost of shipping companies are common in the industry, but such measures lead to unfair competition. Since the 1980s, China has been removing gradually all kinds of subsidies and, at present, there are none available for those engaged in waterborne transportation. For example, there is no reservation of governmental cargoes in China, so all cargo is transported according to agreements between shipper and carrier that follow the common commercial rules. (In order to encourage the development of a ship-building industry, however, China is considering ship construction subsidies.)

III
REFRAMING CHINA’S SHIPPING LAW TO INTEGRATE WTO COMMITMENTS

As discussed above, China had been pursuing liberalism generally in the shipping sector for some time before its WTO accession and had achieved some quite satisfactory results. What then will WTO accession really mean for China’s maritime transport services?

A. Maritime Transport Services

According to the Services Sectoral Classification List, maritime transport services include passenger transportation, freight transportation, rental of vessels with crew, maintenance and repair of vessels. With respect to this service sector, WTO regulation mainly focuses on access to maritime trans-

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15 Id. art. 7.
16 Id. art. 8.
17 WTO Secretariat (1991), Services Sectoral Classification List, HTN. GNS/W/120, item A, art. 11.
portation, freight and passenger, commercial presence of maritime transport, national treatment for foreign service suppliers, etc. Important as this service sector is, China has made a substantial effort to again reform its legal system, promulgating several regulations and administrative rules that implement its new commitments to the WTO.

1. Gradual Standardization of International Shipping Market Administration

The Regulations of the People’s Republic of China on International Maritime Transportation became effective on January 1, 2002 and the Implementing Rules, drafted on the basis of these Regulations, became effective on March 1, 2003. Together they detail the conditions, procedures, and qualifications for market access to international maritime transportation. The Regulations of Maritime Transportation and the Implementing Rules of Maritime Transportation have adjusted and reformed the administrative pattern with respect to access to the international shipping market; they have simplified the procedures and formalities; and they have enhanced supervision of the competitive conduct of shipping enterprises, thus firmly advancing the development and improvement of the international shipping market in China.

The competent authorities have, in accordance with the reform of the system of administrative approval advocated by the State Council, reviewed the relevant regulations governing approval of international shipping projects, in order to make practical changes to the governmental functions, reducing administrative approval for general economic projects, and shifting to macro-administration and supervision over the market order. The core objective in the administration of international shipping in 2002 was to implement the new regulations. In order to help the relevant enterprises to become familiar with the requirements, spirit, and principles of the Regulations, the Ministry of Communications organized many meetings for publicizing and enforcing the Regulations, reached out to the relevant departments, entities and enterprises, and rendered necessary consulting and interpretative services with satisfactory results. A year later, it was clear that China’s shipping industry has basically completed the transfer from the traditional pattern to the new pattern.

According to the Regulations on International Maritime Transportation, foreign service suppliers, may:

establish equity joint venture or contractual jointly venture to engage in international shipping services, international shipping agency services, international ship management services, loading and unloading of international ship-
ments, international maritime container freight station and container yard services, international maritime cargo warehousing services, and offer routine services for the vessels owned or operated by the investor.  

Jointly promulgated by Ministry of Communications and the Ministry of Commerce, the Provision on Administration of Foreign Investment in International Maritime Transportation further clarifies the services open to foreign suppliers and the commercial presence required for each service. With respect to international maritime cargo, foreign suppliers may establish wholly foreign-owned companies to canvass cargo, sign bills of lading, settle freights, warehouse, conclude service contracts, and engage in other ancillary services for vessels they own or operate.

According to another important rule, the Notice on Questions Relating to the Establishment of a Wholly Foreign-Owned Shipping Company by Foreign Shipping Companies, approval by China of operations in China by wholly foreign-owned shipping companies must be in accordance with reciprocal commitments in the bilateral maritime agreement or memorandum between China and the mother country of the foreign shipping company. In January of 2001, this notice was replaced by the Interim Provisional Regulations on the Examination and Approval of Wholly Foreign-Owned Shipping Companies, which reaffirmed the reciprocity requirement in the old notice. As a regulation it not only confirmed the contents of the Notice, but added to their gravity, as according to the legislation law of China, a regulation is a higher form of law than a notice or circular. This regulation also specified some elementary requirements for the application to establish in China a wholly foreign-owned shipping company, viz. qualifications of applicant, requisite documentation and procedure, and requirements for the establishment of an affiliate. Some application requirements were dispensed with in the regulation; for example, submission by foreign investors of balance sheets for the preceding three years, thus, lowering the threshold for

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18Regulations of the People’s Republic of China on International Maritime Transportation, promulgated by the State Council of the PRC on December 5, 2001, signed by Prime Minister Zhu Rong Ji, published on December 21, 2001, and effective January 1, 2002; reproduced infra as Appendix A. See art. 32.
20Id. art. 4.
21Jointly promulgated by MOFTEC and MOC in 1995.
such establishments. At the same time, however, the regulation introduced some requirements making establishment of such companies more difficult in China, and retained others from the preceding notice. For example, an applicant enterprise must have been engaged in shipping services for at least fifteen years before applying and, if it plans to establish a wholly foreign-owned shipping company in China, it must have established a representative office in the planned port three years in advance and its liner must anchor at this port at least once a month.\textsuperscript{23} Chinese employees must account for at least 85\% of the staff of the wholly foreign-owned company.\textsuperscript{24} Through these regulations and administrative rules, China has undertaken to meet all of its commitments in the maritime service sector.\textsuperscript{25}

2. Systemic Change in Domestic Shipping Administration

A major step in reform of the administrative system for China’s domestic shipping occurred in 2002, when the Ministry of Communications issued its Circular on Adjustment in Reform of Administrative Function and Pattern in Domestic Water Transport. As a result, the functions and responsibilities of the administrative departments affiliated with or established by the Ministry of Communications in the Yangtze and Zhujiang systems, and the competent transport departments of the provinces, autonomous regions, and municipalities directly under the Central Government have been adjusted. The approval system administered mainly by the Ministry of Communications has been limited to five aspects while administrative relationships, tasks, and procedures have been further clarified. The administrative schemes for domestic waterway transport have been reformed and registration now suffices in lieu of approval for such projects as initiating or adjusting container feeder lines or passenger lines, building, purchasing, or demise chartering carrying vessels (other than passenger ships or liquefied dangerous cargo carriers), shifting a vessel from international to domestic service, etc.

3. Reform and Standardization in the Domestic Shipping Market

In order to ensure water traffic safety, provide a sound market environment for operators, and secure prompt, continuous, healthy, and stable development of China’s shipping industry, the Ministry of Communications

\[^{23}\text{Id. art. 5.}\]
\[^{24}\text{Id. art. 12.}\]
\[^{25}\text{Section 11, item A, Schedule of Specific Commitments on Services List of Article II MFN Exemptions (“schedule”), WT/ACC/CHN/49/Add.2.}\]
conducted a national program of reform and standardization in the shipping market in 2001 and 2002. Its primary effects in the domestic shipping market are now evident, enabling further refinement.

By the end of 2002, all enterprises and operators engaged in the carriage of passengers, liquefied dangerous goods, and even general cargo had been evaluated in accordance with requirements contained in Order No. 1 issued by the Ministry of Communications in 2001. Enterprises or operators that failed were obliged to restructure or correct their shortcomings within the time specified, or else lose their authority for operations in the shipping market.

B. Port Services

China committed in the Schedule to making available at the ports of China to international maritime transport suppliers, on reasonable and non-discriminatory terms and conditions, the following port services: pilotage; towing and tug assistance; provisioning, fuelling and watering; garbage collecting and ballast waste disposal; port captain’s services; navigation aids; shore-based operational services essential to ship operations; facilities for emergency repairs; and anchorage and berthing services.26 Actually, China has provided most of these to foreign suppliers of transport services since promulgation in 1979 of the Rules on Administration of Foreign-Flag Fleets.27 In 1992 and 1997, MOC issued Rules on Port Charges,28 which govern national and international trade respectively. According to these rules, port charges in China are based on the character of trade (national or international) rather than on the nationality of the vessel. As these rules evidence, China has put much effort into reforming port services and adjusting the regulation of their provision to the requirements of the WTO.

1. Reform in Ports Administration

2002 was the year for implementing reform in the system for administration of China’s ports. The powers of port administration were delegated to lower levels, the separation of the governmental administration of ports from their commercial management was begun, and the reform of port tally,

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26 Id.
27 Rules of the PRC on Administration of Foreign-flag Fleets arts. 4, 13, 35. Some services have been provided in practice to foreign service suppliers, but have not been formally addressed in regulations or administrative rules, e.g., port captain’s services.
28 Partial unofficial translation follows infra as Appendix B.
pilotage, etc., was continued. Meanwhile, the transfer of aspects of the administration of ports heretofore directly under the Central Government or under dual administration was completed. By July 2002, the thirteen provincial or municipal governments involved had embraced the new scheme for port administration. With the exception of the port of Qinhuangdao, which was left to be administered directly by the Hebei Provincial Government, all ports in the other provinces or municipalities were placed under the control of the cities where they are located. By the end of 2002, transfer had been completed for the ports of Qinhuangdao, Nantong, Zhangjiagang, Dalian, Wuhan, Anqing and Wuhu. Plans for the port of Shanghai had been formulated and the process had begun for most of the other ports.

2. The Port Law

The Port Law of the PRC (“Port Law”) was promulgated the following year, offering an important resource for addressing problems of planning and administration and for promoting healthy development of the ports. The principle that foreign vessels are entitled to national treatment in China’s ports is reaffirmed in the Port Law: “China encourages domestic and foreign economic organizations and persons to invest in construction and management of ports in accordance with relevant laws and regulations.”

In 2004, a new Foreign Investment Industrial Guidance Catalogue (“2004 Catalogue”) was issued. It eliminated the requirement that the Chinese party hold the majority stake in port enterprises, allowing it to foreign investors. Soon after the new Catalogue appeared, the relevant authorities approved the first joint venture in the port industry in which foreign investors hold the majority stake, i.e., Xiamen Xiangyu Free Trade Zone Huijian Quay Company, Ltd. According to Article 4 of the Port Law, “China encourages domestic and foreign economic organizations and persons to invest in construction and management of ports in accordance with relevant laws and regulations.”


30 The Foreign Investment Industrial Catalogue was first promulgated on June 20, 1995, amended on March 31, 2002, and most recently updated on November 30, 2004. This version became effective as of January 1, 2005. The old and new versions are hereinafter referred to as the 1995 Catalogue and the 2004 Catalogue respectively. They are available at http://fdi.gov.cn/Hlaw/lawinfodisp.jsp?id=ABC0000000000010453&appId=1.

31 2004 Catalogue § 6, item 4.
laws and regulations.” By the end of 2003, thirty projects for port development that involved direct investment by foreign interests had been approved.

C. Maritime Auxiliary Services

In the 2004 Catalogue, several new sectors were opened to foreign service suppliers. Regarding maritime auxiliary services, foreign investors were for the first time encouraged to invest in storage and warehousing, shipping agency, freight forwarding agency, and cargo handling services.\(^{32}\) Foreign investors are allowed to engage in shipping agency services and cargo handling services only through joint ventures; in shipping agency, such foreign investment shall not exceed 49%. In freight forwarding, it may only account for 50% at the beginning, but foreign majority investment and wholly foreign-owned companies are to be permitted after one and three years respectively following China’s accession. These regulations not only fulfill China’s commitments,\(^ {33}\) they exceed them. For example, China committed in the Schedule to allow foreign investors to engage in storage and warehousing services only by means of joint ventures in which foreign investment did not exceed 49%. Foreign interests were to be allowed majority ownership within one year after China’s accession and wholly foreign-owned subsidiaries were to be allowed after three years. Nevertheless, these limitations have already been lifted.\(^ {34}\)

In November 2002, MOFTEC issued the Regulation on the Administration of International Freight Transport Agency with Foreign Investment\(^ {35}\) to replace the Rules on the Approval of International Freight Transport Agency with Foreign Investment, which had been issued in 1995. The new regulation incorporated China’s commitments in this field and detailed the requirements for establishment of an international freight transport agency by foreign investors. For the first time, foreign investors were allowed in principle to establish wholly foreign-owned enterprises in this sector, but precisely when they could do so was left for further regulation by competent authorities. Meanwhile, only equity joint ventures and contractual joint ventures in which China’s party enjoys majority ownership are allowed.\(^ {36}\)

\(^{32}\)Id. § 6, item 6.

\(^{33}\)The foresaid changes fully implement China’s commitments. See § 11, item H, supra note 26.

\(^{34}\)Catalogue 2004, supra note 30, § 6, item 3.


\(^{36}\)Id. art. 4.
D. Transparency

One of the most serious problems of China’s legal system has been its lack of transparency. There were many ambiguous expressions in China’s laws, regulations, and administrative rules, which made them difficult to interpret by those interested, both domestic and foreign. In order to remove these barriers, the newly published Regulations on International Maritime Transportation specify in detail what is required for the establishment by foreign investors of various kinds of shipping companies in China. The regulations speak to the documents required, the authorities participating, the length of reviewing periods, the permitted scope of business and restricted activities.

1. Entry Requirements

As the chart on the next page illustrates, the Regulations on International Maritime Transportation detail the different requirements for foreign shipping service suppliers establishing different types of service enterprise in China. This figure clearly shows the different qualifications for different service sub-sectors. Provided that foreign service suppliers meet these requirements, they may apply directly to the competent authorities.

2. Scope of Business:

For the scope of business allowed these four kinds of investing enterprises, the Regulations on International Maritime Transportation adopt different approaches for different sub-sectors. Regarding international shipping services and non-vessel-operating services, the Regulations prohibit the following actions by foreign investors:

- Providing service at lower freight rates than normal and reasonable ones, thereby prejudicing fair competition;

- Offering secret rebates to shippers, not reflected in the book-keeping, for the purpose of soliciting cargoes;

- Arbitrarily taking advantage of a dominant position to impose discriminatory freight rates or other restrictive terms detrimental to the other party to the transaction;

- Committing any other actions detrimental to the other party to the transaction or the good order of the international shipping market.\(^\text{37}\)

\(^{37}\)Regulations on International Maritime Transportation, supra note 18. See art. 27.
Thus foreigners investing in these two areas may engage in any other business, that is, any business not prohibited. Regarding international shipping agency services and international ship management services, however, the Regulations specify in detail the only businesses permitted foreign investors. See the chart on the following page.

Foreign operators who invest in these two sub-sectors are not allowed to engage in any business not listed above. While the two regulatory approaches are antithetical, both make clear to foreign investors the boundaries to business opportunities in China in these sub-sectors and therefore enable investment planning.

Through a large and multifaceted initiative of legislative and administrative reform, China has endeavored to carry out its WTO commitments in the sector of maritime service. By the end of April 2004, 146 international liner
companies and 1361 non-vessel-operating companies had been approved by the competent authorities in accordance with the new rules and regulations. A new three-dimensional system for the administration of shipping has come gradually into shape, covering three independent but connected service sectors: maritime transport, ports, and auxiliary services.

### IV

**The Impact on Foreign Maritime Service Suppliers**

As discussed above, the new system employs modern regulatory models, clarifies past ambiguities, and incorporates China’s commitments to the WTO.

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38 Id. art. 29.


40 For general information on trade and investment barriers in China, see United States, Foreign Trade Barriers Report-China (especially from 1997-2002), at http://www.ustr.gov/reports; United States,
It is obvious that China expects to provide a fair, efficient, and stable competitive environment for foreign service suppliers. What foreign service suppliers really gain or lose from these legal reforms is the main question, however.

A. Trade-Related Investment Measures

Such measures that are inconsistent with national treatment and the general elimination of quantitative restrictions are prohibited, including even those otherwise mandatory or enforceable under domestic laws or administrative rulings, or those necessary to obtain a national economic advantage. With reference to the principles underlying the Trade-Related Investment Measures as well as China’s aforesaid commitments, the specific impact of China’s legal reforms on foreign investment can be stated as follows.

B. More Liberal Treatment of Foreign Service Suppliers

With amendments of the 1995 Guidance\(^4\) and the 1995 Catalogue, as well as China’s market access commitments, foreign investors can expect more opportunities for participation in more maritime service sectors/sub-sectors. In keeping with China’s WTO commitments, the encouraged category in the 2004 Catalogue was expanded from 186 to 256 fields and the restricted category reduced from 112 to 78. China has opened up many fields for the first time to foreign investors and has expanded their access to others. For example, foreign investors are encouraged to establish enterprises for international multi-modal containerized transportation, carriage of goods by road, and freight-forwarding agency.\(^4\) The relevant regulation permitted foreign investors majority ownership after 2002. Wholly foreign-owned enterprises

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\(^4\) The phrase “Trade-Related Investment Measures” also refers to investment measures related to trade in goods. Trade-Related Investment Measures art. 1.

\(^4\) The Guidance of Foreign Investment Orientation was first promulgated on June 20, 1995, amended on February 11, 2000, and became effective as of April 1, 2002 (these are hereinafter referred to as the Guidance 1995 and the Guidance 2000 respectively).

\(^4\) 2004 Catalogue Annex supra note 30, at 1, items 7 & 8, and § 2, art. 8, item 2.
will be permitted after December 11, 2005. (For carriage of goods by rail, the transitional period is longer; majority ownership was not permitted until December 11, 2004 and wholly foreign-owned enterprises will not be permitted until December 11, 2007.)

Other sectors are now open to foreign investors, albeit with some restrictions. For the time being, foreign investment may not exceed 49 percent of that for the capitalization of a waterway transportation company, and this restriction applies also to maritime agency services. According to the 2002 Catalog, only equity or contractual joint ventures are permitted for ocean shipping tally services. Even with these restrictions, recent changes have provided more investment possibilities for foreign investors.

C. A More Stable Environment for Investment

In order to better protect the interests of service suppliers, the principle of “fair competition” has been embraced and emphasized during the recent process of legal reform. For example, the Regulations on International Maritime Transportation now prohibit the following:

- liner conference agreements, operating agreements, or freight rate agreements concluded among international shipping operators engaged in international liner services in which Chinese ports are involved and which can be detrimental to fair competition;

- service activities of a consortium set up by international shipping operators engaged in international liner services through agreements that involve a shipping volume exceeding 30% of the aggregate shipping volume for one consecutive year on one particular shipping line to and from Chinese ports and which can be detrimental to fair competition;

- any forbidden act listed in Table 3.

- any other act detrimental to fair competition in international shipping market.

Should there be cause to suspect one of these transgressions, an interested party may apply to the competent communication department of the State Council for the assignment of an investigation group. The person under investigation is entitled to notice of the purpose, reason, time limit, etc., of the

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44 Id. § 2, art. 3.
45 Id. § 2, art. 2 and art. 8, item 1.
46 Id. § 2, art. 8, item 3.
47 Regulations on International Maritime Transportation, supra note 18, art. 32.
investigation. In accordance with the transparency principle, the Regulations on International Maritime Transportation specify that the investigating period shall not exceed one year, but this can be extended by half a year by the competent organ.\textsuperscript{48} After the investigation, the investigating group shall make a conclusion and notify the person under investigation and the interested parties thereof in writing. If the acts under investigation are found to damage fair competition, the competent organ is obliged by the Regulations to take prohibitive or restrictive measures such as ordering the amendment of relevant agreements, limiting the frequency of liner services, suspending freight rates, suspending the filing of freight rates, or ordering the revision of relevant materials. The party concerned shall have the right to a hearing on relevant matters prior to any decision by the relevant organ to take such measures.

This is really the first time that China has so clearly incorporated the principle of transparency into its legal system. It should reassure foreign service providers of a more open and competitive market in China, while at the same time it illustrates China’s commitment to modernizing the legal system and entrenching the rule of law.

C. Barriers Persisting in the New System

Although China has made many reforms in the shipping sector following its commitments to the WTO in the Schedule of Specific Commitments,\textsuperscript{49} foreign operators should also be aware that a national interest must hold the majority share in an enterprise in many fields that may have a great impact on the national economy and people’s livelihood. For example, the share of foreign investors in Chinese-foreign equity joint ventures engaged in international shipping services and international shipping agency services cannot exceed 49\%,\textsuperscript{50} which means that the majority share must be held by the Chinese party. The Regulations of Maritime Transportation also require that “the chairperson of the board of directors and the general manager of a Chinese-foreign equity joint venture or Chinese-foreign contractual joint venture engaged in international shipping services […] be appointed by the Chinese party.”\textsuperscript{51}

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\textsuperscript{48}Id. art. 37.  \\
\textsuperscript{49}See supra note 26.  \\
\textsuperscript{50}Article 32, supra note 37.  \\
\textsuperscript{51}Id.
\end{flushright}
Meanwhile, some new restrictions may raise new barriers to foreign service suppliers. For example, Article 12 of the Interim Provisional Regulations on the Examination and Approval of Wholly Foreign-Owned Shipping Company, requires that Chinese employees comprise at least 85% of the staff in any wholly foreign-owned shipping company.52

Formerly, the Regulation on the Approval of Foreign-Invested International Freight Transport Agency required the same qualifications for both China’s party and any foreign party, i.e., that each “shall have engaged in the international freight transport agency services for at least three years.53” However, the Regulation on the Administration of International Freight Transport Agency with Foreign Investment, which replaced the former regulation in 2002, requires of foreign parties three years’ experience in the international freight transport agency services, but requires of China’s party only one year’s experience.54

The shipping sector is generally one of the most conservative in any country’s economic system, and its regulation by China, now shaped by China’s WTO commitments, compares satisfactorily with its regulation by the state in other major shipping countries.

D. Special Opportunities for Investors from the Hong Kong Special Administrative Region55

Under the WTO framework, the Mainland/Hong Kong Closer Economic Partnership Arrangement (“CEPA”)56 was concluded on June 29, 2003, in order to strengthen trade and investment cooperation between the two57 and promote their joint development. In CEPA, China provides service suppliers from Hong Kong with more preferential treatment than it offered foreigners in the WTO context. According to Annex 5 of CEPA, an enterprise is regarded as a Hong Kong company based upon these criteria:

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52 This was not regulated in the old notice, supra note 22.
53 Item 2, art. 5, supra note 13.
54 Supra note 35, item 1 and item 2, art. 5.
55 There is a similar arrangement between Mainland China and Macao, the Mainland/Macao Closer Economic Partnership Arrangement. Because Macao is not an important shipping center, this discussion will focus on the arrangement between mainland China and Hong Kong, but the same preferential treatment is reserved for the service suppliers from Macao.
57 In CEPA, the word “Mainland” refers to the entire customs territory of China.
• Registration and establishment pursuant to the Companies Ordinance or other relevant ordinance of Hong Kong.

• The nature and scope of its business in Hong Kong

• Payment by enterprise of Hong Kong profits tax

• Years of substantive operations in Hong Kong

• The enterprise owns or rents business premises in Hong Kong to engage in substantive operations. (With respect to maritime transport services, 50% or more of the ships owned by the enterprise, calculated in terms of tonnage, must be registered in Hong Kong.

• 50% or more of its total staff is employed in Hong Kong.58

In the maritime service sector, China will carry out its previous commitments to the WTO and afford Hong Kong companies national treatment in respect of the minimum registered capital requirement. For example, with respect to freight forwarding agency and storage & warehousing services, Hong Kong companies are permitted to operate on the Mainland on a wholly-owned basis two years ahead of China’s WTO timetable.59 Regarding maritime services, not only will these preferential treatments be applied, but Hong Kong service providers are allowed to “use liner vessels serving main routes to move, without any restrictions, empty containers that they own or rent,” which has not been committed in the WTO context. China confirmed these commitments in the subsequently issued Provision on Administration of Foreign Investment in International Maritime Transportation. Wholly Hong Kong-owned enterprises can now provide in mainland China international ship management services, international maritime cargo warehousing, international maritime container freight station and container yard services, and non-vessel-operating services. They may also establish a wholly Hong Kong-owned shipping company in mainland China to offer such routine services as canvassing of cargoes, issuing bills of lading, settling freight, and signing service contracts for their owned or operated vessels.60

Maritime service suppliers who have already engaged in this business in Hong Kong and satisfy the enterprise requirements, may take advantage of

60Article 17, supra note 19.
these preferential treatments. Such arrangements not only enhance Hong Kong’s position as a gateway to China’s markets generally, but also provide more options to foreign service suppliers for entry into China’s maritime service market in particular.

V

CONCLUSION

After twenty years of constant effort, China’s program of economic reform is widely acknowledged to have achieved remarkable results. Now, as a full WTO member, China is embarked on another initiative, reform of its legal system, which should have an equally important impact on China’s economy and society in the future. With respect to reform of the law regulating maritime commerce and shipping, some satisfactory results have already been achieved, and they no doubt instill greater confidence in foreign investors. China’s WTO accession surely promises greater opportunities for foreign investors, allowing them to compete with domestic investors on an equal basis. Even if China has yet to fully open its shipping industry, its trend is clearly in that direction.