

EVOLUTION OF THE CHINESE LEGAL SYSTEM IN THE GLOBALIZED WORLD

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SUMMARY: I. *The Legal System in the Period of Planned Economy*. II. *Opening to the Outside World*. III. *Joining the WTO a New Challenge*. IV. *Effects of the WTO Membership*.

Economic globalization is a great trend of the contemporary world which has extended to every sector of the economy. The wide spread and fast developing globalization has effectively strengthened the intra-sector and inter-sector interdependence of all the members of the international community. The economic integration unavoidably impacts on the laws, legal systems, legal concepts, legal values and legal environment of all the countries in the world, regardless their differences in culture, history, legal and political systems, religious belief and geographical location. China of course cannot be an exception. Its laws and legal system have changed drastically and substantively over the last 50 years. This paper is to overview briefly the characteristics of the Chinese legal system after the establishment of the People's Republic, examine the changes brought about by China's enforcement of open policy in the late 1970s to the end of the last century and then discuss the impact of China's WTO membership.

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I. THE LEGAL SYSTEM IN THE PERIOD OF PLANNED ECONOMY

The current Chinese legal system can be traced back to the period of the Chinese-Soviet Republic in the revolutionary bases prior to the establishment of the People's Republic of China. The first formal piece of legislation was, commonly referred to as, the Common Program of the Chinese People's Political Consultative Congress in 1949 which laid down the essential principles of the *Constitution* in 1954. Thereafter laws relating to the court system, the procurators, marriage, land reform, etcetera, were adopted.

The laws adopted in the early 1950's were to a large extent tinged with revolutionary characteristics for the transformation of private ownership to public ownership. The ideology or spirit of such laws was obviously influenced by the former Soviet Union. In that period, the Chinese government relied not only on the Communist Party, workers and peasants but also on capitalists and intellectuals who agreed to the socialist system. The laws including the *Constitution* were quite balanced in reflecting the interests of these groups of the Chinese population. The hasty enactment of laws in the 1950s, which was needed as the laws of the Guomindang Government previously existing, were announced by the Chinese government as null and void.¹

Starting from 1957 to 1976 with an exception of three to four years in the early 1960's, China was deeply engaged in political movement. Laws of that period reflected the class struggle within the country. At the same time, China adopted a highly centrally planned economic system. Economic plans and administrative orders, instead of laws, had binding force on local governments and enterprises of different sectors of the economy such as manufacturing, distribution and service. Laws thus became a tool of class struggle.² In fact, in the ten years of the Great Cultural Revolution (1966-1976), laws were not considered necessary, leave alone important, to the society.

¹ Soon after its establishment the Communist Government of China nullified the then existing Complete Code of Six Laws in order to establish a "people's" legal system. See Byron S. J. Weng and Chang Hsin, *Introduction to Chinese Law*, Hong Kong, Ming Pao publishers, 1978, pp. 6-14.

² The exploitation of classes as such had been abolished in China, however, it was expected that class struggle would continue to exist within certain bounds for a long time to come. See the Preamble of the Constitution.

The situation remained the same until late Chairman Mao died in 1976 and the pragmatic policies were adopted by the Chinese government in 1978 when the government announced that the country would, from then on, concentrate its efforts on economic construction. That announcement was not surprising. In the first place, at that time, the Chinese economy was on the verge of bankruptcy. Secondly, most of the leaders of the government suffered a lot from the political movements, especially the Great Cultural Revolution. This does not mean, however, that the Chinese government had decided to change its political directions or ideology. Quite contrary, the Constitution of 1982 stipulates the “four cardinal principles”³ as guiding principles for the development of the country.⁴

At economic front, however, the Chinese government realised the need to modify its rigid economic system including the central planning and the People’s Communes. Economic growth requires capital and advanced technology as well as sophisticated management methods. Having been isolated from the rest of the world for several decades and having engaged in political movements at the same time, China neither had the capital nor technology or management skills needed to revitalise its economy.⁵ The pragmatic policies therefore shift the focus to the importation of these items from foreign countries and the neighbouring regions.

II. OPENING TO THE OUTSIDE WORLD

China started to implement the policy of domestic economic reform and opening to the outside world in 1978. The policy suffered some setbacks as a result of the Tiananmen movement in 1989. From 1978 to 1989, numerous laws and administrative regulations were adopted to en-

³ The “four cardinal principles” refer to upholding the pursuit of the socialist road, the proletarian dictatorship communist party leadership and adherence to Marxist-Leninism-Mao Zedong thought.

⁴ See the preamble of the Constitution.

⁵ During the “Cultural Revolution” self-reliance was the buzzword for China. Before that due to political and ideological differences China isolated herself from the rest of the World. It was only open to the countries with same ideology, such as the former Soviet Union and very few other Communist Countries. The three-decade long “close door policy” of China proved to be detrimental to its economic and technological advancement as compared to the rest of the world.

courage foreign investment and domestic economic reforms.⁶ Issues in relation to political reforms were brought about several times, no major law, however, was adopted in that period. The student movement in 1989 put political reform on a standstill, which partially contributed to the slowdown of foreign investment in China.⁷

One of the features of the laws in that period is that most of the laws were composed of laws passed by the National People's Congress and its Standing Committee and administrative regulations passed by the State Council and ministries and commissions. This process inevitably had the effect of boosting the already swelling administrative discretion. The country's much criticized corruption is directly related to this legislative practice.

From the late 1970s to the early 1990s, another salient feature of Chinese legal development is differential treatment between Chinese nationals and foreigners. During this period, most laws and regulations basically consisted of two sets of laws: one applicable to those which involved foreign elements, the other for pure domestic matters. Laws enacted during this period, such as the China-Foreign Joint Venture Law,⁸ the China-Foreign Contractual Joint Venture Law,⁹ the Wholly Foreign-owned Enter-

⁶ During this period more than 450 laws and regulations were promulgated by the NPC, the NPC's Standing Committee and the State Council, including 350 economic laws and nearly 100 laws concerning the introduction of foreign capital and technology from foreign countries. See Rui, Mu, "Chinese Economic Law and the Chinese Legal System", in Rui, Mu and Wang, Guiguo (eds.), *Chinese Foreign Economic Law: Analysis and Commentary*, International Law Institute, Washington D. C., 1994, pp. 1-8.

⁷ The main reason for the slowdown of foreign investment in China was political rather than legal or lack of economic opportunity. The Tinnamen Square incident generated worldwide concern, which in turn affected the foreign government's policy towards investment in China. The situation improved in 1992 with the visit of Deng Xiaoping to the southern China.

⁸ Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures was adopted at the 2nd Session of the 5th National People's Congress (NPC) on 1st July 1979 and was effective as of 8th July 1979. It was later amended in accordance with the Decision to Revise the Joint Venture Law of the People's Republic of China at the 3rd Session of the 7th NPC on 4th April 1990.

⁹ Law of the People's Republic of China on China-foreign Contractual Venture Law was adopted at the 1st Session of the Standing Committee of the 7th NPC on 13th April 1988 and became effective as of the date of promulgation.

prise Law,¹⁰ the Foreign Economic Contract Law,¹¹ and the laws, regulations, and rules relating to taxation and commercial dispute resolution, were cases in point. As in other developing countries, the legislative intent of China's differential treatment between nationals and foreigners was to give preferential treatment to foreign investors and merchants. The result was to put local enterprises and individuals in a disadvantageous position, diminishing the initiative for enterprises and individuals. The situation also provided an excuse for state-owned enterprises to continue incurring losses.

Another special feature of the laws during the period is the over-emphasis on Chinese characteristics which reflect Chinese culture, social, economic and political systems and the lack of overall planning. Many of the laws and regulations of this period were designed to meet immediate needs without systematic organization and advanced planning.¹² For instance, in response to foreign criticism of China's investment environment, the State Council in 1986 passed regulations for encouraging foreign investment, and the ministries and commissions under the State Council enacted detailed rules to implement the State Council regulations. The legislative emphasis on Chinese characteristics was to some extent affected by those scholars who advocated a socialist legal system and by national debates over different paths to socialism and what path China should follow.¹³

The above difficulty was overcome by Deng Xiaoping's trip to southern China in 1992 which motivated China to open its doors wider and started a new era of law-making. Deng pointed out that socialist ideology and a market economy were not necessarily incompatible, thereby signal-

¹⁰ The Law of the People's Republic of China on Wholly Foreign-owned Enterprise was adopted at the 4th Session of the 6th NPC, promulgated by the president of the PRC by order number 39 on 12th April 1986, and effective as of the date of promulgation.

¹¹ The Law of the People's Republic of China on Economic Contracts Involving Foreign Interests was adopted at the 10th Session of the Standing Committee of the 6th NPC on 21st March 1985 and became effective as of 1st July 1985. This law governed contracts between Chinese legal person and legal or natural persons outside the mainland of China.

¹² For discussion of the characteristics of the Chinese law in that period, see Wang, Guiguo, "The Future Trend of Economic Law of the Mainland of China", paper delivered at the *Conference on Opportunities and Challenges under the New Economic Environment in the Mainland of China* held on 5th May 1999 in Taipei City, Taiwan.

¹³ For discussion, see Lo, Carlos Wing-hung, *China's Legal Awakening: Legal Theory and Criminal Justice in Deng's Era*, Hong Kong, Hong Kong University Press, 1995.

ing China's change to a market economy.¹⁴ The resolution adopted by the Chinese Party Central Committee to establish a market economy with Chinese characteristics provided a political guarantee for legal reform. Thereafter, Chinese laws underwent tremendous changes. The main trend has been to massively absorb foreign legislation, including legislative intent, legal concepts, and legal values. Obviously, these laws bore the influence of the common law system, possibly as a result of the large influx of Chinese scholars into countries and regions like the United States, Canada, Australia and Hong Kong. This does not mean, however, that China abandoned its own legal tradition entirely, as Chinese law has frequently studied and copied laws from the continental or civil law countries or regions, including Taiwan. This dual approach is illustrated by the enactment of the Company Law in 1993,¹⁵ the Securities Law in the end of 1998,¹⁶ and the Contract Law in March 1999.¹⁷ For instance, most of the terms of Company law bear resemblances to those of the Common Law countries and regions like the United States and Hong Kong. However, arrangements for supervisors and supervisory boards were drawn from civil law countries like Germany. The Securities Law was directly influenced by the Hong Kong Securities Law, with the addition of measures to fix the latter's legal loopholes and areas of ineffectiveness that had been revealed by the Asian financial crisis. The Contract Law was primarily drafted by scholars and experts who are familiar with civil law systems, with the result that the first draft reflects the contract law in civil law jurisdictions. After several drafts, it has come to embody more contract law characteristics and provisions of the common law system. Nevertheless, to a certain extent, the Contract Law has had the effect of revitalizing the Chinese legal tradition. Principles governing offers, acceptances, submissions and deposits are the same as their counterparts of Taiwan. The Contract Law also adopted the principle prevailing in the

¹⁴ See generally Baum, Richard, *Burying Mao: Chinese Politics in the Age of Deng Xiaoping*, Princeton, Princeton University Press, 1994.

¹⁵ The Company Law of the People's Republic of China was adopted by the 5th Session of the Standing Committee of the 8th NPC on 29th December 1993 and came into effect from 1st July 1994.

¹⁶ The Securities Law of the People's Republic of China was adopted by the 6th Session of the Standing Committee of the 9th NPC on 29th December 1998 and came into effect from 1st July 1999.

¹⁷ The Law of the People's Republic of China on Contracts was adopted at the 2nd Session of the 9th NPC on 15th March 1999 and came into effect from 1st October 1999.

common law system regarding prior contract liabilities, *i. e.* liabilities resulted from negotiating contracts.

Starting from 1993, Chinese laws began to gradually minimize or abolish the differential treatment between Chinese nationals and foreigners. For instance, the tax reforms of the early 1990s gave basically equal treatment to local and foreign enterprises. The Company Law enacted in 1993, the Arbitration Law of 1994,¹⁸ the Commercial Banking Law of 1995,¹⁹ and the Contract Law of 1999 removed the differences between treatment of Chinese nationals and of foreigners. This legislative move is favorable to competitiveness among Chinese enterprises and is conducive to the establishment of a market economy. The abolition of differential legal treatment of Chinese nationals and foreigners was an important step toward China becoming a member of the WTO.²⁰

Another development was to make laws more detailed, specific, and to some extent forward-looking. The Company Law, Securities Law, Commercial Banking Law, and Contract Law are more detailed than their predecessors and reflect the mainstream international approach, especially that of the developed countries.²¹ This change is helpful in promoting economic transactions and economic exchanges between China and other countries, as well as enhancing the depth of such transactions and exchanges. Detailed legislation results in more concrete and specific interpretation of laws, which in turn controls the exercise of administrative discretion directly and helps combat corruption indirectly.

An overview of the legislation in the 20 year period between the late 1970s to the end of the last century shows that most of the laws which were transplanted or copied from overseas are concentrated in the realm of

¹⁸ The Arbitration Law of the People's Republic of China was adopted by the 9th Session of the Standing Committee of the 8th NPC on 31st August 1994 and came into effect on 1st September 1995.

¹⁹ The Commercial Banking Law of the People's Republic of China was adopted at the 13th Session of the 8th NPC on 10th May 1995 and came into effect from 1st July 1995.

²⁰ The fact that Chinese law gives preferential treatment to foreign enterprises is in general considered as contrary to the spirit of free trade, although it is not in violation of the principle of national treatment of the WTO.

²¹ For instance, the Company Law has 230 articles and the Contract Law has 427 articles. In comparison, the Chinese-foreign Equity Joint Ventures Law has only 15 articles and Foreign Economic Contract Law had 43 articles.

the commercial sector.²² The adoption (not to mention transplantation) of public law was minimal, due to political considerations and prevailing ideologies in China.

In the past, it was often said that there was no law in China. As a result of the increased pace of establishing a market economy, a lot of new laws were in place by the end of the last century. People then realized that there were already too many laws in China. Needless to say, enacting laws is only the first step towards regulating the economic sectors and transactions or the rule of law, or "ruling the country according to the law". The crux of realizing the rule of law is the effective and correct implementation of the laws. The main problem that China had was defiance of law and loose law enforcement.²³ If the situation continues, China's goal of market economy would be seriously affected, if not made impossible. The influx of foreign capital and technology would slow down or stop. China again was at a cross-street.

III. JOINING THE WTO A NEW CHALLENGE

Whilst China striving for the establishment of a legal system commensurate to the market economic system, it also tried hard to be part of the multilateral trade system. It submitted its application to resume the Contracting Party status of the GATT in 1986 and participated in the Uruguay Round negotiations. Soon after, it became clear that in order to join the multilateral trade system, China would face difficulties in a number of areas. For example, the extension of the multilateral trading rules to trade in services would impose a great strain on the country. At that time, there were no laws governing banking, insurance and securities. Yet China was aware that once it became a member of the new organiza-

²² During this period, more than 450 laws and regulations were promulgated by the NPC, the NPC Standing Committee and the State Council. Included among them were 350 economic laws and nearly 100 laws concerning the introduction of foreign capital and technology from foreign countries. See Rui, Mu, "Chinese Economic Law and the Chinese Legal System", in Rui, Mu and Wang, Guiguo (eds.), *Chinese Foreign Economic Law: Analysis and Commentary*, Washington D. C., International Law Institute, 1994, pp.1-8.

²³ See Zhang, Xiaoqin, "The Present Situation of Corruption in China and Anti-Corruption Countermeasures", in Wang, Guiguo and Wei, Zhenying (eds.), *Legal Developments in China*, Hong Kong-London, Sweet and Maxwell, 1996, pp. 352-360. This has also been often reported in newspapers and magazines within and outside China.

tion, it would have to open its service sectors to foreign competition. It would also have to adopt measures relating to intellectual property protection and foreign investment. At that time, foreign service providers were not encouraged, nor were those that were operating in China treated on the same footing as Chinese service providers. Foreign banks at that time were permitted to establish representative offices throughout China, but foreign bank branches and Chinese/foreign joint banks could only be set up in Special Economic Zones and in Technological Development Zones.²⁴ Foreign banks were not allowed to conduct Renminbi (RMB) business, and their operations were restricted to the area where they were registered.²⁵

The securities and insurance industry faced a similar situation. Although the Chinese government allowed the issuance of “B” shares and “H” shares, the access of foreign investors to the Chinese securities market was still limited. The insurance market was even more restricted.

While Chinese policy has always been to encourage foreign investment by giving foreign investors preferential treatment in terms of taxation, import and export opportunities, and independent management, Chinese law required foreign investors to give priority to local parts and products in procurement, and linked preferential treatment with export performance. Neither of these policies would conform to the spirit of negotiations on trade-related investment measures at the Uruguay Round. In addition, only Chinese nationals could serve as chairmen of the board of Chinese-foreign equity joint ventures.

With regard to tariff reduction, China substantially reduced its tariffs in 1992 as payment of its “ticket of admission”.²⁶ It also abolished the system of export subsidies and the adjustment tax on imports, and reduced

²⁴ As of March 1993, there were one hundred and ninety-two representative offices of foreign banks and eighty-nine business establishments in China, of which seventy were foreign bank branches, five were wholly foreign-owned banks, ten were Chinese/foreign joint banks, three were Chinese/foreign joint financial companies and one was a foreign-owned company. Changyao, Wang, “The Effect of China’s Resumption of GATT Contracting Party Status on the Financial Industry in Hong Kong”, in *Challenges and Opportunities*, *op. cit.*, footnote 12, p. 74.

²⁵ There were no formal legal restrictions on foreign banks or branches of foreign banks conducting business outside the area of their registration. The restrictions were maintained through the administrative approval process.

²⁶ Yongjiang Gu, “China to Establish a Free Trade System”, 1997, p. 6 at <http://www.ihep.ac.cn/ins/Book/bjreview/march/96-11-13.html>.

the categories of licence and quota requirements. Additionally, in 1993, China ceased to issue directive plans for imports and exports and the import tax was reduced by an average of 7.3%.²⁷

Market access was an important issue. Before China joined the WTO, all foreign trade companies had been State-owned, the Chinese government essentially regulated foreign trade through administrative orders rather than issuing laws. This made it difficult for foreign trading partners to become aware of changes in China's trade policies and laws. In order to meet the GATT-WTO requirements, the Chinese government started promulgating legislation in the early 1990s. The Regulations on the Origin of Goods in March 1992 was an example. The Chinese government also amended its Patent Law,²⁸ Trademark Law,²⁹ and enacted the Copyright Law³⁰ and the Regulations for the Protection of Computer Software.³¹ In March 1993, the State Council decided that each of the coastal districts and counties, border counties and cities, and High Technology Development Zones might have one foreign trade company established in its vicinity. And specialized foreign trade companies and industrial companies might establish subsidiary companies in their business. The effect of these changes was to give foreign investors and traders easier access to the Chinese market.

China also took measures to reform its price system. As a result, only a small proportion of goods which the Chinese government considered crucial to the life of the people or the development of the national economy were subject to government-set pricing. It was reported that by March 1993, market-determined prices accounted for more than eighty percent of

²⁷ *Idem.*

²⁸ China's Patent Law underwent substantial revision in 1992. The amendments enlarged the scope of patent protection to cover pharmaceuticals, chemicals, food, beverages and condiments, and extended the protection terms. They also provide protection to imported patented products. These amendments became effective on January 1st, 1993. The Chinese Patent Law, therefore, is in line with international standards.

²⁹ The amendments of the Trade-Mark Law took effect on July 1st, 1993. These amendments have elevated the Chinese standards to the international level by providing for the protection of service marks and well-known marks.

³⁰ The Copyright Law of China was adopted on September 7th, 1990 and took effect on June 1st, 1991. A year later, China became a party to the Berne Convention and the Universal Copyright Convention.

³¹ These Regulations were adopted by the State Council of China in 1991, and came into effect on October 1st, 1991.

the categories of goods in China.³² Further price relaxation occurred after China's decision to establish a market economy in the country.

IV. EFFECTS OF THE WTO MEMBERSHIP

The WTO deals not only with trade issues but also with investment. Both the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) have a direct bearing on international investment. The Agreement on Trade-Related Aspects of Investment Measures (TRIMs), which requires members of the WTO to gradually abandon investment policies and measures that contravene the principle of national treatment, is directly investment related. Thus, it is obvious that the impact of the WTO on international investment is tremendous.³³

These agreements have tremendous impact of the legal system of the WTO members. Take the principle of national treatment as an example. Traditionally, the principle only required formal reciprocity, *i. e.*, so long as governments accorded to foreign goods, foreign merchants and foreign investors treatment no less favorable than that accorded to their nationals, they would be considered as having fulfilled their treaty obligations. The Paris Convention for the Protection of Industrial Property illustrates this point. Under the Convention, suppose the intellectual property law of Country *A* stipulates that service marks cannot be registered, *i. e.*, not protected, whilst the trademark law of Country *B* provides protection for service marks. When a service mark holder of Country *B* enters Country *A*, he/she cannot have the service mark registered. When nationals of Country *A* go to Country *B*, on the other hand, they may have their service marks registered. If Country *B* were to refuse without a valid reason to register service marks belonging to nationals of Country *A*, Country *B* would violate the national treatment principle.

³² See Xinkui, Wang, "Preparation in Respect of the Chinese Economic System for Returning to GATT", *Challenges and Opportunities, op. cit.*, footnote 12, p. 9.

³³ The Chinese government officials and scholars have always treated service trade as part of foreign investment issues. This is not surprising as very often it is very difficult to distinguish the activities of direct foreign investment from those of providing services.

By contrast, the national treatment obligation under the TRIPs agreement is substantive. Article 1 of the TRIPs agreement provides “Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement”. Article 3 prescribes “Each member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property.” The TRIPs agreement contains detailed requirements regarding the standards of acquisition, scope and use of intellectual property rights, which must be enforced by every member. Any Member that does not enforce these requirements risks contravention of article 1. The TRIPs agreement also contains detailed provisions regarding the system of domestic legal remedies and the principles of law enforcement that must be adopted by WTO members. For instance, it requires all Members to establish a system to provide effective administrative, quasi-judicial and judicial remedies and to adopt the principles of objectivity, fairness and justice in enforcing their laws. The TRIPs agreement also requires judicial review of the decisions of the administrative bodies and with regard to temporary security measures, as well as the circumstances in which the Customs authorities may take custody of goods suspected of infringing intellectual property rights. The requirement of transparency of the legal system of the members is stipulated in virtually every WTO agreement.

To read the above-mentioned provisions of the WTO agreements together with the principle of national treatment leads to the conclusion that the traditional national treatment principle has gained a substantive meaning. First, the result of the international agreements is that all Members’ laws and legal systems will become similar. In addition, any member that refuses or fails to implement its international obligations may be challenged by others. For example, where the laws or legal system of a member are considered to be non-transparent, merchants or investors from other countries conducting transactions in trade, investment or providing services may accuse that country of contravening the principle of national treatment. This is so because in a country whose laws are not transparent, foreigners cannot be as familiar with the policy of the government as the nationals, and are thus placed in a disadvantageous position.

As a member of the WTO, China is not only bound by the Uruguay Round agreements but also agreements accepted by the members after the WTO's establishment as well as its commitments made upon joining the WTO. As far as China's commitments are concerned, they in many respects, span further than those of other WTO members. To take into account the size of China's economy, its status as a developing country, and the degree to which China operated as a planned economy until relatively recently, the extent of China's commitments are unprecedented.³⁴ For instance, China has not only agreed to comply with the terms of the WTO agreements, but, as discussed below, has consented to a number of obligations that "go far beyond" the rules that bind other WTO members, including those members that joined the WTO after 1995.³⁵ As a result, in addition to the changes in the economic system as demanded by the WTO, the laws, legal concepts and legal values adopted by the WTO Agreement are now being transplanted into the Chinese legal system subsequent to China's joining the multilateral trading regime.

1. *Uniform Application of WTO Rules*

Upon joining the WTO, China undertook to revise or annul, in a timely manner, administrative regulations which were inconsistent with its obligations under the WTO Agreement and the Protocol on the Accession of the People's Republic of China (hereinafter the "Protocol").³⁶ The local regulation, government rules and other local measures that were inconsistent with China's obligations must also be revised. This general commitment might seem like a light in surface, but taken together with the specific commitments by the Chinese government it represents enormous and profound undertakings of China.

For the purpose of joining the WTO, China further confirmed that the central government would ensure that all China's laws, regulations and

³⁴ Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B. C. International and Comparative Law Review, 319, 2004.

³⁵ *Idem*.

³⁶ The Protocol was adopted at the Doha Ministerial Conference on November 10th, 2001. Also see Report of the Working Party on the Accession of China (WT/ACC/CHN/49) dated October 1st, 2001 (hereinafter the "Working Party Report"), paragraph 68. The soft version of the Working Party Report is available at www.wto.org web site document number WT/MIN(01)/3.

other measures, including those of local governments at the sub-national level, conformed to its obligations under the WTO Agreement.³⁷ Like other WTO members, China has an obligation to ensure that the provisions of the WTO Agreement are applied uniformly throughout the Chinese customs territory including the Special Economic Zones (SEZs) and other areas where special regimes for tariffs, taxes and regulations are established.³⁸ In that regard, China promised a measure that all individuals and entities in China should be able to bring to the attention of central government authorities cases of non-uniform application of China's trade regime, including its commitments under the WTO Agreement and the Protocol.³⁹ Such cases will be referred promptly to the responsible government authorities and when non-uniform application is established, the authorities must act promptly to address the situation utilizing the remedies available under the Chinese law, taking into consideration China's international obligations and the need to provide a meaningful remedy.⁴⁰

WTO accession encompasses not only commitments to eliminate tariff and non-tariff barriers to trade in goods and market access in respect of trade in services or protection of intellectual property but also a set of obligations that aim to promote transparency, predictability, and fairness in the implementation of WTO obligations. In this regard, the establishment or maintenance of an independent and impartial system for the review of administrative decisions is required. In its Protocol,⁴¹ China undertook to establish or designate and maintain 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 of the GATT, the GATS and the TRIPS. Such tribunals must be impartial and independent of the agency entrusted with administrative enforcement and must not have any substantial interest in the outcome of the matter.⁴²

Review procedures should include the opportunity for appeal any administrative actions. It must also include where the initial right of appeal is to an administrative body, to choose to appeal the decision to a judicial

³⁷ Working Party Report, paragraph 70.

³⁸ *Ibidem*, paragraph 73.

³⁹ *Ibidem*, paragraph 75.

⁴⁰ *Idem*.

⁴¹ Article 2 of the Protocol.

⁴² *Ibidem*, article 1 (D).

body. Notice of the decision on appeal must be given to the appellant and the reasons for such decision be provided in writing. The appellant should also be informed of any right to further appeal.⁴³

Furthermore, China has the obligation to provide to the General Council information concerning the revision or enactment of domestic laws, regulations and other measures fall within the scope of its commitments under the WTO Agreement.⁴⁴

2. *Transparency*

Transparency is an important means to guarantee effective implementation of the WTO obligations. When joining the WTO, China committed to establish an official journal for the publication of all laws, regulations and other measures pertaining to trade in goods, services, TRIPS or the control of foreign exchange and should provide a reasonable period for comment to the appropriate authorities before such measures are implemented. This provision is utmost important for other WTO members as China has been criticized for invoking non-published internal documents in handling economic affairs involving foreign entities.⁴⁵ It should be pointed out that in making its commitment, China kept an escape window for national security, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement. Except the above, China must publish the journal on a regular basis and make copies readily available to individuals and enterprises.⁴⁶

Enquiry point must be set up to provide information relating to the measures required to be published. Replies to requests for information must generally be provided within thirty days after receipt of a request. In exceptional cases, replies may be provided within forty-five days upon receipt of a request. Notice of the delay and the reasons therefore must be provided in writing to the interested party or parties. Replies to WTO members must be complete and represent the authoritative view of

⁴³ *Idem.*

⁴⁴ See annex A1 of the Protocol. Some scholars has expressed some doubt with regard to the commitment of uniformity. See Halverson, *op. cit.*, footnote 34, p. 352-353.

⁴⁵ For such issues, see Guiguo, Wang, "Wang's Business Law of China", *Lexis Nexis*, 4th ed., 2003.

⁴⁶ Article 2C (2) of the Protocol.

the Chinese government, whilst those to individuals and entities must be accurate and reliable.⁴⁷ This contact point requirement serves as an additional guarantee that not only must China publish its laws, regulations and measures but also has an obligation to answer enquiries of both other WTO members and foreign entities and individuals. Consider the criticisms relating to China, the importance of this arrangement together with the general transparency requirement can hardly be overstated.

3. *Transitional Review Mechanism*

The mechanism of review by the WTO of the trade laws and policies of its members is, as discussed earlier, an important tool for ensuring compliance by the WTO members of their obligations. Under the system, all members of the WTO must accept to be verified and to submit themselves to periodic review by the WTO. In general the industrialized members are reviewed every two years, whilst others are subject to the review either with a four-year or six-year frequency. In the Protocol, China agreed to be subject to an annual review for the first eight years as of its becoming a member of the WTO. Thereafter, it will be reviewed once every four years.⁴⁸ Furthermore, China's implementation of the WTO obligations will be reviewed by the subsidiary bodies⁴⁹ of the WTO which have a mandate covering the related areas. Each subsidiary body will report the results of such review promptly to the relevant Council. In general, at least sixteen subsidiary bodies will be involved, showing how widely and deeply China would be scrutinized over the years.

The information to be submitted for review has been stipulated in annex 1A of the Protocol.⁵⁰ The information include economic data such

⁴⁷ *Ibidem*, article 2C (3).

⁴⁸ Lardy, Nicholas, R., *Integrating China into the Global Economy*, Massachusetts, The Brookings Institution, 2002, pp. 69-79.

⁴⁹ They include Council for Trade in Goods, Council for Trade-Related Aspects of Intellectual Property Rights, Council for Trade in Services, and Committees on Balance-of-Payments Restrictions, Market Access (covering also ITA), Agriculture, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Subsidies and Countervailing Measures, Anti-Dumping Measures, Customs Valuation, Rules of Origin, Import Licensing, Trade-Related Investment Measures, Safeguards, and Trade in Financial Services.

⁵⁰ Working Party Report, paragraph 87.

as most recently available import and export statistics,⁵¹ current account data on services, capital account data for inward- and outward-realized foreign direct investment, the value of tariff revenues, non-tariff taxes, and other border charges levied exclusively on imports,⁵² the volume of trade subject to tariff exemptions,⁵³ “the shares of imports and exports accounted for by the trading activities of state-owned enterprises”,⁵⁴ economic development programs and receipts under the Value-Added Tax, etcetera. Not long ago, China considered economic data as state secret.⁵⁵ The agreement to submit such information shows that China, in order to join the WTO, has abandoned its previous practice and policies toward economic data.

Economic policy is another main area subject to review. Such information covers the implementation of non-discrimination principle (basically national treatment), foreign exchange and payments, investment regime and price policies. In this connection, information relating to the framework for making and enforcing policies, such as the structure and powers of the government of sub-central governments, must be provided. In addition, policies affecting trade in goods, including tariff rate quotas, non-tariff measures, import licensing, customs valuation, export restrictions, safeguards, technical barriers to trade, trade-related investment measures, state trading entities and government procurement are also subject to review. Information on policies that may affect trade in services and intellectual properties must also be provided.

In practice, the transitional review mechanism has been used as a tool to monitor China's implementation of its WTO obligations. During the last four months of 2004, China participated in its third transitional review mechanism, in which other WTO Members reviewed China's im-

⁵¹ Annex 1A (1) (a) of the Protocol. The information should be submitted by value and volume, and by supplier country at the HS 8-digit level.

⁵² *Ibidem*, (d). Such information should again be submitted by product or at the highest level of detail possible, but at least by HS heading (4-digit) at the beginning of the review mechanism.

⁵³ *Ibidem*, (f). Information should be by product or at the highest level of detail possible, but at least by HS heading (4-digit) at the beginning of the review mechanism.

⁵⁴ *Ibidem*, (g).

⁵⁵ For instance, when China resumed its contracting party status of the International Monetary Fund in 1980, it was very reluctant to release any detailed economic data. The issue was discussed in length among the central government departments at that time.

plementation record, submitted questions to and heard testimony from the Chinese delegation.⁵⁶

The recent transitional reviews show that the questions on China's WTO implementation have become more specific, focusing on issues that other members considered as China had not addressed in previous reviews or through bilateral discussions. To date, most of the questions have come from the United States, although Japan and the European Union are also regular contributors.⁵⁷

Clearly the transitional review mechanism is a discrimination against China. Although pretext may exist, there is no reason to require China which is considered a developing country member to be reviewed on an annual basis for eight years. No wonder that once the commitment was made known to the public, a lot of criticisms poured to the negotiators from all fronts. Some scholars even openly stated that the completion of China's WTO accession negotiation was an ending rather than a success of the negotiations.⁵⁸ This discontent of Chinese scholars and some government officials has grown as in practice, "even though China has made strides in implementing many of its specific commitments in goods and services, the questions and comments submitted during the TRM indicate that China has yet to embrace fully some of the fundamental principles of WTO membership, such as transparency and national treatment".⁵⁹ This clearly demonstrates that the WTO membership does have important effects on China.

The WTO membership's impact on China is enhanced by China's own legal system. Under Chinese law, international treaty provisions prevail in case of conflict with domestic laws and administrative regulations.⁶⁰ Thus, as China is bound by the WTO Agreement, in case of any inconsistency between Chinese law and relevant WTO provisions, the latter will prevail regardless of whether China has specific rules to implement its WTO obligations. In this respect, China's commitment is

⁵⁶ Walton, Julie, "WTO year 4", *The China Business Review*, Washington, January – February, vol. 32, issue 1, 2005, p. 24.

⁵⁷ *Idem*.

⁵⁸ In a conference held by the Hong Kong WTO Research Institute in 2001, several scholars from China offered criticisms on this issue.

⁵⁹ Walton, *op. cit.*, footnote 56.

⁶⁰ Article 142 of General Principles of the Civil Law of The People's Republic of China.

more serious than those members whose laws require adoption of domestic laws for the enforcement of international treaties. It is foreseeable that as a result of the WTO membership, Chinese legal system will eventually adopt the provisions, legal concepts and legal values of the WTO Agreement and Chinese economic system will become similar to those prevailing among the WTO members.

Besides, the notion of national treatment should also be applicable to the monitoring system run by the government towards service providers like banks and finance institutions. The Commercial Banking Law of China provides for capital adequacy and liquidity in accordance with the Basle Committee. In practice, the banks in China, especially the State-owned banks, have not yet been able to fulfill such obligations. In the long run, China must solve this problem. Upon entering the WTO, there will be influx of banks, financial institutions, insurance companies of other members, especially those from the developed countries. The home countries of these enterprises are usually monitored in accordance with the standards set by the Basle Committee. This influx will pose a problem of how to give no worse treatment to foreign enterprise than the local ones. If the phenomenon of law defiance is allowed to continue, foreign enterprise can also disobey the law. An alternative is to amend the law, reduce the standards so as to make the law in conformity with the reality. The implication may be to convey the message to other members that the monitoring standards of China is too low, other members may then not permit the entrance of banks and financial institutions from China to enter their markets. Thus, from certain perspectives, the status of being a member of the WTO can help promote the legal reform and law enforcement of China.

An important aspect of the GATS is to set limits to the legal system and criterion for law enforcement of its members. Upon becoming the members of GATS, they must publicize the measures, laws, administrative rules, decisions, administrative decrees, international treaties, international agreements, etcetera which are related to the implementation of GATS obligations.⁶¹ Besides, all members must report to the Council annually the enactment, amendment and annulment of the above laws, administrative rules, administrative decrees. In order to ensure that the service providers especially those from foreign members can legally exer-

⁶¹ Article 3 of the General Agreement on Trade in Services.

cise their rights, all members must establish an enquiring mechanism so as to answer queries of the service providers. In enforcing the related laws, administrative rules, administrative decrees and other related measures, all members should strictly observe the principle of reasonableness, objectiveness and fairness. They should also establish the judicial procedures, arbitration procedures and administrative remedies so as to handle the complaints of service providers and to cater legal and administrative assistance.

According to the stipulations of the GATS, it constitutes a breach of contract if the transparency of the laws and legal system of any member is not up to the standard or, if a member cannot cater sufficient legal and administrative assistance to foreign service providers.⁶² Even if there were an objective criterion to determine the transparency of laws, judiciary and administrative actions and assistance, the reasonableness, objectiveness and fairness of such actions is directly related to the history, culture and tradition of the member concerned. Under these circumstances, those members which have greater negotiating power will be in a dominant position. The experience of China's negotiation to join the WTO is the fate of its membership in the WTO. From the viewpoint of development, by becoming a member of the WTO, there must be major changes in the laws and legal system of China so as to satisfy the requirement of the international agreements. The consequence is the inflow of the legal theories, legislative intent, legal values of the developed countries into the legal system of China. As a means to preserve a certain degree of independence and the special features of the Chinese culture, it is unavoidable that China has to give serious thoughts to the practice and experience of the other members especially those of civil law system, Taiwan inclusive, in relation to the legislative and judiciary system.

In conclusion, after the establishment of the People's Republic in 1949, the Chinese legal system was based on the planned economic system. Starting from the late 1970s when China began its open policy, its laws have undergone substantial changes. In the first ten years of the implementation of the open policy, a distinct feature of the Chinese laws was differential treatment between local Chinese and foreigners and emphasis on Chinese characteristics. Gradually, it started to absorb and adopt the stipulations and experience of the developed countries and re-

⁶² *Idem.*

gions so as to enhance the effectiveness of the laws enacted. After China succeeded in becoming a member of the WTO, its laws and legal system have undergone the second tremendous change. With absorbing and transplanting the norms and standards of multilateral treaties especially the WTO Agreement, the Chinese laws and legal system, including law enforcement, will gradually become commensurate with the requirements of market economic system and rule of law.