

The Internet and Ecommerce in China: Challenge of the WTO

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Introduction

“The dot.com bust left hundreds of companies out of business, thousands of people out of work, and millions of investors out-of-pocket.”¹ Nevertheless, “the actual, everyday world of cyberspace continued to transform the ways we live, work, study, play, and just, well, waste time.”²

This description is especially true for certain emerging economies. In India, the world’s largest software-exporting country,³ Internet is one of the fast-growing economic sectors. A June/July 2000 survey anticipated an internet user base of 18 million by March 2003.⁴ With a population slightly larger than that of India,⁵ China has gained even more impressive achievements with respect to Internet development. According to the latest survey report by the China Internet Network Information Center (CNNIC), by June 2002, China’s Internet user population has reached 45.80 million.⁶ Nielsen/Netratings, a U.S. based consulting company on Internet economy, released a study in April 2002 revealing that China was now second the United States

¹ See Tom Regan, *After the dot.com crash*, The Christian Science Monitor, December 27, 2001, available at <http://www.csmonitor.com/2001/1227/p13s1-stin.html>.

² *Id.*

³ See Toshi “IT Qiangguo” – Yindu Jueqi de Mjue [Revealing the secrecy behind India’s emergence as an IT power], available at http://news.china.com/zh_cn/tech/technews/10000034/20010712/10059327.html.

⁴ See Puneet Gupta, *India’s Internet: Ready for Explosive Growth*, available at http://www.isp-planet.com/research/india_stats.html.

⁵ China’s present population is 1.29 billion and India’s is 1 billion.

⁶ The Semiannual Survey Report on the Development of China’s Internet, released by the CNNIC in July 2002, available at <http://www.cnnic.net.cn/develst/2002-7e/index.shtml>.

in the number of home Internet users.⁷ The study further said that Internet subscriptions in China were growing by 5-6% every month and in just three or four years 25% of the Chinese population could have web access, albeit the fact that currently just over 5% of China's more than one billion people can reach the cyberspace from home.⁸ "The potential is staggering," says Nielsen/Netratings managing director.⁹ Another comment by experts from various countries participating a Information Technology ("IT") conference in Hong Kong indicated that China was expected to be Asia's largest web services with its world third largest IT market by 2010.¹⁰

When the idea of the "information superhighway" was first promoted in the US by the Clinton-Gore administration in 1992, the Chinese leadership was quick to jump on the bandwagon. Aware that their political power was ultimately linked to the economic prosperity of the people, the Chinese leaders saw the "informatization" of the national economy as a new engine of economic growth.¹¹ In 2000 Jiang Zemin gave his most enthusiastic comment about Internet and ecommerce, saying: "we should deeply recognize the tremendous power of information technology and vigorously promote its development."¹² Prime Minister Zhu Rongji, who personally served as the director of China's Leading Group for Informatization, summoned the first meeting of the group on December 27, 2001. With the endorsement of several

⁷ China's home web use soars, BBC news, April 23, 2002, *available at* <http://news.bbc.co.uk/2/hi/world/asia-pacific/1945275.stm>.

⁸ *Id.*

⁹ *Quoted in id.*

¹⁰ *See* China expected to be Asia's largest web services market, People's Daily, Sept. 4, 2002, *available at* <http://www.people.com.cn>.

¹¹ "None of the four modernizations would be possible without informatization" was a favourite slogan of President Jiang Zemin. The concept of "four modernizations", namely of agriculture, industry, national defense, and science and technology, was embraced by the leadership at the outset of China's economic reform programme in the late 1970s. It now has become a symbolic phrase for China's goal in terms of economic development. *See* MILTON MUELLER & ZIXIANG TAN, CHINA IN THE INFORMATION AGE: TELECOMMUNICATIONS AND THE DILEMMAS OF REFORMS, Center for Strategic and International Studies, Washington DC, 1996, p. 57.

¹² Jiang Zemin says e-commerce will transform China, Reuters, Beijing, Aug. 22, 2000, *available at* <http://www.insidechina.com/news.php3?id=191172>.

China's top ranking leaders, he set informatization one of the first priorities of the country for the next five years.¹³ As a result of this understanding, the government has recognized that the Internet should be made available to the largest portion of the population possible, and ecommerce should be encouraged as a general policy.

Yet in spite of the huge potential business opportunities of the Chinese web market, it has not all been plain sailing for the Chinese and foreign companies that have sought to develop it. Information technology and authoritarian rule do not make happy bedfellows. The Chinese leadership know they cannot afford to ignore the vast potential economic benefits of the information revolution, but they also recognize how it could undermine traditional social control, which has successfully helped maintain the one-party-dictatorship for the past five decades. As a result they find themselves in the often contradictory position of encouraging the growth of the Internet, while at the same time trying to control people's use of it. Even in this anarchic new medium, tight rules govern the free flow of information, and websites operated by dissident democracy groups have been identified and closed down. When they psychologically felt threatened, even the world's most useful web tool could be bluntly blocked from China's cyber territory.¹⁴

Through the situation has been greatly improved since late 1990s, Chinese Internet entrepreneurs and foreign investors also face a confusing and burdensome regulatory environment. Government bodies at various levels lay claim to "the rule of law" in controlling the Internet and ecommerce. As a result, although China has made enormous strides to shape a regulatory framework for net, the process is so haphazard and capricious that regulations end up being vague, confusing and inconsistent. On

¹³ He Jinsong, Zhu Rongji: Dali Tuijin Guomin Jingji he Shehui Xinxihua [Zhu Rongji, Vigorously promote the informatization of the national economy and the whole society], Xinhua News Agency, Dec. 27, 2001.

¹⁴ China blocking Google, BBC news report, Sep. 2, 2002, *available at* <http://news.bbc.co.uk/2/hi/technology/2231101.stm>.

the one hand, China has created restrictive regarding encryption, network security, national security, dissemination of state secrecy and public news, but on the other hand, private issues such as contract rules, commercial transaction, cyber fraud and citizen privacy fall short of completion. Of course, in certain areas such as intellectual property protection regulations are equal to or above international standards, yet enforcement presents another difficulty. Simply put, many questions and uncertainties remain to be resolved before there can be an adequate administrative and legal environment for the industry.

For China's internet industry, the most significant in recent years is the country's accession to the World Trade Organization. Based on the principle of "non-discrimination," "freer trade through negotiation," "transparency and predictability," and "promoting fair competition," both the WTO General Agreements on Trade in Services (GATS) and China's Accession Protocol require the Chinese government deregulate the industry and allow bigger space for foreign companies and individuals to operate the web business in China. At any rate, the WTO requirements will have a huge impact on China's internet and ecommerce industry, and probably on the country's political and social life. Nevertheless, it is still unclear whether the ruling elite have seen this "Trojan Horse" prospect of the WTO rules.

This article, putting China in the context of international and comparative law, will present a general picture of China's current regulatory framework on the Internet and ecommerce. Part I will outline the regulatory environment in general, while part II will examine judicial interpretations of internet-related legal issues, concentrating on domain names and online copyright infringement. Part III will discuss foreign involvement in China's internet and ecommerce market, and the impact of China's accession to the WTO on this question. Part IV, as a conclusion, will make some

general comments on the current legal framework, and discuss future trends in China's internet law.

I. The Regulatory Framework

A. Regulatory Authorities

As mentioned above, the State Council Informatization Leading Group ("SCILG"), established in 1996, is in theory the highest authority for the informatization campaign. Zhu Rongji, the country's Prime Minister, presently served as the Director of the Group, and a number of China's top leaders acted as Vice-Directors. Among them the most conspicuous is Hu Jintao, the country's soon-to-be paramount leader in 2003. However, the SCILG is merely an entity to promulgate state policies with respect to macro administration of Internet and Informatization. In addition, the SCILG is installed with the mission to bring together concerned government entities to coordinate the management of national computer/internet network, among other tasks. It has yet to be seen whether this group will bring about a clearly defined regulatory structure for China's internet and ecommerce market.

To the extent regulation is concerned, the authority falls on a few ministries under China's State Council. However, it is still a puzzle as to which ministry has a final say on the internet and ecommerce issues. The most prominent authority is the 1998-established Ministry of Information Industry (MII),¹⁵ which was authorized to oversee telecommunications, multimedia, satellites, and the internet. It was once very

¹⁵ In the first year of Zhu Rongji's premiership, he launched a massive reform within the central government, aiming at reduce central officials for 50 percent. As a result, the MII was created as a combination of the former Ministry of Electronic Industry and Ministry of Post and Telecommunications.

active in regulating the “e-area”, and its policy pronouncements covered almost all aspects of the internet and ecommerce.

Partly due to the pressure arising out of bureaucratic politics and departmentalism inside the government, the MII in 1999 relinquished control over some sections in this field. In an interview in December 1999, Mr. Wu Jichuan, Minister of the MII, announced, “ISPs will be regulated by the Ministry of Information Industry. ICPs will be regulated by other government agencies.”¹⁶ With regard to ecommerce, “more government agencies will have to be involved.”¹⁷ The Minister is clearly keeping his options open.

Aside from the MII’s role as primary regulator, a number of other government bodies hand specific functions relating to the internet. For example, the Ministry of Public Security reserves the right to regulate internet activities “to ensure social stability.” The State Secrecy Bureau has demonstrated its willingness to regulate the Internet by promulgating the *State Secrets Protection Regulations for Computer Information Systems on the Internet* in December 1999. The State Encryption Administration Commission was specifically created to oversee the manufacture, use, import, and export of encryption products. The State Administration for Industry and Commerce has issued numerous rules governing the registration of online e-commerce activities.

B. Regulations on Internet Service Providers and International Connections

China has two major regulations governing domestic network’s international access, namely, the *Provisional Regulations of the People’s Republic of China Concerning*

¹⁶ “Wu Said China ISPs, ICPs regulated separately”, Chinaonline news, December 17, 1999, at <http://www.chinaonline.com/industry/telecom/NewsArchive/Secure/1999/December/b9121615.asp>.

¹⁷ *id.*

Administration of International Connections of Computer Information Networks (hereafter the Provisional Internet Regulations) and the *Implementation Measures* (hereafter the *Implementation Measures*). The *Provisional Regulations*, promulgated by the State Council in 1996 and revised in 1997, laid out the basic organizational and administrative structure of China's information services network. The *Implementation Measures* was issued in 1998, setting out details of computer network structures and Internet use requirements.

The two regulations established a four-tier system for Chinese information network's international access. First, all connections to overseas computer networks must go through the sole international gateway operated by the newly established Ministry of Information Industry ("MII"), and "no one in this country shall set up or use other channels for international access."¹⁸ Moreover, only "interconnected networks," defined as computer information networks that directly carry out international connections (actually China's backbone Internet operators),¹⁹ are allowed to connect directly to the International network (Internet) through the MII-controlled gateway. The establishment of new interconnected networks is subject to the approval of the State Council.²⁰

Though the *Implementation Measures* identified four interconnected networks, there are currently six backbone operators approved by the State Council, namely, (1)

¹⁸ The *Provisional Regulations of the People's Republic of China Concerning Administration of International Connections of Computer Information Networks* (the *Provisional Internet Regulations*), art. 6.

¹⁹ The *Implementation Measures of the Provisional Regulations of the People's Republic of China Concerning Administration of International Connections of Computer Information Networks* (the *Implementation Measures*), art. 3(2).

²⁰ See the *Provisional Regulations*, *Supra* note 7, art. 7.

the ChinaNet (the largest ISP and backbone operator, owned by China Telecom); (2) CERNET (network for academic and educational institutions, administered by State Ministry of Education); (3) CSTNET (network for research institutions and scientists); (4) China GBNet (Commercial ISP and owned by Jitong Corporation); (5) UniNet (Commercial ISP and own by China UniCom); (6)CNCNET(Commercial ISP, owned by China Netcom Corporation). Those networks constitute the second-tier in China's network structure. Of the second tire interconnections, only ChinaNet, China GBNet, UniNet and CSCNET are authorized to provide commercial services to the Public. Other ISPs comprise of the third tier of the system, which are called "Internet access networks."²¹ ISPs in this tire must subscribe to one of the six interconnected networks to get access to the Internet.²² There are currently about 200 ISPs in this tier. The fourth tier of the system consists of final Internet users (subscribers).

The two regulations, together with the *Notice on Relevant Issues concerning Implementing a Business Permit System for Operating International Connections of Computer Information Networks* released by the State Council in September 1998 (hereafter the "*Business Permit Notice*"), set forth a set of detailed qualification and procedural requirements for the establishment and operation of ISPs. Currently, a special business permit system is implemented by the MII. Those planning to engage in the ISP business shall file applications to local branches of the MII, which are authorized to approve and issue the permits, which are then recorded with the MII. Multi-province ISPs shall apply directly to the MII for permits.²³

²¹ *Id.*, art. 3(3).

²² *Id.*, art. 8.

²³ *Id.*, art. 8. Also see the *Implementation Measures*, *Supra* note 8, art.11.

A work of Byzantine complexity, the four-tier system reflects the Chinese government's desire to control the free flow of undesirable information from outside world; in its words, to prevent "spiritual pollution." The single-channel international gateway enable the government to block any unwanted foreign website, and it also give the government the capacity to keep watch on the online activities of its citizens, even though that would only be theoretically possible.

Moreover, China also has implemented a recording system for final Internet users, pursuant to the *Circular Concerning the Recordal of Computer Information Systems Linked to Foreign Networks Circular* (hereafter the "Recordal Circular"), which was issued by the Ministry of Public Security on January 29, 1996. The Recordal Circular requires all Internet users to register with the local public security bureau within 30 days of the establishment of a link and it also empowers the public security authorities to warn and/or shutdown computer networks that engage in any acts that, among other infringing activities, "jeopardize the safety of computer information networks."²⁴

In practice, this requirement proved to be, at least, a part failure. Since it arguably frustrates people's desire to subscribe Internet services, most ISPs, forced by commercial competition, now include public registration forms in their application packages. In practice, those ISPs will carry out the required registration for their subscribers after they have completed a simple registration form. More conspicuously, a few big ISPs entirely ignored the "mandatory rule" in their business practice. For example, 263.com, one of China's largest ISPs, adopts a business approach with allow anyone with access to telephone line to get access to internet by dialling 2631, 2632

²⁴ The *Circular Concerning the Recordal of Computer Information Systems Linked to Foreign Networks Circular* (the *Recordal Circular*), Art 3.

or other access number provided at any time, without any background check by the government. Interestingly enough, no public authorities have ever questioned this practice.

C. Control over Internet Content Providers (“ICPs”)

China did not have a definitive body of laws or regulations governing the establishment and operation of Internet Content Providers (ICPs) until October 2000, and before that time, policy signals from relevant authorities and officials remain very confusing. First of all, one could not be certain which government organ is in charge of the administration of ICPs. Investors once believed that this was the MII’s business, if only because the MII was so strident. But surprisingly, Mr. Wu Jichuan, the Minister of the MII, in an interview with the *Wall Street Journal* on Dec.10, 1999, expressly indicated that ICPs did not fall under the jurisdiction of his ministry. Instead, he said ICPs would be regulated by other governmental agencies.²⁵ Theoretically, it is possible that all governmental bodies may be able to claim authority over some piece of internet content, as long as it is related to their jurisdiction.

From October to November 2000, the Chinese government promulgated a series of new rules controlling Internet content. Below is a discussion of those rules:

Internet Content Control in General

On September 25, 2000, Premier Zhu Rongji signed into law the long-awaited “*Measures for Managing Internet Information Service*” (hereafter the *ICP Measures*), which took effect on October 1, 2000. The *ICP Measures* stand as the preliminary framework for Internet content control.

²⁵ *Wu said China ISPs, ICPs Regulated Separately* (visited Aug. 11, 2000)

<<http://www.chinaonline.com/industry/telecom/NewsArchive/Secure/1999/December/b9121615.asp>>.

The new law defines ICPs as “Internet Information Services” (IIS, hereafter).²⁶ Moreover, IIS are divided into commercial and non-commercial providers.²⁷ Commercial IIS refer to providing Internet user with information via the Internet in exchange for compensation, or providing web page creation service,²⁸ while non-commercial IIS refer to providing Internet users with open-source and shared-information service via the Internet on a nonprofit basis.²⁹ The *ICP Measures* further requires that Commercial IIS be licensed by the MII and its appropriate provincial branches, and non-commercial IIS report their services for governmental records.³⁰

With regards to governing authorities, the *ICP Measures* note that the regulators of ICPs and ISPs now include the MII and other government agencies in news, publishing, education, public health, pharmaceuticals, industry and commerce, public securities, and national securities.³¹

It is not a surprise that the Measures forbid ICPs from producing, copying, publicizing or disseminating state-classified information or information “that is targeted against the government and that threatens national security.”³² It also bans any Internet content that stirs up racial ethnic hatred, social disorder, crime or violence.³³ Obviously targeted at the Falungong sect, it disallows any information

²⁶ *The Measure for Managing Internet Information Service (the ICP Measures)*, art. 2.

²⁷ *Id.*, art. 3.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*, art. 4 and art. 7.

³¹ *Id.*, art. 18.

³² *Id.*, art.15, para. 2.

³³ *Id.*, para. 4, 6, and 7.

promoting “evil cults” to be disseminated on the Internet, without defining what an “evil cult.” is³⁴

The *ICP Measures* attached a tight string on the business operation of ICPs and ISPs. They are required to maintain records of all the information that has been posted on their websites and all the users who have dialled onto their servers for 60 days, and submit, on demand, those records to the regulatory agencies.³⁵ Any violation of ICPs or ISPs in this regard will be subject to suspension of business operation, or even shutting down of their websites.³⁶

In addition to the *ICP Measures*, Internet content providers in China are also subject to provisions of the *Telecommunication Regulations of the People’s Republic of China* (hereinafter the *Telecommunication Regulations*). With regard to content control, Article 57 of the Regulations states:

No organization or individual may use telecommunications networks to make, duplicate, issue, or disseminate information containing the following:

- (1) Material that opposes the basic principles established by the constitution;*
- (2) Material that jeopardizes national security, reveals state secrets, subverts state power, or undermines national unity;*
- (3) Material that harms the prosperity and interests of the state;*
- (4) Material that arouses ethnic animosities, ethnic discrimination, or undermines ethnic solidarity;*
- (5) Material that undermines state religious policies, or promotes cults and feudal superstitions;*
- (6) Material that spreads rumors, disturbs social order, or undermines social stability;*

³⁴ *Id.*, para.5.

³⁵ *Id.*, art. 14.

³⁶ *Id.*, art. 21.

(7) *Material that spreads obscenities, pornography, gambling, violence, murder, terror, or instigates crime;*

(8) *Material that insults or slanders others or violates the legal rights and interests of others;*

(9) *Material that has other contents prohibited by laws or administrative regulations.*

Special Rules Concerning Internet News

Thus far only one piece of Internet content significantly attracted the government's lust for power, namely, the Internet news reports. There are currently over 700 news-media organizations that operate their own Web sites in China, and many other commercial-Internet operators run news programs. The government has great interest in supervising the online news dissemination since the introduction of the Internet into China, but it did not fix any rules in this regard until 2000. In February 2000, the MII and the State Council Information Office ("SCIO") jointly issued the *Provisional Regulations on Governance of Internet-based News Providers* (hereafter the *Internet News Regulations*) on November 6, 2000. The following points of the regulation are worth noting:

1. The SCIO would be in charge of the administration of all websites engaged in news dissemination in China.³⁷
2. Internet sites run by media organizations at the central government and provincial government *levels* may publish news, but only after obtaining approval from the SCIO. Other media organizations may not set up independent news sites, but they may, upon approval, set up news pages at the websites run by the above-mentioned approved media

³⁷ The *Provisional Regulations on Governance of Internet-based News Providers* (hereafter the *Internet News Regulations*), art. 4.

organizations.³⁸

3. Comprehensive portal websites run by non-news organization do not have independent interview rights, namely, they may not carry any news items based on their own interviews.³⁹ After gaining approval, they may only publish news provided officially by approved news organization.⁴⁰ This is because, according to an official interpretation from the SCIO, “the State has established a large number of specialized news organizations which have a contingent of professionally trained correspondents and have sound mechanisms and perfect rules and regulations governing news coverage, editing and release, their qualifications for news coverage, editing and release have been approved by relevant administrative management departments of the State.”⁴¹ Furthermore, other web sites established by non-news organization are not allowed to carry news of any kind.⁴²
4. Commercial web sites that wish to carry news must first enter into agreements with authorized news outlets in order to protect copyrights. A copy of these agreements must be filed with information office at the relevant levels.⁴³

³⁸ *Id.*, art. 5.

³⁹ *Id.*, art. 7.

⁴⁰ *Id.*

⁴¹ SCIO spokesman: *Provisional Regulation Help Develop Undertaking of Internet News Dissemination*, People’s Daily News, Nov. 8, 2000, available at http://english.peopledaily.com.cn/200011/08/eng20001108_54647.html.

⁴² The *Internet News Regulations*, *supra* note 26, art. 7.

⁴³ *Id.*, art. 11.

5. China-based web sites will not be allowed to link to overseas news web sites or carry news from overseas news media or web sites, without separate approval by the SCIO.⁴⁴

The implication of the *Internet News Regulations* is far-reaching. Despite its positive impacts on online copyright protection and news accuracy, it actually restrains the massive transmission of news, rather than “help[ing] develop [the] undertaking of Internet news dissemination,” as advocated by the government.⁴⁵ Unlike the United States and most Western countries that interfere little with Internet news dissemination, China has been imposed large restrictions in this regard. There is little doubt that commercial portals, which depend on more liberal news reporting to attract “eye balls”, have been dealt a blow by these tough news regulations. The regulations increased their financial burden because they may need to pay more to state-controlled media for news. Moreover, they may be unable to republish news and reports from outside independent sources, as they used to do. One of the most significant impacts is that smaller more creative news websites are unlikely to emerge under the current legal framework, though they are supposed to be the most energetic news powerhouse for the Internet age.

As far as online news and information dissemination is concerned, another piece of regulation, the *State Secretes Protection Regulations for Computer Information Systems on the Internet* (hereinafter the *State Secrecy Regulation*), should never be ignored, if not receiving greater attention. Though major provisions of the regulations are very vague and subject to further interpretation, they clearly put onerous reasonability on online content providers and web news portals. The most

⁴⁴ *Id.*, art. 14.

⁴⁵ See *SCIO Spokesman*, *Supra* note 30.

controversial part of the law is that it requests internet service providers to monitor the online activities (posts, discussions, chats, etc.) of internet users, regardless whether they could be identified or not, and take responsibilities for illegal activities such as disseminating sensitive political news or leaking state secrecy. Article 10 of the regulation states: “For electronic bulletin boards, chat rooms or network groups that are open to the public, the host or its higher level competent department shall strictly carry out its responsibilities concerning the protection of state secrets, establish a complete management system, and strengthen supervision and inspection. If information related to state secrets is discovered, it shall take time measures and report this to the local authority for the protection of secrets.”

The *State Secrecy Regulation* is actually a Sword of Damocles over the head of both ICPs and Internet users, putting regulatory uncertainty which would allow large state discretion in prosecuting freedom of online speech. The most confusing question is that there is no clear definition as to what information constitutes “state secrecy.” As a ICP has no clue as to the clear boundary of sensitive information, it would probably tend to take excessive censorship measures to control web users’ online communications. As a result, outrageous Chinese internet users often see their online messages or discussions deleted by webmasters which would rather infringe on users’ freedom of speech than displease the government.⁴⁶ But for ICPs, if they resist to do so, the nightmare is quite certain: the regulation authorize government authorities to conduct search and inspection on the facilities and information of ISPs and ICPs.⁴⁷ If “illegal actions” were found, the penalty could be very severe. The National People’s Congress, China’s legislative body, even made online activities that

⁴⁶ In certain most popular Chinese BBS, like Qiangguo Luntan (The Strong Country Forum) at <http://www.qgl.com>, or Shiji Shalong (Century Salon) at <http://forum.cc.org.cn>, one could easily find messages complaining that webmasters “arbitrarily deleting” their posts.

⁴⁷ The *State Secrecy Regulation*, Art. 10, para. 3.

endanger “national security and social stability” criminal conducts, again without defining the boundaries of national security and social stability claims.⁴⁸

The rationale behind the Chinese government’s grave concern regarding Internet news reports is not difficult to grasp. Because the internet is about the free flow of information, it acts inevitably as a means of online political communication. Indeed, this may be the very effect of the interaction between “technology and democracy.” Many Chinese websites continue to republish sensitive political and military news, which they either download directly or translates from overseas websites, simply ignoring the fact that this displeases the government. For example, in May 2000 nearly all the major Chinese news websites – including sohu.com, 163.com and sina.com – published the full text of the inauguration speech of Chen Shui-bian, the elected “President” of Taiwan which is viewed by mainland China as a renegade province. The text is highly unlikely to have appeared in any of the Mainland China’s traditional news medias.

Since early 2000, the Chinese government has greatly tightened its control over Internet content. It put some “web dissidents” into jail, and shut down a number of website by political dissidents, including xinwenming.net, the country’s “first-ever”

⁴⁸ The *Decisions of the National People’s Congress Standing Committee on Safeguarding Internet Safety*, passed on December 2000, states that any of the following activities would be prosecuted under the Criminal Law:

- (1) Fabricating rumors or slander, or publishing or disseminating other harmful information through the Internet to instigate subversion of state power, overthrow the socialist system, or incite the splitting of the country to damage national reunification;
- (2) Stealing or disclosing state secrets, information or military secrets through the Internet;
- (3) Instigating national hostility and discrimination through the Internet to damage national unity; Organizing evil cults and contacting cult members through the Internet to damage the implementation of state law and administrative laws and regulations.

pro-democracy website as claimed by some.⁴⁹ Members of the banned Falun Gong spiritual group have also been arrested for using the internet to spread information about their beliefs, attack the personality of the leadership, and organize protests against the government's years-old crackdown against it. Moreover, *The People's Daily*, the voice of the Chinese Communist Party, labeled the Internet an "important public opinion battle front" and warned that "Enemy forces at home and abroad are sparing no effort to use this battle front to infiltrate us."⁵⁰ Some provinces, like Anhui, even established an Internet police force, and one of whose functions is to monitor any anti-government activities. But the internet police is also used to investigate online fraud or crime.

Another favourite means to control by the Chinese government is to classify some information as "state secrecy" and by so doing restricts its publication and dissemination. The *State Secrets Protection Regulations for Computer Information Systems on the Internet* (hereafter the *State Secrecy Regulations*), released by the State Secrets Protection Bureau on January 25, 2000, but was made retroactive to January 1, governs the activities of all Internet users (including individuals, corporations and other organizations), national backbone networks and ISPs.⁵¹ The regulation dictates that "whoever places material on the Internet shall take the responsibility for it."⁵² Units that provide the information (usually those ICPs) are required to establish a

⁴⁹ *Chinese Police Continue Crackdown on "subversive" Websites*, Agence France Presse, Beijing (August 8, 2000) < <http://www.insidechina.com/news.php3?id=186756§ion=default> >.

⁵⁰ *Vigorously Strengthening China's Internet Media Construction*, *People's Daily* (August 9, 2000) < <http://www.peopledaily.com.cn/GB/channel1/10/20000809/179099.html> >.

⁵¹ The *State Secrets Protection Regulations for Computer Information Systems on the Internet* (the *State Secrecy Regulations*), Art. 3.

⁵² *Id.*, Art. 8.

security system for information examination and approval in accordance with certain procedures.⁵³ The most restrictive rule in this regulation comes from article 10, which reads, “all units and users that establish BBS, chat rooms or network news groups shall be reviewed and approved by the relevant state secrets protection authorities. No units or individual shall release, discuss or disseminate information about state secrets on BBS, chat rooms or networks news groups.”

Restrictive as these rules might seem on paper, the Chinese authorities have not been firm in enforcing them. Industry leaders, based on their experience of “information politics” with “Chinese characteristics”, are expecting enforcement flexibility.⁵⁴ Maybe the practical difficulties of restricting foreign or non-approved news from entering China are simply too great. However, the publicity generated by this blizzard of regulations has been enough to drive content providers offshore, and it is hard to see how this can benefit China commercially.⁵⁵

D. Domain Names Registration

The Chinese system on domain name registration before September 2002 perfectly represents the government’s rigid and suspicious attitude toward the Internet, which had been always subject to public criticism. But the recent circular of the Ministry of Information has substantially changed the situation, making China’s domain name registration system in line with international practice.

⁵³ *Id.*

⁵⁴ *Little News From Big China*, Reuters news report, Nov. 7, 2000, available at <http://www.wired.com/news/politics/0,1283,40010,00.html>.

⁵⁵ For example, many off-shore websites in Chinese language, such as <http://cn.yahoo.com>, <http://www.zaobao.com>, <http://www.singtao.com>, are major news source for many Chinese who are not satisfied with state-backed news medias, but the Chinese government neither blocks them nor is able to enjoin them from provide independent China-related news report.

China has established two sets of domain name registration rules, with one for domain names in western character and the one for domain names in Chinese characters. In China they are currently referred to as “English-language domain names” and “Chinese-language domain names”, respectively. According to the current law, domain name governing authorities are the MII and China Internet Network Information Center (“CNNIC”).

The world domain name system, originated from the United States, currently supports no character sets other than ASCII. In 2000, several domain name technology companies, like i-DNS.net, Verisign Global Registry Services and the Multilingual Internet Names Consortium, began to operate experimental testbeds, testing a variety of approaches for internationalized access to domain names.⁵⁶ On November 10, 2000, a number of US-based domain name registry companies, including leading registrars Network Solutions Inc. (NSI) and Register.com, launched Multilingual Domain Name Registration (MDNR), which enables the creation of domain names in Korean, Japanese, traditional and simplified Chinese characters.⁵⁷ The international domain names will include the suffixes .com, .net and .org.

The Chinese has been very concerned with the Chinese-language domain system since the outset of its development, and they managed to develop their own counterpart system through cooperation with foreign companies.⁵⁸ Just a few days before U.S. companies’ introduction of international domain name registration,

⁵⁶ ICANN: *Internationalized Domain Names*, November 3, 2000, Available at <http://www.icann.org/announcements/icann-pr03nov00.htm>.

⁵⁷ For more information regarding the MDNR, refer to <http://global.networksolutions.com/help/multilingual-learnmore>, <http://ml.register.com/faq>, and <http://verisign-grs.com/multilingual>.

⁵⁸ CNNIC: *An introduction of Chinese domain name*, January 18, 2000, available at <http://www.cdnc.org/e-meeting-2000-1-18.shtml>.

China's CNNIC offered on November 7, 2000 their own Chinese character domain name registration services, with the suffixes of .cn, .公司(.corporation, if translated), and .网络(.net, if translated).⁵⁹ Moreover, China's domain name authorities dramatically oppose foreign firms registering Chinese language domain names. They sent complaint to the Internet Corporation for Assigned Names and Numbers ("ICANN"), the world governing authority over domain names registration, arguing that the US government has no right to authorize any company to manage domain names with Chinese characters, because Chinese character domain names "have unique ... cultural and historical implication."⁶⁰ The CNNIC's position was backed by Chinese Domain Name Consortium (CDNC), which is the highest coordinating organization in the Greater China area set up by four Networks Information Corporations (NICs) in Mainland, Taiwan, Macao and Hong Kong. The CDNC issued on October 22 a statement, claiming the NSI's service to be "misleading" and assisting "interest users from mainland China, Taiwan, Hong Kong and Macao should be fully respected and safely guarded in the process of registering, managing and utilizing Chinese-language domain names."⁶¹

To preserve its "sovereignty" over Chinese domain names, Chinese authorities formulated a number of regulations within a very short period of time after the launch of Chinese domain names registration around the world, which, along with the existing rules concerning English-language domain names, will be discussed in turn.

Rules on English-language Domain Names Registration: Two major

⁵⁹ See <http://www.cnnic.net.cn> for more information.

⁶⁰ Jamila Zhou: *Beijing lodges complaint over domain names*, South China Morning Post reports, November 4, 2000, available at <http://technology.scmp.com/Internet/Daily/20001103124528357.asp>.

⁶¹ CDNC: *Public statement concerning NSI's Chinese-language domain name service*, October 22, 2000, available at http://www.cdnc.org/gb-cdnc_nsi_intro-2000-10-22.shtml.

regulations govern English-language domain name registration, namely, the *Provisional Measures for Administration of the Domain Names on China's International Network* (hereafter the “*English Domain Names Measures*”), which was promulgated by the State Council Information Leading Group on May 30, 1999, and its Implementation Rules (hereafter the “*English Domain Names Implementation Rules*”). The two regulations established China's domain names system under the top-level domain name “CN”, which China registered with the InterNIC. The *English Domain Names Measures* formed the CNNIC to be in charge of China's domain name registration. Pursuant to the design of the two regulations, China's second-level domain names are divided into two categories: “industry domain names” and administrative area domain names”. There are six “industry domain names”, i.e., COM for industrial, commercial and financial enterprises; EDU for educational institutions; GOV for governmental agencies; NET for the information centers and operation centers of all interconnected networks and connected networks; AC for scientific research institutions; and ORG for various types of non-profit organizations. There are thirty-four “administrative area domain names”, which are for use by the thirty-four provinces, autonomous regions and municipalities directly under the central government, i.e., BJ for Beijing, SH for Shanghai, HA for Henan, etc.⁶²

Unlike that in U.S. or many other countries where any individual or entity who has a valid credit card can apply a top-level domain name within a few minutes,⁶³

⁶² The *Provisional Measures for Administration of the Domain Names on China's International Network* (the *English Domain Names Measures*), art. 8.

⁶³ For example, pursuant to the policy of register.com, one of the leading domain name registrar in the U.S., to register a domain name, the applicant only need to specify the contact information and credit card billing information. See Register.com's *Frequently Asked Questions* (visited Aug. 22) <<http://www.register.com/faq/getting-started.cgi>>.

China's domain name registration is only open to entities and organizations which are incorporated or registered under Chinese law. Put another way, no individual is allowed to apply for a domain name followed by "CN". Moreover, even a legally registered entity or organization must follow tedious formalities in order to get a domain name. For example, to register a ".com" domain name, a corporation must submit to the CNNIC its business license; to register a ".org" name, the applying organization must submit an approval letter from relevant authorities.⁶⁴ In addition, the primary domain name server which is associated with the registered domain name must be operated within China and provide continuous services for the domain name.⁶⁵ Even though the *English Domain Names Measures* require that the applicant must be one that can independently assume civil liability under Chinese law, the CNNIC specifically allow foreign companies to apply for a Chinese domain name, provided that they use their Chinese established subsidiaries or representative offices as the applicants and that their main name servers associated with the applied domain name are within China.⁶⁶

Insomuch as registration is concerned, domain names are treated like trademarks in many respects. For example, article 11 of the Domain Name Provisional Measures forbidden the registration and use of the following domain names: (1) that include words like "China", "Chinese", "cn", "national", unless special approvals by the relevant governmental authorities are procured; (2) that include titles of administrative areas above county level, unless special approvals by the relevant local government

⁶⁴ The *English Domain Name Implementation Rules*, art. 5.

⁶⁵ See the *English Domain Names Measures*, *supra* note 48, art. 14.

⁶⁶ CNNIC, FAQ Concerning Domain Name Registrations (Aug.22, 2000)

<<http://www.cnnic.net/registration/e-help.shtml>>.

are procured; (3) that are titles of public-known regions, foreign countries and localities, or international organizations. (4) that are common names of industries or commodities; (5) that are trademarks or trade names registered under Chinese law; (6) that are otherwise harmful to state, society or public interest.⁶⁷ The above requirements are virtually copied from the Chinese Trademark Law article 8.

It should be noted that according to the *English Domain Names Measures*, sale or transfer of China-registered domain names is prohibited.⁶⁸ Violation of this provision will result in cancellation of the transacted domain name by the CNNIC.⁶⁹ Moreover, all domain names registered by the seller will be suspended for a period of six month.⁷⁰

Rules on Chinese-language Domain Name Registration: As the first set of Chinese-language domain name regulations, the MII has issued on November 8, 2000 a “*Notice on Chinese-language Domain Name Administration,*” (hereafter the *Chinese Domain Name Notice*), with the intention to standardize Chinese domain name service in China and keep uninvited foreign registrars out of the domestic market. The *Notice* defines the Chinese domain name registration service as a three-part system, namely (1) the registration administration level operated by the CNNIC, (2) registration service level consisting of CNNIC accredited registrars, and (3) registration agency level consisting agents of accredited registrars.⁷¹ The *Notice* specified that any applicant who wishes to become a registrar or an agent of a registrar must obtain

⁶⁷ See the *English Domain Name Measures*, *supra* note 48, Art.11.

⁶⁸ See the *English Domain Name Measures*, *supra* note 48, Art. 24.

⁶⁹ See the *English Domain Name Implementation Rules*, *Supra* note 50, Art. 17.

⁷⁰ *Id.*

⁷¹ *The Notice on Chinese-language Domain Name Administration*, art. 2.

approval from the MII.⁷² Before submitting application to the MII, the said applicant must first get accreditation from the CNNIC if he want to be a registrar, or sign an agency agreement with a accredited registrar if he want to be an agent of an accredited registrar.⁷³ Without acquiring approval first, no one is allowed to conduct Chinese-language domain name service within China.⁷⁴ It is so clear that international registrars like Network Solutions Inc. and Register.com will not benefit from China's domestic market, if they are not able reach an agreement with Chinese authorities concerning those disputed technical and "sovereignty" issues.⁷⁵

In the administrative level, the CNNIC released the *Trial Administrative Measures for Chinese-language Domain Name Registration* (hereafter the *Chinese Domain Name Measures*) several days after the promulgation of the MII's *Chinese-language Domain Name Notice*. As a set of procedural rules, most provisions of the *Chinese Domain Measures* are substantially similar to the above-discussed *English Domain Names Measures*. Nonetheless, there is a significant change in the *Chinese Domain Names Measures*, that is, most of the restrictions on the words forming an English domain name are no longer applied to Chinese-language domain names. Theoretically, a domain name can contains words like "China," "national," or region names or public known industry names, as long as it is not harmful to the nation and the society.⁷⁶

⁷² *Id.*, art. 3.

⁷³ *Id.*, art. 4.

⁷⁴ *Id.*

⁷⁵ International registrars have already gained huge revenue from China, because they have already completed registration for hundreds of thousands of Chinese through their agents in China before the MII *Notice* took effect.

⁷⁶ The *Trial Administrative Measures for Chinese-language Domain Name Registration*, art. 7.

E. Commercial Encryption Regulations

As its name indicates, information is of primary concern in the information society. The protection of information from loss, unauthorized altering, or disclosure is therefore a major concern.⁷⁷ In information security, encryption plays a vital part. As a tool for keeping communication secret, it has been widely used in intelligence, diplomacy, business and wars. Since encryption involves many aspects of national security, private privacy and commercial success in IT industry, it has emerged as a major problem for governments: how should they balance the conflicting interest of privacy and information security on one hand with the interests of law enforcement and national security on the other? While most governments still keep a close watch on the encryption technology, the general trend is that governments have started to de-regulate commercial encryption.⁷⁸

With respect to commercial encryption, the Chinese government played an “arrest and release” game for foreign software companies. It issued the *Regulation of Commercial Encryption Codes* (□□□□□□□□ hereafter *the Encryption Regulations*) on October 7, 1999, which was supplemented on November 8, 1999, requiring all foreign and domestic firms or individual using encryption technology to register with the government. However, partially due to aggressive lobbying efforts by U.S. trade officials and businesses to see the regulations removed, the State Encryption Administration Commission (“SEAC”) issued an clarification letter regarding the

⁷⁷ BERT-JAAP KOOPS, *THE CRYPTO CONTRROVERSY* 23 (Kluwer Law International 1999).

⁷⁸ For example, the United State de-regulated the export of encryption software in 1999, removing restrictions it had long placed on what is considered “high-end” encryption software such as the so-called “128-bit” products.

enforcement of the *Encryption Regulations*, which virtually reversed the application of the regulations to most of the commercial softwares, indicating that the Encryption Regulations “only limit specialized hardware and software for which encryption and decoding operations are core functions.”⁷⁹ “Other products, including wireless telephones, Windows software, browser software, etc., are not included in the scope.”⁸⁰

However, since the *Encryption Regulations* has not been repealed in any respect, but was only limited in terms of application scope, it remains to be the major law with respect to encryption. As a result, it is still meaningful to review the relevant provisions of the *Encryption Regulations*.

The *Encryption Regulations* define “commercial encryption” as “encryption technology and encryption products used for encryption-based protection or security certification of information which does not have State secrets content.”⁸¹ It provides that commercial encryption technology is a state secret, which is therefore also subject to the *Law of the People’s Republic of China on Protecting State Secrets* (issued on September 5, 1988 and effective on May 1, 1989). The *Encryption Regulations* set up a watchdog for commercial technology, namely, the State Encryption Administration Commission (“SEAC”).

The regulations laid out the following rules concerning commercial encryption:

1. Regulations of Research and Production

⁷⁹ Alexa Olesen, *China Reverses Encryption Regulations*, VirtualChina.com news (March 14, 2000), available at <http://www.virtualchina.com/news/mar00/031400-cryptoreg-alo-jsl.html>.

⁸⁰ *Id.*

⁸¹ The *Regulation of Commercial Encryption Codes* (the *Encryption Regulations*), Art. 2.

Scientific research on commercial encryption will be carried out by units designated by SEAC. Such units must have the appropriate technical capability and equipment.⁸² In the same way, only units designated by the SEAC are permitted to produce commercial encryption products.⁸³ The types and models of commercial encryption products produced by designated producers must be approved by the SEAC,⁸⁴ and they must pass the quality inspections of inspection agencies appointed by the SEAC before being put into use.⁸⁵

2. Regulations of Sales

Only SEAC licensed PRC entities will be allowed to sell commercial encryption products.⁸⁶ Before it issues a sale permit to an entity, the SEAC will examine the entity to ensure it has: (1) personnel who are knowledgeable in commercial encryption products and after-sales services; (2) a sound system of rules for sales service and security control; and (3) an independent legal person status.⁸⁷ The regulations also impose a compulsory registration system, which requires that commercial encryption product sellers must truthfully record the actual user's name, address and organization ID number (or resident ID number), and the use to which each product is put.⁸⁸

3. Regulation of Import and Export

⁸² *Id.*, art. 5.

⁸³ *Id.*, art. 7.

⁸⁴ *Id.*, art. 8.

⁸⁵ *Id.*, art. 9.

⁸⁶ *Id.*, art. 10.

⁸⁷ *Id.*, art. 11.

⁸⁸ *Id.*, art. 12.

The approval of the state encryption administration authorities is required for the import of encryption products and equipment containing encryption technology. Approval is also required for the export of encryption products.⁸⁹ No sale of foreign commercial encryption products is allowed within China.⁹⁰

4. Regulations of Usage

Units and individuals are only allowed to use commercial encryption products that have been approved by the state encryption administration authorities. They may not use encryption products they have researched and produced by themselves or that have been produced outside China.⁹¹ Furthermore, foreign organizations and foreign individuals must obtain approval for the use of encryption products and components in China.⁹² Users of commercial encryption products may not transfer their commercial encryption products. Any malfunction of an encryption product must be repaired by a unit designated by the state encryption administration authorities.⁹³

The above rules have raised grave concerns among foreign investors over China's Internet policy. Though the SEAC clarification letter alleviated some concerns, the worries have not been completely removed. As long as the *Encryption Regulations* stay effective, it creates the potential for close, if not invasive, supervision by government authorities' over computing activities in China.

F. Rules on Electronic Contract Formation, Electronic Signature and Legal Proof Issues

⁸⁹ *Id.*, art. 13.

⁹⁰ *Id.*

⁹¹ *Id.*, art. 14.

⁹² *Id.*, art. 15.

⁹³ *Id.*, art. 16.

The only rule that may govern electronic contract formation is Article 11 of the *Contract Law of the People's Republic of China* (hereafter the “*Contract Law*”), which explicitly recognizes the effect of electronic message. The *Contract Law* provides that a contract may be made in writing, in an oral conversation, or in any other form.⁹⁴ Where a contract shall be in writing if a relevant law so requires or the parties have so agreed,⁹⁵ the writing requirement can be satisfied by “electronic message including telegram, telex, facsimile, electronic data exchange and electronic mail, etc., which is capable of expressing its contents in a tangible form.”⁹⁶

With respect to offer-acceptance process, the general provision of the Chinese *Contract Law* is that an offer becomes effective when it reaches the offeree.⁹⁷ When electronic contract is involved, the effectiveness of an electronic offer depends on whether a specific recipient computer system has been designated by the offeree. If the offeree (recipient of an electronic offer) has designated a specific system to receive the offer, the time when the electronic offer enters into such specific system is deemed its time of arrival. If, however, no specific system has been designated, the time when the electronic offer first enters into any of the recipient's systems is deemed its time of arrival.⁹⁸ The same rule applies to determine the effectiveness of the offeree's acceptance.⁹⁹

A question that is closely related to electronic contract formation as well as

⁹⁴ The Contract Law of the People's Republic of China, art. 10.

⁹⁵ *Id.*

⁹⁶ *Id.*, art. 12.

⁹⁷ *Id.*, art. 16, para. 1

⁹⁸ *Id.*, para. 2.

⁹⁹ *Id.*, art. 26.

information security is the legality and admissibility of electronic signatures. The terms “digital signature” is usually a term of art to denote an electronic signature that has been produced through the use of public key cryptography. In this sense, a digital signature is part of message that indicates the source of the message and signifies that the message has not been altered in transit. For the public key cryptography to work, parties need to maintain a public key infrastructure, or as they do in most cases, to find a trusted third party to be responsible for binding an individual with the public key. One type of trusted third party is a certification authority (“CA”). Generally, these issues have been the subject of much international debate and have been addressed in documents such as the 1996 *UNITRAL Model Law on Electronic Commerce* (with additional article 5 as adopted in 1998)(hereafter the *UNITRAL Model Law*)¹⁰⁰. In the United States, President Clinton signed into law in June 2000 the *Electronic Signatures in Global and National Commerce Act*, which gives online contracts the same legal force as equivalent paper contracts.

China has not enacted any national law governing the operation of electronic signatures or the admissibility of electronic message/signatures as legal evidence. The Chinese *Civil Procedure Law* admits seven forms of evidence¹⁰¹, none of which explicitly covers electronic message, and Chinese scholars are divided in classifying electronic message as “documentary evidence” or “audio-visual material evidence.” Since “audio-visual material evidence” is not able to stand alone as independent

¹⁰⁰ Available at <http://www.uncitral.org/en-index.htm>.

¹⁰¹ They are: 1)documentary evidence; (2)material evidence; (3) audio-visual material; (4)testimony of witnesses; (5)statements of the parties; (6) expert opinions; and (7) records of inspection. *See* the Civil Procedure Law of the People’s Republic of China, art. 63.

evidence,¹⁰² more and more commentaries prefer to view electronic message as “documentary evidence.”¹⁰³ This interpretation will encounter another conflict with the *Civil Procedure Law*, which has an article stipulating, “any document submitted as evidence must be the original.”¹⁰⁴ However, in practice, Chinese legal scholars tend to construe the relevant evidential rules of the *Civil Procedural Law* in line with the *UNCITRAL Model Law*. They argued that in order to facilitate e-commerce in China, Chinese courts should follow the Model Law rules.¹⁰⁵ According to Article 8 of the Model Law, the “original form” requirement of a particular jurisdiction is met if there exists a reliable assurance as to the integrity of the data message from the time it was first generated in its final form, and the information is capable of being displayed to the person to whom it is to be presented.¹⁰⁶ If Chinese courts are so open-minded to follow this rule, it will be a very positive step towards creating a legal framework that is conducive to e-commerce.

There are some more specific local rules governing electronic certificates. Shanghai, the biggest city in China, once again leads the nation. The Shanghai Municipality published the *Provisional Methods on Price Administration of E-commerce* (hereafter the “*Shanghai Provisional Methods*”), which took effects on January 1, 2000. Besides those provisions on pricing policies in relation to digital

¹⁰² Pursuant to Article 69 of the Chinese Civil Procedure Law, in order to determine the admissibility of audio-visual material, courts must verify and examine audio-visual material in combination with other evidence.

¹⁰³ PKU Law Weekly, Issue No. 41 (online version) (August 29, 2000), available by subscribing to weekly@law.pku.edu.cn.

¹⁰⁴ Chinese Civil Procedure Law, art. 68.

¹⁰⁵ PKU Law Weekly, *Supra* note 89.

¹⁰⁶ *UNCITRAL Model Law On Electronic Commerce*, Art. 8.

certificates in the city, the *Shanghai Provisional Methods* also set up Shanghai's first authorized CA, providing that the Shanghai Electronic Certificate Authority Center Co., Ltd is the only institution responsible for the issuing, verification and management of digital certificates.¹⁰⁷ Though there is no particular provision in the Provisional Methods stating the legal status of digital certificates, they imply an official recognition in this respect.

G. Regulations on Online Securities Trading

CSRC (China Securities Regulatory Commission), the Chinese version of SEC, has released at least two major regulations concerning online securities transactions. The *Interim Regulations for the Online Securities Brokerage Sector* (hereafter the *Online Brokerage Regulations*), issued by the CSRC on March 30, 2000, provide a comparatively comprehensive regulator environment for the online trading business. The second one is the recently issued *Procedures for the Examination and Approval of Securities Companies for Engaging in Online Brokerage Activities*, which, as its name indicates, set out detailed procedures for securities firm's application to be an online trading licensee.

The *Online Brokerage Regulations* allow qualified securities companies to carry out online securities commission ("online commission"), which is defined as "a service provided by securities companies through the Internet, whereby investors who open an account with these companies can give instructions for securities transactions and obtain the results of these transaction."¹⁰⁸ The law also set technical standards, service standards and information disclosure requirements for online trading activities.

¹⁰⁷ The *Provisional Methods of Shanghai Municipality on Price Administration of E-commerce* (the *Provisional Methods*), Article 4.

¹⁰⁸ The *Interim Regulations for the Online Securities Brokerage Sector*, Art. 2.

Under the *Online Brokerage Regulations*, on-line securities trading is limited to securities companies with brokerage licenses, which must apply for online brokerage business licenses from the CSRC. Pursuant to Article 26 of the *Online Brokerage Regulations*, institutions other than securities companies shall not engage in the online commission business, either overtly or in a disguised form.¹⁰⁹ Online trading Web sites run by IT companies which do not have brokerage licenses are therefore prohibited from engaging in on-line trading.¹¹⁰ Such companies could, however, provide consulting and other securities-related value-added services such as stock quotes, historical statistics, and research reports, etc.

As for the operation of the application of online brokerages license, according to the newly issued *Procedures for the Examination and Approval of Securities Companies for Engaging in Online Brokerage Activities*, after accepting application documents from applying securities companies, the CSRC shall invite experts to organize an examination panel that examines matters related to transactional and technical readiness of the applying company.¹¹¹ Subsequent to a full discussion, the examination panel shall make a recommendation decision by vote, and the CSRC shall make a final decision on whether to approve the application, based the panel's examination opinion.¹¹² Companies whose application is not approved may apply for reconsideration within 60 days.¹¹³ Companies who fail to pass the reconsideration

¹⁰⁹ *Id.*, art. 26.

¹¹⁰ *Id.*

¹¹¹ The *Procedures for the Examination and Approval of Securities Companies for Engaging in Online Brokerage Activities*, Art. III.

¹¹² *Id.*, art. IV.

¹¹³ *Id.*, art. V.

process may reapply in the next year, starting from the day that the CSRC made its written decision.¹¹⁴

H. Local Regulations Concerning E-Commerce Registration, Online Advertising And Consumer Protection

Beijing and Shanghai are playing a very positive role in regulating online business activities. Shanghai is already taking the lead in encouraging e-commerce and, as is often the case with liberalizing policies in Shanghai, it is expected that the local authorities will forge ahead without the central government's blessing. For instance, in June 1999, the Shanghai Foreign Investment Commission and the Office of Shanghai National Economy and Society Information Leading Group jointly issued the *Trial Opinions Regarding Participation by Foreign Investors in Shanghai's Information Technology Services Industry* in light of Shanghai's specific circumstances, circumstances that involved numerous foreign invested information services enterprises utilizing the Internet. As noted above, Shanghai is the first municipality in China that issued regulations governing the operation of digital certificates. However, recently Beijing seems to be more active because it has provided a relatively comprehensive legal framework for e-commerce registration, online consumer protection and advertising.

Beijing issued on March 28, 2000 the *Circular of the Beijing Municipal Administration for Industry and Commerce Concerning E-commerce Activities* (hereafter the *Beijing Registration Circular*). The Circular is a pioneering local regulation aimed at regulating the proliferating business activities on the Web by establishing a system of registration and recordation for on-line business activities. According to the definition of the Circular, the law governs profit-making activities

¹¹⁴ *Id.*

on the Internet, as well as the acts of image designing, product publication, auctions and advertising.¹¹⁵ Under the Circular, e-commerce companies are required to apply for an e-commerce operation registration if they engage in any of the business activities specified in the Circular.¹¹⁶ The Beijing Municipal Administration for Industry and Commerce (“BMAIC”) provides approved applicants with an electronic seal over the Internet. The e-commerce company should then post the registration seal on the homepage of its portal web sites.¹¹⁷ This provides a centralized system for monitoring e-commerce companies, and helps to protect the interest of consumers.

Beijing also has touched the consumer protection arena, which has not been well addressed by China’s national consumer protection law. Being aware that some online sellers taking advantage of the anonymity that e-commerce offers, the BMAIC issued the *Circular on Protecting the Legitimate Rights and Interests of Consumers in Network Economic Activities* on July 7, 2000. The new law requires business operators who sell goods or offer service via websites do the following: (1) provide consumers with their actual place of registration, methods of contract or the location where transactions are carried out; (2) state explicitly the price of goods to be sold or service to be offered, and not offer false prices for goods or services; (3) state clearly the manufacturer, place of production and the quality of the goods offered; and (4) not

¹¹⁵ The *Circular of the Beijing Municipal Administration for Industry and Commerce Concerning E-commerce Activities* (the *Beijing Registration Circular*), art. 1.

¹¹⁶ Under Art. I of the *Beijing Registration Circular*, those business activities include: (1) executing contracts, doing business and trading on the Internet; (2) releasing commercial advertisements on the Internet; (3) carrying out image designing and product publication activities on the Internet; (4) Specializing in providing Internet-access service, network technical support service, ecommerce and information source service on the Internet, and (5) other profit-making activities. *See, id.*, art. I.

¹¹⁷ *Id.*, art. IV.

make misleading or false claims on websites either through advertising or by other methods. The Circular provides a website, <http://hd315.gov.cn>, for consumers to make complains.¹¹⁸

As to online advertisement, the relevant circular issued by the BMAIC on May 16, 2000, the *Circular on the Qualifications for Enterprises to operate Internet Advertisement*, set out a flexible framework in this regard. Under the Circular, advertisement entities which has already obtained advertisement operation licenses may freely conduct Internet advertisement business.¹¹⁹ Moreover, other Internet companies may advertise on their own websites, provided that the advertisements are made by licensed advertisement agencies.¹²⁰ If Internet companies want to conduct full Internet advertisement service, they must reregister with the BMAIC to expand their business scope to include advisement business.¹²¹

So far Chinese legislators at national and local levels have addressed the above aspects of the Internet and e-commerce fields. Their efforts probably reflect the characteristics of an emerging national legal framework for regulating online business activities. Other aspects, such as electronic payment and credit systems, electronic recordkeeping and internal control, Internet privacy, liability for deficient service, etc., though very important for any information society, have not got enough attention in China.

¹¹⁸ *Get the fraud out of the baud: Beijing issues laws to regulate e-commerce*, Chinaonline news (July 13, 2000) <http://www.chinaonline.com/issues/internet_policy/currentnews/secure/C00070709.asp>.

¹¹⁹ The *Circular on the Qualifications for Enterprises to operate Internet Advertisement*, Art. 2.

¹²⁰ *Id.*, art. 3.

¹²¹ *Id.*, art. 4.

II. JUDICIAL VIEWS ON INTELLECTUAL PROPERTY DISPUTES: DOMAIN NAMES AND COPYRIGHT

Theoretically China is civil-law country, where a judicial adjudicated case, even one made by the Supreme Court, does not set a precedent but is rather only an individual application of legislations.¹²² However, because of China's involvement with common law jurisdictions (especially the United States) in the "reform era", and also because of practical need, judicial opinions laid out by courts in their judgments have become more and more important in the Chinese legal system. In the new areas generated by technology and economic development which have not fully addressed by legislations, court opinions of national economic centers were often followed by lower courts within the same jurisdiction as well as courts of neighboring jurisdictions.

Though China has enacted a variety of Internet related regulations, few of them are concerned with dispute resolutions of private parties. When Chinese courts are presented with Internet cases, in many situations they have no alternatives but to interpret existing laws in a very constructive way and, sometimes, to invent some new rules under the coat of applying "general principles of law." As we shall see in the following cases, the Chinese judges were trying to put the unprecedented domain name and online copyright problems into conventional wisdom. They did generate some decisions favoring rights holders and foreign investors, but have not provided a legal certainty in this respect.

¹²² The Supreme Court of the People's Republic of China, however, is authorized to interpret law, which has turned out to be the Court's most important function. According to the *Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law* (June 10, 1981), the Supreme Court is authorized to interpret "questions involving the specific application of laws and decrees in court trials." See Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 *Journal of Chinese Law* 145, 165 n. 87 (1993).

A. Domain Name Dispute Decisions

In the domain name registration arena, the first question is always the conflict and mutual accommodation of the rights of trademark owners with the rights of domain names holders. It is often the case that someone registers others' trade names or trademarks as domain names when domain name registration agencies assume no responsibility to protect trademark owners' rights. For this purpose, domain name holders who registered someone else's trademarks as domain names are termed as "cyber-squatters."¹²³ It is argued that cyber-squatters have made no contribution to the goodwill of the domain name and register with the intent to profit either by selling the domain names to the legitimate trademark owners or by diverting traffic to its website. In the case of cyber-squatting, Chinese courts seem to be more favorable to trademark owners.

A Chinese court, in the "IKEA" decision, ruled that at least internationally and domestically well-known trademarks should be protected from cyber-squatting. The case concerned a dispute between IKEA, the Netherlands-based furniture manufacturer and CINET (Guowang), a Beijing ISP. The CINET is one of the most notorious cyber-squatters in China. It had register more than 2,000 domains in China, including "DuPont" and "Procter & Gamble." When IKEA decided to jump into China's cyberspace in 1999, it found that the domain www.IKEA.com.cn it desired had already been registered by the Beijing company years ago. IKEA filed a suit with the Beijing Number Two Intermediate People's Court of Justice, demanding that CINET change its website registration. In a landmark ruling, the court decided that CINET had infringed upon the trademark rights of IKEA and engaged in unfair

¹²³ Preston M. Torbert, *Cyber-squatters beware: IKEA case a telling one* (July 5, 2000)

<http://www.chinaonline.com/commentary_analysis/legal/currentnews/secure/c00070541.asp>.

competition, and thus the court ordered CINET to stop using the website and cancel the registration it made in November 1997.¹²⁴

The IKEA case appears to be the first court ruling on a domain name involving a foreign company and the first ruling by a Chinese court on what constitutes a well-know trademark, which was always decided by the State Administration for Industry and Commerce (“SAIC”) according to its internal regulations. The court determined that by using the IKEA name in its address CINET prevented IKEA from exercising its trademark rights on the Internet. The court also found the many of the CINET registered domain names had not been “actively used,” indicating that CINET had registered them because they were “waiting for a good price to sell,” according to the verdict.¹²⁵ Based on the *Paris Convention for the Protection of Industrial Property* and relevant Chinese laws, the court judged that CINET was involved in unfair completion.¹²⁶

CINET lost its footing again in the “Procter & Gamble”(“P&G”) case and is being prosecuted by DuPont in an ongoing case as of the date of this writing. In the case of P&G, CINET was not only ordered to cancel Procter & Gamble domain name but also to compensate P&G for 20, 000 renminbi (US\$2, 415) in loss, which sets an indemnity precedent on cyber-squatting.¹²⁷

However, these two cases should not give out an impression that the Chinese courts are willing to treat domain names exactly as trademarks. In another famous

¹²⁴ Zhao Huanxin, *IKEA wins back domain name*, Chinadaily Report (June 23, 2000)

<<http://www.chinadaily.com.cn/cndydb/2000/06/d3-ikea.623.html>>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *You name it, you keep it: CINET loses P&G cyber-squatter case*, Chinaonline news (7 July 2000)

<<http://www.chinadaily.com.cn/cndydb/2000/06/d3-ikea.623.html>>.

domain dispute case, a Chinese court held that a trademark owner does not have exclusive rights over his trademarks against a domain name registrant. In the “PDA” case, the plaintiff, holder of the “PDA” trademark, discovered that the web address “pda.com.cn” has been registered by the defendant, a PC dealer. Moreover, the defendant displayed a “PDA” logo on its homepage. The plaintiff brought an action based on trademark infringement and unfair competition at the Beijing Number One Intermediate People’s Court of Justice.¹²⁸ The court held that “the trademark infringement and unfair competition are not established because: (a) using a registered trademark as part of domain name is not the trademark owner’s exclusive right and it is also outside the scope of trademark infringement according to the Trademarks Law of the PRC; (b) PDA is the generic name of laptop computers and the plaintiff was not able to prove it is a well-known trademark, or the public has been misled because of the defendant’s use of the mark.”¹²⁹

The Beijing Intermediate Court’s point of views gained support the Beijing Higher Court, which issued on August 2000 *Guidelines for Trying Civil Intellectual-Property Rights Case Arising from the Registration and Use of Domain Names*.¹³⁰ The *Guidelines* noted that the malicious registration of others’ famous brand names as domain names violates the principle of good faith in commerce and constitute unfair competition. The courts must find the following three aspects before they determine

¹²⁸ Judge Li Dongtao: *A Special Domain Name Case*, Computer World (last visited July 20, 2000)

<<http://www.computerworld.com.cn/99/law/edefault.asp> >.

¹²⁹ *Id.*

¹³⁰ Xing Weiguo & Niu Aimin, *Beijing Higher Court began to Standardize the trial of domain name disputes*, Xinhua News Agency (August 30, 2000) <

<http://www.peopledaily.com.cn/GB/channel4/976/20000831/210725.html> >.

there exists a malicious domain name registration: (1) the domain name is similar or identical to the trademark or business name of a right holder; (2) the domain name holder does not have any prior rights over the domain name mark or logo; and (3) the domain name holder has a malicious intent in registering and using the domain name.

¹³¹ For purpose of the *Guidelines*, “malicious conduct” refers to: (a) the proposed compensated transfer of domain names by domain name holders to the owners of brand names through selling, leasing or other means; (b) the intentional confusion of domain names with other’s trademarks or business names so as to lure Internet users to access web pages or other online services with the purpose of making a profit; (3) the registration of domain names with purpose of preventing others from registering trademarks or business names as domain names; or (4) other domain name registration with the purpose of harming the business reputation of others.¹³² If the court find fault on the part of domain name holder, it can enjoin the use of the domain, order its cancellation, and even render damage award.¹³³

It is very clear the *Guidelines* will be the major regulations governing most domain names cases in China, largely due to the fact that China’s sole domain name registrar, the CNNIC, is located in Beijing, and therefore Beijing’s courts have jurisdiction over almost all Chinese domain name disputes because it is usually the “place of tort committed” according to China’s Civil Procedure Law.

B. Online Copyright Infringement Cases

¹³¹ Mei Yulan & Niu Aimin, *Beijing issued measures governing domain name disputes*, Xinhua News Agency (August 31, 2000) < <http://www.peopledaily.com.cn/GB/channel4/976/20000831/210725.html> >.

¹³² *Id.*

¹³³ *Id.*

Cases concerning infringement of copyright of works placed on the web has occurred frequently in China, while the 1991 Copyright Law of the People's Republic of China has no clear provisions dealing with online copyright disputes. When faced with these cases, the Chinese courts boldly interpreted existing Chinese copyright law, giving them new meanings for the Internet age.

1. Nature of online dissemination of copyrighted works and ISP/ICP's liabilities

In the nationwide-known case *Wangmeng and others v. Century Internet Communications Technology Co. Ltd.*, a Beijing court held that, except as otherwise provided by the law, any entity or individual with publicly exploits others works without authorization, constitutes copyright infringement.¹³⁴ The case involved a dispute between six famous Chinese writers and one of China's earliest ISP/ICP. The defendant established on its website a novel section, which carried a lot of novel stories by Chinese writers, including those authored by the above six writers. The works were uploaded by a special group in charge of the maintenance of this section on the website, which got the works either by downloading them from other websites or from novel fans who emailed the works to the group for free.¹³⁵

The defendant argued that existing Chinese law had no provision on whether the dissemination of other's works through the Internet required prior consent from the copyright owners concerned or how to pay the copyright owners remunerations. It

¹³⁴ Ren Hong and Zhang Guoliang, *Wang Meng and Other Five Writers v. Century Internet Communications Technology Co. Ltd. Respectively for Copyright Infringement*, 22 *Zhongguo Falu* (China Law) (January 2000) <http://www.newchinalaw.com/chi_law/English/index.htm>.

¹³⁵ *Id.*

maintained that it was not the first one to put the works on the Internet, and therefore, it was not aware of the exploitation of the plaintiffs' works on the Internet.¹³⁶

The first instance court, the Beijing Haidian District Court, interpreted that current copyright laws covers online publications and distributions. It held:

“Paragraph 5 of Article 10 of the Copyright Law of China does not exhaust or enumerate all means of exploiting works. With the development of science and technology, new media of works will emerge and the range of exploiting works will be expanded. it should be affirmed that the dissemination of works through the Internet was one of the ways of using works, and the copyright owners of works had the right to decide whether their works could be disseminated through the Internet. Although the dissemination of works through the Internet is somewhat different from the ways of exploiting works through publication, circulation, public performance and play as defined by the Copyright Law of China, it is meant in essence to realize the dissemination of works to the general public, to enable viewers or listeners to know the content of the works concerned. The difference among the ways of disseminating works should not affect the right of the copyright owners to control the dissemination of their works.”¹³⁷

As to the defendant's liabilities, the court ruled that the defendant, as an ISP/ICP, was an infringer, because it saved the works on its web servers and made it available to everyone who visited the website.¹³⁸ The first instance court's decision was fully upheld by the appeal court. The most prominent feature of the case is that Chinese courts began decide cases by relying on its own interpretations of legislative intent.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

The appeal court held that, since the legislative intent is to protect the exclusive right of copyright owners, it is naturally to reason that the law governs online use of works, which is only one of the ways of using works.¹³⁹ This is very encouraging news for copyright owners who are concerned with their rights being infringed in China.

2. Determining authorship of online works

The Chinese courts also dealt with cases concerning identification of authors of works published on the Internet. Generally Chinese judges' view is that it is the defendants' burden of proof to prove the plaintiff is not the legitimate author. In the "3D sesame Street" case, an article entitled "Joking Talk about MAYA" was uploaded to a webpage called "3D Sesame Street", with the author name "Wufang." Later, the article was published on a newspaper with the name "Wufang" but not contribution fee was paid. The plaintiff claimed "Wufang" was his penname and sued for copyright infringement, but the defendant insist that the plaintiff prove he was "Wufang" first.¹⁴⁰ The Bieing Haidian District Court, upon the finding that (1) the article was first published on "3D Sesame Street" webpage and that (2) the webpage was the plaintiff's homepage because the plaintiff was in control of the homepage access, ruled that the plaintiff was assumed the true author of the article, unless the defendant could provide reasonable evidence to prove the contrary.¹⁴¹

¹³⁹ *Id.*

¹⁴⁰ Judge Li Yanrong, *A few Problems on the Judicial Proteciton of Copyright of Works Placed on the Web*, 21 *Zhongguo Falu (China Law)* 77, 78 (1999). And see Judge Li Dongtao, *The First Internet-related Case of Copyright Infringement in PRC* (last visited July 20, 2000) <<http://www.computerworld.com.cn/99/law/edefault.asp>>.

¹⁴¹ *Id.*

As indicated in the above cases, Chinese courts touched some respects of online copyright infringements and preferred to protect the rights of true copyright owners. However, in a traditionally civil law country like China, the judges' enthusiasm cannot last long without legislative backup. As pointed out by a Chinese judge, the online copyright problem "must be tackled through the joint efforts of legislature, judicial authority and the jurisprudence circle."¹⁴²

III. POLICIES AND REGULATIONS FOR FOREIGN INVOLVEMENT

It is apparent that there is tremendous potential for foreign investment in Internet-related business in China, given China's fast growing need for network infrastructure and online service. However, a number of barriers stand in the way.

A. ISPs and ICPs

Under current laws and regulations, foreign investment in the areas of ISPs and ICPs is generally not allowed. As noted previously, China's Internet networks are controlled by a few state-backed backbone service operators, of which only China Telecom, China Unicom, China GBNet, China Netcom and JiTong Corporation are authorized to sell access to other ISPs. Needless to say, the charges are considerably high. Even though, foreigners are not entitled to buy. As for ICP service, it is argued that since China currently has not set a definitive body of laws to govern ICPs, and theoretically ICPs do not own or operate any telecommunications networks or facilities in China, therefore ICPs should not be classified as engaging in the telecommunications business that is explicitly not opened to foreigners. As a result,

¹⁴² Judge Li Yanrong, *Supra* note 126, at 79.

ICPs should be confined by the relevant foreign investment restrictions.¹⁴³

However, this is not the majority view held by China Internet law observers, both because of MII's recent negative policy announcements, and certain provisions in the existing laws.

Under the 1995 released *Defined Scope of Liberalized Telecommunications Business* by the Ministry of Post and Telecommunications (MPT), predecessor of the MII, computer information service business and email service business were classified as two of five value-added telecommunications services liberalized for operation by non-State owned enterprises. The ordinance defined computer information service business as using database technology to collect, process and deposit data to form a user database, using the public telecommunications network to connect the database to users' computer terminals and allowing users to use telephone lines to access the database by entering users ID and passwords and to search and retrieve information contained in the data base.¹⁴⁴ It is apparent that Internet content service would fall within the definition and therefore would be considered to be value added telecommunication service, which are barred from foreign investment. Apart from this ordinance, Article 13 of the *Administrative Measures for International Connections of China Public Computer Interconnected Networks* (the "Public Network Measures") also provides that all domestic computer information service operators utilizing information resources on the international Internet shall be subject to approval in accordance with pertinent rules applicable to the liberalized

¹⁴³ Xiaohu Ma and Jun Deng, *China' Regulations of the Internet and Related Legal Issues*, Morrison and Foerster LL.P online publications, (last visited August 20, 2000)

<<http://209.0.110.65/mofocgi/getpractlong?INTERNAT,0647CHINAREG>>.

¹⁴⁴ *Id.*

telecommunications businesses, indicating that Internet content services are to be treated as telecommunications businesses and that ICPs are treated the same as other telecommunications operators.¹⁴⁵

The latest stipulation concerning foreign involvement in China's Internet market came from the above discussed *Measures for Managing Internet Information Service*. According to the *Measures*, ICPs and ISPs must obtain approval from the MII before they are allowed to be listed on the domestic market or overseas market or establish joint ventures and partnerships with foreign investors.¹⁴⁶ The percentage of foreign capital in ICPs or ISPs should comply with relevant rules and regulations.¹⁴⁷ The question, however, remains that what are "relevant rules and regulations."

However, in practice the MII is enforcing this policy with "big mouth" but "soft hands". Data show that millions of US money has poured into China's Internet sector and that more than 50% of ICPs have foreign funding. Most popular Chinese-language portals, such as Sina.com, Netease.com and Sohu.com, have a substantial volume of foreign investment.¹⁴⁸ Companies like Intel, Compaq, Ericsson, Motorola, Yahoo, etc., have various degree of participation in China's ISP/ICP market, and the Chinese government has not take actions against anyone in this regard.

¹⁴⁵ *Id.*

¹⁴⁶ The *ICP Measures*, *supra* note 15, art. 17.

¹⁴⁷ *Id.*

¹⁴⁸ Preston M. Torbert and Jia Zhao, *An Overview of China's Internet Market and Its Regulation*, Baker & McKenzie Comments (April 4, 2000), available at <http://www.bmck.com/ecommerce/china-internet.doc>.

B. Other E-commerce Area

China has not released rules governing foreign investment in other areas of e-commerce, such as B2B, B2C, online shopping, online payment, online booking, online stock trading, etc. Due to lack of comprehensive e-commerce regulations, it is unclear whether such activities should be treated as conventional business which would only require the operator to obtain a license from local Administration for Industry and Commerce and a permit from relevant industry authorities. It is still the majority view that these are out-of-bounds areas for foreigner, though some foreign companies has started to test the water by cooperating with Chinese partners to establish e-commerce facilities and services.¹⁴⁹

C. WTO's Impact

It is expected that China's policy toward foreign investment in Internet sectors will change with its accession to the WTO. According to the WTO agreement between China and the United States signed late last year, once China joins the WTO, it will allow foreign investment in China-based Internet companies. Foreign service suppliers will be able to provide an array of services including, among other, email, voice mail, online information and data base retrieval, EDI, enhanced/value-added

¹⁴⁹ For example, according to a news reported by People's Daily, the Chinese Communists Party's mouthpiece, IBM has started its strategy to cooperate with local governments in China to launch e-commerce program. The first contract was signed with Jiangmen City government of south China's Guangdong Province. According to the contract terms, IBM will help the city train e-commerce personnel, build a local e-commerce platform, and familiarize local companies with the latest high technology. This project is part of IBM's regional development program. See *IBM starts e-commerce cooperation with south China city* (July 20, 2000)

<http://english.peopledaily.com.cn/200007/20/eng20000720_45933.html>.

facsimile services (including store and forward, store and retrieve), code and protocol conversion, on-line information and data processing (including transaction processing), and paging services. Foreign service suppliers may hold 30 percent foreign equity share upon accession, 49 percent after one year, 50 percent after two years. Foreign service suppliers may provide services to Beijing, Shanghai, and Guangzhou upon accession, to Chengdu, Chongqing, Dalian, Fuzhou, Hangzhou, Nanjing, Ningbo, Qingdao, Shenyang, Shenzhen, Xiamen, Xi'an, Taiyuan, and Wuhan after one year, and nationwide after two years.¹⁵⁰ As noted by a White House press release issued on 17 November 1999, "The agreement ensures that Internet services will be liberalized at the same rate as other key telecommunications services."¹⁵¹ On the other hand, by joining the WTO China will have a valuable forum in which it can interact with its global trading partners to form a unified approach to e-commerce.

IV. CONCLUSION

Though Chinese government at various levels vows to attach strategic importance to IT industry and e-commerce, to a certain degree those claims fall short of reality. A number of political, economic and cultural snags stand in the way of bring of the advent of an e-era in China.

The first question to address is: what is the proper role for Chinese government in the play of Internet and e-commerce field? It is wise to look at the wisdom and experience of those more advanced countries in terms of e-commerce development. The United States, the leading country in promoting e-commerce, takes the approach

¹⁵⁰ Torbert and Zhao, *Supra* note 134.

¹⁵¹ *Summary of US-China Bilateral WTO Agreement*, Press release issued by the White House on 17 November 1999.

of “minimum government involvement”. In a statement concerning e-commerce issued by the White House in July 1997¹⁵², the Clinton & Gore Administration announced five principles that guide government’s role in this area, and they are: (1) the private sector should lead; (2) governments should avoid undue restrictions on electronic commerce; (3) where government involvement is need, its aim should be to support and enforce an predictable minimalist, consistent and simple legal environment for commerce; (4) government should recognize the unique qualities of the Internet – its decentralized nature and its tradition of bottom-up governance; (5) electronic commerce on the Internet should be facilitated on a global basis.¹⁵³ While it is argued that thinking about Chinese government’s role by analogy to the United States is misleading, the U.S. position is still worth reading, not only because the policy is said to be the product of democratic decision-making, but also because it does stimulates a very prosperous e-commerce market – one can not deny that the United States is a country with the highest volume of data communication, the most network access and service providers, the most Internet hosts, and the highest total number of Internet connections.

However, true differences make it impossible to apply the U.S. principle to China. When evaluating the latest developments in this country’s regulatory regime governing the Internet, it is necessary to take into consideration China’s huge economic and educational disparity among different regions and classes of people, and China’s weak private sector that has not taken a lead in e-commerce. Thus, a certain level of government intervention may be both necessary and desirable. In this

¹⁵² William J. Clinton & Albert Gore, *A Framework for Global Electronic Commerce*, July 1, 1997 <<http://www.ecommerce.gov/framework.htm>>.

¹⁵³ *Id.*

respect the position addressed by the Organization for Economic Co-operation and Development(OECD) may be more appropriate for China. It said:

*“In the case of newly industrializing and developing countries, governments should be encouraged to take a creative role in promoting Electronic Commerce. In these contexts, public interventions of various kinds can act as important catalysts for the diffusion of Electronic Commerce applications in the private sector.”*¹⁵⁴

The Chinese government has taken a number of national policy initiatives to encourage the development of information technology, the building of e-commerce platforms, and the expansion of Internet access. The present concern in China, however, is that government interference is stifling Internet growth rather than building a sound basis for its long-term development. As declared by a China investment analyst in a high-level conference in Seattle, “The guiding hand of the state puts the timely development of e-commerce in China at risk.”¹⁵⁵ Those restrictions on Internet and e-commerce, such as state monopoly of ISP service, tight control over Internet content, suspicious attitude toward foreign investment in Internet sector, and too many forbidden areas for private companies, will inevitably retard the realization of China’s goal to be a leading IT market in the world.

Apart from many government interventions, the current legal regime for Internet and e-commerce is still at a nascent stage of development. While hundreds of national and local regulations have been promulgated in recent years, the laws are still characterized by ambiguity and have yet to evolve to a stage where complex issues

¹⁵⁴ OECD, ELECTRONIC COMMERCE, OPPORTUNITIES AND CHALLENGES FOR GOVERNMENT 66 (1997).

¹⁵⁵ Michael Chugani, *Beijing accused of regarding net growth*, South China Morning Post, November 13, 2000, available at <http://technology.scmp.com/Internet/Daily/20001113065215158.asp>.

related to advance tertiary industries are adequately addressed. Legislation regarding data communication services in general is sparse, and the majority of the rules were designed to monitor people's Internet activities rather than promoting online commercial transactions. The Internet fraud issue has drawn some attention, but no rules have been made nationally. Regulations concerning those very important aspects of e-commerce are either simple or missing. For example, rules concerning contract formation and legal proof issues are too simple to provide an operable guidance for dispute resolution. There are no national regulations addressing issues like digital signatures and authentication, online intellectual property issues, and public information. Moreover, regulations on electronic markets remain ambiguous, and functions of government bodies are not that clear. Meanwhile, judicial interpretations, though very positive in protecting intellectual property rights, have not been able to fill out the vacuum left by ambiguous regulations.

Despite all those defects in the current legal system there is room for optimism, in that the Chinese market is still growing very fast¹⁵⁶ and the Chinese leadership is becoming aware of the crucial nature of e-commerce to China's economic development. Due to its relatively late entry into the Internet and IT infrastructure construction, China has the opportunity to learn from the experience of other countries and forego antiquated technology. However, if the Chinese leaders fail to face the reality that massive legal uncertainty will eventually frustrate businesses and investor's enthusiasm, and also fail to provide a legal framework that ensures

¹⁵⁶ According to an IDC (International Data Corp) report, China has become Asia-Pacific region's second-largest IT market, and it is poised to overtake Australia to become the largest in the region (June 22, 2000)

<<http://www.chinaonline.com/industry/infotech/NewsArchive/Secure/2000/june/C00062008.asp>>.

competition, protect intellectual property and privacy, prevent fraud, foster transparency and facilitate dispute resolution, China's ability to take advantage of opportunities for economic development arising from the Internet may be significantly limited.