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China's Telecom Regulatory Regime on the Eve of WTO Accession

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Recent years have witnessed a continuous and rapid development of the telecommunications industry in China—trends which have stimulated prospective domestic and foreign investors in this sector. As part of its bid for joining the World Trade Organization (WTO), China has agreed to abide by the WTO's Agreement on Basic Telecommunications Services and gradually open its telecommunications market to foreign investment. In an apparent effort to fulfill such commitments and prepare for the further development of the industry, China promulgated the first comprehensive "Regulations on Telecommunications." The new Telecom Regulations are designed to establish a generally pro-competitive telecommunications regulatory regime in the fields of regulatory independence, transparent licensing, and interconnection rights. While due to the legacy of the past the regulatory regime shows some room for improvement, the actual opening of the telecommunications sector to foreign competition lags noticeably behind what China has committed. Further legislative efforts are needed for a free and open telecommunications regulatory regime to occur in China.

KEYWORDS: **telecommunications; regulation; World Trade Organization (WTO); foreign investment**

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China is the world's fastest growing[1] and most promising telecom-

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[1]According to Zhou Deqiang (周德強), president of the China Telecom Group, China now

munications market.[2] Recent years have witnessed market-oriented reforms and new operational rules being prepared in China's telecommunications sector. Many believe that as the market-oriented reforms deepen and World Trade Organization (WTO) accession approaches, this traditional monopoly sector will eventually be opened to domestic and foreign investors. As a matter of fact, many foreign companies have already begun to explore strategies for tapping the market.[3] There will certainly be an influx of capital as soon as direct foreign investment—in whatever form—becomes possible in this sector. This may account for why the newly launched telecommunications regulations have received a cautious welcome from foreign as well as domestic telecommunications operators.[4]

This paper examines the existing telecommunications regime based on the "Regulations on Telecommunications" (電信條例). The analysis assesses the regime against the backdrop of China's commitments relating to WTO accession.

Market-Oriented Reforms

China's telecommunications sector used to be dominated by a traditional PTT (post, telephone, and telegraph) monopoly and insulated from industrial competition in both services and operation. Prior to 1998, the

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ranks second in the world in the number of fixed-line users and second in the size of its telephone network, up from 17th in the 1980s. See Zhongguo xinwenshe (China News Service), July 17, 2000.

[2]By August 2001, China boasted approximately 160 million fixed-line and 126 million cellular subscribers. China had become the biggest mobile telecommunications market in the world. Moreover, the number of Chinese Internet users was over 20 million by the end of 2000. Despite these attractive figures, only 5 percent of this market has been tapped.

[3]On June 13, 2000, Vodafone and China Unicom signed an agreement on cooperating in roaming services. For details, see <http://www.vodafone.com/media/press_ releases/9222.htm>. Lucent Technologies has secured a CDMA project with China Unicom to provide mobile telecommunications service. See <http://www.lucent.com.cn/>. Singapore Telecom is reported to have obtained permission to participate in the Internet services with the establishment of its alliance with the China Netcom.

[4]For instance, Jamie P. Horsley, an attorney who lived and worked in China for thirteen years as a lawyer, diplomat, and corporate executive, hailed the "Regulations on Telecommunications" as "paving the way for a WTO-compatible national law." See *The China Business Review*, July-August 2001, 34.

Ministry of Post and Telecommunications (MPT 郵電部) was not only China's principal telecommunications regulator, but—through its commercial arm, China Telecom (中國電信局)—was also the dominant operator of telecommunications business in the country. Primarily arising due to security concerns,[5] the monopoly was also a natural selection from a technological point of view.[6] With the realization of the role of the telecommunications sector in national economic[7] and technological development,[8] corporatizing the telecommunications monopoly and gradually introducing market forces into a variety of telecommunications markets become an important task for the Chinese government.

The market-oriented reforms in the telecommunications sector began with the establishment of China United Telecommunications Corporation (China Unicom 中國聯合通信有限公司) and China Jitong Telecommunications Corporation (China Jitong 中國吉通通信有限公司) in December 1993 and January 1994, respectively. China Unicom and China Jitong were previously under the primary supervision of the Ministry of Electronic Industry (MEI 電子工業部).[9] While China Jitong focused on Internet

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[5]The openness of networks is the inherent weakness that leaves the system vulnerable to attack.

[6]The "three networks" (telecommunications network, radio and television network, and computer network) used to be independent. With the development of computer technology, the demarcation between the three has become blurred.

[7]Early in December 1978, Deng Xiaoping (鄧小平) vowed to develop the telecommunications infrastructure which he saw at the time as one of the chief bottlenecks hindering economic growth. See Ministry of Information Industry, "Chronicles of the Reform and Opening-Up of the Country's Telecommunications Area" (in Chinese, January 20, 2001), available at <http://www.mii.gov.cn>.

[8]Digital technology, a common technical platform of the "three networks," has allowed convergence of voice, data, text, image, and all other transfer services. This naturally results in pressure for cross-competition in various types of services by the three networks.

[9]The founding of China Unicom was co-sponsored by the ministries of Electronic Industry, Power Industry, and Railways. The company also received capital input from such enterprises as China International Trust and Investment Corporation, China Everbright International Trust and Investment Corporation, China Resources Group, China Huaneng Group, China Merchants Holdings Company Ltd., China National Chemicals Import and Export Corporation, China Trust and Investment Corporation for Foreign Economic and Trade Relations, China National Technology Import and Export Corporation, Beijing CATCH Communications Group Co. (on behalf of the Beijing Municipal Government), Shanghai Science and Technology Investment Corporation, Guangzhou South-China Trade Center Group, and Dalian Vastone Enterprise Development Company Ltd.

postal services, China Unicom was designed to copy the business model of the existing China Telecom—i.e., being a full-range telecommunications service operator by providing such services as fixed-line, paging, GSM[10] and CDMA[11] mobile phone communications, and Internet access service. The establishment of China Unicom and China Jitong signified the introduction of competition in the telecommunications sector, even though neither company was in a position to pose any serious competitive pressure on China Telecom. More importantly, the existence of a weak China Unicom and China Jitong made more prominent the dominant market position of China Telecom; this provided impetus for the restructuring of the telecommunications regulator and, subsequently, of China Telecom.

Accordingly, in March 1998 a new ministry—the Ministry of Information Industry (MII 信息產業部)—was established, replacing the MPT and the MEI, which was responsible for, among others, the computer industry. Most matters concerning information development (except for radio and television broadcasting) fall within the MII's competence,[12] reflecting the fact of digital technological convergence.

In February 1999, the old China Telecom was divided into three independent telecommunications companies—a new China Telecommunications Group (China Telecom Group 中國電信集團公司) in the fixed-line business, China Mobile Communications Group (中國移動通信集團

[10]GSM (Global System for Mobile Communications) refers to an open, nonproprietary system that is constantly evolving. One of its great strengths is international roaming capability. This gives consumers seamless and standardized same number contactability in more than 170 countries. GSM satellite roaming has extended service access to areas where terrestrial coverage is not available. See <http://www.gsmworld.com/technology/faq.html>.

[11]CDMA (Code Division Multiple Access) is a "spread spectrum" technology, which means that it spreads the information contained in a particular signal of interest over a much greater bandwidth than the original signal. See the website of CDMA Technology, <http://www.cdg.org/tech/tech.asp>.

[12]Interesting is to note that the MII had been reportedly considering merging the MII and the State Administration of Radio, Film, and Television (SARFT), which the SARFT was disinterested in. See Hou Mingjuan, "Cable Authorities Decline Telecoms Sector's Plan to Converge Markets," *China Daily* (Beijing), July 23, 2001. According to market research report by Global Information, Inc., the State Council, which has always banned the SARFT from engaging in telecommunications operations and the MII from engaging in radio and TV operations, has granted the MII regulatory authority over commercial TV broadcasting companies. See Global Information, Inc., "China Telecom 2000: China's New Telecom Policy and Structure after Reorganization," available at <http://www.gii.co.jp/english/gi3557 mn_china telecom.html>.

公司), and China Satellite Communications Group (China Satcom 中國衛星通信集團公司). The paging business of China Telecom has been transferred to China Unicom. Parallel to this restructuring, the Chinese government granted preferential policies in order to cultivate fledgling players.[13] With the full support of the government, China Unicom was incorporated as the country's second largest mobile communications operator to compete with newly established China Mobile. Similarly, China Netcom Corporation Ltd. (China Netcom 中國網絡通信有限公司) was designed as a competitor of the new China Telecom Group in the field of Internet service. China Railway Telecommunications and Information Corporation (China Railcom 中國鐵道通信信息有限責任公司) is now a competitor of China Telecom Group in the field of fixed-line telephone service. All these changes are part of the effort to create a competitive domestic market.

In this regard, the change in the role of MII's predecessor and MII is noteworthy. In contrast with that of the MPT prior to 1998, the role of the MII—pursuant to the central government restructuring plan—was that of a telecommunications regulator overseeing areas relating to telecommunications, multimedia, broadcasting, satellite, and the Internet, without any mandate for directly engaging in telecommunications business.[14] The new regulator of the telecommunications sector is no longer supposed to play the role of telecommunications operator.

Telecommunications Regulations

Given the importance of telecommunications, a Telecommunications Law by the National People's Congress (NPC) or its Standing Committee

[13]While China Unicom's mobile subscriber use base (GSM) is similar to China Mobile's, China Unicom has only 5.23 million mobile phone users, compared with 40 million at China Mobile. In order to compete with China Mobile in the area of mobile communications, China Unicom decided to set up a nationwide CDMA network. The authorization for China Unicom to construct and operate a CDMA network is therefore the biggest form of governmental support.

[14]For a detailed description of the role of the MII, see <http://www.mii.gov.cn>.

is more suitable for governing this sector. According to the hierarchy of laws and administrative regulations, laws by the NPC or its Standing Committee are more authoritative than and superior to the administrative regulations by the State Council in terms of legal force. In fact, empirical evidence shows that important laws somewhat consistently regulate industries such as railway and electricity. However, mindful of the urgent need to establish a national regulatory framework in anticipation of China's impending entry into the WTO, a set of administrative regulations by the State Council, rather than a law by the NPC or its Standing Committee, were first promulgated to regulate the telecommunications sector. On September 20, 2000, the State Council issued the "Regulations on Telecommunications" (hereinafter referred to as *Telecom Regulations*).[15]

Nevertheless, the *Telecom Regulations* legalized the completed or ongoing reforms and more importantly revealed new reforms to be instituted in this sector. The general principles of the *Telecom Regulations* are "to regulate the telecommunications market, safeguard the legitimate rights and interests of users of telecommunications and proprietors of telecommunications business, ensure the safety of telecommunications network and information, and promote healthy development of the telecommunications industry" (Art. 1).

The *Telecom Regulations* consolidated the reform efforts in order to separate the government from business in the telecommunications sector. The *Telecom Regulations* make the department in charge of information technology under the State Council, the MII, responsible only for regulating rather than operating the national telecommunications sector. In addition, breaking monopolies, encouraging competition, and facilitating development, openness, fairness, and justice are also now the functions of the MII (Art. 4).

According to the *Telecom Regulations*, China will implement a licensing system in the telecommunications sector in line with different categories of business. All operators must apply to the central or provincial

[15]For the text of the *Telecom Regulations*, see *Guowuyuan gongbao* (Gazette of the State Council) 33 (2000): 11-21.

information industry administration for the license before starting up their businesses (Art. 7). The *Telecom Regulations* divide the telecommunications sector into basic telecommunications services (BTS) and value-added telecommunications services (VATS) (Art. 8). Operators of BTS must apply to the State Council's information industry administrative department for business permits.

In order to qualify for a license to operate a BTS business, at least 51 percent of the total equity of an applicant must be state-owned (Art. 10.1). Also the State Council will be the sole authority to examine and approve BTS license applications, whereas applicants for VATS license may either submit their applications to the telecommunications administrative authorities of the State Council or those of the relevant provinces or municipalities, and both authorities shall have equal power in examining and granting the license (Art. 9).

The kinds of VATS are defined in the annex to the *Telecom Regulations*, though the regulations expressly provide that the State Council may make adjustment to such definition anytime "depending on the actual situation." Pursuant to the annex, VATS include e-mail, databases, and the reselling of telecommunications services—such as Internet connection services, on-line data processing, and transaction processing services—to third parties. For VATS, the operators must apply to the State Council's information industry administrative department for permits if their business covers two or more provincial areas, autonomous regions, or municipalities under direct administration of the central government. Such operators can apply to the provincial information industry administration for permits if their business covers only one provincial area. For the first time, moreover, domestic private investors in China are expressly allowed to participate in the telecommunications sector through the operation of VATS.

The *Telecom Regulations* also contain pro-competitive provisions. In this regard, most noteworthy is the treatment of the relationships among the country's communications service providers, which has been a big headache for the MII because disputes between them are increasing nationwide. The *Telecom Regulations* incorporate an applicable procedure to deal with these problems, *inter alia*, by setting forth an obligation to interconnect for

the "dominant telecommunications operator" (Art. 17). In addition, the *Telecom Regulations* specifically prohibit actions that attempt to limit subscribers to use services of other operators, unreasonable cross-subsidization of other business, and provision of below-cost services (Art. 42).

WTO Disciplines on Telecommunications Services

Within the WTO framework, there are two agreements relating to the telecommunications sector. One is the General Agreement on Trade in Services (GATS) that took effect on January 1, 1995. The other agreement —the Agreement on Basic Telecommunications Services (ABTS), which was reached on February 15, 1997 and took effect on February 5, 1998— is an annex to the Fourth Protocol of the GATS.[16] The GATS, which covers trade in services, is binding on all WTO members as a multilateral agreement. As to the ABTS and its accompanying Reference Paper, participation by WTO members is voluntary, although in 1996 the forty-eight members that had then acceded to the ABTS accounted for 90 percent of the world's telecommunications revenue.[17]

A close examination of the ABTS Reference Paper reveals the following underlining disciplines:

Competition safeguards: The disciplines call for "appropriate measures" to be maintained to prevent anti-competitive practices by a dominant supplier. Anti-competitive practices include cross-subsidization, exploiting information obtained from competitors, and not making available to competing suppliers on a timely basis technical information about essential facilities and other commercial information required to provide services.

Interconnection: Because of the network externality, competing telecommunications networks often need access to existing networks to ex-

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[16] For an elaboration on the ABTS, see, for instance, Philip L. Spector, "The World Trade Organization Agreement on Telecommunications," *The International Lawyer* 32, no. 2 (1998): 217-30.

[17] See "Background Note on the WTO Negotiations on Basic Telecommunications," *WTO Press Release*, February 22, 1996.

change traffic and allow intercommunications among users of the different systems. The WTO regulatory principles call for ensuring interconnection with a major supplier "at any technically feasible point in the network." Interconnection must be provided on nondiscriminatory terms, in a timely fashion, at cost-oriented rates, and with sufficient unbundling so that competitors need not pay for network components or facilities they do not require. Moreover, the procedures for interconnection must be publicly available and transparent. Meanwhile, in order to settle disputes about interconnection there must be recourse to an independent regulator with the power to resolve disputes in a reasonable period of time.

Universal service:[18] Members of the agreement have the right to establish universal service obligations, but these obligations must be administered in a transparent, nondiscriminatory, and competitively neutral manner, and not be so burdensome as to constitute a barrier to competition.

Licensing criteria: Where licenses to operate a service are required, the country must make publicly available all licensing criteria and the time period required to reach a decision about an application for a license. Signatories are also committed to make the terms and conditions of individual licenses publicly available.

Independent regulators: Regulatory bodies should be "separate from, and not accountable to" any supplier of services. Decisions and procedures of the regulator should be impartial.

Resource allocation: Procedures for the allocation of resources such as telephone numbers and radio frequencies should be "carried out in an objective, timely, transparent, and nondiscriminatory manner."

WTO Accession-Related Commitments by China

After becoming a WTO member, China will be bound by the GATS. Under the GATS, China will progressively eliminate the measures restrict-

[18]"Universal service" means the telecommunications operators must cover remote areas where communications services are needed.

ing foreign participation.[19] Moreover, in the U.S.-China agreement on China's WTO accession reached in November 1999,[20] China agreed to abide by the ABTS. China further committed to implement the pro-competitive regulatory principles embodied in the accompanying Reference Paper and Chairman Notes after the country's entry into the WTO. These principles include providing access to the public telecommunications networks of incumbent suppliers (i.e., interconnection rights) under non-discriminatory terms and at cost-oriented rates, as well as an independent regulatory authority. China has also committed to technology-neutral scheduling, which means that any basic service may be provided through any means of technology (e.g., cable, wireless, and satellites).

Contrary to its current prohibitive practice regarding foreign investment in the telecommunications sector,[21] under this U.S.-China agreement China for the first time committed to allow 49 percent foreign investment

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[19]The GATS requires progressive elimination of such measures as limitations on numbers of service providers, on the total value of service transactions, or on the total number of service operations or people employed, as well as restrictions on the kind of legal entity or joint venture through which a service is provided or any foreign capital limitations relating to maximum levels of foreign participation. See GATS, Art. XVI (2). China, however, has so far prohibited foreign investment in the telecommunications sector.

[20]The text of the China-U.S. WTO market access agreement is available at the website of the U.S.-China Business Council, <http://www.uschina.org>.

[21]China prohibited foreign participation in telecommunications network ownership, operations, and management. However, China Unicom, the second largest telecommunications operator, and its incorporators devised a model—the "*Zhong-Zhong-wai*" (中中外 Chinese-Chinese-foreign) mode—to circumvent this regulation. In a "*Zhong-Zhong-wai*" arrangement, a foreign investor (Foreign) forms a joint venture with Chinese partners (Chinese) which is either the incorporator of China Unicom or the companies designated by China Unicom (these Chinese partners are not in the field of telecommunications sector). The joint venture will build the network and sign revenue sharing and other network services agreements with China Unicom (Chinese). The foreign investor typically contributes the majority of the funding needed for network buildup and in return shares the revenue allocated to the joint venture from China Unicom. In this way, the foreign investor seemingly could reap "equity-like" returns without breaking Chinese rules. According to one study, during the four years from 1995 to late 1998, nearly fifty "*Zhong-Zhong-wai*" projects were established, involving US$1.4 billion of foreign investment from companies from the United States, Canada, Germany, France, Italy, Japan, South Korea, and Singapore. In September 1998, the Chinese government issued a decree calling for the ban of the "*Zhong-Zhong-wai*" investment model. The move was apparently a major setback for foreign investors who were using this model to circumvent the Chinese government ban on foreign participation in the telecommunications services industry. See He Xia, "Strategic Selections for Financing China's Telecommunications Industry," in *Zhongguo guizhi yu jingzheng: Lilun he zhengce* (Regulation and competition in China: Theory and practice), ed. Zhang Xinzhu et al. (Beijing: Shehui kexue wenxian chubanshe, 2000), 310-12.

in all services; 50 percent foreign equity share participation in VATS (including, for example, electronic mail, voice mail, Internet, on-line information and data base retrieval, and enhanced value-added facsimile services) and paging services two years after accession; 49 percent foreign equity share in mobile voice and data services (including all analogue/digital cellular and personal communications services) five years after accession; and for domestic and international services (including, for example, voice, facsimile, intra-company e-mail, voice and data services) six years after accession. No geographic restrictions will be imposed for paging and value-added services two years after accession, for mobile voice and data services in five years, and for domestic and international services in six years.[22]

According to the agreement reached between the European Union (EU) and China in May 2000,[23] China further agreed to speed up the market access timetable. Specifically, the timetable for market opening in mobile telephone has been accelerated by two years. Foreign investment will be allowed at 25 percent on accession, 35 percent after one year, and 49 percent after three years. China will open its leasing market in three years, allowing foreign companies to rent capacity from Chinese operators and resell it for both domestic and international traffic. The liberalization of domestic leased circuit services would allow joint venture foreign telecommunications operators to create their own networks, independent of the existing ones, and to sell their capacity to clients in China. In Internet and other value-added services (including paging), foreign companies would immediately be allowed 30 percent stakes in Chinese companies in Beijing, Shanghai, and Guangzhou. Foreign ownership would be increased to 50 percent in two years when all geographic restrictions disappear.

True, neither the China-U.S. agreement nor the China-EU agreement is worry-free. However, worthy bearing in mind is that in general the results of the two agreements are to be extended to all WTO members on a nondiscriminatory basis through the "most-favored-nation" (MFN) prin-

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[22]China's key telecommunications services corridor in Beijing, Shanghai, and Guangzhou, which represents approximately 75 percent of all domestic traffic, will open to all telecommunications services immediately upon WTO accession.

[23]For the highlights of the China-EU WTO market access agreement, see the EU website at <http://europa.eu.int/comm/trade/bilateral/china/high.htm>.

ciple.[24] Although the agreements allow particular measures inconsistent with the MFN obligation to be maintained, "provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions,"[25] China has not yet actually done so. As a result, any investor from any WTO member state will be entitled to hold China to all commitments Beijing has made in any bilateral agreement on WTO accession with any WTO member state.

Compatibility of the *Telecom Regulations* with the WTO

The *Telecom Regulations* and the relevant practice are to be assessed in comparison with the disciplines or principles embodied in the ABTS or the GATS, and with China's commitments concerning foreign participation in telecommunications services.

A Comparison Between the Telecom Regulations and WTO Disciplines

With regard to competitive safeguards, the *Telecom Regulations* commendably recognize pro-competitive principles. Although China so far has no antimonopoly law,[26] the *Telecom Regulations* do establish the same competitive principles as those in the ABTS (Arts. 41 and 42). A noteworthy example is that the issuance of BTS licenses is subject to a competitive tendering process in accordance with the relevant provisions of the state.

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[24]See Art. II (1) of the GATS. Also, the fourth Annex to the GATS (Annex on Telecommunications) requires WTO member states to ensure that all service suppliers seeking to take advantage of scheduled commitments have reasonable and nondiscriminatory access to and the use of public basic telecommunications networks and services.

[25]See Art. II (2) of the GATS.

[26]In September 1993, China passed an "Anti-Unfair Competition Law" which prohibits price-fixing and prevents predatory pricing. However, this law was so vague as to make enforcement difficult. For example, the law indeed has sought to prevent telecommunications operators from collecting telecommunications charges in excess of what stipulated, but the law does not have substantive or predictable procedures in place to prevent anti-competitive behavior by the dominant operators (China Telecom), let alone challenge the longstanding monopoly in the telecommunications industry.

The provisions in the *Telecom Regulations* that leave room for private initiative in the telecommunications sector[27] have also the effect of enhancing competition. While BTS is required to be at least 51 percent owned by a state-owned entity, VATS is thrown completely open to Chinese private firms.[28] Since China agreed to progressively open its telecommunications market to foreign participation, a foreign private investor should therefore be able to establish a Sino-foreign VATS joint venture with a private domestic entity.[29]

In addition, the *Telecom Regulations* stipulate the setting of telecommunications services' charges and standards,[30] and these specific standards are designed to help hamper the telecommunications operators from using their dominant positions in dealing with services users.

However, more work needs to be done in order to further enhance competition in the telecommunications sector. Among other things, the MII needs to clarify when and how this tendering process will be implemented. Given the existing protectionist approach toward the licensing process relating to the BTS,[31] provisions dealing with the tendering of BTS

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[27]For instance, Art. 13 of the *Telecom Regulations* provides that all eligible Chinese companies, regardless of state-owned or private enterprises, can operate VATS.

[28]There is no requirement that a certain percentage of the equity or share capital of a VATS operator must be owned by the state. Therefore, possible is that 100 percent of the equity or share capital of a VATS operator may be owned by non-state-owned or private domestic entities.

[29]Under the terms of the China-U.S. bilateral WTO agreement, foreign investment in VATS will be capped at 30 percent initially and at 50 percent within five to six years of China's WTO accession. A non-state-owned or private entity can thus hold 70 percent of the equity initially (which may be reduced to 50 percent within five to six years of China's WTO accession) of any proposed Sino-foreign VATS joint venture.

[30]Chap. II of the *Telecom Regulations*, Section 3 (from Art. 23 to Art. 26) covers procedures for telecommunications charges. Chap. III (from Art. 31 to Art. 44) is designed to specify the standards for telecommunications services.

[31]The MII has made clear new service licenses would be granted to existing telecommunications operators and dismissed the possibility of licensing more telecommunications companies in the near future. Vice-Minister of Information Industry Zhang Chunjiang (張春江) was reported to have said in relation to the new mobile telecommunications service licensing that "[t]he selections process is still under discussion, but current telecommunications service operators are likely to be licensed." Reports widely rumored that both China Telecom and China Netcom will be allowed to provide mobile communications services. See *People's Daily*, May 18, 2000. Ironically, according to one MII official, the "current, ineffective level of competition in the industry" accounts for the need to apply selectively discriminatory policies to "support backbone enterprises in order to give them

licenses need to be issued soon.

In respect to interconnection, China Telecom has not yet performed satisfactorily.[32] However, the *Telecom Regulations* provide for the interconnecting rights of telecommunications operators.[33] The "Measures for Interconnection Between Public Networks" (公用電信網間互聯管理規定), promulgated in May 2001 by the MII, further clarified the procedures for interconnection. These provisions are obviously in line with the WTO discipline.

Regarding universal service, in telecommunications as in other sectors, China's government is concerned about geographic disparities and thus attaches importance to the concept of "universal service." Designating universal service providers is within the competence of the ABTS member states. However, the requirements in the *Telecom Regulations* (Art. 44) might prove to be a problem for foreign investors given that they are still geographically restricted in the transitional period. Moreover, while nowadays the Chinese operators providing universal services benefit from the "universal service subsidy" system (which is structured to cross-subsidize high-cost areas),[34] if foreign operators designated to provide such services were not to be entitled to such benefits, they would be in a disadvantaged position. Either of the cases would not be deemed to conform to the principle of national treatment embodied in the GATS. However, since the *Telecom Regulations* contain no provision in this regard, evaluating the compatibility between the *Telecom Regulations* and the WTO disciplines

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a stronger foothold in the international arena." Huang Chengqing (黃澄清), a senior official with the Telecom Administration Bureau under MII, made the remarks at the U.S.-China Telecommunications Regulatory Policy Forum & Roundtable, October 24-25, 2000.

[32]China Telecom has been found, on numerous occasions, to have purposefully disconnected China Unicom from the national network it maintains. See Yu Hui, "An Ally Between Administrators and Operators in the Regulated Market: Examples of China's Telecommunications Industry," in Zhang, *Zhongguo guizhi yu jingzheng*, 31.

[33]Chap. II of the *Telecom Regulations*, Section 2 (from Art. 17 to Art. 22) specifically deals with the obligations and procedures for interconnection.

[34]At present, China Telecom and China Mobile offer universal service across the country. For a study of universal service in the Chinese telecommunications industry, see, for instance, Xu Hui, "Universal Services Principle and Its Application in China's Telecommunications Regulation," available at the Beijing University Law School website: <http://211.100.18.62/research/academy/details.asp?lid=2610>.

is pointless.

As for licensing criteria, the *Telecom Regulations* set out in clear terms the framework for operational licensing conforming to this WTO discipline.[35] The licensing framework contains explicit criteria to be used, and the criteria are publicly available. However, as indicated before, the licensing practice needs to be further clarified concerning the time and detailed procedures for implementation of these criteria.

In regard to regulatory independence, the *Telecom Regulations* clearly separate the regulator from the operator. However, due to the legacy of the past, the practice leaves much to be desired. First is regulatory independence of the Chinese telecommunications regulator. The MII is perceivably continuing to protect, and to exercise influence over, the major telecommunications operators,[36] as the MII is responsible for operational licensing, interconnection, the setting of telecommunications services' rates and standards, the allocation of telecommunications resources, and the selection of universal service providers. Given the close relationship between the MII and China Telecom in the past, and the perceived continuing association between the MII and the new China Telecom Group, it remains to be seen whether the MII will in practice be impartial with respect to all telecommunications operators (including new entrants) in exercising its regulatory powers under the *Telecom Regulations*. The official stance is that the current level of interference is meant only to achieve full competition, which will in turn obviate the need for the involvement of government bodies. Once this is achieved, the industry should fully realize the power of market mechanisms. More worrisome is that monopoly will not be easily broken and deregulation will be limited.[37] In reality, a con-

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[35]Chap. II of the *Telecom Regulations*, Section 1 (from Art. 7 to Art. 16) deals in detail with the operational licensing.

[36]According to a 2000 study on telecommunications competition in China, the MII "still significantly influences strategic issues such as pricing, assets, and personnel matters at both China Telecom and Unicom." See Bing Zhang and Mike W. Peng, "Telecom Competition, Post-WTO Style," *The China Business Review*, May-June 2000, 16. For an elaboration on how the regulator might collude with operators in the telecommunications industry, see Yu, "An Ally Between Administrators and Operators," 23-34.

[37]First, for telecommunications security, the openness of networks is the inherent weakness that leaves the system vulnerable to attack. The MII may be unwilling to take the risk of

siderable period of time, even after China's WTO accession, may be necessary before the MII ceases exercising such biased interference and then becomes a truly independent telecommunications regulator. That the State Leading Group for Informatization (SLGI 國家信息化領導小組) was set up is a blessing.[38] Given that this group is in practice the policymaker of the information work and is above the somewhat interested MII, the SLGI can be expected to intervene when the MII fails to act as an independent regulator.

Resource allocation in China is governed by the "Regulations on Radio Administration" (無線電管理條例).[39] These regulations centralized spectrum allocation in the hands of a State Radio Regulatory Committee (國家無線電管理委員會), which was made part of MII in 1998. This made the procedures for obtaining spectrum more orderly explicit.

A Comparison Between the Telecom Regulations and China's Commitments

According to the "Provisional Regulations on Foreign Investment Guidelines" (指導外商投資方向暫行規定) and the "Catalogue of Industries for Guiding Foreign Investment" (外商投資產業指導目錄),[40] the telecommunications industry belongs to the "category of prohibitive industries," i.e., industries where foreign investment is barred. From a legal perspective, foreign participation in the telecommunications sector is still prohibited at present.[41] Note that in both the U.S.-China and EU-China

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undermining telecommunications security. Second, the regulations on the separation of government from enterprises generate a dilemma: as the government's role is separated from that of enterprise operations, the MII will have less power to directly weaken China Telecom Group's monopoly. See *Zhengquan shibao* (Securities Times), July 16, 2000.

[38] The State Council set up the Leading Group for Informatization in 1996. It had the Office of the Leading Group for Informatization as its administrative body. In 1998, the Office of the Leading Group for Informatization and the former State Radio Regulatory Committee became two divisions of the newly established MII. Recently, the LGI was reorganized into a higher-ranking SLGI, with Premier Zhu Rongji (朱鎔基) as its head. See *Ming Pao* (Hong Kong), September 27, 2001.

[39] The State Council and the Central Military Commission issued the "Regulations on Radio Administration" in September 1993.

[40] The Guidelines and the accompanying Catalogue were promulgated in 1995, while the Catalogue was amended in 1997.

[41] Investors, especially foreign venture capital suppliers, report being confused by China's

agreements, as well as other bilateral agreements on China's WTO accession, China has agreed to progressively open its telecommunications industry to foreign companies in three phases, which vary in timing over three different categories of services: VAS, paging mobile voice and data services, and basic fixed-line services.[42] In order to align with the commitments, the *Telecom Regulations* state that foreign organizations or individuals[43] will be allowed to invest in and operate telecommunications businesses in accordance with a separate set of rules to be formulated by the State Council (Art. 80). Since this is the only provision in the *Telecom Regulations* relevant to foreign participation in telecommunications services, premature would be to evaluate the compatibility between the *Telecom Regulations* and China's commitments.

Nevertheless, clear is that while foreign telecommunications operators are eagerly looking forward to the upcoming regulations, the Chinese

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current policies concerning investment involving Internet content and service providers. Although many of the country's Internet content and service companies have won capital support from foreign investors, the official stance is still one of "prohibition."

[42]This is another aspect where the *Telecom Regulations* are not free from criticism in relation to the definition of BTS and VATS. The definitions of BTS and VATS are not inconsistent per se with the GATS and the Basic Telecommunications Agreement. The Services Sectoral Classification List, an informal note by the GATT on July 10, 1991, divides telecommunications services into fifteen subsectors. Although the WTO ABTS does not provide a definition of BTS, the first six subsectors of the list (voice telephone services, packet-switched data transmission, telex services, telegraph services, fax services, and private-circuit services) as well as certain mobile communications and other services are in the catchall "other" category, as BTS. However, technological development may outdate the distinction and lead to misconceptions. The definition of BTS under the "Classification Catalogue of Telecommunications Services" would appear to be broad. For example, the meaning of certain services included as part of BTS—such as network bearer services and network outsourcing services—is not immediately obvious. Network outsourcing services, paging services, and resale of BTS would appear to be value-added in nature but have been included as part of BTS and are subject to the more stringent licensing requirements under the *Telecom Regulations*. Amidst the calls for clarification, on June 11, 2001 the MII substantially revised the catalogue in a "Circular on the Adjustment of the Classification Catalogue of Telecommunications Services." According to the new catalogue, some telecommunications services that used to belong to the BTS under the original catalogue—such as network outsourcing services, paging services, and resale of BTS—are treated as reference to VATS, thus giving clear-cut definition of various telecommunications services. However, the lease or sale of products that presumably should not constitute telecommunications business is still included in the definition of BTS, and is thus subject to the licensing regime introduced by the *Telecom Regulations*.

[43]For the purpose of the *Telecom Regulations*, "origin investors" include those from Hong Kong, Macao, and Taiwan.

authorities obviously will not open telecommunications services to foreign investment until the last minute. Helpful would be if the draft regulations on foreign-invested telecommunications enterprises—"Administrative Regulations on Foreign-Invested Telecommunications Enterprises"—are compared with China's commitments.

While authorizing a Chinese and a foreign party to incorporate a Sino-foreign equity joint venture for the provision of telecommunications services, the draft regulations do not contemplate the possibility of a wholly foreign-owned enterprise participating in the telecommunications industry. Contractual joint venture was also not discussed in the draft, although there were suggestions that there may be separate restrictions dealing with investment in telecommunications using this structure.[44]

Concerns have also been expressed that notwithstanding the promise of increased access after WTO accession, the State Council might set qualifications requirements for a foreign investor in a telecommunications joint venture that act as a restriction in many of the potential entrants.[45] For instance, under an earlier version of the draft regulations, one of the requirements for a foreign investor to qualify in a telecommunications joint venture on BTS is to have an average annual revenue of more than US$10 billion from its telecommunications businesses over the two-year period prior to the application, a criterion which would eliminate many companies from participation in the Chinese market.[46]

Nevertheless, Minister of Information Industry Wu Jichuan (吳基傳) was reported to have assured investors that the regulations for foreign investors will provide a level playing field and China will abide by its

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[44]See Stefanie Tetz and Ralph Koppitz, *New Developments for Foreign Investment in China's Telecoms Sector* (Munich: Clifford Chance Pünder, 2000).

[45]See, for example, Frank Xing Fan, "Foreign Investment in China's Internet Business: Forbidden, Forgiven, Forced Open?" available at the website of the Center for Strategic and International Studies (Washington, D.C.), <http://www.csis.org/ics/foreigninvestchina.html>.

[46]An unofficial draft, circulated in late 2000, created uproar by imposing restrictive conditions on foreign applicants as well as their Chinese partners. According to a Coudert Brothers report, this is a criterion which would eliminate many companies from participation in the Chinese telecommunications market. See Vivienne Bath and Cindy Chong (Coudert Brothers, Hong Kong Office), "China's New Telecommunications Regulations," *Asia Legal Briefing*, November 2000.

international commitments in order to accelerate China's accession to the WTO.[47] The approval of a pilot VATS joint venture in advance of the draft regulations or the WTO accession has sent encouraging signal.[48] In this context, clear is that while basically conforming to the WTO, the *Telecom Regulations* reflect some vestiges of the centrally-planned economy. The *Telecom Regulations* provide for obligations in association with social control.

One example is the state control provisions. True, non-state-owned or private entities are now allowed for the first time to hold up to 49 percent of the equity or share capital of a BTS operator within five to six years of China's WTO accession; the requirement that 51 percent of the equity or share capital of a BTS operator must be owned by the state reflects, however, the Chinese government's determination to retain control over the operation of BTS. Unless a potential foreign investor is willing to accept an ownership interest of less than 49 percent in any proposed Sino-foreign BTS joint venture, the chances of the foreign investor successfully partnering with a non-state-owned or private domestic entity would therefore appear to be minimal. Another example is that, because the MII intends to exercise a certain degree of social control in association with telecommunications services, all telecommunications companies are required to provide universal service.

Concluding Remarks

China wants to embrace the economic development potential of information technology and the global trading system. While also wanting to retain the traditional levers of control over national industrial policy and

[47]Wu made the remarks at a press conference held by the State Council Information Office on September 30, 2000.

[48]In December 2000, a VATS joint venture involving the AT&T, Shanghai Information Investment Corporation, and Shanghai Telecom—Shanghai Xintian Telecommunications Ltd. 上海信天通信有限公司)—was set up and would provide broadband Internet services in Shanghai's Pudong area.

political and social communication associated with the monopoly structure of the past, the Chinese government knows it has to respond to new necessities stemming from the development and commercialization of new telecommunications technologies. China has been restructuring the telecommunications sector, including making preparations for a new regulatory regime. As a result, the telecommunications sector is undergoing unprecedented change, with a competitive environment likely to emerge.[49]

Also, in a bid to join the WTO, China has been purposely adjusting its current industrial policies in order to make them suitable to international practice as exemplified by the WTO agreements. By setting out and implementing nationwide supervisory mechanisms for the users, operators, and regulatory organs of the industry, the *Telecom Regulations* constitute a basically WTO-compatible regime for telecommunications. Foreign enterprises will hence have the opportunity to invest in and operate local area networks with no obvious obstacles in terms of capital, technology, allocations, or service systems. Although the regulations for foreign investment in telecommunications services have not been passed, foreign private companies will have bright prospects. One example is the ability to operate local area networks for realty districts and enterprise groups, provided that the regulators are willing to distance themselves from dominant telecommunications operators.

[49]As the commercialization of third-generation telecommunications technology (3G) nears, the selection of 3G operators has been on the MII's work agenda. The ministry has set up an expert panel to research and study how to distribute China's 3G licenses. Reports held that the Chinese government would announce the final 3G operators during the second half of 2001 and the first half of 2002. Recently, wireless application protocol (WAP) technology has received enormous publicity, while private Internet companies can use their existing networks to participate in WAP operations as their first step in edging into the telecommunications sector.