How Does TRIPS Transform Chinese Administrative Law?

Chien-huei Wu*

Abstract

This paper argues that, after its accession to the WTO, Chinese Administrative Law has been transformed. Four elements are of great importance in this transformation process: the domestic constitutional function of the WTO; detailed procedural and substantive requirement of the TRIPS agreement (these two factors being strengthened by China's Accession Protocol where the right to trade and the obligation to provide independent judicial review are explicitly referred); China's perception as an impetus to widen and deepen its economic reforms, and subsequently legal reforms; and political pressures from other members of the WTO. This paper argues detailed procedural and substantial rules provided in the TRIPS agreement can effectively act as a body of Global Administrative Law. It further controls the discretion of domestic governmental agencies. After the theoretic analysis of this "inevitable" transformation, this paper examines the existent practices in China. It starts with a general evaluation, and goes further to examine some case-laws in Chinese courts so as to evidence this transformation.

I Introduction.

The title of this paper suggests (1) that Chinese Administrative law[1] has been changed, and (2) that these changes can be attributed, to whatever extent, to China's accession to the WTO, more precisely, to the TRIPS agreement. Consequently, this paper has to justify its claims by illustrating significant changes in Chinese Administrative Law, and by providing analysis to establish a casual link between these changes and Chinese implementation for the fulfillment of its obligations under the WTO Agreement or TRIPS. However, an empirical approach is not what this paper opts for. This paper will, on the contrary, take up to argue that the WTO law, with a transformative function which is normative in nature, will inevitably bring about these changes. This transformative function is amplified by the specific feature of TRIPS agreement, and is further strengthened by the fact that China sees its WTO membership as an impulse to accelerate its domestic reform.

Based on this logic, this paper deals firstly with the transformative function of the WTO. Although this paper focuses on how TRIPS transforms Chinese administrative law, the TRIPS agreement can not be isolated from the Single Undertaking of Uruguay Round Agreement. Placing TRIPS agreement into a broader

* 3rd year researcher of Law Department, European University Institute (EUI) at Florence, Italy. E-mail: chien-huei.wu@eui.eu. This paper was originally presented in 3rd Global Administrative Law Seminar in Vieterbo, 15-16/06/2007. The author wishes to thank Professor Gregory Schaffer and other participants' comments. The author also wishes to thank Professor Ernst-Ulrich Petersmann's continuous encouragement and valuable comments on an earlier draft. Any errors are my own.

[1] The term administrative law employed here is to be defined as a body of law, which is regulatory in nature. It does not limit to the "administrative law" as traditionally understood and defined, namely a body of law governing the function of administrative power. Civil and criminal measures with regulatory functions will also be counted as part of this administrative law. Courts should also be regarded as part of this regulatory regime. Besides, while this paper focuses on intellectual property rights, especially the foreign right-holders, the transformation of Chinese administrative law is not limited to the area of intellectual property rights. As clarified in this article, "administrative" rule of law cannot be separated into those measures related to the WTO and those not. Those disciplines of Global Administrative Law apply equally to both foreign right-holders and private economic actors in China. The author owes this point to Professor Gregory Schaffer.

context of the WTO law, linked with China's Accession Protocol, helps to present a clearer picture of this issue. The constitutional function of WTO law, being supported by detailed procedural and substantial obligations laid down in the TRIPS agreement and by the unusual obligation to provide an independent judicial review in China's Accession Protocol, has been gradually and inevitably bringing about this process of transformation. These detailed obligations serve as the intermediate layer between constitutional principles in the WTO law and national implementation measures. In other words, these procedural and substantial rules can be regarded as an effort to control the discretion of national implementation measures (as in this paper, China) in the area of intellectual property rights. These detailed prescriptions (in particular the procedural requirements) laid down in the TRIPS agreement can be well qualified as a body of Global Administrative Law.[2]

It would also be stressed that domestic judicial review centers in this process of transformation, as TRIPS rules are to be, directly or indirectly, enforced in domestic courts. It is also through domestic courts that individual intellectual property rights are to be protected. The background against which these domestic implementations are situated will also be touched upon. It is this international background, as the bedrock, that ensures China shall carry out its WTO obligations, and thus makes this transformation possible.

This paper will then illustrate how these detailed obligations affect the Chinese administrative law. An overall evaluation will be presented, followed by a particular analysis on the subject of intellectual property rights. The potential political pressure, coming from home states of intellectual property rights holders in response to powerful influence of these interests groups, will also be presented. It will also be explored how these political pressures helps to shape China's intellectual property protection measures. Apart from the legislative and administration aspects, emphasis will be placed upon how these elements are enforced in Chinese domestic courts. Judicial review is the best guardian to ensure that these substantive and procedural requirements are respected and intellectual property rights are guaranteed. Some illustrative cases will then be presented so as to evince this transformation.

This paper will lastly examine the role of intellectual property rights holders in Chinese courts. The role of intellectual property rights holder is peculiar in several aspects. First, it is a private property right in nature, which differs from the traditional agreements in the GATT/WTO, as these agreements deal mainly with rights and obligations of WTO members, namely, governments. Secondly, as a large proportion of intellectual property rights are possessed by foreign individuals or enterprises, usually backed with foreign governments, they tend to be more active in litigations,

[2] For this Global Administrative Law approach, see generally, BENEDICT KINGSBURY, et al., *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15, 49 (2004-2005). See also, NICO KRISCH & BENEDICT KINGSBURY, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 Eur. J. of Int'l L. 1 (2006). With regard to the WTO law, Cassese argues that, using the examples of TPT, STS, and GATS, it has penetrated national legal systems by dictating principles and criteria that national administrations must respect and that individual economic actors may rely upon for the protection of their own interest. Apart from substantial elements, there are also a number of procedural requirements in the WTO law. The US-Shrimp case is the best example, illustrating principle of due process, established at the WTO level, being applied into national level. See, SABINO CASSESE, *Global Standards for National Administrative Procedures*, 68 L. & Contemp. Probs. 109, 110, 116-117 (2005). This penetration of the WTO into domestic legal systems has also been identified by some Chinese legal scholars, see, *e.g.*, SHUHONG YUN & GONGDE SUNG, WTO and Administrative Law 1-3 (Beijing University Press. 2002). In the fifth chapter of this book, the impact of the WTO membership upon Chinese administrative reform is examined with great care. In addition, the WTO Law is also referred to as "international administrative law." See e.g., BIXIN JIANG, WTO and Administrative Rule of Law - A Global Perspective of Administrative Law 49 (Chinese People's University of Public Order Press. 2002).

compared to Chinese citizens and enterprises. Besides, since intellectual property rights holders are powerful interests groups, a complaint in the WTO resulting from the petition of these intellectual property rights holders is likely to come, when satisfactory results in domestic courts are not available.

II The Most Transformative Legal Instrument in the History?

A. The Constitutional Function of the WTO Law and the Constitutional Significance of China's Accession Protocol.

As argued, the WTO Agreement should be read as a constitutional instrument. As legal and political objectives of the WTO are no less important than trade liberalization, the WTO Agreement should not be interpreted in purely economic terms, but should be read as a constitutional instrument instead. According to Petersmann, the WTO Agreement does not only employ formal techniques ("constitutional methods"), but it also includes various substantive principles (constitutional principles). These constitutional methods and constitutional principles are characteristics of constitutionalism, which lay a good foundation for the constitutionalism in the WTO law. What he refers to as constitutional methods means those techniques employed in various constitutions, such as the distinction between constitutional politics and normal politics, the primacy of the constitution over national legislation, and subjecting human rights guaranteed by the constitution to the exception for the protection of public interests. What is referred to as constitutional principles includes those fundamental principles contained in the WTO Agreement, such as rule of law, protection of human rights, and separation of powers. He also emphasizes the social justice dimension of the WTO. With these constitutional methods and constitutional principles, WTO law can thus be conceived as a part of multi-level constitutional framework in multi-level trade governance.[3]

As far as the multi-level governance is concerned, the WTO's treaty constitution compliments national constitutions as nation governments, in such a globally interdependent world, are not capable of protecting a worldwide division of labor or any other basic needs. This ever-closer globalizing world makes it difficult for a single state to regulate international trade issues, among other areas, with such a vast complexity, in particular in light of the potential effects of these regulations upon foreign individuals and enterprises. Besides, WTO law, as a part of multi-level constitutional framework can also help to set up multi-level restraints, preventing human rights of citizens from being abused by government power.[4] With multi-level constitutionalism in place, trade governance can be duly decentralized to appropriate corresponding levels where Most-Favor-Nation treatment, national treatment, private

---

[3] ERNST ULRICH PETERSMANN, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, *in* Constitutionalism, Multilevel Trade Governance and Social Regulation 32-33 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

[4] *Ibid*, at 35. The same observation is shared by Global Administrative Law approach, which argues that "important regulatory functions are no longer exclusively domestic in character and have become significantly transnational, or global. This is especially true in the area of rulemaking, in which genuinely international action combines with action by national regulators in networks of global coordination to supplement, and often determine, domestic action, thus penetrating deeply into domestic regulatory programs and decisions." KINGSBURY, et al., supra note 2, at 25. It should also be noted that, in view of the author, the constitutional approach and Global Administrative Approach do not necessarily contradict with each other. On the contrary, these two approaches are complimentary. While Global Administrative Law aims to distigush itself from global constitututional, some normative conceptions are shared by both approches, notably for the protection of private rights and the promotion of democracy. Ibid, at 42-51. With regard to an different conception of constitutionalism in the WTO, see. e.g, NAIL WALKER, *The EU and the WTO: Constitutionalism in a New Key*, *in* The EU and the WTO : legal and constitutional aspects 31-57 (G. De Búrca & Joanne Scott eds., 2001); See also NAIL WALKER, *The Idea of Constitutional Pluralism*, 65 Modern L. Rev. 317 (2002).

property rights, protection of freedom of trade, and rule of law are constitutionally safeguarded. In order to maintain equivalent constitutional protection at different levels, this multi-level constitutionalism will also require national legal order to show due respect to WTO law, particularly dictating stricter compliance to the WTO rules and more effective judicial protection in domestic courts.

In this vein, the role of domestic courts, though usually neglected, in ensuring effective judicial protection appears clear: they are an indispensable element to safeguard multi-level constitutionalism as well as to fully protect individual rights. A rights-based approach toward the WTO law can not sustain if "rights" are not guaranteed by and resort can not be had to courts. The attempt to include human rights dimension in the WTO also relies highly upon effective judicial protection. It is clear that "rights" referred to in the Dispute Settlement Understanding means the rights of the WTO members, not the rights as understood by human rights law. However, it does not imply that individual rights are absent in the WTO law. Even though this world trading system was established in the form of international agreement, governments being the subjects of the Marrakesh Agreement, it does not necessarily mean that individuals have no space in the scene of this world trading system. As the panel correctly defines the role of the WTO in *United States Sections 301-310 of the Trade Act of 1974*, holding that:

> "[T]he GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals. However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish." [5]

The aim to provide security and predictability in multilateral trade system is to protect the individual economic operators as "the lack of security and predictability affects mostly these individual operators,"[6] since the "multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators."[7] In other words, whereas the WTO Agreement addresses rights and obligations of members, rights of individuals are thus to be indirectly secured in this "integrated, more viable and durable multilateral trading system,"[8] where eventually, international trade activities are carried out by these individual economic actors, exporters, importers, service suppliers, and intellectual property rights holders included. As is rightly pointed out by an author, the WTO agreement gives individual economic actors an entitlement to various substantive and procedural rights, ranging from intellectual property rights to "due process" requirements in the national legal system.[9] A multi-level framework of constitutionalism is thus proved to be essential for the protection of rights of these individual economic actors.

Truly, these rights are mainly economic rights, which human rights lawyers may once again denounce not to be human rights.[10] It should be nevertheless stressed that

---

[5] Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, paras. 7.71-7.72.
[6] *Ibid*., para. 7.76.
[7] *Ibid.*
[8] Preamble of Marrakesh Agreement Establishing the World Trade Organization.
[9] Steve Charnovitz, *The WTO and the Rights of the Individual*, in Trade Law and Global Governance 377-396 (Cameron May. 2002).
[10] PHILIP ALSTON, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 Eur. J. of Int'l L. 815, 826 (2002).

a minimum notion of constitutionalism focusing on non-discrimination, individual rights (albeit mainly economic rights) and dispute-settlement mechanisms (particularly courts) will gradually develop into a set of individual constitutional rights protected from any form of power. With the protection of economic rights under dispute-settlement mechanisms, international rule of law can be gradually developed, and sufficient inputs can be thus obtained so as to "feed" the global constitutionalism.[11]

This notion of constitutionalism, even in its thinnest form, is important in understanding how China's Accession to the WTO may contribute to constitutionalism in China, or how its WTO membership may transform Chinese Administrative Law. As noted above, a minimum notion of constitutionalism may be established on the basis of non-discrimination, individual rights (though mainly economic rights), and dispute-settlement mechanisms. These elements are all explicitly provided in China's Accession Protocol to the WTO. Apart from the fundamental non-discrimination principles, including Most-Favored-Nation Treatment and National Treatment, China's Accession Protocol includes the right to trade, the right to import and to export as defined, and the obligation to provide independent judicial review. These elements will gradually sustain a constitutional understanding of the WTO law, which ensures not only the commercial interests of the states but also the trading rights of individuals.[12] It is thus made clear that China' accession to the WTO has tremendous importance not only because of economic impacts, but also because of its constitutional and legal significance.

With the forgoing analysis, the role of the right to trade and the obligation to provide an independent judicial review is clarified. It is true that the right to trade recognized in China's Accession Protocol is comparatively limited in scope, and it is also true that this right to trade has to be further supplemented and materialized by domestic implementations; however, a WTO-consistent interpretation of this right to trade in Chinese domestic legal system can provoke better domestic constitutional guarantee in conformity with its international liberalization commitments.[13] Such interpretation is of crucial importance in Chinese context as most economic activities, prior to its open-up policy, were dominated by the state power. It is therefore essential to make market freedoms available and fair competition possible so that individuals are able to pursue their own self-development through positive freedoms (e.g. freedom of profession, property, and trade) and their human capacities.[14] Liberal economic rights are no less important than civil and political rights concerns, at least in the case of China. It would be too naïve to argue for civil and political rights when one's property and possession can not be guaranteed. In this vein, the 2004 constitutional amendment, which explicitly recognizes private properties rights and lays down obligations for the state to protect these rights, can be seen as a response to China's international obligation of this right to trade. Another example is the recognition of intellectual property rights as property rights in *Chinese Property Rights Law*, newly enacted on 16 March 2007 (effective as of 1 October 2007).[15] According to this new legislation, rights to exclusive use of trademarks, the property right among patent rights and copyrights are transferable. These two provisions are

---

[11] MIGUEL POIARES MADURO, *The Constitution of the Global Market, in* European Law and Integration 63 (Francis Snyder & Miguel Poiares Maduro eds., 2002).

[12] With regard to trading rights and distribution services, a first request for the establishment of a panel by the U.S was positioned at the agenda of Dispute Settlement Body meeting on 22 October 2007, and blocked by China. WT/DS/363/5 (15/05/2007).

[13] It should also be noted that trading rights can also be litigated and effectuated at the WTO level. On 10 April 2007, the US requested for a consultation with regard to some measures that restricts trading rights. See, WT/DS363/1 (16/04/2007).

[14] ERNST ULRICH PETERSMANN, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, *in* Human Rights and International Trade 56 (Thomas Cottier, et al. eds., 2006).

[15] Chinese Property Rights Law, Subparagraph 5 of Article 223.

illustrative examples to evince how the WTO law constitutionally controls and transforms Chinese legal system.

An establishment of independent judicial review also contributes to this effective control. With an independent judicial review in place where individual economic actors can claim the right to trade explicitly conferred to them by the Accession Protocol, China's WTO obligations can be more effectively implemented. Effective enforcements of China's WTO obligations should not rely solely upon the faithful implementation of Chinese government. It is also essential to allow individuals to challenge WTO-inconsistent measures in domestic courts. When more and more individual litigants, relying upon these procedural and substantial obligations laid down in WTO Agreement (in particular TRIPS agreement) and China's Accession Protocol, and backed by their home states, refer cases to domestic courts, domestic courts would gradually acquire more and more experience and legitimacy to deal with trade disputes. With the credibility of resolving trade disputes, resort to domestic courts will become more and more attractive to individual litigants, and, by so doing, effective control will be once again further strengthened.[16] Even though it should also be noted that its potential influence should not be overestimated, yet it is legitimately expected that Chinese courts, after experiencing in controlling administrative measures in trade areas, would gradually start to control measures in other fields. With the gradual expansion of judicial powers, time for "governing with judges" and for "governing like judges" in China will inevitably come.

Apart from these elements, deriving from top-down constitutional function and bottom-up individual-litigants-driven forces, two factors also affect the transformation of Chinese legal system: China's perception of its WTO accession and political pressures from other members. China's perception of the WTO as an impulse to accelerate its domestic reform, to lock in the progress of its economic liberalization, and to make it irreversible also helps to make this control more effective. As argued by Petersmann, one major constitutional function of the WTO law is to ensure domestic constitutional guarantee of these fundamental market freedoms, non-discrimination rights, and the judicial protection. Chinese perception of the WTO accession corresponds to this argument of constitutional function of the WTO law. China's Accession Protocol can thus be seen as a pre-commitment, with constitutional significance, to bind itself so as to resist the temptation of short-term interests and thus to benefit from long-term interests. Such pre-commitment is indispensable for China to lock in the progress of its economic reform so far made and to make it irrevocable. It is also an essential vehicle for Chinese reformists to counter against domestic political opposition and to resist local protectionism. Such pre-commitment might be read as not "democratic." This undemocratic pre-commitment, however, contributes to the sustainability of Chinese economic reforms, and makes the gradual political and legal reforms possible. China's pre-commitment to recognize right to trade, to establish independent judicial review, and to the continuous economic liberalization is justified by their output legitimacy. This output legitimacy can be evidenced by the fact that opportunities of self-development are made available, that properties rights are better protected, and civil and political rights gradually evolves as long as the ever-freer economic market sustains enough foundations for the development of strong civil society.[17]

---

[16] ALEC STONE SWEET, Governing with Judges: Constitutional Politics in Europe 144 (Oxford University Press. 2000).

[17] It would be wrong to hold that civil society is isolated from economic market as the former can not find a solid basis if the latter is not well developed. As the experiences of western industrialized countries suggest, the emergence of the middle class as well as the development of capitalism correspond to the development of a strong civil society. The relation between economic development and civil society in China can be drawn from more and more cases are reported in relation to expropriation of property, labor movements and protection, administrative litigations concerning consumer's complaints about product safety.

Above all, pressures from foreign countries also help to ensure this control well functioning, and this transformation being smoothly brought about. The effectiveness of this control is strengthened by a transitional review mechanism, which is established, lasting for 10 years, in the WTO to monitor China's implementation. Apart from this special transitional review mechanism in the WTO, some members also enact national legal instruments to oversee China's implementing efforts and to ensure the conformity with WTO rules. For example, the U.S. Congress enacted the U.S.-China Relations Act of 2000 which requires the United States Trade Representative (U.S.T.R.), under section 421, to report annually to Congress on China's compliance to commitments made in connection with its accession to the WTO, including both multilateral commitments and any bilateral commitments made to the United States. The U.S.T.R has subsequently prepared an annual report on China's WTO compliance to Congress since 2002. Apart from this, the U.S.-China Economic and Security Review Commission, created in 2000 under the National Defense Authorization Act for 2001, also reports to the Congress annually. The WTO compliance is also among the highlights of these annual reports. To subject China's domestic implementations to international scrutiny dictates China to observe faithfully its international obligations, particularly those rule of law obligations. Such political pressures are also factors which have induced or forced China to transform its constitutional and legal system.

Petersmann, when commenting on China's Accession Protocol, refers to the WTO law as the most transformative legal instrument in the history. Various "rule of law" obligations, including the obligation to provide independent judicial review, and the explicit reference of right to trade, right to import and to export as defined, are cited as examples to justify this claim.[18] As China's Accession Protocol to the WTO, unlike any other accession protocol to the WTO, is not a standardized document, and it covers various procedural and substantive obligations instead, China's Accession Protocol, placed into a broader context of the WTO treaty constitutional and numerous positive integration obligations in TRIPS agreement, can be therefore perceived as a powerful instrument to control the exercise of state power in China, albeit its limited scope in relation to trade areas. This constitutional control is strengthened by litigations of intellectual property rights holders in Chinese domestic courts, China's perception of the WTO membership as an impulse to deepen and widen its domestic reform, and political pressures from other WTO members.

B. TRIPS: An Intermediate Layer with Administrative Law Features

The driving force consisting in the four aforementioned elements to bring about constitutionalism in China, and to transform its legal systems is strengthened in light of numerous detailed substantive and procedural positive integration rules of the TRIPS agreement. These more detailed procedural requirements work as a further effort to control national discretion, when obligations under the TRIPS agreement are implemented in domestic legal systems. It aims to provide minimum standards of protection of intellectual property rights, both with regard to the substantive scope of these intellectual property rights and to various procedural requirements.[19] As is prescribed in the first paragraph of the first Article, members are thus not obliged to provide more extensive protection than required by the TRIPS agreement, given that such protection does not contravene their treaty obligations. However, what is of more

[18] ERNST-ULRICH PETERSMANN, Dispute Prevention, Dispute Settlement and Justice in International Economic Law (forthcoming).

[19] This paper will not deal with the substantive aspect, since it does not fall into the scope of this paper. It is true that the definition of intellectual property rights affects how this minimum protection is maintained. However, as this paper aims at arguing whether and how this procedural protection in Chinese regulatory procedures is being transformed, the substantive aspect of the TRIPS agreement will not be dealt with in this paper, unless to the extent that it is indispensable for the comprehension.

significance in this sentence is that protection provided should be in conformity with the TRIPS agreement. By requiring members to introduce legislative, executive, and judicial measures in order to offer minimum standards of protection, legal harmonization in the field of intellectual property rights rules, to whatever extent, is realized.[20]

The enforcement of intellectual property rights laid down in the TRIPS agreement is one of its major achievements. Various elements of administrative law, such as due process, transparency, participation, access to information, reasoned decision-making, assurance of legality, judicial review, can be found in the legal texts of TRIPS. These enforcement provisions can thus be seen as a step forward to transform domestic, (in this paper Chinese), regulatory regimes.

Paragraph 1 of Article 41 of TRIPS agreement lays down the general obligations in relation to the enforcement procedures, which dictates effective action against infringement of intellectual property rights should be made available in domestic legal systems. Fair and equitable procedures, reasoned decisions with no undue delay and an opportunity for parties to be heard in the proceedings, and an opportunity for judicial review of these decisions are prescribed in the following paragraphs. Apart from these general obligations, rules governing civil and administrative procedures and remedies, provisional measures, and special requirements related to broader measures are laid down in the following three sections of this enforcement part. Four elements provided in these enforcement rules, namely, fair and equitable procedures, reasoned decisions, transparency, participation and right of information, and judicial review are mostly related to this paper. Consequently, the following will discuss these four aspects in more detail.

Fair and Equitable Procedures: members are required to provide fair and equitable procedures in relation to the enforcement of intellectual property rights, which shall not "unnecessarily complicated or costly" or entail "unreasonable time-limits" or "unwarranted delays." More detailed requirements, related to civil and administrative procedures and remedies, are provided in Article 42.[21] Members are obliged to make available civil judicial procedure to right holders for the enforcement of intellectual property rights. "Make available" is interpreted as rights holder's entitlement to have access to civil judicial proceedings that are effective in bringing about the enforcement of their rights covered by the agreement." Rights holders, as defined in the accompanying note 11, include federations and associations having legal standing to assert such rights. In contrast to the term "owner of a registered trademark" used in Article 16.1, rights holders are interpreted by the Appellate Body as persons who claim to have legal standing to assert rights.[22] Right of defense, a right to timely written notice providing sufficiently detail, is also explicitly referred to in this article. Besides, right to be represented by independent legal counsel should also be made

[20] It is argued that, even in EC Law, such overarching legal harmonization in intellectual property rights rules has not been carried out. See, ERNST-ULRICH PETERSMANN, *From Negative to Positive Integration in the WTO: The TRIPs Agreement and the WTO Constitution, in* Intellectual Property: Trade, Competition, and Sustainable Development 27 (Thomas Cottier & Petros C. Mavroidis eds., 2003).

[21] Article 42, and the subsequent articles in related to civil judicial procedures are of relevance in this paper on two counts. Firstly, as previously noted, the term administrative law in this paper is defined as a broader regulatory sense. Civil judicial or criminal procedures can be, by all means understood as instruments with regulatory functions, while judges are one of the most powerful and efficient regulators. Secondly, in terms of positive law, as clearly provided in Article 49, equivalent principles to those set out for civil judicial procedures should be provided and be made available to the extent that any civil remedies can be sought from administrative procedures. In other words, these principles set out for civil judicial procedures are also applicable to administrative procedures.

[22] WTO Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, para. 217.

available in this procedure. In addition, parties should have the opportunity to substantiate their claims and to present all relevant evidence.[23] These rights covered in Article 42, as interpreted by the Appellate Body, are procedural in nature, aiming to guarantee "an international minimum standard for nationals of other Members within the meaning of Article 1.3 of the TRIPS agreement."[24]

Reasoned Decisions: another element to avoid arbitrary decision-making in order to ensure effective protection in the domestic legal system is to require decisions given, without undue delay, to be provided with reasons, and preferably in writing. With this requirement of decisions with reasons given in writing, administrative agencies are forced to justify their decisions being rationally taken. This also provides a good basis for judicial review to check whether the administrative discretion has been abused. In these decision-making proceedings, parties should also be offered an opportunity to be heard so as to examine the evidence to be used for their decisions.

Transparency, Participation and Right of Information: as is common to other WTO agreements, general transparency requirements are laid down in Article 63 in the TRIPS agreement. Laws and regulations, final judicial decisions and administrative rulings of general application, and agreements between governments or government agencies of any two members, in relation to the subject matters of the TRIPS agreement, should be notified to TRIPS Council, published or made publicly available, and should be provided upon a written request of other members. Whenever members have reasons to believe these final decisions and administrative rulings or bilateral agreements affect their rights, they should be given access to these decisions, rulings or agreements, or should be informed of in sufficient detail.

Apart from these general transparency requirements, two specific obligations, namely right to be heard and right of information, are provided in the TRIPS agreement. The right to be heard is to be read in the context of evidence examination. Under general obligations concerning the enforcement procedures, only evidence with regard to which parties are offered an opportunity to be heard of can be taken into account for decisions on the merits of a case.[25] Another similar provision relates to the denial of access of information; whenever a party to the proceedings voluntarily and without good reasons denies access to or does not provide necessary information, judicial authorities may make preliminary or definitive determinations on the basis of information presented to them. However, opportunity to be heard on the allegations or evidence should also be made available.[26] Besides, in respect of provisional measures and suspension of release of goods taken as a boarder measure, defendants should be provided with possibility for the review of these decisions; right to be heard should be included in this review procedure.[27] The right of information relates to the disclosure of the identity of third party involved in the production and distribution of the infringing goods or services, as well as of the channels of this distribution.[28] This right of information is of crucial importance to fight against professional infringements. As judicial authorities have the authority to order the infringer to inform the identity as well as the channels of distribution, sanctions with regard to non-cooperation, such as "contempt of court" may be applicable to the refusal.[29]

Judicial Review: judicial review may be perceived as interlinked with the three

---

[23] Detailed rules governing evidence is provided in the following article, Article 43, of the TRIPS agreement.

[24] Appellate Body Report, *US – Section 211 Appropriations Act*, above n. 19, para. 221.

[25] The TRIPS agreement, paragraph 3 of Article 41.

[26] The TRIPS agreement, Article 43.

[27] The TRIPS agreement, Paragraph 5 of Article 50 and Article 55.

[28] The TRIPS agreement, Article 47.

[29] DANIEL GERVAIS, The TRIPs Agreements: Drafting History and Analysis 301 (Sweet & Maxwell 2nd ed. 2003).

aspects mentioned above; yet, it is also justifiable to be dealt with on its own merit, as it is the controlling element of these requirements. The enforcement part of the TRIPS agreement sets out rules in relation to civil, administrative and criminal procedures, evidencing the attachment of members to judicial authorities in ensuring the protection of intellectual property rights.[30] Paragraph 4 of Article 41 prescribes that an opportunity for review by judicial authority of the final administrative decisions should be made available, and right of appeal of the initial judicial decisions, at least in legal aspects, should be also provided. However, this right of appeal is subject to the "jurisdictional provisions concerning the importance of a case." Various subsequent articles lay down obligations to Members to institutionalize judicial authorities to have the power to order specified measures; a systematic refusal of judicial authorities to exercise this power might constitute nullification or impairment.[31]

C. China's Accession Protocol: Independent Judicial Review Centering in the IPR Regulatory Regime

The enhanced controlling force of the TRIPS agreement, fueled by these "WTO-plus"[32] obligations provided in China's Accession Protocol, has becoming even more powerful. These minimum standards are highly elevated. Three points are worthy of further elaboration: transparency, uniform administration, and independent judicial review.

Transparency requirement has been strengthened in several significant ways, including the extension of coverage, publication before implementation with a right to comment, enforcement only of those published laws and regulations, a single inquiry point for response within a time constraint.[33] Apart from those subject matters previously covered in WTO agreements, foreign exchange control is also included. Besides, in contrast to the existing WTO/GATT requirements, individuals and enterprises are also entitled to request for relevant information.[34] In addition, in order to facilitate the licensing procedures for imports and exports, China is required to provide with any of three official languages of the WTO: the organization responsible for the approving or authorizing the licenses, criteria and procedures, lists of products subject to tendering requirements and imports and exports restrictions.[35]

The judicial review section requires China to provide and maintain tribunals, which, with no substantial interest in the outcome of the matters, are impartial and independent of the agency entrusted with administrative enforcement, for the prompt review of all administrative actions. An opportunity for appeal to a judicial body without penalty should also be included in these review procedures. Written decisions on appeal with instruction for further appeal should be given to the appellants. Compared to TRIPS agreement, the mandatory requirements of decisions in writing and the opportunity to appeal are much more stringent.

---

[30] While civil judicial procedures and criminal procedures do not fall into the scope of judicial review as traditionally defined and understood, with reasons given in note 1 and 18, they are covered into the discussion of transformation of "Chinese administrative law" in this paper.

[31] D. Gervais, above n. 26, at 289.

[32] For China's "WTO-plus" obligations, see, JULIA YA QIN, *"WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System---An Appraisal of the China Accession Protocol*, 37 J. W T. 483 (2003).

[33] SYLVIA OSTRY, *Article X and the Concept of Transparency in the GATT/WTO, in* China and the Long March to Global Trade: The Accession of China to the World Trade Organization 127 (Alan S. Alexandroff, et al. eds., 2002).

[34] China's Accession Protocol, Article 2(C).

[35] China's Accession Protocol, Article 8(1).

Compared to the existing provisions governing domestic judicial review, a delicate but important difference is that China is obliged to "establish, or designate, and maintain tribunals, contact points *and* procedures", while GATT X:3(b) dictates members to "maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals *or* procedures". By comparing these two provisions, it is thus made clear that all these three elements, i.e., tribunals, contacts points, and procedures, should be covered in China's implementation measures for this obligation. Although tribunals are usually connected with procedures, however, as GATT X:3(b) refers to tribunals "or" procedures, it appears that mere procedures, which are able to provide a review mechanism comparable to prescribed standards, should also be accepted as meeting this requirement. By contrast, a tribunal, which is a "body" established to settle certain types of dispute, is indispensable to China's implementation measures. Nevertheless, in Article X:3(c) of the GATT, it is prescribed that existent procedures in force on the date of GATT do not have to be substituted or eliminated, if these procedures provide objective and impartial review of administrative action provided, even though they are not "fully or formally independent of the agencies entrusted with administrative enforcement". Therefore, if a member believes that procedures in force on the date of the GATT are objective and impartial, it is not required to substitute or eliminate these existing procedures. As the second sentence of the Section 2(D)(1) of China's Accession Protocol clearly stipulates, tribunals in China should be "independent of the agency entrusted with administrative enforcement". In the existent WTO agreements, members are not required to institute a new review mechanism which would be inconsistent with their constitutional structure or the nature of their legal systems (Article VI:2(b) of GATS). However, such leeway is not available for China.[36]

As provided in the legal text of China's Accession Protocol, these tribunals should have the jurisdiction on "administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS agreement." To some extent, the scope of the application is clearly defined. Nevertheless, what these relevant provisions of the TRIPS agreement are exactly referred to may be subject to dispute. It may be well interpreted as reference to Article 41 to 40 and 59 of TRIPS agreement. Yet, it is rather unclear. One the other hand, as clearly provided in the Working Party Report, the scope of administrative actions in terms of Section 2(D) of the Accession Protocol should also cover those related to "the implementation of national treatment, conformity assessment, the regulation, control, supply or promotion of a service, including the grant or denial of a license to provide a service and other matters".[37] Consequently, such administrative actions would be subject to the prompt review of independent tribunals. The subject matters which Section 2(D) covers are apparently wider than those in relevant provisions of the WTO Agreements.

With regard to uniform administration, China is required to apply and administer all its laws, regulations and other measures in a uniform, impartial and reasonable manner. This obligation applies to, throughout the entire customs territory of China, its central government and sub-national governments. The scope is also extended to the foreign exchange control. Besides, individuals and enterprises should be given an opportunity to bring attention to the central government the existence of the non-uniform application.[38]

III Has Chinese Administrative Law Really Changed? For What Sake?

A. Major Significant Progress So Far Made.

[36] *Ibid*., at 495-496.
[37] Report of Working Party on the Accession of China, WT/ACC/CHN/49 (1 October 2001), para. 79.
[38] China's Accession Protocol, Article 2(A).

1. General Evaluation

As argued by one Chinese author, the WTO serves as "power" to "check and balance" the powers of Chinese governments, and constitutes a special form of "separation of power." China's WTO accession is an international impetus to widen and deepen its administrative reform. The impacts of WTO accession can clearly found in these aspects: the loosening and lessening of governmental control and intervention in imports and exports, further liberalization followed by further de-regulation, the gradual unifying of internal and external trade, and the strengthening rule of law requirements in economic regulation.[39] The *Administrative Permit Act*[40] is a good example to examine these influences as it was passed on 27 August 2003, when the debate of "WTO and the rule of law in China" was in its high peak. [41] Its enactment signifies the separation of "state and state enterprise/public service unit"[42] and "state and society," a product of market economy, as such permit to engage in economic activities is unnecessary in plan economy.[43] This argument can find its support from the legal text of *Administrative Permit Act*, prescribing in article 13 that regulation by permit from administrative agency is unnecessary (1) where citizens, legal persons or other organizations can autonomously decide; (2) where the mechanism of economic competition can effectively adjust; (3) where professional associations can effectively self-discipline; and (4) where effective control can be maintained by *ex post* supervision.

Some elements of *Administrative Permit Act* deserve further elaboration. Firstly, drafts of laws, regulations, and regional regulations including procedures to regulate such administrative permit should be subject to comments. If necessary, a public hearing should be held. The authorities should explain the necessity for the regulation by administrative permit, and the potential social and economic impacts of such regulation.[44] Citizens, legal persons, or other organizations should be allowed to provide comments and recommendations on this regulation and its implementation.[45] Rules governing administrative permit should be made public available. Those not

---

[39] JUN FENG, *The Function and Influence of the WTO on the Reform of Chinese Administrative Law*, *in* WTO and the Reform of Chinese Administrative Law 184-188 (Chunying Xin ed., 2005).

[40] This act is also translated by some legal scholars, as well as by the U.S. Congressional-Executive Committee on China, as "Administrative Licensing Act." Licensing is a good perspective to perceive the objectives of this act, as this act specifies areas where "licensing" is needed. It also provides conditions where "licensing" is not necessary. It relates to China's WTO obligations with licensing, and its liberalization commitments, notably, right to trade. Another perspective to understand this "administrative permit" or "licensing", which is also an important one, is from that of the traditional administrative law. It can be understood, to some degree, as "Verwaltungsakt" in the German administrative law, as Chinese administrative law has traditionally been influenced by German law. See *generally*, FENG LIN, Administrative Law Procedures and Remedies in China (Sweet & Maxwell. 1996). See also, STANLEY B. LUBMAN, Bird in a Cage: Legal Reform in China after Mao (Stanford University Press. 1999); RANDALL L. PEERENBOOM, China's Long March toward Rule of Law (Cambridge University Press. 2002).

[41] A variety of Chinese legal scholarships are devoted to impacts of WTO rules toward Chinese administrative law, even until now. See *e.g.*, SHUHONG YUN & GONGDE SUNG, WTO and Administrative Law (Beijing University Press. 2002)., supra note 1. BAOKU ZHENG, WTO and the Rule of Law in China (Tianjin University Press. 2003); TAIFENG ZHEN, China's WTO Membership and the New Round of of Administrative Reform (Renmin Publishing. 2006).

[42] "Public service unit" is a special entity in China's public sector, of which the major objective is to provide public service. It is also translated as "institutional units" or "public institutions." This paper follows the translation taken by the World Bank report on China's public service reforms, see THE WORLD BANK, China: Deepening Public Service Unit Reform to Improve Public Service Delivery (Citic Publishing House. 2005).

[43] *Ibid*, at 189.

[44] Chinese Administrative Permit Act, Article 19.

[45] *Ibid*, Para. 3, Article 20 of Chinese Administrative Permit Act.

public available should not be used as bases for decisions of such administrative permit. Decisions and implementation should also be made public available, except those related to confidential information and privacy.[46] These provisions correspond to China's WTO obligations in relation to transparency, notably, the requirement of the enforcement only of published laws and regulations, and of the publication before implementation, where a right to comment is to be provided.

With regard to the decision-making procedures of administrative permit, general requirements laid down in this act is that right to be heard and right to defend should be provided. Interested parties should be informed of the right to be heard and right to defend if significant interests related to these third parties are present.[47] This provision covers right to be heard and right to defend of both applicants and interested third parties, with the aim that rights and interests of these parties can be carefully taken into account and be rightly balanced. Apart from these general requirements, an important measure included in this act is the hearing procedure. As prescribed in article 46, a public hearing should be held, when laws, regulations and region regalements so require, or when the administrative agency deems as necessary. Interested parties should be informed of the right to request a hearing to be held.[48] The decision should be based on the record of this hearing procedure.[49] These requirements of right to be heard, right to defend, and judicial review can clearly draw their trace from China's WTO obligations. Furthermore, the practice of hearing can be seen as a step forward. The procedural protection offered in this act, in terms of law in books, is certainly highly strengthened.

It should be, however, pointed out that judicial review of administrative decisions has only been generally governed by one provision, prescribing that administrative re-consideration and judicial review of the decisions should also be offered.[50] Whether effective judicial remedies can be provided remains unclear. Such arrangement may be justified on the ground that detailed provisions in relation to judicial review should be governed by *Administrative Litigation Act*. However, this Administrative Litigation Act, enacted in 1990, appears outdated in terms of jurisdiction, standing, and standard of review, and etc.[51]

Against this background, the following three interpretations[52] issued by Supreme People's Court are of crucial importance, as they are issued by Supreme People's Court especially for the needs of administrative litigations. Following China's accession, Supreme People's Court issued three interpretations with respect to judicial review in external trade measures so as to ensure "independent judicial review" being provided: *Regulations on Several Problems in the Trial of Trade-Related Administrative Litigation Cases*; *Regulations on the Application of Law in the Trial of Anti-Dumping Administrative Litigation Cases*; *Regulations on the Application of Law in the Trial of Anti-Subsidy Administrative Litigation.* With regard to the enforcement of intellectual property rights protection, it also co-issued with the Supreme People's Procuratorate the *Interpretation by the Supreme People's Court and*

---

[46] Chinese Administrative Permit Act, Article 5(2).
[47] Chinese Administrative Permit Act, Article 36.
[48] Chinese Administrative Permit Act, Article 46.
[49] Chinese Administrative Permit Act, subparagraph 5 of Article 48 (1).
[50] Chinese Administrative Permit Act, Article 7
[51] SHINZU WANG, *Judicial Remedies in Chinese Administrative Law and their Integration with WTO Rules, in* Rule of Law in Chinese Administration and Its Integration with WTO Rules 73-82 (Shinzu Wang ed., 2005).
[52] Judicial interpretation is a peculiar practice in Chinese judicial system. It serves as guidance to the lower court, and is legal binding in nature. See *generally*, NANPING LIU, Opinions of the Supreme People's Court: Judicial Interpretation in China (Sweet & Maxwell Asia; Sweet & Maxwell. 1997).; NANPING LIU, *An Ignored Source of Chinese Law: the Gazette of Supreme People's Court*, 5 Conn. J. Int'l L. 271 (1989).

the Supreme People's Procuratorate on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property. The second interpretation governing the same subject matter was issued on 5 April 2007.

Regulations on Several Problems in the Trial of Trade-Related Administrative Litigation Cases define the scope of trade-related administrative litigation cases, and clarify the standing, standard of review and applicable laws. The regulations also explicitly, in article 9, take the treaty-consistent interpretation approach, stipulating that the interpretation consistent with China's treaty obligations should apply when two reasonable interpretations of the legal text at issue are available. It should be also noted that courts are limited to review the administrative acts for the legality, based on the examination of the evidences, the interpretations of the legal rules, procedural requirements, misuses or lacks of competence, manifestly unfair or refusal of the legal duties and that the inquiry for appropriateness or reasonableness is not allowed (article 6). It appears very problematic that courts are allowed to examine the reasonableness of administrative actions, as this limitation highly undermines the effectiveness of judicial review.

Regulations on the Application of Law in the Trial of Anti-Dumping Administrative Litigation Cases define the scope of the anti-dumping acts subjective to administrative review. The regulations also lay down the rules on the standing, defendant authority, jurisdiction, burden of proof, examination of the evidence, and standard of review. Similar stipulations are included in the *Regulations on the Application of Law in the Trial of Anti-Subsidy Administrative Litigation.* With regard to the standard of review, insufficiency of the evidence, misinterpretation of laws and administrative regulations, the violation of procedural requirements, and misuses or lacks of competence are expressly identified (article 12(2)). It should also be pointed out that factual materials not included in the records during the anti-dumping or anti-subsidy investigations should not be presented as evidences to justify the anti-dumping or anti-subsidy decisions (article 7(2)).

The reason why these judicial interpretations are so important is that provisions in the relevant national legislations are often too vague, and the lower courts are not so equipped with the knowledge to apply laws concerning the international trade. Supreme People's Court, and sometimes Supreme People's Procuratorate, issues judicial interpretations to serve as guidance for the lower courts to effectively and correctively apply the relevant legislations. It is expected, by doing so, that the coherence of the interpretation of laws and the quality of adjudication can be enhanced.

Before going into specific examination with regard to intellectual property rights, one additional point should be clarified. The transformation of Chinese administrative law is comprehensive, even though it is most apparent and visible in the field of intellectual property rights. As one Chinese lawyer points out, the administrative measures related to foreign trade is only a small portion of administrative measures; it can not be possible to separate one portion of governmental actions, which is related to international trade and thus governed by the WTO rules, from another portion of governmental actions, being related solely to internal affairs. Consequently, the WTO rules can not be selectively applicable to some part of governmental actions, since measures related to foreign trade are likely to be connected with other part of governmental measures. Besides, the values contained by those fundamental principles of the WTO, such as fairness, impartiality, liberalization, and transparency, are the bases of the rule of law, which Chinese administrative law is in need.[53] This also explains that the approach of "commercial rule of law"[54] proposed by the U.S

[53] MINGAN JIANG, *The WTO Fundamental Legal Principles and Chinese Administrative Law*, 1 Political and Legal Forum 1, 4 (2002).

[54] The "Commercial Rule of Law" is a concept proposed by the United States. In the 2003 annual

government, focusing, in terms of the development of rule of law in China, only on the foreign trade aspects is not workable. It is difficult to maintain the imbalance between economic rights and civil and political rights, to ensure commercial rule of law while other areas remained repressed. One may argue an incremental and realistic approach will enhance the gradual development of rule of law in China. However, it may be also argued that commercial rule of law can not succeed, with other civil and political rights remained restricted. Although it is understandable and reasonable that Chinese administrative law would be most likely to be transformed in the foreign trade areas, and this view is also shared by this author, it does not suggest that rule of law can be isolated, and applicable to only one portion of governmental actions.

2. Intellectual Property Rights in Particular.

With regard to intellectual property rights, a direct effort to comply its WTO obligation of judicial review is to allow judicial review to decisions of administrative agency in relation to trademarks and patents, of which judicial review was previously not provided.[55] The implementation of the TRIPS agreement in China thus provides a good example to illustrate why domestic judicial review is important to ensure WTO compliance and how effective it can be. Since its accession, China has been forced to strengthen intellectual property rights protection as this issue is always under the highlight of US-China and EU-China Trade.

In response to an agreement between Deputy Premier Wu Yi and the U.S. government at the 15th annual meeting of the U.S.-China Joint Commission on Commerce and Trade, the People's Supreme Court and the People's Supreme Procuratorate, on 22 December 2004, jointly issued *An Interpretation on Several Issues of Concrete Application of Laws in Handling Criminal Cases of infringing Intellectual Property.*[56] Apart from this, a specialized Chamber focusing on intellectual property rights was established within the People's Supreme Court in 1996. Private intellectual property rights holders have long been allowed to seek judicial remedies in the cases of infringements. The intellectual property rights litigations have become the most active area since most intellectual property rights holders are foreign enterprises or individuals. Compared to Chinese individuals and enterprises, they are more wiling to refer cases to courts and more experienced in litigations. As previously mentioned, it is also because TRIPS agreement lays down various procedural and substantial obligations in relation to trade-related intellectual property rights, and thus makes these rights holders easier to claim in Chinese domestic courts. According to some observers, the interpretation touches upon five main elements: "(1) lower the numerical thresholds determining the criminal status of infringing acts; (2) allow for accomplice liability for importers, exporters, landlords, and others who assist infringers; (3) permit goods produced in factories and/or kept in warehouses to be included in sales calculations; (4) authorize using the number of illegally duplicated disks or internet advertising revenue to satisfy the for-profit

---

report of the Congressional-Executive Commission on China, this terminology is used as a subcategory of rule of law, addressing mainly the impacts and legal issues resulting from China's accession to the WTO. The commercial rule of law refers to the general principles of the GATT/WTO, such as transparency, non-discrimination, and the judicial review concerning the trade measurers. The commercial rule of law approach tries to separate itself from the sensitive and difficult issues of civil and political rights. The approach is mainly designed for China and may "suit" the needs of China, since China would be glad to distinguish economic rights from civil and political rights. See further, Congressional-Executive Commission on China, 2003 Annual Report, 62-69, available at http://www.cecc.gov/pages/annualRpt/annRpt2003.php (lasted visited 17/09/2007).

[55] For an overview of China's regulatory framework of intellectual property rights, see, *e.g.*, OECD, China in Global Economy: Governance in China 403-431 (OECD Publishing. 2005).

[56] An official English version of this interpretation is available at <http://www.chinaiprlaw.cn/file/200501234109.html> (last accessed 14/03/2007).

requirement; and (5) expand the definition of an infringing trademark."[57] Another interpretation in relation to criminal cases of infringing intellectual property rights was newly issued on 5 April 2007. It widens the scope of "reproduction and distribution" governed in Article 217 of criminal law so as to include advertising for the sale of copyright-infringing product. It also lowers again the thresholds, in terms of illegal copies, determining "serious" or "especially serious" referred in article 217 of criminal law.

However, to enact such legislation or to issue such interpretation does not necessarily mean to transform its administrative law, even in the field of intellectual property rights. More proof must be offered to justify the claim that Chinese administrative law has been transformed. Therefore, a good perspective to examine whether those principles, related to rule of law, dictated by the WTO agreements have been observed in Chinese administrative law is through its case law. It should also be noted that protection of intellectual rights in domestic legal system are to be understood in two dimensions: to make one's intellectual property rights recognized and to prevent these rights from being infringed. It is thus feasible to examine case law in relation to these two dimensions. With this objective and understanding in mind, the following will explore some illustrative cases regarding Chinese intellectual property rights protection to certify the existence of such transformation.[58]

B. Judicial Practices in Domestic Courts.

In a *Xuwenquing v. Patent Re-examination Board of SIPO*,[59]for the application for re-trial, the court finds that a major basis for invalidating the patent at issue derives from a written submission, titled "post-hearing statement," from third parties, who sought to invalidate the applicant's patent. However this statement was not notified to appellant. The court then holds that, as *guidance of examination*, which stipulates, in article 8.3 of Part IV (1993 version), that opportunities to explain and to comment on the facts, grounds and evidence should be provided, referred to as "hearing principle," is an administrative decree issued by State Intellectual Property Office according to the *Patent Law* and *Implementation Regulation of Patent Law*, the violation of procedural requirements prescribed by this guidance constitutes a breach of legal procedures provided in subparagraph of article 54(2) of Administrative Litigation Law. The Court further rejects the agency's argument that "hearing principle" laid down in the guidance had been met since the legal basis for invalidation of this patent, i.e., article 26 (4) of *Patent Law* had been notified to the applicant, and opportunities to explain and to comment had been provided with regard to this provision. The Court further elaborates that facts, grounds and evidence stipulated in article 26(4) differ from case to case. To provide opportunities for parties to explain and comment in administrative procedures means opportunities to explain and comment on these case-specific facts, grounds and evidence should be made available, in particular with regard to those to be relied upon in adverse decisions. The court then again rejects the agency's argument that opportunities to explain and to comment had been offered in the hearing. As required, major issues in the hearing process should be recorded into the hearing records. Since such records are not

---

[57] BJORNBAK QIANG, et al., 40 Int'l Law. 556 (2006).

[58] It may be questioned that how these "leading" cases are leading. That is, to what extent do these cases reflect the real practices in Chinese courts? This question can be answered in two levels. Firstly, as suggested by the title of this paper, I do not intend to address the degree or percentage of this transformation. Instead, this paper aims to explore how this transformation is made happen. Secondly, these two cases appear in latest reported cases and in other category at the homepage, when I browsed the website established mainly for promotion of intellectual property rights protection on 3 May 2007. Although these cases are selectively reported by Chinese courts, a degree of randomness exists, and therefore, to some extent, they can be seen as representative.

[59] Reported as (2005) Minsanti zi Nr. 2 Judgment, available at <http://ipr.chinacourt.org/public/detail_sfws.php?id=252> (last accessed 03/05/2007).

existent, the agency's assertion is ungrounded.

This case helps to make clear how Supreme People's Court perceive these various procedural requirements in relation to right to be heard and right to defend, and how these requirements are to be implemented by administration agencies in patent examination procedures. As the Court dictates that opportunities to explain and to comment on case-specific facts, grounds and evidence should be offered, a fair level of procedural protection appears to be maintained. As far as evidence is concerned, a decision based on the records of hearing will highly strengthen these requirements related to right to comment and right to defend. As previously noted, it also provides a sound basis for judicial review, as has been evidenced by this case.

Besides, in *F.Hoffmann-La Roche AG v. Chongquing Wanlikang Co., Ltd.,*[60] the court had to decide whether, in pharmaceutical cases, it is a prerequisite to refer to State Food and Drug Administration for administrative protection before seeking judicial remedies for economic compensation in people's courts. The court had also to define the nature of pharmaceutical exclusive rights and to clarify the legal hierarchy of national legislation and administrative regulations. F.Hoffmann-La Roche AG, who, according to the *Regulation of Administrative Protection for Pharmaceuticals*, was the owner of the exclusive rights for the production and distribution of Orlistat requested the Court to order the defendant, *Chongquing Wanlikang Co., Ltd* (a) to stop from manufacturing and distributing, and/or exporting the Orlistat, and (b) to order the compensation paid to the plaintiff. The defendant contended that the claim was not admissible since the procedural requirement for referring to the State Food and Drug Administration (SFDA) for administrative protection, as prescribed in article 19[61] of *Regulation for the Administrative Protection of Pharmaceutics* and article 30[62] of the *Implementation Rules*, was not met.

The Chongquing Higher Court held that the practices of administrative protection of pharmaceutical products in China was a transitional policy since the Patent Act, as amended in 1993, did not recognize patent rights of pharmaceutical products. In order to faithfully enforce the principle of National Treatment, and to confer patent protection for foreign pharmaceutical products, the former State Pharmaceutical Administration, after the approval of State Council, promulgated the *Regulation on the Administrative Protection for Pharmaceuticals.* The exclusive rights in terms of article 5 of the Regulation are patent rights by nature. The administrative protection of foreign pharmaceutical products has the effect of the exclusive rights for the production and distribution of pharmaceutical products in question. Even though these exclusive rights are conferred by administrative powers, they are, in essence, civil rights. In case of infringement, remedies may be sought both through administrative procedures and civil procedures. In light of the legislative intent and original meaning of article 19 of the Regulation and article 30 of the Implementation Rules, which lay down the procedural rules for the infringement compensation, whether to refer to the SFDA for the administrative protection is up to the owners of exclusive rights. As the

---

[60] Reported as (2007) Chongqing yugaufaminzhong zi Nr. 4 Ruling, available at<http://ipr.chinacourt.org/public/detail_sfws.php?id=7979> (last accessed 13/08/2007).

[61] Article 19 of the Regulation at question provides that "[W]here there is any manufacture or marketing of a pharmaceutical without authorization of the owner of the exclusive right of the pharmaceutical who has obtained Administrative Protection, the owner of the exclusive right of the pharmaceutical may request the competent authorities for the production and distribution of pharmaceuticals under the State Council to stop the infringing act; if the owner of the exclusive right of the pharmaceutical requests for economic compensation, he or it may institute legal proceedings in the people's court."

[62] Article 30 of the Implementation Rules at question provides that "[T]he owner of the exclusive right of the pharmaceutical may institute legal proceedings in the people's court for economic compensation after the determination of the infringement by the State Food and Drug Administration." (the author's translation).

SFDA is not competent for the order of economic compensation, the owner of infringed exclusive rights should refer to people's courts for this claim. It does not suggest that reference to the SFDA for administrative protection is a prerequisite for seeking judicial remedies. In addition, the court added that the designation of reference to administrative protection as a procedural requirement for resort to the courts should be regulated by national legislation, instead of administrative regulation or decree. The court's decision laid down two fundamental principles of administrative law. Firstly, the court clarified the nature of exclusive rights of pharmaceuticals, and subsequently pronounced the importance of judicial remedies for the protection of "human rights"[63]. As long as these exclusive rights of pharmaceutical products are rights guaranteed by civil code, judicial remedies must be made available in case of infringement. Besides, the court also took efforts to point out a fundamental principle of German administrative law, *Gesetzesvorbehaltprinzip*, even though the court did not explicitly refer to the *Faluibaoliu* (the conventional term for the Chinese translation of *Gesetzesvorbehalt*).[64] As China is required to provide an independent and impartial judicial review in relation to foreign trade measures, people's courts take caution to make comparable judicial protection available to individual economic actors. In this vein, procedural requirements for access to courts, being a core element of this judicial protection, should not be subject to the limitation of administrative regulations.

In *UFO Co., Ltd. v. Wumuzhao*,[65]the court was called upon to examine whether the administrative permit for the publication of audiovisual products, and for their reproduction, is indispensable for the protection of intellectual property rights protection. The court then repealed the ruling of the lower court, holding that copyrights are rights protected by national legislation. The court further holds that these rights will not be affected even though the right holders are not able to obtain administrative permit for the publication and reproduction. Consequently, the argument that these products are against the prohibitive rules of Chinese administrative regulations, and are thus not protected is unfounded. This case illustrates the crucial role of administrative permit in the enforcement and protection of intellectual property rights. It can effectively act as barrier for intellectual property rights holders to exercise their rights. According to the court, the rights holders are entitled to prevent the infringement and to claim compensation from infringers. However, in order to effectively exercise intellectual property rights, rights holders should be allowed to make intellectual property reproduced. However, the court does not make clear potential remedies with regard to the refusal of cultural authority to issue administrative permit. Administrative litigation is certainly one of the choices. Then the court is faced with a really hard case: conflicts between censorship of

---

[63] Whether patent rights, a subcategory of intellectual property rights, can be defined as property rights, and whether property rights can be classified as human rights as defined and understood by human rights lawyers are subject to dispute. However, as this paper repeatedly emphasizes, the importance of economic rights in China is no less than that of political and civil rights. An illustrative example of the development in this area is the numerous cases of expropriation in the urban planning, where numbers of inhabitants refuse to move and choose to litigate and defend their own rights and interests. See further KATHERINE WILHELM, *Rethinking Property Rights in Urban China*, 9 UCLA J. Int'l L. & Foreign Aff. 227 (2004); EVA PILS, *Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan*, 19 Colum. J. Asian L. 235 (2005); See also, FRANK XIANFENG HUANG, *The Path To Clarity: Development of Property Rights in China*, 17 Colum. J. Asian L. 191 (2004).

[64] *Law on Legislation*, enacted in 2000 also touches upon this issue. Article 8 prescribes competence subject to national legislation, while article 56 governs the competence of the State Council to issue administrative regulation, and article 64 deals with the competence subject to local decrees of local people's congress. Article 10 prescribes the delegation of legislative power, underlining the specification of objective and scope of the authorization in the enabling decision.

[65] Reported as (2005) Yuekau faminzhongsan zi Nr. 210 Ruling, available at <http://ipr.chinacourt.org/public/detail_sfws.php?id=3275> (last accessed 03/05/2007).

publication in China and its international obligations in relation to intellectual property rights.[66]

C. Individual IPR holders, Domestic Courts, Foreign Governments.

After the forgoing analysis, it is feasible to refer back to the WTO framework. As intellectual property rights holders are one of the most powerful interest groups in the United States, one would not be surprised to see that the United States referred to the WTO in this issue. As observed, a "public-private partnership," where firms work with U.S.T.R. as a partner, is visible in the WTO dispute settlement.[67] This is particularly true in the case of intellectual property rights as one can easily relate to *Special Section 301*. Intellectual property rights associations have significantly influenced the priority list, as well as the ultimate finding of the reports.[68] Besides, these intellectual property rights holders, as powerful lobbyists, have also significant influence in inciting congressional pressure and affecting executive decision-making through various particularly-established channels to challenge practices of Chinese intellectual property rights protection: Congressional-Executive Committee on China, U.S.-China Economic and Security Review Commission, U.S.T.R. under the authority of U.S.-China Relations Act of 2000, etc. Direct political pressure is also available through U.S.-China Joint Commission on Commerce and Trade. With various channels available, the United States' intellectual property rights holders may quickly turn to their home state, whenever satisfactory results in Chinese courts are not available.

On 10 April 2007, the U.S. requested for consultation with regard to measures affecting protection and enforcement of intellectual property rights.[69] How to afford effective protection of intellectual property rights through Chinese courts is one of the major issues. In its submission, the unavailability of criminal procedures and penalties for those who engages either unauthorized reproduction or unauthorized distribution (*fuzhifaxing*) is identified.[70] The U.S. argues that a willful copyright piracy on a commercial scale, consisting of unauthorized reproduction, but not unauthorized distribution, of copyrighted works, and *vice versa*, may not subject to criminal procedures and penalties. A clear link to the second judicial interpretation concerning the definition of "reproduction and distribution" can be drawn as the interpretation explicitly covers these two types of infringement. Another matter relates to the thresholds that must be met so as to subject certain acts of trademark counterfeiting and copyright piracy to criminal procedures and penalties. These thresholds are mainly laid down by judicial interpretations co-issued by Supreme People's Court and Supreme People's Procuratorate. The U.S contends that such thresholds do not serve as an effective deterrent to prevent trademark counterfeiting and copyright piracy, and that effective protection is not made available in Chinese courts. Article 1 of the second judicial interpretation which loosens the thresholds also corresponds to this contention. Efforts, albeit of no avail, taken by Supreme People's Court to prevent the U.S. from referring to the WTO are conceivable.

---

[66] As will be discussed below, this case precisely corresponds to the third matter of the U.S submission for consultation. It also justifies this paper's argument that courts are also a major element in the regulatory regime of intellectual property rights protection.

[67] GREGORY SHAFFER, *"Public-Private Partnership" in WTO Dispute Settlement: the US and EU Experience*, *in* The WTO in the Twenty-first Century: Dispute Settlement, Negotiations, and Regionalism in Asia 153 (Yasuhei Taniguchi, et al. eds., 2007). See also, GREGORY SHAFFER, Defending Interests: Public-Private Partnerships in WTO Litigation (Brookings Institution Press. 2003).

[68] *Ibid*, at 158.

[69] WTO Document, WT/DS362/1 (16 April 2007).

[70] There are four major matters in this submission. Apart from these three discussed in this paper, it also covers the disposal of infringing products.

Another major issue in this submission is the censorship for publication in China. As publication is subject to regulation of various administrative permits, and sometimes it appears impossible to acquire such permits, such regulation constitutes a barrier for rights holders to exercise their intellectual property rights. As held by the court, in the aforementioned *UFO Co., Ltd. v. Wumuzhao* case, rights holders are entitled to prevent others from infringing their intellectual property rights even though they do not obtain relevant administrative permits. However, their intellectual property rights are not effectuated if commercial reproduction and circulation in Chinese market is not made possible. A panel has been established to examine this issue on 25 September 2007 at the second request of the U.S. [71]

The role of Chinese domestic courts is significant in several aspects. Firstly, it is the one who is responsible for the review of various administrative acts related to trade measures, and to ensure that WTO rules and China's commitments are faithfully enforced and implemented. Besides, Chinese courts are also an important element of Chinese intellectual property regulatory regime, particularly in respect of its competence to define the scope of intellectual property rights, to set up thresholds, and to issue binding interpretation related to specific provisions (People's Supreme Court). In addition, while domestic courts are expected to act as a guardian of private rights, intellectual property rights in this paper, Chinese domestic courts are also subject to the scrutiny of dispute settlement mechanism in the WTO. In other words, Chinese domestic courts, being an element in China's trade regulatory regime,[72] act as not only a regulator to control administrative measures, but they are at the same being regulated by disciplines laid down by the WTO agreements. As domestic courts are the major channels through which enforcement and protection of intellectual property rights are to be carried out, it is thus of crucial importance, at the international level, to ensure minimum standards of protection to be offered in Chinese courts. It is not only because various enforcement procedures provided in the TRIPS agreement are to be implemented through domestic courts, but also because Chinese courts are obligated act independently and impartially as prescribed in China's Accession Protocol. When dealing with intellectual property cases, Chinese courts are usually confronted with foreign intellectual properties rights holders, backed with their home states. This presses Chinese courts to act cautiously, as potential legal challenges in the WTO as well as political pressures through numerous channels.

IV Conclusion

This paper argues that four elements have been transforming Chinese administrative law: the domestic constitutional function of the WTO; detailed procedural and substantive requirement of the TRIPS agreement (these two factors being strengthened by China's Accession Protocol where the right to trade and the obligation to provide independent judicial review are explicitly referred); China's perception as an impetus to widen and deepen its economic reforms, and subsequently legal reforms; and political pressures from other members of the WTO. This paper also examines significant changes so far made in this subject matter. After a general evaluation is provided, this paper then goes to examine the specific area of intellectual

[71] WT/DS362/7 (21/08/2007).

[72] An illustrative example of Chinese courts being a regulatory policy actor is the *Opinions on Strengthening the Adjudicative Work with the Aim to Providing Judicial Protection for the Construction of Innovative State*, issued on 11 January 2007. As its title suggests, courts are seen as an actors to carry out policy goals. In the preamble, the central committee of Chinese Communist Party is explicitly referred. Various policy goals are identified in these opinions. They also points out that the major task is being focused upon intellectual property rights, due to the pressure of China's trading partners, notably the U.S. and the EU. See Fafa Nr. 1 (11 January 2007), available at http://www.chinacourt.org/flwk/show1.php?file_id=115565 (last accessed 06/09/2007).

property rights. It examines both legislative efforts and judicial practices. After the examination of three cases randomly found from the website of Chinese intellectual property protection, the author argues that some important features of Chinese administrative law has *really* been changed, in terms of procedural requirements such as right to be heard and right to defend, examination of evidence, and more effective administrative review. This papers then comes back to examine the triangular relationship between domestic courts, intellectual property rights holders, and foreign governments. An illustrative consultation request (subsequently, a request for the establishment of a panel) is discussed with the aim to clarifying how Chinese courts responds to claims of intellectual property right holders, working side by side with their home states.