China, State Secrets, and the Case of Xue Feng: the Implication for International Trade

Sigrid Ursula Jernudd

Follow this and additional works at: https://chicagounbound.uchicago.edu/cjil

Recommended Citation
Available at: https://chicagounbound.uchicago.edu/cjil/vol12/iss1/12

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in Chicago Journal of International Law by an authorized editor of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
China, State Secrets, and the Case of Xue Feng: the Implication for International Trade
Sigrid Ursula Jernudd*

Abstract

In April 2010, the People’s Republic of China revised its Law on Guarding State Secrets (State Secrets Law). In addition, the State-Owned Assets Supervision and Administration Commission (SASAC) issued Interim Regulations in March 2010 making it clear that the power to make determinations with regard to possible state secrets in the Central State-Owned Enterprises (Central SOEs) lies with those enterprises, while simultaneously providing very little guidance as to exactly what should constitute a state secret.

This broad discretion is likely to cause serious problems for foreign enterprises operating in conjunction with the Central SOEs. This Comment uses as an example on the case of Xue Feng, an American citizen who was convicted in July 2010 for violating an earlier version of the State Secrets Law after purchasing what he believed was a freely available commercial database. Because of the burden this places on the ability to do business in China, particularly given the vagueness and lack of transparency in state secret determinations, this Comment argues that the State Secrets Law, despite its revisions, violates numerous provisions found in China’s accession to the World Trade Organization, and as such ought to be challenged.

Table of Contents

I. Introduction.................................................. 310
II. China’s Obligations in the WTO.......................... 312
III. China’s Central State-Owned Enterprises Under the State Secrets Law .... 316

* BA 2007, University of Pennsylvania; JD Candidate, 2012, The University of Chicago Law School. The author would like to thank her mother, Sharon Mann, for her advice and support both with this comment and generally, and the CJIL staff and editorial board for their help and suggestions.
I. INTRODUCTION

China's accession to the World Trade Organization (WTO), completed in December 2001, was a long and drawn out process, concluding with China's promises to undertake serious changes in its economic system. These promises include significant market access commitments, sometimes according China less than most-favored nation (MFN) treatment. China also agreed to undertake reform to bring its legal system in line with "market economy-based international legal standards," including "non-discrimination, transparency and predictability, fair competition, uniform and impartial administration of laws, and judicial review." To achieve these goals, China agreed to revise existing domestic laws to bring them into full compliance with WTO obligations.

---

China, State Secrets, and the Case of Xue Feng

The nine years since China’s WTO accession have not been without their challenges. Since China became a member, twenty-one cases have been filed with the WTO naming China as respondent, regarding issues as diverse as automobile parts imports, financial services, and the distribution of audiovisual entertainment.\(^4\) Because so many years have passed since its accession, China is now being held accountable as a “mature participant” in the WTO system, with obligations matching its status.\(^5\) However, China’s trading partners—for instance, the US and the European Commission—do not yet believe that China is fully WTO-compliant, and the WTO itself has also raised some areas of concern through its Trade Policy Review (TPR) process.\(^6\) At the root of these problems is “China’s pursuit of industrial policies that rely on excessive, trade-distorting government intervention intended to promote or protect China’s domestic industries and state-owned enterprises,” leftovers from its days as a non-market economy.\(^7\)

One area of concern with regard to the State-Owned Enterprises is China’s legislation concerning state secrets. The State Secrets Law—which is extremely vague and opaque—makes it a crime to be involved in the distribution of anything considered a “state secret,” including through the State-Owned Enterprises.\(^8\) This not only makes it more difficult to do business in China, but it also poses a direct threat to employees of foreign enterprises who are ethnically Chinese, regardless of where they hold citizenship, through the possible application of criminal sanctions for ordinary business activities. The case of Xue Feng, a naturalized American citizen from China who is currently serving an eight-year prison term for signing a purchase order on behalf of his employer, IHS, Inc, for what he believed was a freely available commercial database, is one

\(^4\) See World Trade Organization, Disputes by country/territory, online at http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#chn (visited Jan 27, 2011).


\(^7\) See 2010 Report at 2 (cited in note 5).

illustration of the dangers of this law. In its application and design, the State Secrets Law violates a number of major WTO principles, though China is likely to argue that it is subject to the security exception and therefore beyond the WTO’s reach. Beyond its importance to business and trade, the State Secrets Law has a wide-ranging and problematic impact on human rights and the development of Chinese rule of law in general.

To conduct an analysis of the problems posed by the State Secrets Law, this Comment begins by outlining the broader concepts underlying China’s WTO obligations and the design and application of the State Secrets Law. It then examines what provisions of the GATT and the Accession Documents the State Secrets Law violates. Finally, this Comment addresses the security exception found in the WTO, which China could use to argue against review of its application of the State Secrets Law.

II. CHINA’S OBLIGATIONS IN THE WTO

When China acceded to the WTO, it agreed to the series of documents forming the basic WTO commitments. The basic WTO trade rules are made up of the Uruguay Round agreements, which encompass the General Agreement on Tariffs and Trade (GATT) (governing goods), the General Agreement on Trade in Services (GATS) (governing services), and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) (governing intellectual property), as well as a number of other extra annexes and agreements. In addition, China made certain exceptional commitments through the Accession Documents. The first of these is through the Accession Protocol, which is an “integral part” of its WTO agreements. The second is the Working Party Report, which kept a record of the process and main issues in the WTO negotiations, some but not all of whose provisions are binding.

---

9 See Michael Wines, Geologist’s Sentence is Questioned, (NY Times, July 5, 2010), online at http://www.nytimes.com/2010/07/06/world/asia/06china.html?_r=1&ref=jonmhuntsmanjr (visited Feb 7, 2011).


The Accession Documents are unique in that they “significantly revise” the WTO rules of conduct for China through a series of “WTO-plus” obligations. The WTO-plus obligations govern: “(1) transparency, (2) judicial review, (3) uniform administration, (4) national treatment, (5) foreign investment, (6) market economy, and (7) transitional review.” In certain areas, they impose provisions and obligations that go beyond those found in the GATT. In fact, the Chinese obligations go far enough that some academics in the region have taken exception to the agreements, arguing that they are deeply unfavorable to China.

Any consideration of China’s ability to meet its obligations under the WTO must consider the goals of the world trading order as a whole for China’s accession and for the future development of the WTO. China’s accession has been an opportunity both for foreign nations and their investors—who theoretically gain access to a large and growing market—and for China itself, solidifying its central position in the world economy.

China’s accession to the WTO was “part of a larger strategy of massive and fundamental economic reform [in China].” The country was given the opportunity for greater integration into the world economy and, in exchange, required to make a push to improve its own domestic regulations and address transparency concerns, especially where related to foreign investment or trade. China also voluntarily opened itself up to more than economic change—as the Honorable Xiao Yang, Chief Justice and President of the Supreme People’s Court explained, China “publically proclaimed to the world that [it] would adopt the rule of law as [its] governance strategy.” This does need to be balanced with the risks that China assumed by forcing its economic transition and the costs of social change accompanying these adjustments, in particular when it came to the State-Owned Enterprises (SOEs), a major source of employment.

---

16 Id at 491.
17 See id at 500 (comparing national treatment under the GATT and the Accession Protocol).
18 See, for example, Xiaohui Wu, No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization, 10 Chinese J Intl L (2011) (accepted for publication).
19 See Clarke, 2 Wash U Global Stud L Rev at 97 (cited in note 3).
The accession also opened up economic policymaking to the influence of a number of actors outside of the strong central government, including not only the WTO itself but also nongovernmental agencies and other multilateral actors.23

There are actions that China can take to mitigate the changes the WTO requires of it, while staying within the boundaries of WTO law. The strongest of these is the national security exception, which is found in the WTO documents, including GATT and the Accession Documents.24 There has been some debate as to the strength of the security exception, with some going as far as to argue that it would preclude WTO review altogether, though there is a lack of clear precedent on the issue.25 Security concerns were raised during the accession process in an effort to avoid the competition that WTO accession would bring.26 These arguments are especially powerful as they tap into a general "widespread fear" of social unrest and a loss of Chinese sovereignty.27 China has brought up security concerns in a number of contexts to shield Chinese enterprises, and so would presumably not hesitate to bring up this exception.28

China's security claims fit into broader concerns regarding its willingness to comply with certain of its WTO obligations that connect fundamentally to its conception of the state's role in the world trading order.29 The Chinese government has been accused of "quite deliberately subordinat[ing] the interests of foreign businesses to those of local development."30 This is part of a broader picture of a movement away from continuing integration with the trading order

---

23 See id at 160.
24 See GATT, Arts X(1) and XXI (governing the protection of confidential information where there is a legitimate interest at stake and protecting essential security interests, respectively); Accession Protocol, Art 1:2(C)(2) (providing exceptions to the transparency regime where national security is implicated). See, for example, Working Party Report ¶ 158, 230 (cited in note 3).
27 See id at 363.
28 See, for example, 2010 Report at 60, 69 (cited in note 5) (discussing investment in key sectors and foreign investment).
established by the WTO. More optimistic scholars believe that China recognizes the advantages that the trading order provides, and will emerge as a "champion" of the WTO, or at least stay within its liberal international rules.

However, China remains subject to the dispute settlement process established in the WTO. While the recognition of the advantages provided by following WTO laws provides some incentive for governments to act appropriately, the dispute settlement process provides a blunt-edge sword in areas where this may fail. There are a number of stages to work through before a country is found in violation of the WTO, involving a period of consultation, a full panel process, and the opportunity for appeal. After a final decision is reached, the losing party must comply within a "reasonable time;" if not, trade sanctions are available, though they have rarely been used. These formal and informal mechanisms provide an external means of enforcement of WTO trade obligations.

Because of the major changes that it involves, China's accession—the most complex in the history of the WTO—challenges the basic fundamentals of the trading system. The WTO needs to be flexible enough to avoid stress that would damage the organization while discouraging China and other states from adopting policies that would prevent movement away from furthering its goals. At the most basic level, this involves the promotion of free trade and the

32 See G. John Ikenberry, The Rise of China and the Future of the West: Can the Liberal System Survive?, 87 Foreign Aff 23, 32 (2008) ("The evolution of China's policy suggests that Chinese leaders recognize these advantages: as Beijing's growing commitment to economic liberalization has increased the foreign investment and trade China has enjoyed, so has Beijing increasingly embraced global trade rules.").
33 See Brendan Ruddy, Note, The Critical Success of the WTO: Trade Policies of the Current Economic Crisis, 13 J Intl Econ L 475, 490−94 (2010) (listing mechanisms that helped prevent protectionist policies during the last economic crisis that would have violated WTO trade laws).
35 See id; Steve Charnovitz, Rethinking WTO Trade Sanctions, 95 Am J Intl L 792, 794, 805−07 (2001) (explaining that, "of the forty-three disputes in which a defendant government was judged in violation, only two have led to trade sanctions," and outlining the growing acceptance of sanctions in the WTO process).
avoidance of undue economic governmental interference.\textsuperscript{38} It also involves a recognition that countries are obliged to exercise their sovereignty according to WTO commitments they have made in return for receiving all the advantages of free participation in the world trading community.\textsuperscript{39} A failure to properly balance these principles with respect to China could seriously damage the credibility and undermine the purposes of the WTO.

III. CHINA'S CENTRAL STATE-OWNED ENTERPRISES UNDER THE STATE SECRETS LAW

A. The Central State-Owned Enterprises

The WTO negotiations addressed China's SOEs extensively, as they were recognized as a possible barrier to full WTO cooperation even before the accession process began.\textsuperscript{40} The SOEs are a category of State-Trading Enterprises (STEs).\textsuperscript{41} Like any other enterprise granted special privileges by the government, the SOEs may be operated to "create serious obstacles to trade" in violation of GATT Article XVII:3, which allows some exceptions for special developmental needs.\textsuperscript{42} This is combined with the Chinese bureaucracy's general distrust of private companies in particular, which leads to a more difficult business environment for foreign firms that may be singled out for unfair treatment.\textsuperscript{43} It also continues despite some reform of the Central SOEs, which are centrally run and typically larger enterprises, including a considerable consolidation and thinning of their ranks in order to improve corporate structure.\textsuperscript{44} The Central


\textsuperscript{41} An STE is a "commercial entit[y] usually owned by the state which [is] authorized to conduct international trade." Walter Goode, \textit{World Trade Organization—Dictionary of Trade Policy Terms} 401 (Cambridge 5th ed 2007).


\textsuperscript{44} See Hao Yan, \textit{China to cut central SOEs to 30–50 in 5 yrs}, (China Daily, Nov 1, 2010), online at http://www.chinadaily.com.cn/bizchina/2010-11/01/content_11485527.htm (visited Dec 21,
SOEs “enjoy monopolistic status” in sensitive and important areas of the economy, “including oil and gas; minerals and power generation; banking and insurance; telecommunications and transportation; as well as aerospace and defense.” The Central SOEs are governed by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), which “performs investor’s responsibilities, supervises and manages the state-owned assets of the enterprises, and . . . enhances the management of the state-owned assets.” This gives SASAC a good deal of control over the Central SOEs.

B. The State Secrets Law

The Law of the People’s Republic of China on Guarding State Secrets was first passed in 1989 (1989 Law), replacing provisional regulations that were developed in 1951. The National People’s Congress Standing Committee then passed a revised version of the Law on the Protection of State Secrets on April 29, 2010 (Revised Law). Where the version of the law does not make a substantive difference to the analysis, and, as a result, there is no need to distinguish between the two, this Comment will simply refer to the State Secrets Law. State controlled media listed two main reasons for the changes in the law. First, it was developed in response to the challenges posed by Internet
Second, it was developed to reduce arbitrary and confusing decisions in both defining and releasing state secrets, in particular due to the actions of lower level decision-makers. There are two key provisions that apply to the classification of a state secret. Article 2 provides a broad definition of what can be considered a state secret. In the 1989 Law, state secrets were defined as “matters that have a vital bearing on state security and national interests.” In the same article of the Revised Law, this definition is actually broadened somewhat, as the language requiring a “vital bearing” has been removed so that the clause simply reads “matters that relate to state security and national interests.” In both versions of the Law, the state secret must be specified according to “legally defined procedure.” Finally, the number of people with access to the information at issue must be limited, and the language in the Revised Law was narrowed somewhat, from “entrusted to a limited number of people for a given period of time” to “restricted to a defined scope of personnel within a defined period of time.”

A list of specific categories of what can be deemed a state secret is provided in Article 9 of the Revised Law, updating the list found in Article 8 of the 1989 Law. This list governs areas in policy decisions, national defense and the armed forces, foreign relations, national economic and social development, science and technology, and state security and criminal offenses that relate to and could harm “state security and national interests.” The Revised Law did remove the word “include” (baukuo) before the description of the list. This term generally signifies in Chinese legislation that it is not meant to be exhaustive, and so the removal of baukuo could be seen as a positive development. However, like the 1989 Law, the Revised Law also provides a catch-all provision for information that does not fall into the above category,

---

49 See Wei Minli, Zou Wei and Wei Wu, PRC Experts: Revised State Secrets Law Meets Requirements (Xinhua, Apr 29, 2010).
50 See id.
51 1989 Law, Art 2.
53 See id; 1989 Law, Art 2.
54 See 1989 Law, Art 2; Revised Law Art 2 (emphasis added).
55 See Revised Law, Art 9.
57 See id.
and simply covers “other secret matters” as determined by the “department administering and managing the protection of state secrets.” This fails to improve one of the major sources of uncertainty in the 1989 Law.

Foreign scholars have raised serious doubts as to the actual effect of the revisions to the State Secrets Law on improving transparency and accountability. Chinese scholars claim that the Revised Law will lead to a reduction in the number of state secrets and “boost government transparency,” especially as it narrows the agencies that can mark state secrets and provides greater penalties for improper classification. However, with regard to the claimed narrowing of the scope of the State Secrets Law, in particular, the changes have been called “more apparent than real” given the broad classifications that are still permitted. Other measures, such as the punishments permitted for the misclassification of information as secret, are not as helpful as they may appear given that they only apply if there are “serious consequences”—unlikely to include the mere “concealment of public information.” There is some hope in the limitations placed on who can classify a state secret; however, it is unclear how much difference this will make without effective judicial review. This also may be counterbalanced by a “more robust set of legal responsibilities and penalties” for the failure to classify information a state secret.

The penalties for violating the State Secrets Law are found in the Chinese Criminal Law, which also defines the particular offenses. The most serious offense is that of “stealing, spying to obtain, buying, or unlawfully supplying” state secrets to “an organ, organization, or individual outside the territories of China,” which, if done with subjective intent to deal with a state secret, will be punished with anything between five years imprisonment and the death penalty, depending on the seriousness of the circumstances of the crime. Unlawfully acquiring state secrets, either through “stealing,” “spying,” or “buying,” which

---

58 See Revised Law, Art 9(7); 1989 Law Art 8(7).
59 See Gelatt, 22 Cornell Int’l J at 260 (cited in note 56).
60 See, for example, Li Huizi and Cheng Zhuo, China narrows definition of “state secrets” to boost government transparency (Xinhua, Apr 29, 2010), online at http://news.xinhuanet.com/english2010/china/2010-04/29/c_13272939.htm (visited Jan 29, 2011) (quoting Professor Wang Xixin of Peking University Law School). See also National People’s Congress (cited in note 48).
61 See, for example, Jerome A. Cohen and Jeremy Daum, Behind Closed Doors (US Asia Law Institute, May 25, 2010), online at http://www.usasialaw.org/?p=3687 (visited Jan 29, 2011).
62 See id.
63 See id.
64 See National People’s Congress (cited in note 48).
does not have a mens rea specified, carries penalties of up to three years, or in more serious cases, of three to seven years. Similar punishments follow for the crime of divulging state secrets, which can be done with "subjective intent" or merely by fault. Because the penalties are so serious for violations of the State Secrets Law, in some cases involving foreign corporations, charges have been reduced to trade or commercial secrets violations, which carry less serious penalties. This was seen in the case against the Australian mining giant Rio Tinto.

There, four employees of Rio Tinto were prosecuted and sentenced to up to fourteen years in prison following the corporation's recent decision to reject a major $19.5 billion investment from the Aluminum Corp of China (Chinalco), and accompanied speculation that the arrests were a warning from the central government following tough negotiations over iron ore prices.

Prosecutions under the State Secrets Law are particularly challenging for defendants given the provisions in the Criminal Procedure Law applied to these crimes. Any "evidence involving state secrets shall be kept confidential." While ordinary criminals are permitted to appoint a lawyer without any restrictions, suspects accused of violating the State Secrets Law are required to "obtain the approval of the investigation organ" first, and defense attorneys must again obtain approval before meeting with the suspect. Finally, cases involving state secrets shall not be heard in public. The closed nature of the trial is explicitly provided in Supreme People's Court legislation passed in 2007 specifying that, "state secrets and secrets of judicial work shall be strictly kept, and the parties' private affairs and commercial secrets shall be protected according to law.”

---

66 See id at §§ 15:5-7 at 205-06.
67 See id at §§ 18:8-10 at 267-69.
68 See Silk Testimony (cited in note 8) (providing in addition a table showing the differences in penalties for state secrets and trade secrets violations).
69 See id; David Barboza, Chinese Court Hands Down Stiff Sentences to Four Mining Company Employees, NY Times (Mar 29, 2010), online at http://www.nytimes.com/2010/03/30/world/asia/30riotinto.html (visited Jan 8, 2011).
70 See id; David Barboza and Michael Wines, Mining Giant Scraps China Deal, NY Times (June 5, 2009), online at http://www.nytimes.com/2009/06/06/business/global/06mine.html (visited Jan 8, 2011).
72 Id at Art 96.
73 Id at Art 152.
C. Central SOEs and State Secrets

The determination of what is a state secret, as opposed to a commercial secret, in the context of the SOEs is regulated by SASAC, which released a circular providing Interim Regulations on the commercial and state secrets in March 2010, stressing the “high importance” of the protection of commercial secrets. Even this document does not provide much guidance on the definition of a “state secret” within the context of the Central SOEs, merely stating that, “[w]here the operational information and technical information of Central SOEs falls into the scope of state secret, such information shall be protected as a state secret according to the related laws.” The definition of a “commercial secret” is extremely broad, and covers a wide variety of operational information. It is also slightly unclear as to why the Interim Regulations need to exist through a measure applicable only to SOEs, given the fact that the State Secrets Law already covers commercial matters. These regulations are designed to interact with the Revised Law on state secrets.

While there has been some dispute as to the extent to which ordinary business information is a state secret under the Interim Regulations, it is evident that at the very least the Central SOEs do not only have the power but also the obligation to make the determination of what constitutes a state secret. The Interim Regulations establish that the Secrecy Committee within the Central

---


76 See id at Art 3.

77 See id at Art 10 (clarifying the meaning of “operational information”). Art 2 defines a “commercial secret” to mean “the operational information and technical information which is unknown to the public, can bring economic benefits to Central SOEs, [is] practical, and is already subject to the protection measures of Central SOEs.”

78 See 2010 Report at 61 (cited in note 5).

79 See Interim Regulations at Art 1 (cited in note 75) (clarifying that the regulations are “formulated in accordance with the Law of the People’s Republic of China on Guarding the State Secrets . . . ”).

SOE is responsible for the regulation of “secret protection,” and that, within their scope, the “technology, legal and intellectual property departments shall be responsible for the protection and management of commercial secret[s].” The regulations also state that, “[w]here the commercial secret of [the] central SOEs is upgraded to be [a] state secret due to the adjustment of the scope of state secret, such information shall be recognized as state secret according to legal procedures.”

D. State Secrets and the Case of Xue Feng

The potential dangers for foreign business—in particular for employees who are either local Chinese workers, or who hold foreign citizenship but are of Chinese origin—under the operation of both the 1989 Law and the Revised Law governing state secrets are best illustrated in how the regulations have been imposed thus far. The most striking example of the application of this law and its impact on foreign business is the case of Xue Feng, a naturalized American citizen who was convicted and sentenced to eight years imprisonment for violating the State Secrets Law, and subjected to numerous human rights abuses while awaiting trial. Xue Feng was charged under the 1989 Law, as the revisions did not come into effect until October 2010, after his trial. However, there is no reason to believe that the revisions would have had any impact on his case. He purchased a database of oil and gas information that was deemed to be unprotected; however, after its purchase and conveyance to the US, China determined that the material was a state secret. The database is still available through IHS, Inc, the American corporation that employed Xue Feng until shortly before his arrest. Much of the information in the database is publically available and necessary for basic due diligence work for businesses involved with the Central SOEs. Further, Xue Feng was not provided a number of substantive rights; not only was he denied an attorney for over a year and the ability to have either American officials or his family in attendance at the trial, but the court postponed the decision as long as possible, perhaps, some have

81 See Interim Regulations at Ch 2, Arts 6–9 (cited in note 75).
82 See id at Art 11.
86 See Rowley Letter (cited in note 83).
Xue Feng has not yet been released, despite continuing pressure from American officials, and his conviction was recently affirmed. In a worrying trend, he is the last in a long line of ethnic Chinese with foreign citizenship who have been arrested on charges of state secrets for work related to natural resources, finance, and other sensitive areas. These employees are the “most vulnerable to prosecution” under these laws, and foreign companies have already started to alter their research policies and behavior in response. It is also important to note that there is a risk of this chilling the behavior of Chinese nationals, potentially making them less likely to share information with foreign business out of a fear of arrest.

IV. THE STATE SECRETS LAW VIOLATES THE WTO

The State Secrets Law—both in its new and revised versions—violates key provisions of the WTO. These include requirements regarding National Treatment, Transparency, Judicial Review, State-Trading Enterprises, and the Uniform Administration of Laws.

A. National Treatment

National Treatment is a core WTO provision, which has important repercussions for the WTO as a whole, as it recognizes that “facially origin-neutral domestic regulation often adversely affects imported products or foreign services/service suppliers,” and attempts to delineate when this regulation is in violation of the WTO. There are two provisions of the GATT that demonstrate the importance and meaning of National Treatment within the WTO. The first of these is GATT Article III, which governs “internal taxes and other internal charges, and laws, regulations, and requirements affecting the

87 See Cohen, How China Handles (cited in note 84). See also United States of America and China Consular Convention (Sep 17, 1980), Art 35(4), 33 UST 2973 (Jan 17, 1981) (providing for the right of consular officials to contact American citizens in any form of detention).
92 See Gaëtan Verhoosel, National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy 1 (Hart 2002).
internal sale, offering for sale, purchase, transportation, distribution or use of products . . . "93 There are a number of forms that protectionism can take under Article III, which can include regulatory restrictions.94 Another useful lens through which to examine the State Secrets Law is GATT Article XX, which governs exceptions to being bound by the WTO, but also contains language on nondiscrimination, specifying that "such measures [must] not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."95

At its most basic, the National Treatment principle is that the WTO "impos[es] essentially one obligation on all trading partners: any time a domestic policy impacts trade, it must be exercised in a non-discriminatory manner, that is, it must address all products affected in an origin-neutral manner."96 The scholarly and "popular" view of the WTO National Treatment provision is that it substantively examines the regulation at stake and then looks to whether it is consistent with WTO values.97 While the WTO case law on the matter can provide some guidance, scholars have criticized current decisions as being "intransparent and inconsistent."98 However, it is still useful. First, it establishes the "broad and fundamental purpose of Article III" as the avoidance of "protectionism in the application of internal tax and regulatory measures," in particular as applied to products.99 While the State Secrets Law does not seem to directly implicate products, it does have an impact on the ability of foreign companies to trade with or compete with the Central SOEs, and as such should be held to apply here. Second, the purposes of the law at issue are extremely important, "objectively manifested in the design, architecture and structure of the measure."100 Again, while the State Secrets Law may appear on its face to fail to meet this requirement, an examination of the measure’s application and implementation demonstrates, first, that it lacks in its design basic transparency

93 GATT, Art III:1.
95 GATT, Art XX.
98 See Verhoosel, National Treatment and WTO Dispute Settlement at 3 (cited in note 92).
that would help solve any WTO problems, and, second, that it has been used in a retaliatory way, making an objective view of both the design and structure difficult. The "general principle" set out in Article III:1 is intended to inform the rest of the interpretation of the National Treatment principle. While National Treatment can be excused should the regulation in question be held necessary—in this case, that it is required to protect state security—the State Secret Law does not meet this bar. Finally, even if the National Treatment principle as found in GATT is held not to apply, the theory underlying this ideal provides an important basis for understanding how the WTO should operate in China as a whole.

The Accession Documents, which require treatment that is "no less favourable than that accorded to other individuals and enterprises," lend support to this view of the GATT National Treatment principles when applied to China. This provision applies to both "the procurement of inputs and goods and services necessary for production and the conditions under which the goods are produced, marketed or sold, in the domestic market and for export," as well as "the prices and availability of goods and services supplied by national and sub-national authorities and public or state enterprises, in areas including transportation, energy, basic telecommunications, other utilities and factors of production." In one of its binding paragraphs, the Working Party Report also states that, "China would provide the same treatment to Chinese enterprises, including foreign-funded enterprises, and foreign enterprises and individuals in China," part of a section discussing National Treatment. Because of the clear language in the Accession Documents, it becomes apparent that the National Treatment provisions apply even should the WTO decision makers find that the connection to goods and the GATT for the Central SOEs is too attenuated. The Accession Documents have been interpreted by scholars as requiring "China to accord national treatment to foreign individuals and enterprises with respect to their investment and business activities in China," covering anything related to the production of various goods.

---


102 See Section V (outlining the reasons that the security exception in the WTO is not applicable in this case).

103 Accession Protocol, Art I:3 (cited in note 13).

104 Id at Arts I:3(a), I:3(b).


106 Qin, 17 J of World Trade at 500 (cited in note 15).
The way that the State Secrets Law has been applied violates both of these principles. The case of Xue Feng serves as an excellent example. The database that Xue Feng purchased was readily available, and had been used for an extended period of time. However, for reasons that remain unclear even to his lawyers, the database—which, even if it is not itself considered a good, contains information on the ability to access other goods in China—was made unavailable. This demonstrates that it is possible for the Central SOEs (and, by extension, the central government, given the close between the SOEs and the government and the control that the government exercises over the SOEs) to use the Law to both protect their goods against international competition, regardless of the national security interest, and also support one country or policy over another based on ambiguous political or economic concerns. This makes the State Secrets Law a clear violation of China’s obligations with regards to National Treatment.

B. Transparency

There are strong requirements for transparency in both the GATT and the Accession Documents, and they provide perhaps the strongest challenge to the State Secrets Law. GATT Article X requires generally that “laws, regulations, judicial decisions and administrative rulings of general application” must be “published” and clear.107 This principle, which has evolved over time, is now viewed as central to the WTO.108 While transparency originally only required the “publication and administration of trade regulations,” it has been expanded through successive rounds of negotiations to generally include the “publication of laws and regulations and the mode of administration in tradable services.”109 This mimics the American approach towards administrative law that is promoted in the Federal Administrative Procedure Act (APA), which contains guidance on when and how administrative agencies can promulgate their regulations.110 Features of this system include greater use of independent regulatory agencies, often with quasi-judicial as well as quasi-legislative and executive/administrative functions; greater emphasis on notice-and-comment for administrative rules and on freedom of information

107 See GATT, Arts X(1), X(2).
108 See Padideh Ala'i, From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance, 11 J Int'l Econ L 779, 781 (2008).
laws; and a greater reliance on judicial review of the rulemaking activity (as well as quasi-judicial actions) of administrative agencies or departments.\textsuperscript{111}

It has also been suggested that the GATT transparency provision extends beyond the requirement of basic APA procedures and into, for example, the permissibility of labor unions in foreign-owned companies.\textsuperscript{112} The fact that transparency requirements are implicit in a number of other provisions strengthens this contention.\textsuperscript{113} Transparency provisions are seen as so central to the functioning of various international obligations that they have been used in a wide variety of international contexts.\textsuperscript{114} Because the transparency requirement is so fundamental—and China's administrative infrastructure required so much development—a weak stand on transparency could seriously damage the functioning and integrity of the WTO.\textsuperscript{115}

WTO case law has continued to develop a strong conception of transparency that underscores the importance of Article X, even in situations where a decision was not reached on those grounds.\textsuperscript{116} This is especially important given the imprecise definition of transparency that is laid out in GATT.\textsuperscript{117} For example, the Appellate Panel has stressed the importance of "promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality."\textsuperscript{118} This strengthens the slightly ambiguous language in GATT, and demonstrates the intent of the Appellate Body to broadly apply the transparency provision.

China's Accession Protocol also contains language on transparency.\textsuperscript{119} Article I:2(C) states that laws affecting goods shall be announced in an appropriate journal "before such measures are implemented or enforced" and then published. The transparency commitment here is more distinct and specific than in the basic WTO documents, including GATT, and has been viewed as a "quite comprehensive rule of law requirement."\textsuperscript{120} Possible problems with the
transparency of the trading system in China were highlighted repeatedly in the negotiation process. The Working Party Report contains a section dedicated to transparency, most specifically in the publication of rules and regulations, going so far as to list the journals in which China plans to publish new regulations. Further, the Working Party Report confirms that the application of transparency requirements to the operations of Central SOEs was a major concern of the negotiation process. It contains discussions of transparency specifically related to the “state trading entities” (which include the Central SOEs), linked closely to concerns expressed about the autonomy of the SOEs.

While the regulation at stake here was published before it was implemented, the lack of information provided as to when the State Secrets Law would be applied clearly violates the spirit of the transparency requirements, which push for an open and honest process of governmental regulations. Because the State Secrets Law is so opaque, allowing a wide range of dealings with the Central SOEs to be considered a state secret despite supposed restrictions, a serious lack of transparency with important implications for business interests ensues. Foreign businesses and their employees are unlikely to predict what they can do to avoid running afoul of the State Secrets Law, and what organizations they have to deal with to fully comply. Thus, the new law violates the transparency regulations under the WTO.

C. Judicial Review

Judicial review is another important concept whose provisions appear within the WTO transparency regime. The implementation of the State Secrets Law violates this basic concept. GATT requires parties to administer laws in a “uniform, impartial and reasonable manner,” and institute or maintain “judicial, arbitral or administrative tribunals.” This provision was designed to give potentially impacted parties “a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively seek modification of such measures.”

122 See id at ¶ 208–10 (binding obligation is ¶ 210).
124 GATT, Art X(3).
125 See Cotton and Fibre Man-made Underwear, WT/DS24/AB/R at 21 (cited in note 118).
The Accession Protocol contains more detailed language directly addressing judicial review. China is required to have “tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application,” with an opportunity for appeal and review. Judicial review must also be undertaken by a tribunal “independent of the administrative actions,” though there is an exception should this conflict with the “constitutional structure” or nature of the legal system. The Working Party Report echoed some of these concerns, again taking particular note of administrative concerns. The Working Party Report then confirmed that review would be available for obligations under GATT (and related WTO agreements, such as GATS and TRIPS), and reiterated the promise to make “relevant domestic laws and regulations” consistent with WTO requirements.

The State Secrets Law fails to live up to effective judicial review. While there are no doubt a number of factors under which effective judicial review can be evaluated, there are three minimal factors which should be required: “a capable judicial system (including courts and judges with competence and integrity), the reviewing power delegated by law, and true judicial independence.” China’s judiciary as a whole is heavily influenced by the “ubiquitous” control of the Chinese Communist Party (CCP), and so acts as a policy-arm of the central government as opposed to an independent decision maker, especially in matters as sensitive and political as state secrets prosecutions, which makes independent evaluation of the claims nearly impossible. The judiciary is also believed as a whole to be incompetent and corrupt, despite attempts in recent years to improve its quality.

While there is some dispute as to whether or not the WTO actually requires a “fair and well-functioning legal system,” even critics of this concept recognize that GATT and related agreements still require a legal process that meets the test of “fairness and compliance.” In addition to broader problems with the judiciary—which there are many—the State Secrets Law presents unique problems. Of ordinary administrative law proceedings, which are

---

126 Accession Protocol, Art 1:2(D) (cited in note 13).
127 See Qin, 17 J World Trade at 495 (cited in note 15).
129 Id ¶ 78–79 (binding provisions under ¶ 342 of the Working Party Report).
133 See Clarke, 2 Wash U Global Stud L Rev at 112 (cited in note 3).
presumably less sensitive than those involving the State Secrets Law, only an extremely small amount are accepted by courts before they are withdrawn. Of those, even fewer deal directly with business, whose management may be fearful of retaliation by the Chinese government—again, a factor likely to be felt even more strongly when potential state secrets are at stake. Trials for violations of the State Secrets Law follow an extremely opaque process, especially given the lack of transparency in determining what constitutes a state secret.

This is exacerbated by the fact that defendants in state secrets trials have extremely few due process rights to begin with; those that are given are often significantly violated, as they were for Xue Feng. Experts believe that a state secrets charge arising in the trade context—“against a foreign individual in a business context”—would likely involve several ambiguities, with a trial that is either completely secret or closed, as it was for Xue Feng. While China has taken remedial measures to live up to its WTO commitments in this general area, those measures are unlikely to solve the underlying problems with the state secrets law and its availability of judicial review, or lack thereof. Because of easily available potential solutions to the judicial review process—such as having a more transparent implementation process, or putting in place basic protections for foreign nationals (at a minimum, informing them of the charges they are facing)—that would not compromise their rights to security and that could be implemented, the current state of judicial review as applied to the State Secrets Law should be enough to strike it down.

D. State-Trading Enterprises

The WTO includes specific remedies related to STEs. The Central SOEs fall into this category of government businesses. Under GATT Article XVII, state enterprises that are granted “formally or in effect, exclusive or special privileges” shall “act in a manner consistent with the general principle of non-discriminatory treatment.” At its most basic, this is designed to prevent the “exclusivity that allows non-competitive behavior” through “creating general impediments towards trade” or by “creating discrimination between

---

135 See id.
137 See Silk Testimony (cited in note 8); Cohen, *Xue Feng's Case* (cited in note 84).
138 See Hung, 52 Am J Comp L at 108 (cited in note 134).
suppliers.” However, it is not enough that the actions of the STEs are undertaken following “commercial considerations,” which the WTO Appellate Panel has disclaimed the ability to evaluate properly; instead, the WTO must inquire into the impact on the market. STEs still may not make “purchases or sales on the basis of non-commercial considerations.” While the State Secrets Law does not directly govern goods, making it unclear whether or not GATT Article XVII would apply, the article does cover “governmental . . . entities with exclusive or special rights or privileges, and with influence over the amount or pattern of exports and imports through purchase and sale transactions.” As Article XVII was implemented because “contracting parties recognize that [state trading] enterprises . . . might be operated so as to create serious obstacles to trade,” the links that the Central SOEs do have to the sale and purchase of goods might be enough for this provision to apply in some contexts in which state secrets arise.

China also agreed to more detailed provisions governing STEs during its accession to the WTO. The Accession Protocol contains language on the price and purchasing decisions of STEs, which seems like a relatively minimal commitment on the part of China, directing the central government to “refrain from taking any measure to influence or direct state trading enterprises” with regards to these decisions. Greater promises were made in the Working Party Report. China argued that “the [SOEs] basically operated in accordance with the market economy” and as part of a “modern enterprise system,” claiming that it was “furthering its reform of [SOEs].” In addition, China said that it was aware of the “increasing need and desirability of competing with private enterprises in the market,” requiring that decisions by SOEs “had to be based on commercial considerations as provided in the WTO Agreement.” Any examination of the Central SOEs and State Secrets Law should be undertaken

141 Id ¶ 149.
143 See GATT, Art XVII:3.
146 Id ¶ 45.
with these claims in mind. China also made a binding obligation mirroring the promises found in GATT Article XVII, but containing slightly more detailed language on the importance of “commercial considerations” and the government’s removal from commercial considerations.147 This combination of the promises made in the Accession Documents and GATT has been interpreted to require that China’s Central SOEs “shall respect non-discriminatory treatment and take into account commercial considerations.”148

The State Secrets Law violates the Accession Document provisions as well as the spirit of the GATT requirements, and the changes made in the Revised Law do not solve the problems with the law and its implementation. It allows the Central SOEs to be run essentially as an arm of the government, as the ability to make security designations is an inherently governmental power. Further, this power creates barriers to trade that are unique to the Central SOEs. The uncertainty introduced by requiring them to take these steps means that there is a high risk that foreign firms will avoid seeking out certain information or opportunities. It does this through “potentially criminalizing the gathering of ordinary business information” related to the Central SOEs.149 This risk is evident in the case of Xue Feng; while he was prosecuted under the 1989 Law, the Revised Law has not substantively changed the transparency and control issues in such a way that would have prevented him from being found guilty. The Rio Tinto case, in which a state secrets charge was then reduced to a commercial secrets prosecution, also provides some guidance. Though the defendants in Rio Tinto may have been guilty as charged, many commentators believe that their prosecutions were undertaken in retaliation for the failure of certain steel negotiations.150 Unless the Revised Law were to remove this power from the Central SOEs, the State Secrets Law will continue to violate China’s obligations regarding SIEs.

E. Uniform Administration of Laws

The GATT articles do not specifically address the uniform administration of the laws. However, like judicial review, this concept is folded into the transparency requirements, reading that each party “shall administer in a uniform, impartial and reasonable manner all its laws, regulations decisions and

147 See id ¶ 46.
149 Chang Statement (cited in note 123).
150 See id.
For the purposes of GATT, a member could have as the “measure at issue” “any act or omission attributable to another Member,” as long as the complaint is specific enough under Article 6.2 of the Dispute Settlement Understanding of the WTO (DSU). This does not “necessarily” have to be the manner of administration, though that is the problem in this case. It is possible to challenge a “system as a whole or overall,” as long as WTO pleading requirements are met, and so the lack of the uniform administration of the State Secrets Law would enter the WTO dispute resolution process.

Therefore, this GATT provision can be used to challenge the State Secrets Law.

The uniform administration of laws is discussed in greater detail in the Accession Documents, where it is enough of a matter of concern in the Chinese context that it is given its own section. Under the Accession Protocol, China is required to apply and administer in a uniform, impartial and reasonable manner all its laws, regulations, and other measures of the central government, as well as local regulations, rules and other measures . . . pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights (“TRIPS”) or the control of foreign exchange. This provision has extremely broad reach, and has even been read to apply to the criminal law.

The State Secrets Law—even in its revised format—still leaves doubt as to whether it will be applied in a uniform manner, and fails to “entirely eliminate the element of doubt” for those dealing with potentially sensitive information. This is especially evident given the way that the regulations on state or commercial secrets have been applied in the past. One of the most troubling aspects of this is the willingness that Chinese authorities have demonstrated in taking legal actions that are widely believed to be retaliatory, using unclear laws—like the State Secrets Law—and the power of the Central SOEs following foreign actions that the authorities disagreed with, a tactic that has been used in

---

151 GATT, Art X:3(a).
153 See id ¶ 137.
154 See id ¶ 166 (citing the Panel Report in permitting the United States to challenge the European Communities’ system of custom administration overall).
155 See id ¶ 176.
158 See Silk Testimony (cited in note 8).
a variety of contexts, such as the Rio Tinto prosecutions. The baffling nature of the Xue Feng case—he purchased a database containing ordinary and easily available information, and was not arrested until after the database was already in the US—also lends evidence to the arbitrary application of the law. This fits into broader problems with the legal system in China, where the US business community named "inconsistent interpretation and implementation of laws" as their top business concern in a 2010 survey by the American Chamber of Commerce. The "inconsistent legal treatment" and the "selective enforcement of laws and regulations" have also been named as serious concerns in the American and European business communities. This factor becomes far more dangerous given the ambiguous and opaque nature of the State Secrets Law.

V. THE STATE SECRETS LAW IS NOT PERMISSIBLE UNDER THE WTO EXCEPTIONS

A. The State Secrets Law Should Not Be Allowed Under the Security Exception

The WTO provides for several exceptions to GATT and other binding agreements that China will most likely try to use. The strongest argument that China can make involves the security exception, which is found in two different places in GATT. Article X permits parties (in this case, the Central SOEs) to avoid the disclosure of "confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private." Article XXI also provides a security exception, stating that GATT shall not be "construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests," which

---

159 See State Secrets: China's Legal Labyrinth at 14 (cited in note 10). See also id at 214–28 (listing cases that have been prosecuted under the State Secrets Laws).

160 See Interview with David Rowley, Professor, University of Chicago Department of Geophysical Sciences, in Chicago, Ill (Jan 6, 2011) (author's personal discussion with Professor Rowley regarding his involvement with Xue Feng, who was a graduate student of his).


163 GATT, Art X(1).
could be read to forbid the disclosure of or greater methodology with respect to the State Secrets Law. 164

The Accession Documents also contain a national security exception. The Accession Protocol exempts from its procedural requirements in the transparency discussion “laws, regulations or other measures involving national security . . . and other measures the publication of which would impede law enforcement.” 165 The Working Party Report also contains language recognizing the need to take into account security concerns, though these provisions are not binding under ¶ 342. 166

The WTO security exceptions have not been widely applied, leaving little guidance as to their scope. This is in part due to the fact that some countries, as China is likely to do, have argued that both the original negotiation documents of GATT and Article XXI’s early application suggest that the security exception should be read to not only provide a defense to WTO cases, but to preclude review of the issue altogether. 167 This is the argument that the US put forward when challenged by the European Communities (EC) on the Helms-Burton Act, an attempt to strengthen the US embargo against Cuba. 168 However, the US and the EC reached an agreement before the panel considered the issue, and therefore no decision was reached on the matter. 169 A similar argument was put forward in Nicaragua—Measures affecting imports from Honduras and Columbia; however, despite the WTO’s decision that a panel could be established, it was never constituted. 170 Even in situations where the defense has been invoked, it has failed to prevent a resolution of the issue, as other measures, such as diplomacy or settlement, have been used. 171

Despite the lack of clear WTO precedent on the issue, there are compelling arguments that the invocation of a security exception should not preclude review altogether. First, other international tribunals—the European Court of Justice, the European Court of Human Rights, and the International Court of Justice—

---

164 GATT, Art XXI(a).
166 See, for example, Working Party Report ¶ 158 (providing a national security exception to export controls) and ¶ 230 (recognizing the need for food security).
169 See id.
170 See id at 377; World Trade Organization, Nicaragua—Measures Affecting Imports from Honduras and Columbia (Feb 24, 2010), online at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds188_e.htm (visited Feb 6, 2011).
have all ruled on security issues, implying that it is appropriate for them to be considered by international courts. Second, making the security exception self-judging would remove the force of having the exception at all, since "a self-judging obligation is not an obligation at all," and so preclusion of security review entirely would remove the force of GATT. Third, while parties may claim that this kind of question is political and so outside of the scope of trade law, this is not sufficient to avoid jurisdiction. There are significant trade interests implicated, and the DSU explicitly covers situations with potential political implications. The DSU is not subject to a security exception. Therefore, this issue should be reviewable regardless of the possible use of the security exception.

There may also be an argument to be made that the serious human rights concerns that are implicated in the way that a state secrets prosecution proceeds—especially as applied in the case of foreign citizens—should color the application of the national security exception, given the international norms at stake. However, while this should make the international community more leery of allowing a security exception, it should not be determinative in this case.

After this threshold inquiry has been met, and the question deemed reviewable, the security exception would not be appropriately invoked. GATT requires that national security should be protected using the least restrictive means possible in order to avoid an application that is overly broad or applied too frequently. At the very least, this involves a claim that is made in "good faith" and proportional to the threat that the country at issue is hoping to avoid. Similar analysis can be applied to Article X(1), which also requires a "necessity test" to be applied when scrutinizing domestic legislation.

---

172 See Akande and Williams, 43 Va J Intl L at 382–83 (cited in note 168).
173 See id at 383.
174 See Lindsay, 52 Duke L J at 1280–81 (cited in note 171); Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement, online at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (visited Jan 9, 2011).
176 See id.
180 See Verhoosel, National Treatment and WTO Dispute Settlement at 3 (cited in note 92).
this standard, a key question is whether there is another option—if the State
Secrets Law can be revised in such a way that it would no longer provide a
barrier to international trade, while providing substantially the same protections
to the security concerns China has, it should not be upheld in its current form.

B. The State Secrets Law Can Be Rewritten to Protect Both
China’s Interests and Business Operating in China

There are a number of ways in which the State Secrets Law, in combination
with the regulations applied to the Central SOEs, could be rewritten to balance
the protection of China’s essential security interests and the ability of business to
operate freely. There are two ways to resolve the problems with the law. The
first addresses the administrative validity of the law and related regulations
themselves. The second addresses the application of the law as a whole, and the
need to avoid the due process and other concerns that add to the uncertainty
and political use of the State Secrets Law.

1. China could improve the administrative validity of the State
Secrets Law

China could resolve many conflicts between the State Secrets Law and the
WTO, particularly transparency and national treatment, through following
appropriate administrative procedures for its application to the Central SOEs.
First, China could follow a formal notice-and-comment procedure, for the
implementation of guidelines related to state secrets for the Central SOEs that
are clearer than the Interim Rules, as required in administrative actions in the US
and under the GATT articles and as China has done in other administrative
actions. A stronger definition of what constitutes a state secret in the context
of information likely to be dealt with by the Central SOEs would greatly reduce
uncertainty, and decrease the ability of the central government to participate in
arbitrary prosecutions. This would also bring the law into line with the
transparency requirements in GATT and the Accession Documents. Second,
China could provide administration of the State Secrets Law through a central
body instead of at the level of the Central SOEs themselves, as permitted under
the Interim Rules. This would reduce the chance of any improprieties, a factor
that the Chinese government recognized as a problem and part of the driving

---

181 See, for example, United States Trade Representative, 2011 National Trade Estimate Report on Foreign
Trade Barriers, 91-92 (March 2011), online at http://www.ustr.gov/webfm_send/2751 (visited
May 16, 2011) (discussing China’s movement towards an official journal for publication of trade-
related measures, but noting specifically SASAC’s failure to include the Interim Rules in that
journal, solicit any public comments, or make the full text of the rules available until a month after
announcing their issuance).
force behind some of the revisions regarding local action made to the State Secrets Law.\textsuperscript{182} It may also reduce the ability of the law to be applied in a retaliatory manner because it will build in greater accountability by making it clear where the decision is made. While these changes may require some serious structural work, the Central SOEs are already undergoing significant reform. Further, any changes that strengthen China's commitment to transparency and international trading norms would benefit the country overall.

2. China could improve the implementation of the State Secrets Law

The way that China's judiciary has approached cases under the State Secrets Law is another area that could be greatly improved. While this would increase China's WTO compliance as a whole, it would have a particular effect on transparency, the uniform application of the law and, somewhat self-evidently, the judiciary. The means through which courts in other nations have dealt with secret information can provide a guide to the ways in which China can edit its law to lead to a more transparent and fair application in courts. This would reduce significantly the dangers of basic rights violations in a state secrets prosecution, though the nature of the material means that no trial is likely to be completely transparent. China has demonstrated a willingness to use foreign law as a guide in the evolution of its legal system.\textsuperscript{183}

For instance, American law features a state secret privilege that the government can invoke when matters of national security are at stake.\textsuperscript{184} Also known as the national security privilege, this is "a privilege that the government may invoke against the discovery of material that, if divulged, could compromise national security," with consequences ranging from denial of evidence to dismissal of the case.\textsuperscript{185} However, unlike the Chinese law, there are a number of due process protections built into the application of this privilege in cases where there is a possibility of abuse, including a requirement for a formal claim by the relevant department head—not a local official—and the possibility of in camera review of the relevant evidence.\textsuperscript{186} Further, the non-governmental party can overcome the privilege if they demonstrate important enough "countervailing

\textsuperscript{182} See Huizi and Zho, \textit{China narrows definition} (cited in note 60).


\textsuperscript{184} See generally Jason A. Crook, \textit{From the Civil War to the War on Terror: the Evolution and Application of the State Secrets Privilege}, 72 Albany L Rev 57 (2009).


considerations.” \(^{187}\) The US also has legislation addressing the use of secret government information in prosecutions, such as the Classified Information Procedures Act. \(^{188}\) While the US law dealing with these issues is far from perfect, it provides one approach to the state security privilege, and China can also look to the functioning of other sound legal systems featuring varying levels of government deference. \(^{189}\) Regardless, this example stands in stark contrast to the many procedural abuses that faced Xue Feng. China, by strengthening the protections available under its legal system and the due process accorded to suspects, could greatly improve the State Secrets Law in such a way that would bring it in line with WTO requirements and international norms.

VI. CONCLUSION

China’s State Secrets Law violates both the spirit and the letter of China’s WTO obligations. The law, which can and has been applied in an inconsistent and ad hoc manner, plays directly into concerns discussed during China’s accession on the privileged position of the SOEs and the functioning of China’s legal and security system as a whole. Permitting this regulation to stand without challenge would undermine some of the most important and long-standing tenants of the WTO, in particular as related to transparency and national treatment.

There is also a human cost to allowing the regulation as it stands. One man—Xue Feng—has already lost several years of his life and has been subjected to torture because he purchased what he fairly believed was a publicly available database. The cost of doing business in China should not extend to unknowingly putting ordinary employees and business contacts at risk. This is especially true when prosecutions in state secrets cases are taken not for legitimate ends, but to protect the Central SOEs and give Chinese state business an additional protectionist advantage. The WTO needs to take this opportunity to stand behind the principles of free trade it has established, and take a greater step towards implementing important international norms on the rule of law to the member states that made their decision to benefit from the opening up of trade that the organization permits.

\(^{187}\) See Setty, 75 Brooklyn L Rev at 207 (cited in note 185).


\(^{189}\) See, for example, Setty, 75 Brooklyn L Rev at 237–55 (cited in note 185) (comparing the US law on the state security privilege to that in India, the UK, and Scotland, and discussing congressional attempts in 2008 to legislate greater controls on the use of the state secrets privilege).