

ECONOMIC DISPUTE RESOLUTION BY  
ADMINISTRATIVE ORGANS AND COURTS IN CHINA  
---From A TRANSPARENCY PERSPECTIVE

by

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## ABSTRACT

The increasingly dynamic interplay between national legal construction and normative international practice is shaping China's ongoing legal reforms. Transparency, a concept which has become so widespread that it has reached an exalted status in the arena of multilateral trade, now goes well beyond international trade circles and has become a buzzword in China since its accession to the WTO.

In entering the WTO, China is taking on many very significant obligations. Certainly one of the most challenging is the obligation of greater transparency. To varying degrees, the core definition of transparency, though not yet widely enforced due to the friction between it and some of China's cultural components, has gone to many aspects of China's current legal reforms. Accordingly, China's compliance with the WTO must extend beyond general principles and performance in government regulations generally, to include compliance with WTO norms on dispute resolution.

Dispute resolution is essential to the process of empowering economic actors to seek enforcement of substantive norms of law and the government regulations. This thesis therefore singles out transparency with respect to business-related dispute resolution, trying to look into how China's transparency obligation improves its rule of law in the dimension of economic dispute resolution. Notably, all possibilities of economic dispute resolution include negotiation, mediation, arbitration and litigation. However, those involving the exercise of the power and resulting in binding force on the parties merit special attention in current China as a series of obligations under the WTO impose on it and one of them is transparency which is supposed to run through all dispute resolution mechanisms involving the state power. Hence, this thesis, from a transparency perspective, focuses on economic disputes resolved by administrative organs and judicial bodies. It concludes with a discussion of institutional and cultural approaches that might prove useful in seeking greater transparency in economic dispute resolution by administrative organs and judicial bodies.

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## LIST OF ABBREVIATIONS

|        |   |
|--------|---|
| ALL:   | Administrative Litigation Law of the PRC                              |
| ARL:   | Administrative Reconsideration Law of the PRC                         |
| CCP:   | Chinese Communist Party   |
| CPL:   | Civil Procedure Law of the PRC  |
| GATT:  | General Agreement on Tarrifs and Trade 1994                           |
| GATS:  | General Agreement on Trade in Services                                |
| NPC:   | National People's Congress of the PRC                                 |
| PRC:   | People's Republic of China  |
| TRIPS: | Agreement on Trade-related Aspects<br>of Intellectual Property Rights |
| TRIMS: | Agreement on Trade-related Investment Measures                        |
| WTO:   | Word Trade Organization   |



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*[I]nstrumental freedoms contribute, directly or indirectly, to the overall freedom people have to live the way they would like to live... Transparency guarantees can be an important category of instrumental freedom. These guarantees have a clear instrumental role in preventing corruption, financial irresponsibility and underhand dealings.*<sup>1</sup>

## **Chapter I Introduction**

The world in which we are living is rapidly shrinking in terms of the increasing interconnectedness and interdependence in economic life among different national economies. In response to this fundamental change, more and more nation-states have adopted internationally recognized and institutionalized principles and practices in conducting their economic activities.<sup>2</sup> Today such states include a growing number of developing countries which find it necessary to play by the rules formulated by the leading industrialized countries and manifested in the legal framework of major international economic organizations in order to fully participate in international economic exchanges.<sup>3</sup> Although it is controversial about whether the adoption of

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<sup>1</sup> Amartya Sen, *Development as Freedom* (Oxford University Press, 1999), pp. 38, 40.

<sup>2</sup> See Thomas Yunlong Man, "National Legal Restructuring in Accordance with International Norms: GATT/WTO and China's Foreign Trade Reform", 4 *Ind. J. Global Leg. Stud.* p. 471.

<sup>3</sup> In this sense, these countries have strengthened the tendency toward the globalization of law, although there is no universally accepted definition of the concept "globalization" of law. For some efforts to delineate important aspects of this concept, especially its connection with and

internationally recognized norms is mostly externally driven or internally driven,<sup>4</sup> it has been noted that in China, the dynamic interplay between national legal construction and normative international practice is shaping China's ongoing legal reforms.<sup>5</sup> Such interplay has been increasingly obvious since China's entry into the WTO because from then on, China has started formally (*zhengshi*) to integrate itself into the world capitalist economic and political system, the basic characteristics of which are market economics and democratic politics.<sup>6</sup> Transparency, a concept which has become so widespread that it has reached an exalted status in the arena of multilateral trade, now goes well beyond the international trade circles<sup>7</sup> and in China has become a buzzword in the legal regime since its accession to the WTO.

In entering the WTO, China is taking on many very significant obligations. Certainly

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distinctions from "internationalization", see Peter Dicken, *Global Shift, The Internationalization of Economic Activity* (USA : Sage Publications, 1992, 2<sup>nd</sup> ed.), pp.1-5.

<sup>4</sup> One view is that the main driver of change in the Chinese legal system will be internal developments in China, not foreign legal assistance programs. see Donald C. Clarke, "China's Legal System and the WTO: Prospects for Compliance", 2 *Wash. U. Global Stud. L. Rev.* 97, (Winter 2003); others hold that China's entry into the WTO has provided a much-needed outside impetus for it to adopt certain universally accepted principles such as transparency and judicial review, as discussed by Chris X. Lin, "A Quite Revolution: An Overview of China's Judicial Reform", 4 *Asian-Pac. L. & Pol'y J.* 9 (June 2003); more discussion of various concerns about internationalization is available at David Kennedy, "Receiving the International", 10 *Conn. J. Int'l L.* 1.

<sup>5</sup> See *Nanfang Zhoumo* (Southern Weekend), 25 Oct 2001, p.6.

<sup>6</sup> Joseph Fewsmith, The Political and Social Implications of China's Accession to the WTO, *The China Quarterly*, Vol. 167 (September 2001), p. 584.

<sup>7</sup> See William Safire, "On Language; Transparency, Totally", *N.Y. TIMES*, 4 Jan.1998, Sec. 6, pp. 4.

one of the most challenging is the obligation of greater transparency.<sup>8</sup> Although liberal norms of transparency and uniform application of law and regulation are not widely accepted or enforced in China<sup>9</sup> due to the friction between it and China's cultural components, the core concept of transparency, to varying degrees, has gone to many aspects of China's current legal reforms.<sup>10</sup> Accordingly, China's compliance with the WTO must extend beyond general principles and performance in government regulations generally, to include compliance with WTO norms on dispute resolution.

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Dispute resolution is essential to the process of empowering economic actors to seek enforcement of substantive norms of law and the government regulations. This thesis singles out transparency with respect to economic dispute resolution, trying to look into how China's transparency obligations improve its rule of law in the dimension of

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<sup>8</sup> Chief among these new obligations are: (i) a general requirement that businesses from other WTO member states be treated in the same fashion as Chinese businesses; (ii) an end to dual pricing policies that discriminate against imports and in favor of exports; (iii) the elimination of restrictions on the rights of foreign enterprises to freely import, export, and trade throughout China within three years of China's accession to the WTO; (iv) a promise not to use price controls to protect domestic industries from foreign competition (except in the case of pharmaceutical products); (v) an elimination or relaxation of many state trading monopolies within three years of accession; and (vi) an agreement to comply with the WTO's Agreement on Trade-Related Intellectual Property Rights. See "WTO Members Agree on China's Accession; Compromise Reached on Insurance Clause," 18 *International Trade Reporter*, pp.1460-1462 (20 September 2001)

<sup>9</sup> See generally, S. Lubman, "Introduction: The Future of Chinese Law", *The China Quarterly*, No. 141 (1995), p. 1-21.

<sup>10</sup> See Long Yingxia, "Dui Zhongguo 'Rushi' hou Zengqiang Toumingdu de Falv Fenxi" (Legal Analysis of Strengthening Transparency since China's Accession to the WTO), *NanFang Jingji (Southern Economy)*, No. 3 (2002).

<sup>11</sup> See generally, Pitman B. Potter, "Evolution of Law in Contemporary China", in Ostry, et. al, *China and the long march to global trade* (Routledge, 2002), pp. 138-140.

economic dispute resolution. Today, the general mechanisms of economic dispute resolution in China are arbitration, mediation, and litigation. Depending on the nature of a dispute, the parties may resort to one, two, or even all of these avenues. Indeed, the same institution may try to resolve a dispute through more than one of these modes. For instance, in cases of commercial disputes, arbitration is the most popular mechanism, even though arbitrators often conduct mediation prior to arbitration. Similarly, to challenge certain types of administrative actions, citizens may either resort to administrative reconsideration or file a lawsuit in court. However, those mechanisms involving the exercise of the state power from the beginning to the end and resulting in binding force on the parties merit special attention in current China as a series of obligations under the WTO impose on China, and one of them is transparency which is a concept going to the heart of a country's legal infrastructure, and more precisely to the nature and enforcement of its administrative regime.<sup>12</sup>

Judicial bodies are the dispute resolvers most familiar to us. As for the administrative organs, although they are not usually included in the common dispute resolving institutions, their role in resolving disputes cannot be overlooked. It is through an exercise of both administrative and adjudicatory power that administrative organs get the disputes resolved. Being institutionally and culturally related to a great extent, this particularity brings many transparency issues since China's entry to the WTO. Therefore, this thesis, besides a study on administrative litigation and commercial

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<sup>12</sup> See Ostry, S. (1998) "China and the WTO: The Transparency Issue," Spring 3 *UCLA Journal of International Law and Foreign Affairs* 1.

litigation, also focuses on economic disputes resolved by China's administrative organs through administrative reconsideration and administrative adjudication. It is aimed to figure out how far China has to go to achieve transparency-enhanced economic dispute resolution by administrative organs and judicial bodies in China's cultural context.

This thesis proceeds as follows. After the introduction, Chapter II of the thesis deals with transparency and dispute resolution, discussing China's transparency obligations and how they fit into a broader thinking of economic dispute resolution, and identifying the elements of transparent economic dispute resolution. Chapter III explores how China's administrative organs resolve the economic disputes including commercial administrative disputes and non-administrative commercial disputes from the transparency perspective. Chapter VI views how the concept of transparency works in the setting of China's court adjudication, i.e., administrative litigation and commercial litigation, by which the courthouses get the economic disputes resolved. Finally, the thesis concludes by considering the role of institutional and cultural factors in seeking greater transparency in economic dispute resolution.

## **Chapter II    Transparency and Economic Dispute Resolution**

### **2.1    Transparency under the WTO and China's Commitments**

December 11, 2001 marked the date of China's entry into the WTO and

China's integration into the world economy. The implications of this event may be as far-reaching and dramatic for China and the rest of the world as China's adoption of the Open Door Policy in 1978. In order to gain a WTO membership, China has to undertake many very significant obligations. Transparency is one of the most challenging one. While China's accession to the WTO is often portrayed as a matter of economics and commerce, it is at root a fundamental challenge of politics, governance, institutions and culture. The GATT/WTO principles of transparency derive broadly from liberal principles of government accountability.<sup>13</sup> Accordingly, China's adaptation to this ideal is not only at the legal level, but also at institutional level and could go deep into the political regime and cultural setting.<sup>14</sup>

Transparency is considered as one of the basic rules governing the post war trading system as embodied in the General Agreement on Tariffs and Trade (GATT) and now the World Trade Organization (WTO).<sup>15</sup> On several occasion, the WTO agreements refer, both explicitly and implicitly, to transparency as one of key principles of the multilateral trading system, albeit in a limited, technical sense.<sup>16</sup> Transparency obligations are directed against Members and aim for improved clarity and accessibility of domestic trade regimes and measures. Greater transparency in turn, increases rule adherence and renders the multilateral trading system more predictable

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<sup>13</sup> See Pitman B, Potter, "Globalization and Economic Regulations in China: Selective Adaptation of Globalize Norms and Practices", *Washington University Global Studies Law Review* 1 (2003), p.119-150.

<sup>14</sup> More discussion about transparency in institutional sense is conducted at Chapter V.

<sup>15</sup> See Ostry, S. *Supra* Note 12.

<sup>16</sup> See GATT Article 10, GATS Article 6 and TRIPs Article 63.

to states and business actors.

Under the WTO framework, the transparency commitments of each member country are prescribed by the Article 10 of GATT, Article 6 of General Agreements on Trade in Services (GATS) and Article 63 of Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). Take the GATT as an example, Article 10 (1) of the GATT requires publication of trade regulations, while Article 10 (2) requires publication of general measures affecting an advance in import duties, restrictions, or payments before enforcement.<sup>17</sup> In addition to imposing state obligations to disseminate the content of rules, these provisions may also permit the subjects of regulation opportunities to consult with government authorities to learn about laws and practices.<sup>18</sup> Article 10 (3) requires states to administer trade laws and regulations in a uniform, impartial, and reasonable manner, and to establish independent judicial, arbitral, or administrative tribunals or procedures for prompt review and correction of administrative action that fails to conform to these criteria.<sup>19</sup> The transparency and enforcement provisions of the GATT Article 10 provide the framework for implementing the substantive norms of the WTO. For in the absence of transparency about the content and application of trade regulations, trading partners and their business constituencies cannot know whether or not the central GATT

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<sup>17</sup> For text see The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Agreements 424 (World Trade Organization ed., 1999).

<sup>18</sup> See John H. Jackson, *World Trade and the Law of GATT* 463 (1969).

<sup>19</sup> For text see The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Agreements 424 (World Trade Organization ed., 1999).



principles of trade liberalization are being granted or denied. The substantive and operational norms complement each other and set the tone for the GATT's regulatory culture.<sup>20</sup>

China will need to make substantial changes in this respect to conform to the relevant requirements of WTO membership.<sup>21</sup> Among China's WTO commitments, the following is those with respect to the transparency: As part of its WTO commitments, China agreed to enforce only "those laws, regulations, and other measures pertaining to or affecting trade in goods, services, TRIPs or the control of foreign exchange that are published and readily available to other WTO members." It also agreed to establish an official journal publishing all trade-related laws and regulations, and to establish an inquiry point where WTO-related information could be obtained. Furthermore, it has committed itself to administering all laws and regulations in a uniform, impartial, and reasonable manner. Finally, China agreed to "make available to WTO members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPs or the control of foreign exchange before such measures are implemented or enforced."<sup>22</sup> These substantial commitments with respect to legal issues as part of China's WTO accession are all

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<sup>20</sup> See Pitman B, Potter, *supra* note 13, p. 119-150.

<sup>21</sup> See Deng Juan & Wang Qihong, "More should be done on foreign investment law", *Zhongguo Jingji Shidai (China Economic Times)*, 4 November 2000, p. 2.

<sup>22</sup> Protocol on the Accession of the People's Republic of China (WT/L/432), Article 2 (C).

steps economic actors at home and abroad applaud.<sup>23</sup>

## **2.2 Implications of Transparency Commitments for China**

### **2.2.1 Going beyond Legal Regime**

As globalization has brought on more frequent and intimate interaction among states and societies, more and more nations, to a varying degree, domestically legalize internationally recognized norms through the process of selective adaptation.

<sup>24</sup> This process starts consciously in terms of the active efforts of a nation to integrate itself into the global market. This process, at the same time, embodies a society's acceptance to some external norms but resistance to others, which may occur unconsciously. The selective process more depends on the specific circumstances in a specific context, in connection to long-developed social and cultural habits. In this sense, China's past pursuit to entry to the WTO reflects its eagerness to be a player of world economy and on the other hand, will be a paradigm to the world of how a

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<sup>23</sup> Some specific examples are: (i) The substantive laws and procedures designed to protect patents, copyrights and trademarks under the TRIPS agreement must be accessible to the governments and enterprises of other Member states; (ii) If there is an action within China for the imposition of a countervailing duty, the entire process must be consistent with the GATT Agreement on Countervailing Duties and specific procedures used to compute the amount of the countervailing duty "shall be transparent and adequately explained"; (iii) Since one of the basic purposes of the GATT Agreement on Import Licensing is to ensure that the licensing procedures of member states are transparent, China's import licensing rules will have to be published, the licensing application forms will have to be as clear and simple as practicable, and the whole procedure will have to be consistent with China's overall obligations under the WTO agreements. From these examples, it is apparent that the obligation of transparency is intended to assure that the concessions agreed to by China are in fact available to enterprises of the other member states. Transparency also is one of the principal devices used to monitor China's adherence to the terms of the WTO agreements.

<sup>24</sup> For more discussion of selective adaptation, see generally, Pitman B, Potter, *supra* note 13, p. 119-150.

country, as ancient as China with so many political, economic and cultural carry-overs of the past, assimilates western liberal norms under the WTO framework. Amidst all of painless and painful nationalization of internationalized rules, transparency-oriented reforms have brought much attention at home and abroad as it is a notion going beyond the heart of China's legal regime and touching upon the China's culturally-rooted institutional setup and societal context.

In the administrative regime, the notorious internal regulations can be explained by the blurry line separating the administration from the political power, the government from the CCP. For instance, many important decisions are jointly issued by the CCP Central Committee and the State Council, PRC's central government. Numerous regulations and circulations concerning state-leading cadres or functionaries are drafted both by the CCP Organization Department and the Ministry of Personnel. Are these norms political or administrative ones? Also, the issue of judicial independence, an avoidable topic when it comes to the transparency, ultimately depends on changes in the political system.<sup>25</sup>

The law in China, whether imperial or communist, was a flexible tool, not an absolute, independent standard. Laws were and are embedded in, and often subservient to, societal norms and values and the ruling elite. Hence, China's transparency issues are

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<sup>25</sup> see Jean-Pierre Cabestan, "*Administrative Law-Making in the People's Republic of China*", in Eduard B. Vermeer and Ingrid d' Hooghe (eds.), *China's Legal Reforms and Their Political Limits* (Curzon Press, 2002), pp. 32.

not just legal or even political but could firmly root in Chinese cultural and societal values, which require an insight into some of the values and practices that structure Chinese society itself. A very obvious example is the gap between law in statutes and law in practice. In the recent years, China's effortful legislative activities have not brought satisfactory effects in practice. To a great extent, it is because practical significance of the revisions will depend on their adoption by the law enforcement agents, lawyers, and even common people, something that requires an attitudinal change and much culturally-rooted.<sup>26</sup>

By placing the transparency issues in the Chinese cultural context, it will become considerably easier to gauge the changes that have taken place in this field and figure out the distance for China to go. Since the changes in the Chinese political system or in Chinese society are sometimes misinterpreted from a Western cultural perspective, this cultural approach is needed as it recognizes the way Chinese act and think amongst themselves.<sup>27</sup> (More discussion of cultural approach has been done in Chapter V)

### **2.2.2 Go beyond Foreign Trade Regime**

China's transparency obligations under the WTO mostly focus on the foreign trade arena. But in order to fulfill those obligations, more comprehensive reforms

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<sup>26</sup> see Geor Hintzen, "To Have One's Cake and Eat It? Human Rights in Chinese Culture", in Eduard B. Vermeer and Ingrid d' Hooghe (eds.), *China's Legal Reforms and Their Political Limits*, (Curzon Press, 2002), pp. 50.

<sup>27</sup> Ibid.

with an expanded range of trade area are desirable. As a Chinese officer said, entry to the WTO is to shake the whole legal system of China.<sup>28</sup> In principle, all domestic laws and legal regulations must be in keeping with the WTO rules. All laws and regulations that conflict with WTO rules must be changed.<sup>29</sup> Although it still remains to be seen to what extent those reforms can be implemented in the real life due to various reasons especially China's culturally-rooted bureaucratic traditions, to say the least, China has got an external engine pushing it forward on the way to be a well-behaved WTO Member. And this external engine, combining with China's increasing awareness of developing an orderly domestic market economy and of the critical need for adaptation to international legal standards if China is to truly integrate itself into the world economy, has come to be an internalized one. As a part of the engine, the ideal of transparency has driven China's response extending the trade circles to many other areas. Dispute resolution is certainly one of areas which should be and has indeed been affected for the sake of realizing the WTO commitments and for China's own sake.

China now enjoys an extremely energetic economic growth. With the marked growth in the economy, economic disputes occur more frequently and there is a growing need to resolve them. Among the available dispute resolution alternatives to litigation and administrative judicature, arbitration is the most important and is the preferred

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<sup>28</sup> *Nanfang Zhoumo (Southern Weekend)*, 25 Oct. 2001, p.6.

<sup>29</sup> Among of them like the Chinese government announced as early as May 2002 that more than 2,300 laws and regulations had been amended to comply with WTO rules, and 830 laws have been abolished since China joined the WTO. See *ibid*.

methods of dispute resolution in the commercial sector. The last few decades in particular have seen the importance and influence of arbitration grow to such an extent that they have had a significant effect on economic life in China.<sup>30</sup> Increased share of China's economic dispute resolution market gained by arbitration impels us to think about why other dispute resolving mechanisms are much less welcomed. One of the reasons, *inter alia*, lies in that greater transparency can be obtained from arbitral proceedings.<sup>31</sup>

Meanwhile, not all economic disputes can be resolved through arbitration in China. Commercial administrative disputes shall be handled either through administrative reconsideration or litigation; a part of commercial disputes, pursuant to law, shall be settled by administrative adjudication or by judicial proceedings.<sup>32</sup> Some economic disputes, if involving social interests, may be excluded from arbitration, such as the internal disputes arising within agricultural collective economic organizations.<sup>33</sup>

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<sup>30</sup> See Wang Shengchang, *Resolving Disputes in the PRC* (Asia: Sweet & Maxwell Ltd., 1996), pp.5.

<sup>31</sup> The main advantages of arbitration are flexibility, finality and enforceability and confidentiality. One thing deserves to be mentioned is that, although greater transparency in arbitration has been recognized, it does not mean that China's arbitration is satisfactory enough. It also leaves quite a lot to be desired if compared with the elements of transparency discussed in the following text of this thesis. For an example, as for the applicable legislative law, there lacks clear guidance of why to apply the law of one country but not the law of others; for independence, the establishment of arbitration commission is still tainted with strong administrative influence. But, these issues are beyond the discussion of this thesis.

<sup>32</sup> See the discussions in Chapter III & IV.

<sup>33</sup> *Zhonghua Renmin Gongheguo Zhongcai fa (Arbitration Law of the People's Republic of China)*, Article 77, in *The Laws of the People's Republic of China* (1995), compiled by the Legislative Affairs Commission of the Standing Commission of the National People's Congress of the People's Republic of China (Beijing: Law Press of China, 1996), vol. 7.

The abovementioned economic disputes, especially those commercial administrative disputes, which arbitration commissions are not qualified to resolve, entail a close look. As it is well known, market economy may be characterized as rule of law economy. Within the increasingly comprehensive legal system governing the market, inevitably, there are a variety of business law and regulations. Many of them are enforced by administrative agencies and embody the interaction of administrative authority and economic behavior. Disputes ensue when administrative organs fail to implement their duties or improperly exercise the power and therefore may infringe upon rights and interests of the external parties subject to administration, including individuals, legal persons and other organizations. Such type of administrative disputes in relation to business law and regulations (hereinafter "commercial administrative disputes") are numerous in current China. Meanwhile, under the WTO

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Chinese legislations can be accessed by a variety of Chinese and English language sources. Chinese language sources include *Zhonghua renmin gongheguo fagui huibian* (Compilation of Current Laws and Regulations of the PRC) (Beijing: Law Publishers, yearly); *Zhonghua renmin gongheguo xinfagui huibian* (Compilation of New Laws and Regulations of the PRC) (Beijing: Legal system publishers, periodical); *Zhonghua renmin gongheguo duiwai jingji fagui huibian: 1945-1985* (Compilation of Economic Laws and Regulations Pertaining to Foreign Matters) (Beijing: People's Press, 1986); *Zhongguo jingji tequ kaifaqu falu fagui xuanbian* (Compilation of Laws and Regulations for China's Special Economic Zones and Open Areas) (Beijing: 1987); *Renmin ribao* (People's Daily); *Fazhi ribao* (Legal System Daily); and *Guoji shang bao* (Journal of International Commerce). English language sources include *Laws for Foreign Business* (CCH Australia Ltd.); Victor Nee (ed.), *China Commercial Laws and Regulations* (New York: Oceana); *China Economic News*; *China Law and Practice*; *The China Business Review* and *East Asian Executive Reports*.

In this thesis, the cited Chinese laws and regulations are taken from *The Laws of the People's Republic of China* (Chinese-English version, compiled by the Legislative Affairs Commission of the Standing Commission of the National People's Congress of the People's Republic of China, Beijing: Law Press of China, yearly starting from 1993, Vol. 5; before 1993, Vol. 1, from 1979-1982; Vol.2 from 1983-1986, Vol. 3, from 1987-1989; Vol.4 1990-1992)

framework, the disputes therein are trade-related and arise from administrative activities. One party to the disputes is business participators and the opposite party is regulators of trade, the government or relevant administrative organs. How to resolve these disputes by administrative organs and judicial bodies, due to numerous Chinese cultural nuisances encountered in potential proceedings, is definitely a big concern of international community which is scrutinizing how China lives up to its WTO commitments, the concern of foreign investors who are paying close attention to China's legal environment including dispute resolution and remedies, and also, the concern of domestic businessmen who are awakened to realize the importance to seek legal protection against maladministration.

### **2.3 Interpretation of "Transparency"**

The principles of transparency were firstly brought forward to the international community by the GATT.<sup>34</sup> Since then, subsequent legal documents continuously strengthened these principles. After the Uruguay Round, transparency obligations under the GATT have been included into various multilateral trade agreements and are applicable to all areas of international trade. However, the articles concerning the transparency under the above agreements reveal that the requirements of transparency, as set out previously, are all procedural. What is transparency, i.e., its connotation and values, is scant from the WTO agreements. This can be explained by the fact that an understanding of transparency is related to the specific cultural contexts and

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<sup>34</sup> GATT, Article X: Publication and Administration of Trade Regulations.



consequently there might be different comprehension of the underlying norms of this concept among the WTO Members. To seek common points while reserving differences, procedural design is a relatively effective way. It is more visible, calculable, and comparable and is able to avoid possible divergence arising from political, economic, legal, cultural and ideological differences.

As a matter of fact, that transparency is not a purely free trade issue but related to the Members' legal and political system is acknowledged by the WTO framework itself. Under the TRIMs, it mentions that the implementation of domestic transparency must be on the voluntary basis and take domestic legal and political system into account,<sup>35</sup> and TRIMs is not intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members.<sup>36</sup>

Although transparency is one of pillars of the WTO regime, it is also noted that what is missing from the legal framework of the WTO Agreement and its annex is an external dimension of transparency. In its relations with civil society, the WTO may have made factual progress towards transparency, but legal manifestations of WTO obligations to give public accounts of its activities are scant.

Therefore, the WTO principles of transparency are embodied as a series of basic

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<sup>35</sup> TRIMs B. "Domestic transparency".

<sup>36</sup> TRIMs A. "Objectives".

procedural criteria. These protective measures *per se* do not constitute a value judgment on protective objects. In order to learn connotation and contents of transparency, going through the present stipulations under the WTO framework may not be enough. For the purpose of the discussion in this thesis, further clarification of requirements of transparency is to be sought after. By a review of different expression of transparency, the thesis hopes to find out how this concept used by the international investment policy community fits into broader thinking on economic dispute resolution.

#### **Views:**

- *Political science dictionary* (Brewer's Politics): "openness to the public gaze" (in Florini (1999)) <sup>37</sup>
- *Business consultancy*. "the existence of clear, accurate, formal, easily discernible and widely accepted practices" (Price Waterhouse Coopers 2001). <sup>38</sup>
- *OECD Public Management*. "The term 'transparency' means different things to different groups [of regulators]. Concepts range from simple notification to the

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<sup>37</sup> Florini, A. (1999), "*Does the invisible hand need a transparent glove? The politics of transparency*". Paper prepared for the Annual World Bank Conference on Development Economics, Washington DC, 28-30 April. Available at [www.worldbank.org/research](http://www.worldbank.org/research). (accessed date: 10 Oct 2003)

<sup>38</sup> PriceWaterhouseCoopers, *The Opacity Index*, January 2001, available at [www.opacityindex.com](http://www.opacityindex.com). (accessed date: 12 Oct 2003)

public that regulatory decisions have been taken to controls on administrative discretion and corruption, better organization of the legal system through codification and central registration, the use of public consultation and regulatory impact analysis and actively participatory approaches to decisions making.” OECD (2002a) <sup>39</sup>

- *International Monetary Fund*.... [b]eing open to the public about the structure and functions of government, fiscal policy intentions, public sector accounts and fiscal projections” IMF (1998). <sup>40</sup>
- *Draft Multilateral Agreement on Investment*: “Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rules and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement. Where a Contracting Party establishes policies which are not expressed in laws or regulations or by other means listed in this paragraph but which may affect the operation of the Agreement, that Contracting party shall promptly publish them or otherwise make them publicly available.” <sup>41</sup>

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<sup>39</sup> OECD (2002a) Regulatory Policies in OECD Countries: From Intervention to Regulatory Governance.

<sup>40</sup> International Monetary Fund (1998), *Code of Good Practices on Fiscal Transparency -- Declaration on Principles*.

<sup>41</sup> April 1998 draft text. [www.oecd.org/daf/mai/](http://www.oecd.org/daf/mai/).

- *APEC Leaders' Statement to Implement APEC Transparency Standards (October 2002)*: Transparency “is a basic principle underlying trade liberalization and facilitation, where removal of barriers to trade is in large part only meaningful to the extent that the members of the public know what laws, regulations, procedures and administrative ruling affect their interests, can participate in their development... and can request review of their application under domestic law... In monetary and fiscal policies, [transparency] ensures the accountability and integrity of central banks and financial agencies and provides the public with needed economic, financial and capital markets data.
  
- *Monetary policy practitioners*: “The communication of policymakers’ intentions with a view to enhancing their credibility”. (Friedman 2002); <sup>42</sup> “The communication of policymakers’ intentions” (King 2000).
  
- *World Trade Organization*. Ensuring “transparency” in international commercial treaties typically involves three core requirements: (1) to make information on relevant laws, regulations and other policies publicly available. (2) to notify interested parties of relevant laws and regulations and changes to them; and (3) to ensure that laws and regulations are administered in a uniform, impartial and reasonable manner. WTO (2002).

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<sup>42</sup> Friedman Benjamin, “The use and the meaning of words in central banking: inflation targeting, credibility and transparency”, NBER Working Paper 8972 (2002).

Despite differences in expression and nuanced differences in connotation, the core meaning of transparency is revealed from the above statements. The following perspective is a good summarization of the core meaning.

At a conference in Washington in March 1998,<sup>43</sup> Jonathon Fried set out the basic propositions of transparency particularly succinctly. He asserted that there are three facets of transparency, which are:

- i. the laws and regulations governing trade are publicly available;
- ii. there is procedural fairness, that is, that the process of administrative decision making is principled, comparatively stable, and the basis for making a decision can be known;
- iii. there is an independent and impartial system for review of administrative decision making.

This perspective was adopted by a legal scholar, Sarah Biddulph. She based on these three aspects of transparency to examine the ways in which and the extent to which they are reflected in the Chinese legal system.<sup>44</sup>

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<sup>43</sup> China/WTO Accession Washington Meeting, sponsored by the University of Toronto Centre for International Studies and the Institute for International Relations and Foreign Policy, UCLA 5-6 (March 1998)

<sup>44</sup> See Sarah Biddulph, "China's Accession to the WTO: Legal System Transparency and Administrative System", Ostry, et. al, *China and the long march to global trade*, (Routledge, 2002), pp. 155-187.

## **2.4 Constituents of Transparent Economic Dispute Resolution**

Jonathon's propositions concerning "transparency" are compatible with the purpose of this thesis too. To explore economic dispute resolution in China from a transparency perspective, relevant requirements under the WTO are the fundamentals. In terms of economic dispute resolution to be discussed in this thesis, i.e., a process involving substantive, procedural as well as institutional issues, more specific description of efforts China is supposed to make would be desirable. Therefore, taking Jonathon's propositions, this thesis clarifies the following interpretation of transparency as the basis of discussion.

- i. Transparent applicable legislation
- ii. Procedural fairness
- iii. Independence of Dispute Resolving Institutions

### **2.4.1 Transparent Applicable Legislation**

An understanding of the law is a fundamental premise by which a company, an enterprise or an individual guarantees that its business operations are within the law. They are entitled to know what commercial activities are legal, which are viewed with legal tolerance and which activities are banned. Much like a soccer game, when one does not understand the rules, no amount of discussion about how to obey these rules can get you closer to knowing how to win the game.

**(a) Publication: publicly accessible**

Publication of law includes the publicly accessible procedures for drafting, passing and promulgating laws.

The regulatory drafting model under the WTO is derived from a corollary in the US Administrative Procedure Act s. 553. It is premised on the existence of a legislation and rule-making procedure which incorporates a consultation phase or some other formal system of scrutiny before the law or rule can validly be passed. Now the requirement of consultation with the interested parties is widely used. It reflects a growing recognition that effective rules cannot rely solely on command and control -- the individuals and organizations covered by rules need to be recruited as partners in their implementation. Consultation is the first phase of this recruitment process. It can also generate information and ideas that would not otherwise be available to public officials. Consultation mechanisms are becoming more standardized and systematic. This enhances effective access by improving predictability and outside awareness of consultation opportunities. Now, there is a trend toward adapting forms of consultation to the stage in the regulatory process. Consultation tends to start earlier in the policy making process, is conducted in several stages and employs different mechanisms at different times.

Openness of the procedures by which the law is passed strengthens the degree of transparency of the law application. Today, not only the legislative bodies but also administrative organs are entitled to legislative power. Both of them are governed by

clear stipulations of passage of law, which are supposed to be knowable to the public. Being aware of when, where and how a specific law or regulation is passed, and that the enacting authority exercises its power in law making *intra vires*, contributes to compliance of law; on the contrary, non-public passage of law only ends in people's unwillingness to obey the law.

To make the laws and regulations applied by the dispute resolving institutions knowable to the disputants, it is required to publish them once enacted and make them publicly accessible. Proper legal procedures must be followed in promulgating any law or regulation.

Public access to business laws, regulations and norms, together with accuracy and timeliness of such information, is the thread that links all concepts of transparency in dispute resolution. It can be thought of as the inner kernel from which all other concepts and practices grow. It is so fundamental as to be almost inseparable from legislative and regulatory functions, compliance with and enforcement of legislation. Public access to law refers to codification of law, publication of registers of law, linking enforceability to availability on the register and access like via Internet.<sup>45</sup> The adoption of centralized registers of laws and regulations will also enhance accessibility.<sup>46</sup>

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<sup>45</sup> For an example, three quarters of OECD countries now make most or all primary legislation available via the Internet.

<sup>46</sup> Eighteen countries of OECD stated in end-2000 that they published a consolidated register of all subordinate regulations currently in force and nine of these provided that enforceability



Other factors are also relevant when trying to render law and public policy more transparent:<sup>47</sup>

*Regulation complexity and choice of audiences.* Policies are often complex and information about it has to be condensed, simplified and put into context in order to make it comprehensible. In some areas, however, the policies to be described are inherently complex and involve specialized expertise. A policy that is understandable and transparent to an audience of specialists, may not be to other audiences. So plain language drafting is called for.

*Codification and the transparency of administration and enforcement.* Business activities influenced by laws and regulations are very complex. For example, prudential regulation in banking is required to account for financial institutions' activities in numerous markets and geographical locations. Complexity means that policy makers must make choices about how they frame law and regulation should they set forth broad principles and let businesses decide what these principles mean for their behavior or should they opt for more detailed descriptions of legal and illegal behaviors? These choices influence approaches to transparency. If legislative requirements are framed as broad principles, legal codes will tend to be short and

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dependent on inclusion in the register. Many countries now also commit to publication of future regulatory plans.

<sup>47</sup> See generally, Organization for Economic Co-operation and Development, Directorate For Financial, Fiscal and Enterprise Affairs & Committee on International Investment and Multinational Enterprises, "Public Sector Transparency and International Investment Policy", DAF/IME 2002 (16)/FINAL, approved and declassified by the CIME at its meeting on 9-11 April 2003, International Investment Perspectives (2003 Issue), also available at OECD website.

easily understandable. Yet, in this case, approaches to administration and enforcement determine much of a law's substance. For this reason, it is important that administration and enforcement also be transparent.

*Insiders versus outsiders.* Since transparency involves national institutions, ways of communicating and even languages, "insiders" people who are native to a particular legal environment might be more comfortable with national transparency arrangements than "outsiders". This consideration is of particular interest to the investment policy community, since it implies that, in order for the principle of non-discrimination to apply in matters of transparency, governments may have to make special efforts to communicate effectively with "outsiders" including international investors.

Yet, the publication of law is not identical to having tools to be able to determine the substantive content of the regulatory regime in a particular area. Regulatory uniformity, consistency, stability and certainty are also indispensable for transparent applicable law.

**(b) Regulatory Certainty, Uniformity, Consistency and Stability**

The Western doctrine requires that all laws should be sufficiently open, clear, and relatively stable that people will be able and willing to be guided by them.<sup>48</sup> Regulatory certainty, uniformity, consistency and stability make calculability and predictability of law possible. They are what modern capital enterprises mostly rely

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<sup>48</sup> See Nanping Liu, *Judicial Interpretation in China* (Asia: Sweet & Maxwell, 1997), pp.204.

on. That is, law and administrative system are run by a series of rational and predictable methods and people can at least make prediction in principle according to the general norms.<sup>49</sup> Modern capitalism, for the sake of existence, entails a kind of mechanically calculable law. Just like putting a coin on the top of a “vending machine”, an expectant conclusion can be obtained through the rules enacted beforehand. Judiciary and administration whose functions can be rationally anticipated based on fixed and general rules are highly desirable.<sup>50</sup>

Institutional calculability is even more important with the increasingly growing international interaction. People coming from different countries and areas have different cultural background, legal thinking and political ideas. Trade and business, in a sense, are getting insecure due to the potential unpredictability and uncertainty of commercial transaction governed not only by the knowable internationally-recognized norms but also by the diverse domestic laws which are more culturally specific than the former. “International institutional bridging cost”,<sup>51</sup> therefore, strongly calls for domestic transparency in laws and rules. Public accessibility to law is just the basic requirement to embody the transparency in the applicable legislation. Even if the laws and regulations governing business activities are accessible to the economic actors, business risks would be still there both of economic disputes avoidance and

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<sup>49</sup> See Max Weber, *Economy and Society: An Outline of Interpretative Sociology* (Guenther Roth and Claus Mittich eds.) (Berkeley: University of California Press, 1978), pp. 1394.

<sup>50</sup> See Max Weber, *Economy and Society* (transplanted by Ling Rongyuan) (Beijing: The Commercial Press, 1997), Part. II, pp. 738.

<sup>51</sup> See Wolfgang Kasper & Manfred E. Streit, *Institutional Economics: Social Order and Public Policy* (translated by Han Chaohua) (Beijing: The Commercial Press, 1997), pp. 738.

resolution would be difficult if the norms themselves are ambiguous and lack uniformity, consistency, stability. The degree of transparency in the trade policies and legal system has become an important factor considered by business and trade decisionmakers in international trade arena.

Admittedly, due to ever-changing societal situations to which the law applies, it is impossible to make law constantly adaptable to the regulatory environment. A statute, in a sense, starts to lag behind the societal development right after it has been enacted. However, maximized predictability of legal effect is still possible if ambiguous language is avoided in law making, attention is paid to harmonization between legislations, and legal norms especially underlying ones are comparatively stable.<sup>52</sup> In addition, increasing use of legislative codification and restatement of laws and regulations is able to enhance clarity and identify and eliminate inconsistency.<sup>53</sup>

Conflicts of law are a big hindrance to the application of law and worsen the pursuit of transparency when clear guidance about how to handle the conflicts is scant. Today, the reality is that different departments have their legislative authority, so do central government and local governments. In any particular jurisdiction, there are law-making, rule-making and maybe other forms of legal norms with binding force. Given these, law conflicts cannot be perfectly avoided. In case such legislative conflicts occur between relevant laws and regulations, how to apply the law so as to get the disputes resolved should be clearly stipulated.

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<sup>52</sup> See Sarah Biddulph, *supra* note 44, pp. 165.

<sup>53</sup> See *supra* note 47.

Regulatory uniformity, consistency and stability can counteract uncertainty to the utmost extent and thus should be included into the connotation of the transparency principles.

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According to the above, the first aspect of transparency involves both being able to know what the law is and that it will be enforced according to its terms. Related ideas are that the drafting process is open and that only those laws that are known will be enforced.<sup>54</sup> The principles of rule of law which underpin a western understanding of the concept of rule of law and transparency are that legal rules and principles are clear and knowable, they are enforced according to their terms and that they are fairly stable.

#### **2.4.2 Procedural fairness**

As mentioned at the beginning of the thesis, transparency has significant instrumental value. The thread therein is fairness, substantive as well as procedural fairness.

Substantive fairness is hardly accurately measurable. Nowadays, it is increasingly difficult to point out what is right in the substantive sense.<sup>55</sup> It is because substantive law, inherently, has limitations and obscurity, no matter what legislative

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<sup>54</sup> See Sarah Biddulph, *supra* note 44, pp. 158.

<sup>55</sup> See Song Bing, et. al, *Chengxu, Zhengyi yu Xiandaihua (Procedures, Justice and Modernization)* (Beijing: China University of Political Science and Law Press, 1998), pp. 374.

techniques are employed. Broad and abstruse prescription and the loopholes existent in substantive laws provide dispute resolution decisionmakers with discretion. Also, dispute resolution in itself is a process launched and operated by man and inevitably involves subjective factors and appraisal criteria. Due to different views toward rights and wrongs of different people coming from different cultural backgrounds, it is hardly surprising to find out that there may be no uniform opinions on the eventual resolution. Further, substantive fairness is not guaranteed in another sense. As it is premised on correct determination of facts while the happening of the cases is foregone and collection of evidence is limited to time and space, resolution is more or less tainted with ambiguity.<sup>56</sup> Therefore, the value and significance of procedural fairness are prominent. By providing a symbolic appearance of legality, dispute resolution procedures can deflect attention from the harsh or unfair substance.<sup>57</sup> Dispute resolution with fair and transparent procedures remedies the deficiencies of substantive law. Being aware of how the disputes get resolved, disputants, even with different cultural concepts, are inclined to accept the decisions which appear more persuasive to them and thus sparks fewer complaints.

The process of dispute resolution should be principled and comparatively stable. Further, an open system runs through the whole dispute resolution process. That is, the process is open both to the public and the parties whose access to necessary

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<sup>56</sup> See He Jiahong, "Sifa Gongzheng Lun" (On Judicial Fairness), *Zhongguo Faxue* (China's Law Science), No. 2 (1999)

<sup>57</sup> See Prosser. T, "Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and Their Predecessors" 4 *BJLS* 39, 1977.

information is clearly and adequately guaranteed by law.

(a) Openness to the public

The public is entitled to access the dispute resolution information: for example, court trial or administrative judicature process. Keeping the resolution process open to the public unless otherwise provided by law is a built-in requirement of transparency.

<sup>58</sup> Dispute resolution concerns the rights and interests of people. Proper public exposure is necessary to prevent abusive exercise of state power in this respect. A supervisory role played by the public promotes legalization of every step of dispute resolution. At the same time, convenient access to the information of dispute resolution proceedings educates the public on the operation of law and legal effect of their similar behavior and thus enhances the predictability of laws.

Openness to the public usually requires that the public be legally allowed to audit the dispute resolution. No burdensome restriction should be imposed on the people who want to sit in the dispute resolution hearing except for necessary and reasonable procedures under the law. News media is allowed to report whatever cases suppose they are responsible for the report. <sup>59</sup>

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<sup>58</sup> Exceptions include arbitration which does not require open hearing, judicial trial and administrative adjudication, if they are concerning state, business or private secrets.

<sup>59</sup> Also see Warren E. Burger, "The Interdependence of Judicial and Journalistic Independence." 63 *Georgetown Law Journal* (1975), p.1195: in an address to the American Society of Newspaper Editors, Chief Justice Burger suggests that the independence of the judiciary and journalists are interdependent. Journalists depend upon the courts to protect and

(b) Openness to the disputants

If the openness to the public is in a formal sense, openness to the disputants means more like in a substantive sense. For the administrative judicature which is more likely than judicial proceedings to be held in closed session due to its easier connection to state secret, business secrecy or private secret, openness of dispute resolution to the disputants appears especially important.

Openness to the disputants refers to the idea that the disputants are entitled to access the information of the whole process, be informed of their due rights, and exercise these rights. Information of the dispute resolution includes time, place, composition of decisionmakers and relevant case documents like the response of the other party to the dispute, evidence, etc. A series of procedural rights including the right to challenge, the right to make a statement, debate and cross-examination and the right to appeal should be notified to the disputants in a timely manner. Failure to satisfy any of above requirements ends in defective dispute resolution and entitles the disputants of the right to challenge the decision.

One idea that deserves to be singled out here for the purpose of the discussion in the following text is that the reasons of decision-making shall be given. Procedural fairness forms a key element of many Western legal systems. The requirement that reasons for a decision be given to the affected person is seen as being “an essential

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enforce their press freedoms; conversely, the courts depend on the actions of a free press in exposing and combating assaults on the judiciary that would limit its independence.



component of fair procedure”.<sup>60</sup> The disputants expect to know the applicable legislations of their behavior. They surely expect to know the specific governing law whose application ends in the settlement of their disputes, and the reasons of application. They are the elements contributing to the persuasiveness of a written decision or judgement. Persuasive dispute resolution then is relatively easier to be enforced by the parties. It is more illustrative to the people about possible legal significance of their behavior. A convincing ruling or judgement is no less than a law textbook and due to its close relation to the reality, even more instructive and enlightening to the public.

In sum, although in different social contexts, cultural nuisances may result in different understanding of what procedures are acceptable and even produce different effects in practice, it is undeniable that reasonable and stable procedures governing the whole process of dispute resolution to be strictly abided by is the key to prevent the arbitrariness of decisionmakers and abuse of power.

#### **2.4.3 Independence of Dispute Resolving Institutions**

Independence of dispute resolving institutions requires that decisionmakers obey nothing but law. Specifically speaking, the dispute resolving institutions as a whole should be externally independent from any public bodies, organizations, or

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<sup>60</sup> See Richardson, G., “The Study to Give Reasons: Potential and Practice,” Public Law 437 reproduced in Allars, M., *Australian Administrative Law Cases and Materials*, (Sydney: Butterworths, 1997[1986]), pp. 212-213.

individuals. The specific dispute resolvers should be independently responsible for resolving specific disputes, without internally institutionalized interference, like so-called guidance from higher officers or higher level court. For an instance, when administrative organs act as dispute resolving institutions, they should be the independent adjudicative bodies, not part of the internal complaints mechanisms of government departments and other public bodies.<sup>61</sup> Besides, impartiality of dispute resolving institutions inherently requires that dispute resolvers be also independent from the disputants themselves, not favoring either party. This is especially important when one party to the dispute is governmental organizations with state power. Keeping independence under such circumstance is a challenge for dispute resolving institutions, the administrative organs and the courts as well.

Independence of dispute resolving institutions is a legal issue in the sense that it requires a legal guarantee. However, the kind of legal guarantee that is available to ensure the independence and to what extent the guarantee can function well, is more an institutional issue than a legal issue due to its close relation to a nation's political regime and cultural components. Separation of power aims for this, offering protection from the tyranny of a single highly powerful branch.<sup>62</sup> As regards to the system, like communism in China where assembly government called the

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<sup>61</sup> See Andrew Le Sueur, Javan Herberg & Rosalind English, *Principles of Public Law*, (Cavendish, 1999), pp. 192-196.

<sup>62</sup> See J. Clifford Wallace, "Independence of the Judiciary: Independence from What and Why", 58 *N.Y.U. Ann. Surv. Am. L.*, (2001), p.241; also see M. Vile, *Constitutionalism and the Separation of Powers* (1967); W. Gwyn, *The Separation of Powers*, *Tul. Stud. in Pol. Sci.* vol. 9, (1965)

combination of the legislature and executive is exercised, the judiciary cannot be independent from the National People's Congress.<sup>63</sup> There is, thus, only separation of functions among legislative organizations, administrative organs and judicial bodies. The way to keep independence of dispute resolving institutions invites much controversy.

### **Chapter III    Economic Dispute Resolution**

#### **by Administrative Organs**

#### **3.1    Introduction**

##### **General**

In the early twentieth century, the rapid expansion of administrative power in western countries posed challenges for the theory of "passive administration". The era, described by Wade that except the post office and policemen, an English man with law abiding consciousness may spend his whole life without realizing the existence of the government, was over.<sup>64</sup> The emergence of a monopolized economy and welfare state requires that the government actively involves itself into the economy and

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<sup>63</sup> China's combination of legislature and execution is deeply rooted in Communist ideology held by Karl Marx and Lenin. See Mark, *Civil War in France* 73 (New York: International Publishers, 1932); See V.I. Lenin, *State and Evolution* (chap. 3, section 2-3).

<sup>64</sup> See generally, H.W.R.Wade, *Administrative Law* (Oxford, 1989), pp.4-10; see A.V.Diecy, *Law of the Constitution*, (Oxford, 1885), pp. 198.

society management. Hence, the theory of “active administration” develops.<sup>65</sup>

Accordingly, administration by law is not limited to the parliament’s legislation but extends to the rule making and normative-documents making by government and administrative departments. And, the government is not limited to administrative enforcement of law and administrative legislative power. It is also entitled to administrative judicature power, by which the administrative agency can resolve the disputes occurring between the private parties and the administrative organs and disputes between the private parties. It is noted that in many countries and areas, administrative organs play an important role in dispute resolution.<sup>66</sup> For an example, in the UK, under many Acts of Parliament, tribunals have been set up to hear appeals against the determinations of public bodies. Tribunals dwarf the ombudsmen and judicial review in terms of the number of complaints they deal with each year.<sup>67</sup>

The tendency today is to believe that going to court should be a last resort; litigation is seen as expensive, long winded and, more often than not, unnecessary. As a US

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<sup>65</sup> See generally, Jiang Mingan, “Administrative State and Control and Transformation of Administrative Power” (Xingzheng Guojia yu Xingzhengquan de Kongzhi yu Zhuanhua), in *Fazhi Ribao (Legal Daily)*, 13 Feb. 2000, p.3.

<sup>66</sup> Some countries and areas as follows: in the US, many administrative tribunals established within some administrative departments are specialized in dealing with the disputes in the relevant areas; in Canada, there exist a large number of administrative tribunals or agencies with specialized jurisdiction, like hearing human rights complaints, disputes between employers and unions, etc; in France, administrative courts are professionally responsible for handling administrative disputes and in nature they are not judicial bodies but still belong to the administrative system; in Taiwan, how to play the role of administrative organs in resolving disputes has invited much attention.

<sup>67</sup> See Andrew Le Sueur et al, *supra* note 61, pp. 192-196.

report of the National Commission on Law Observance and Enforcement (Wickersham Commission) mentioned, "in nineteenth-century America we sought to make the courts do the bulk of what to-day we have been learning to do through administration; in particular we cast upon courts a heavy burden of what is more appropriately administrative work".<sup>68</sup> Successive governments have, therefore, encouraged the proliferation of alternative methods of dealing with disputes. Public authorities have been exhorted to establish their own internal procedures for dealing with complaints.<sup>69</sup> These procedures range from recording complaints via telephone 'hotline' to more elaborate reviews by the public body itself of what allegedly went wrong. The shift to informal dispute resolution has, in large part, been motivated by the desire to reduce public spending for tribunal hearings and litigation in court is expensive.<sup>70</sup>

The modern society provides an even wider space for the development of administrative judicature. On one hand, increasingly complicated knowledge included in disputes makes the courts' ability unequal to their ambition to get the dispute resolved; at the same time, the courts' burden is lessened to a great extent with wide application of administrative judicature. On the other hand, less complex procedures of administrative judicature than judicial proceedings bring the disputants higher

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<sup>68</sup> National Comm'n on Law Observance and Enforcement, Report No. 8, at 14 (1931).

<sup>69</sup> For an example, in the UK, under the Citizen's Charter initiative, internal procedures have been established by public authorities for dealing with complaints. *See* Andrew Le Sueur et al, *supra* note 61, pp. 192-196.

<sup>70</sup> *See* Andrew Le Sueur et al, *supra* note 61, pp. 194.

efficiency, which sounds quite important nowadays when “justice delayed is justice denied”<sup>71</sup> is very much emphasized. As described in a UK’s report on the future of tribunal adjudication in the 1950s, tribunals were better for resolving some disputes than courts. People with specialist knowledge could be appointed to sit on them; for instance, doctors on tribunals hearing complaints against refusal of welfare benefit for disablement. Tribunal hearings could also be conducted with less formality than litigation in court, and be so speedier and less costly.<sup>72</sup>

In so far as the aim of internal complaints procedures is to provide cheap and quick resolution of disputes, they are good things. There is, however, also a darker side. In recent years, it has been witnessed a trend to compromise and downgrade procedures in a way which may endanger the proper application of the principles of openness, fairness and impartiality which should underpin tribunal system in general.<sup>73</sup> Informal grievance handling takes place behind closed doors; and if public authorities are not called to account in public, the wider public interest that justice is not only done but seen to be done is compromised.<sup>74</sup> Also as the above report pointed out, administrative institutions for dispute resolution should be viewed as independent adjudicative bodies, not part of the internal complaints mechanisms of government

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<sup>71</sup> *Klopper v. North Carolina*, 386 U.S. 213, 223-24 (1967) (referring to Sir Edward Coke's belief "that the delay in trial, by itself, would be an improper denial of justice").

<sup>72</sup> Report of the Committee on Administrative Tribunals and Enquiries, Cmnd 218 (London: HMSO, 1957)

<sup>73</sup> Annual Report 1989-1990, HC 64, p.1.

<sup>74</sup> See Mulcahy, L and Allsop, J, “A Wolf in Sheep’s Clothing? Shifts towards Informal Resolution of Complaints in the NHS”, in Leyland, P and Woods, T (eds.), *Administrative Law Facing the Future* (London: Blackstone, 1997).

departments and other public bodies. Openness, fairness and impartiality should inform the design and practices of administrative organs in charge of dispute resolution. Thus, so far as appropriate, such administrative organs should use procedures similar to those of courts; hearings should be in public; applicants should have the right to be legally represented; tribunals should give formal reasons for their adjudications; and there should be an appeal from the findings of these dispute resolving institutions to the court.<sup>75</sup>

### **China**

China's context is culturally unique. China is an administration-dominated country all through the ages. In the past, there was no separation between government and judiciary in dispute resolution. Government was called the parents of people (*Fu mu guan*) and was responsible for handling any disputes. Nowadays, although administrative effects still penetrate into judicial adjudication practically, there is at least a division of functions between administrative organs and judicial bodies under the present Constitution.<sup>76</sup>

Among a variety of administrative functions, one is dispute resolution. Such administrative activities are titled as administrative judicature. As a Chinese scholar describes, administrative legislation, administrative enforcement of law and administrative judicature constitute three kinds of administrative activities under

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<sup>75</sup> See Supra Note 72.

<sup>76</sup> See Constitution of the PRC (1982, 1993)

China's administration framework. Administrative judicature, together with court adjudication and nongovernmental arbitration, composes the whole adjudicatory system of current China.<sup>77</sup> China's unique cultural context and institutional setting, however, shape the administrative judicature framework with many so-called Chinese characteristics, encouraging ones as well as discouraging ones.

As defined previously, economic disputes are categorized into administrative disputes with respect to business law and regulations, i.e., commercial administrative disputes and commercial disputes. These two kinds of disputes can be settled by resorting to administrative agencies pursuant to law. For commercial disputes between private parties, they may be resolved through administrative mediation, administrative arbitration or administrative adjudication; for disputes between administrative agencies and the parties subject to administration, they may be settled through administrative reconsideration. Therefore, administrative judicature is composed of administrative reconsideration which is aimed to resolve administrative disputes, and administrative mediation, administrative arbitration and administrative adjudication, which are responsible for civil and commercial disputes.<sup>78</sup>

As it is easy to get confused by the above concepts, a clarification is necessary.

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<sup>77</sup> See Wen Zhengbang, Xue Zuomin & Wang Bing, "Shichang Jingji yu Xingzheng Sifa Zhidu de Jianshe yu Gaige" (Market Economy and Establishment and Reforms of Administrative Adjudication System), *Xiandai Faxue (Modern Law Science)*, No. 4 (1996)

<sup>78</sup> See Zhang Shaohua, "Woguo Xingzheng Sifa Lilun zhi Pipan yu Chonggou" (Critique and Reconstruction of China's Administrative Adjudication Theory), *Xingzheng Faxue Yanjiu (Study on Science of Administrative Law)*, No.3 (1999)



Administrative mediation (*Xindzheng Tiaojie*) means administrative organs, according to the agreement of disputants on both sides, act as mediators or intermediaries, instead of employing administrative power, to resolve the disputes.<sup>79</sup> The agreed mediation agreement has neither binding force nor executive force. Execution is on the voluntary basis. If mediation fails, or one party refuses to accept the mediation decision, he or she may apply for arbitration or bring a civil litigation.<sup>80</sup> In this sense, except for more authority of the mediators, there is no big difference between administrative mediation and non-governmental mediation. Since administrative mediation is made at the request of the parties on both sides and enforcement of mediation is still up to both parties, there are accordingly no many procedural concerns on dispute resolvers. This is thus not the focus of this thesis.

Administrative arbitration (*Xingzheng Zhongcai*) refers to that the administrative agencies, by way of mediation or adjudication, settle certain disputes occurring between certain equal parties.<sup>81</sup> Since the *Arbitration Law of the PRC* came into effect in 1995, administrative arbitration has faded from civil and commercial dispute

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<sup>79</sup> See Luo Haocai (ed.), *Administrative Jurisprudence* (Beijing: China University of Political Science and Law Press, 1989), pp. 202.

<sup>80</sup> *Zhonghua Renmin Gongheguo Xingzheng Fuyi fa* (Administrative Reconsideration Law of the People's Republic of China, hereinafter "ARL"), passed on 29 April 1999 and effective on 1 Oct 1999, Article 8,

<sup>81</sup> See Luo Haocai ed. *supra* note 79, pp. 197. More discussion about administrative arbitration is available at Ying Songnia (ed.), "Science of Administrative Acts" (Beijing: People's Press, 1993), pp. 787.

resolution except for labor disputes.<sup>82</sup> Although administrative arbitration for labor disputes was remained, labor dispute arbitration committees act as intermediary instead of the subject of administration. Such activities are not featured as administration. In case the interested party refuses to accept the arbitral award, he or she cannot bring administrative litigation but civil litigation. As labor disputes are not within the scope of economic disputes to be discussed in this thesis, administrative arbitration will not be treated either.

The meaning of administrative adjudication (*Xingzheng Caijue*) is quite obscure in current China. There are at least three kinds of different understanding of this concept: the narrow, wider, and widest understanding.<sup>83</sup> In the narrowest sense, it is only civil and commercial disputes that are resolved through administrative adjudication.<sup>84</sup> In

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<sup>82</sup> This is also evidenced by the legislative changes between original Administrative Reconsideration Regulations (enacted in 1990 and revised in 1994 by State Council) and ARL (1999). When it comes to what administrative acts are excluded from administrative reconsideration, Article 10 of Administrative Reconsideration Regulations clearly states administrative arbitration cannot be submitted for reconsideration. Article 8 of ARL expressly mentions if the parties are not happy with administrative mediation and other determinations, they may apply for arbitration or bring the litigation to the courts. The change implies that except for the labor disputes, civil and commercial disputes are not more resolved by administrative arbitration.

<sup>83</sup> See Zhang Shangzu, et al, *Zouchu Digu de Zhong Xingzheng Faxue* (China's Administrative Jurisprudence Stepping out of Low Tide Development) (Beijing: China University of Political Science and Law Press, 1991), pp. 285-286.

<sup>84</sup> See Ying Songnian, *Xingzheng Faxue Jiaocheng* (Administrative Jurisprudence) (Beijing: China University of Political Science and Law Press, 1988), pp.362; see Zhang Shuyi, et. al, *Xingzheng Faxue Xinlun* (On Administrative Jurisprudence) (Beijing: Current Affairs Press, 1991), pp.174; see Wang Yujun, "Lun Xingzheng Caijue de Qisu Tujin yu Shenli" (On Ways to Sue Administrative Adjudication and the Trials), *Remin Sifa* (People's Judiciary), No. 10 (1994); see Ji Ya, "Guanyu Bufu Xingzheng Caijue de Fuyi yu Susong Wenti" (On Administrative Reconsideration of and Litigation Against Administrative Adjudication), *Xingzheng Faxue Yanjiu*

the wider sense, administrative adjudication is responsible for both civil and commercial disputes and administrative disputes.<sup>85</sup> In the widest sense, imposing administrative sanction and remedies is also included in the scope of administrative adjudication.<sup>86</sup>

Given the non-uniform and complex usage of this concept, this thesis attempts to seek a workable definition of administrative adjudication for the purpose of this thesis by exploring its characteristics as follows:

First, by contrast to abstract administrative act, administrative adjudication belongs to specific administrative act. It also makes it different from administrative mediation which in nature is non-administrative behavior and has no binding force.

Second, administrative adjudication is a kind of special administrative act. Unlike the bipartite administrative relationship established because the administrative agencies unilaterally take initiative in exercising administration (for an example administrative penalties), administrative adjudication builds up tripartite relationship similar to a

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(*Studies on Administrative Jurisprudence*), No. 1 (1996); See Wang Lianchang et. al, *Xingzheng Faxue (Science of Administrative Law)* (Beijing: China University of Political Science and Law Press, 1994), pp. 285; see Luo Haocai et. al, *Xingzheng Faxue (Science of Administrative Law)* (Beijing University Press, 1996), pp. 249.

<sup>85</sup> See Long Qiang, "Chuyi Xingzheng Caijue Xingwei", *Faxue and Shijian (Science of Law and Practice)*, No. 6 (1992); see Hu Jianmiao et. al, *Xingzheng fa Jiaocheng (Administrative Jurisprudence)* (Hangzhou: Hangzhou University Press, 1990), pp. 203.

<sup>86</sup> See Ma Huaide, "On Administrative Adjudication" (*Xingzheng quan Bianxi*), *Faxue Yanjiu (Studies on Law of Science)*, No. 6 (1990)

judicial trial. Administrative agencies involving dispute resolution are comparatively independent from the parties to the disputes.

Third, the disputes that are resolved through administrative adjudication are limited to civil and commercial disputes in relation to administration. Purely civil and commercial disputes and purely administrative disputes are not included.

Fourth, administrative adjudication is conducted by the exercise of administrative power and thus has determinative force, binding force and executive force, which are lacked by administrative mediation.

Therefore, administrative adjudication herein can be defined as a kind of specific administrative activities through which administrative organizations, by law or based on applications of the parties, resolve civil and commercial disputes in relation to administration. Such understanding is the basis for our discussion.

The meaning of administrative reconsideration (*Xingzheng Fuyi*) is fairly clear. It is a system through which administrative disputes between the party subject to administration and administrative agencies are resolved within the interior administrative agencies.<sup>87</sup> Unlike the above three ways, it is responsible for dealing with the administrative disputes caused by administrative acts. Pure civil or

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<sup>87</sup> See Luo Haocai (ed.), *supra* note 79, pp. 191.

commercial disputes are excluded. In the event that the interested party refuses to accept the administrative reconsideration decision, he or she may bring administrative litigation.

### **3.2 Commercial Administrative Disputes: Administrative Reconsideration <sup>88</sup>**

In social economic life, economic actors have to deal with different administrative agencies in many areas such as applying for business licenses, for various kinds of registration like changing and ending business, reporting tax, and undertaking import or export and so on. Application for a permit may not be issued; registration may be refused; administrative penalties may be imposed. All such administrative decisions may lead to complaints, which may be heard within the interior administrative organizations apart from the courts. When the disputes in this category are brought to administrative organizations for review, it is what we called administrative reconsideration.

According to *Administrative Reconsideration Law of the PRC* (hereinafter "ARL"), the party concerned may submit the review application to the people's government at the corresponding level to the administrative agency at issue or the administrative

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<sup>88</sup> In China, although there is a debate as to whether the nature of administrative reconsideration is self-supervision or dispute resolution and remedy. This thesis thinks both of them are the characteristics of administrative reconsideration, whose ultimate aim is to secure the rights of the external parties to the administration by supervising the exercise of administrative power. More discussion about the nature of administrative reconsideration can be found in Zhang Chunsheng & Tong Weidong, "Woguo Xingzheng Fuyi Zhidu de Fazhan he Wanshan" (Improvement and Development of China's Administrative Reconsideration System), *China's Science of Law (Zhongguo Faxue)*, No. 4 (1999)

department in charge at the next higher level. If administrative act at issue is done by some certain administrative organizations, the administrative department in charge at the next higher level is the review organization.<sup>89</sup> No matter which specific organ is responsible for reconsidering the application, applicable legislation, procedures and independence of the reconsideration organs shall be at least in compliance with the concept of transparency spelled out as above.

### **3.2.1 Transparent Applicable Legislation**

What review organs rely on to reconsider the administrative decisions leading to administrative disputes is a big concern. What is the legislation applied by administrative review organs? Are they knowable and accessible to the parties subject to administration? Are they uniform, consistent and stable in nature?

#### **(a) Applicable Legislation**

It is interesting to see the legislative changes in this regard between the previous *Administrative Reconsideration Regulations*<sup>90</sup> and the ARL. Article 41 of the former states that the administrative review organs reconsider the cases according

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<sup>89</sup> ARL, Article 12: in the event that the applicant is not satisfied with the specific administrative acts conducted by administrative departments under local governments above the county level, the applicant may choose to apply to People's Government at the corresponding level or the administrative department in charge at the next higher level for review. In the event of administrative acts conducted by custom, finance, state revenue, foreign exchange administrative departments where vertical leadership is exercised, as well as state security organizations, the applicant shall apply to the administrative department in charge at the next higher level for review.

<sup>90</sup> Zhonghua Renmin Gongheguo Xingzheng Fuyi fa (*Administrative Reconsideration Regulations of the P.R.C.*), promulgated on 24 Dec 1990 and revised on 9 Oct 1994. It now has been replaced by ARL (1999)

to law, administrative regulations, local regulations, rules as well as decisions and orders with universal binding force made by administrative organizations of higher levels. The ARL avoids stipulating the applicable legislation.<sup>91</sup> However, application of law is unavoidable in practice. In handling each case, the review organs have to work out this problem. As it is known, the law, administrative regulations and local regulations will be applied without question. The key issue here is the applicability of rules (*Gui zhang*) and normative documents (*Guifanxing wenjian*) to administrative reconsideration.

Due to the fact that the rules are usually made by the administrative departments higher than the review organs or even by the review organs themselves, it is impossible that the rules will not be applied, or applied conditionally or applied after their legality has been confirmed. Therefore, the rules will be applied unconditionally.

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Legal validity of normative documents is lower than that of the law, administrative regulations and rules. No matter whether normative documents fall within the

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<sup>91</sup> However, application of law by review organs has been specified in local regulations. For instance, in Jiangsu Province, under the Detailed Rules for Administrative Reconsideration Procedures of Nanjing, (Nanjingshi Xingzheng Fuyi Ban'an Chengxu Shishi Xize), Ning Fu Fa [2003] No. 15, effective on 1 July 2003, article 27 states that officers in charge of administrative reconsideration make a thorough review on appropriateness and lawfulness of the specific administrative action according to law, regulations, rules and normative documents as well as relevant state policies.

<sup>92</sup> In China, it is noted that rules are applied by court in hearing administrative cases as references. (see the discussion in Chapter IV)

constitutionally recognized category of law or not,<sup>93</sup> practically, these documents are binding on officials in the system within which they were formulated and to whom they are directed. They are primarily within the hierarchy of a particular state organ or department as a means of giving instructions to local officials on the content and manner of performing their functions. They affect rights and duties of actors external to the administrative system to the extent that they define the ways in which the state agencies carry out their work and implement law. Concerns about both the public availability of law and changeability of legal rules are often directed at this category of documents.<sup>94</sup> Since they are utilized tremendously by administrative organs, it is unimaginable that the review organs would disregard this reality and refuse to apply them. Otherwise the whole administrative system may not be able to run properly. Given the chaos and complexity of these non-law documents, reconsideration organizations may take them conditionally or as references. It means application of them is unavoidable, although how to apply and to what extent they can be applied is uncertain.

#### **(b) Public Accessibility**

As for law, administrative regulations and rules, which are defined as normatively formulated rules under the Constitution of the PRC, publication is

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<sup>93</sup> For a narrow view, see Zhou Wangsheng, *Lifa Xue (The Study of Legislation)* (Peking University Press, 1988), pp. 263-264; for a more inclusive definition of the types of document that constitute law, see Ying Songnian et. al, *Xingzheng Xingweifa: Zhongguo Xingzheng Fazhi Jianshe Lilun yu Sijian (Administration Action of Law: Theory and Practice of the Construction of China's Administrative Legal System)* (Beijing: People's Press, 1993), pp. 93.

<sup>94</sup> See Sarah Biddulph, *supra* note 44, pp. 161.



regarded as a part of legislative process and a prerequisite to go into effect according to *Legislation Law of the PRC*.<sup>95</sup> *Legislation Law of the PRC* also stipulates the forms of making publication and the standard text. So the publication of law, administrative regulations and rules has been guaranteed by law.

With respect to the documents of administrative norms, publication is a quite complicated issue in China. According to the Constitution and relevant organic law, besides administrative regulations and rules, administrative organizations are also entitled to issue administrative decisions, decrees and guidance with universal binding force. These documents are grouped together under the heading "normative documents". However, *Legislation Law of the PRC* does not deal with the normative documents. Therefore, the publication of these documents is only by way of general administrative procedures. The openness to the public is not required by law but decided by chief administrative officers, depending on actual needs.<sup>96</sup> This constitutes a threat against the ideal of transparency under the WTO.

Among these documents of administrative norms, there are normative documents which have been issued internally. They are called internal guidelines or red letter ("Neibu Guiding", "Hongtou Wenjian"). This category of documents concerns finance,

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<sup>95</sup> Legislation Law of the PRC, passed on 15 March 2000 and came into effect on 1 July 2000.

<sup>96</sup> See Tan Shigui & Wang Lin, "WTO zhong de Sifa Guize yu Woguo Sifa Gaige" (Judicial Rules under the WTO and Judicial Reforms of China), *Hainan Daxue Xuebao Renwen Shehui Kexueban* (Humanities & Social Sciences Journal of Hainan University), Vol. 20, No. 1 (March 2002); see Yu An, "WTO Xieding de Guonei Shishi Wenti" (Issues on Domestic Implementation of WTO Rules), *Zhongguo Faxue* (China's Science of Law), No. 3 (2000)

tax, industry and commerce, credit, material, import and export, etc.<sup>97</sup> Unpublicized internal guidelines for a time, continued to determine the ultimate meaning of published regulations. Problems with transparency of such documents have been the bane of foreign investors for years. Before and around China's accession to the WTO, the subject mentioned and criticized most in the articles or works written by foreign legal scholars is about China's non-transparent legal system, especially the internal documents.<sup>98</sup> In the *Fengxiang Trade Ltd.*, the administrative organ maintained the administrative decision at issue partly because it relied on an internal regulation which was not open to the public.<sup>99</sup> In the *Jin Man Ke Electric Ltd.*, the defendant, which was applied to by the applicant for administrative reconsideration of the administrative penalties decision imposed on the applicant, confirmed the decision at issue also based on the internal documents.<sup>100</sup> So, albeit not expressly by law, the review organs refer to these documents practically, it means it may be very difficult for the external parties to know the strength of their applications for reconsideration without obtaining access to the potential applicable legislation.

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<sup>97</sup> See Chen bin, "Shi Lun Waishang Touzi de Falv Tongyixing yu Toumingdu Wenti" (On Uniformity and Transparency of China's Foreign-capital Law), in *Guangxi Shehui Kexue* (*Guangxi Social Sciences*), Vol. 87, No. 3 (2002)

<sup>98</sup> For scholars' complaints, see J. Burns & S. Rosen, General Introduction, in J. Burns & Rosen eds., *Policy Conflicts in Post-Mao China* 15 (1986); for complaints from members of the business community about "internal documents", see M. Moser, "Foreign Investment in China: The Legal Framework", in M. Moser (ed.), *Foreign Trade, Investment, and The Law in the People's Republic of China* (1987), p. 90, 96, 102.

<sup>99</sup> See Appendix: *Fengxiang Trade Ltd., Shanghai v Salt Administrative Bureau, Shanghai* (2002).

<sup>100</sup> See Appendix : *Jin Man Ke Electric Ltd. v State Revenue of Shenzhen* (1997)

Although it is impossible to abolish the well-entrenched mechanism for the internal management of decision making overnight, hope is indeed on the horizon. It is encouraging to note that some local governments have adopted specific measures to scale down the use of internal regulations. For instance, the Shanghai municipal government has decided to issue "Shanghai Municipal Public Announcements" to the public on a complimentary basis via a paper publication and on a website. This periodical used to be restricted to internal circulation within government officers.<sup>101</sup> In Guangdong Province, on Sept. 14, 2000, Shenzhen has disclosed all regulations and policies up for review by municipal government and legal authorities before being issued. Shenzhen will phase out all outdated -- red letter --governmental policies from wider circulation. The list of red letter documents will be published on schedule and in a timely fashion. To enhance transparency, after the red letter documents are annulled, all the remaining regulations will be published in a government periodical.<sup>102</sup> On 1 January 2003, the *Regulations on Openness of Governmental Information of Guangzhou* came into effect. It is the first local regulation in China about seeking transparency in governmental administration. Some officers even stated with more optimistic tone that the principle had been changing from doing things "according to superior orders" to "according to the law".<sup>103</sup>

More importantly, the ARL enlarges the scope of administrative reconsideration,

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<sup>101</sup> See *Zhongguo Qingnianbao* (China Youth Daily), 5 December 2000, p.1a.

<sup>102</sup> See *Beijing Qingnianbao* (Beijing Youth Daily), on 22 September 2000, p. 36.

<sup>103</sup> See *Nanfang Zhoumo* (Southern Weekend), 25 Oct. 2001, p. 6.

which now includes the abstract administrative action.<sup>104</sup> It means that the red letter relied on by the administrative agencies can be challenged by the external parties to the administration. In a sense, there is now a supervisory mechanism at the hands of common people to make internal guidelines and red letter in compliance with the law.

**(c) Certainty, uniformity, consistency and stability**

Public accessibility of applicable legislation, however, is only one side of the issue. Certainty, uniformity, consistency and stability of legislation are also required by the transparency principle. Emphasis of this is especially important for China, a country with multi-layered law making system. As a foreign scholar observes,<sup>105</sup> in China, the question about knowing what the law is and how it will be enforced involves more than merely the presence or absence of mechanism for publication and consultation. Criticisms of the Chinese system of rule making are not only of the failure to publish all relevant rules and regulations but also that publication of central level laws and rules does not give business people an accurate understanding of the content of the legal regime with which they are obliged to comply. Some uncertainty about what the law is in practice stems from the system itself rather than simply from a failure to publish documents.

The language and phrasing of Chinese legislation and rules create wide scope for administrative discretion in interpretation because a major goal of Chinese legislative

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<sup>104</sup> ARL, Article 7.

<sup>105</sup> See Sarah Biddulph, *supra* note 44, pp. 158-159.

drafting is “flexibility.” As a result, at all levels Chinese legislation is intentionally drafted in “broad, indeterminate language,” which will allow administrators to vary the specific meaning of legislative language with circumstances.<sup>106</sup> Standard drafting techniques include the use of general principles, undefined terms, broadly worded discretion, omissions, and general catch-all phrases.<sup>107</sup>

As legal experts observed, the problem of securing reliable information has created severe problems for effective resolution of commercial disputes within China.<sup>108</sup> The problem is much related with China’s hierarchically organized and multi-tiered legal system. In China, the National People’s Congress creates laws, the State Council issues guidelines and rules and every ministry or commission has its own regulations, not to mention regulations and rules issued by local governments. These laws, rules and regulations are prolific, both in number and content. Plus, there are a lot of implementing regulations, rules, measures and in some situations, interpretations made by the relevant administrative organs or by the Supreme People’s Court, which are particularization of legislation and are indispensable to implement the general terms of laws. It is, quite naturally, not possible for any given enterprise to know

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<sup>106</sup> See Perry Keller, “Sources of Order in Chinese Law”, 42 *Am. J. Comp. L.* 711, 734 (1994); Anthony Dicks, “Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform”, in Stanley Lubman (ed.), *China’s Legal Reforms* (1996), p.82, 99-103.

<sup>107</sup> See Stanley B. Lubman, Bird in a Cage: Chinese Law Reform After Twenty Years, 20 *Nw. J. Int’l L. & Bus.* (2000)

<sup>108</sup> See Pitman B. Potter, riding the Tiger: Legitimacy and Legal Culture in Post-Mao China, *The China Quarterly* (June 1994); Matthew Bersani, The Enforcement of Foreign Arbitral Awards in China, 10 *J. INT’L ARB.* 47 (1993); Donald C. Clarke, Dispute Resolution in China, 5 *J. Chinese L.*, 245 (1991).

everything about every law, regulation and rule in detail, especially under the circumstance that an all-around information system is far from being built up in China. On the other hand, such wide range of sources of law is not self-harmonized. Take foreign-investment law as an example, time limit for examination and approval is respectively 90 days under the *Law of PRC on Foreign-capital Enterprises*,<sup>109</sup> three months under the *Law of the PRC on Chinese and Foreign Equity Joint Ventures*,<sup>110</sup> and 45 days under the *Law of PRC on Chinese and Foreign Contractual Cooperative Enterprise*.<sup>111</sup> Besides, as for the scope of investment and nationalization, the stipulations under the above laws are not harmonized.

In China, it is assumed that policies would be applied experimentally with Party decisions determining local variations. Because of lack of experience and possible consensus among the relevant departments, in the early 1980s many laws and rules were designated “tentative”, “interim”, “contemporary” or “for trial implementation”. Many of them remained in force unchanged for much longer than originally intended.

<sup>112</sup> Such tentativeness further leads to legal uncertainty. The continued reliance of Chinese decision makers on policy directives and makeshift regulations to introduce reforms clearly compromises any movement towards a legislative model in which the

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<sup>109</sup> Law of PRC on Foreign-capital Enterprises, effective on 31 Oct 2000, Article 6.

<sup>110</sup> Law of the PRC on Chinese and Foreign Equity Joint Ventures, effective on 15 March 2001, Article 3

<sup>111</sup> Law of PRC on Chinese and Foreign Contractual Cooperative Enterprise, effective on 31 Oct 2001, Article 5.

<sup>112</sup> See Sarah Biddulph, *supra* note 44, pp.165.

formal sources of law provide a coherent foundation for interpretation and doctrinal elaboration.<sup>113</sup>

These problems suggest that the making and interpretation of laws in China is marked by disorder and potential for arbitrariness. Lawmakers exercise power to interpret rules of their own making, which are couched in indeterminate language. No wonder one writer concludes that the disparate mass of laws and regulations which makes up the formal written sources of Chinese law does not possess sufficient unity to be regarded as a coherent body of law. In their disarray, the sources of Chinese law seem barely capable of providing the basic point of reference which all complex systems of law require.<sup>114</sup>

### **3.2.2 Procedural Fairness**

Administrative reconsideration is regulated by *Administrative Reconsideration Law of the PRC* (ARL), which was passed on 29 April 1999. It replaces the *Administrative Reconsideration Regulations* which came into effect from 1 January 1991.

The ARL establishes the principles of conducting administrative reconsideration: lawfulness, justness, openness, timeliness and convenience to the applicants.<sup>115</sup> The

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<sup>113</sup> See Perry Keller, "Sources of Order in Chinese Law", 42 *Am. J. Comp. L.* 711, 734 (1994), p.731; also see Lubman, *supra* note 106.

<sup>114</sup> See Perry Keller, *ibid*, p.711; also see Lubman, *supra* note 107.

<sup>115</sup> ARL, Article 4.

following is an examination of to what extent the ARL embodies these principles and is transparency-oriented.

**(a) Applicant-friendly Procedures**

Compared with the previous *Administrative Regulation*, the procedures provided by the ARL are more applicant-friendly.

As for jurisdiction, in principle, the applicant is entitled to choose the review organ between the People's government at the same level as the administrative decision maker and the higher level administrative department.<sup>116</sup> That the applicant may decide which organ to apply for the review, may contribute to counteracting localism and professionalism to a certain degree. Moreover, in the event that the applicant is not sure about the review organ, he may submit the application to the People's government at the county level in the same region where the specific administrative action at issue occurs. The People's government at the county level is responsible to transmit the application to the relevant administrative organ.<sup>117</sup>

As regards the form of application, the applicant may either apply in writing or orally. In the event of oral application, the review organ shall, on the spot, write down the basic situations of the applicant, the claims, the facts, the reasons and the time.<sup>118</sup>

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<sup>116</sup> ARL, Article 12. This article also provides exceptions. In respect of decisions at issue made *inter alia* by customs, finance departments, taxation authorities, foreign exchange control authorities and state securities agencies, the ARL excludes the jurisdiction of review organs established in local government.

<sup>117</sup> ARL, Article 18.

<sup>118</sup> ARL, Article 11.



In contrast to the previous Administrative Regulations which provides the applicant shall apply for review within 15 days, the ARL extends the period to 60 days, as of the date when the applicant knows the administrative action at issue.<sup>119</sup> A longer period is more advantageous for the applicants to seek for remedies through the reconsideration mechanism.

In the meantime, unlike before, the ARL clearly states that the application for administrative review is free of charge. The expenses are covered by the administrative outlay which shall be guaranteed by the finance departments at the corresponding level.<sup>120</sup>

It is also encouraging to see the ARL specifies the legal responsibilities of the review organ in a much more detailed manner,<sup>121</sup> which are forceful legal weapons to drive the review organs to do the work properly according to law.

The right to sue entitled by the aggrieved parties has been fortified under the ARL. Unlike the past, it exists beyond the situation that the applicant refuses to accept the review decision. In the event that the law or regulations require the preposition of reconsideration prior to an administrative suit and the review organ dismisses the application or fails to give a review within the time limit, the applicant now is entitled

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<sup>119</sup> ARL, Article 9.

<sup>120</sup> ARL, Article 39.

<sup>121</sup> ARL, Article 34-39.

to initialize an administrative litigation within 15 days from the date when he receives the dismissal notice of application or from the expiry date of reconsideration.<sup>122</sup>

Procedural requirements are strengthened under the ARL, so is greater openness. The ARL requires that the reasons for decisions at issue made by the administrative agency be given. Applicable legislation, evidence and other materials shall be shown and can be looked up by the aggrieved party and a third party.<sup>123</sup> In the case of *Shitong Communication Equipment Ltd* (1999), the Guangzhou Industrial and Commercial Administrative Bureau accepted the complaint brought by three private parties who argued that the third party's application for changing the registration of legal person and stock rights was problematic because the supportive materials were forged. A decision for the complainants was made but was later quashed by the administrative reconsideration organ which set out convincing and quite detailed reasons.<sup>124</sup> If the administrative agency fails to show the evidence, the applicable legislation and other relevant materials on which the decision at issue bases, it is deemed that the administrative action at issue lacks evidence and legislative authorities and thus shall be quashed.<sup>125</sup> In *Mr. Wang Enwu* (1997), the administrative agency failed to provide the relevant legislative authorities, the applicable law, before the first instance court trial ended. Even if it did produce the applicable law to the court of appeal, it was found that this applicable law could not be adopted and the

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<sup>122</sup> ARL, Article 19.

<sup>123</sup> ARL, Article 23.

<sup>124</sup> See Appendix: *Shitong Communication Equipment Ltd. of Guangzhou v People's Government of Guangzhou* (1999)

<sup>125</sup> ARL, Article 28 (4).

decision at issue made by the administrative agency lacked necessary legislative support.<sup>126</sup>

In terms of enforcement of the reconsideration decisions, the ARL provides that in the event that the administrative agency fails to implement the review decision or delay the implementation without due reasons, the review organ or the higher level administrative department shall order it to fulfill the duties within the required period.

<sup>127</sup> Otherwise, the directly responsible executive and other personnel in charge may be subject to disciplinary sanction.<sup>128</sup>

**(b) Implications for the future**

Admittedly, much progress has been made by the ARL. Yet it does have some distance to go to make procedures more transparent and fair.

**(i) Reconsideration on documents, hearing and cross-examination**

The ARL provides that reconsideration is to take place based on the documents unless otherwise requested by the applicant or the reconsideration agency considers it necessary in which case an investigation may be carried out and the opinions of the applicant, the administrative decision maker and a third party may be taken.<sup>129</sup>

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<sup>126</sup> See Appendix: *Mr. Wang Enwu v People's Government, Heping District, Tianjin* (1997).

<sup>127</sup> ARL, Article 32.

<sup>128</sup> ARL, Article 37.

<sup>129</sup> ARL, Article 22.

In principle, reconsideration is conducted on documents. It is in a closed session and thus non-transparent. Without participation of the parties, it is easy for the review officers to be subjective and biased. Although the applicant is entitled to apply for the opinions to be heard, it is noted that the review agency *may*, not *ought to*, hear the opinions. It implies that the review organ retains the right to refuse the applicant's request. Besides, the provision only says the review organ may take the opinions. But how to take the opinions is unknown. Also, the review agency itself may find it necessary to hear the opinions of the parties concerned; but the ARL fails to say under which kind of circumstance the review agency may think it necessary to do so. In this sense, this provision is too rough and is impracticable.<sup>130</sup>

In contrast to the general terms of the ARL, local regulations in this regard appear more particularized. Since the ARL went to effect, many local regulations concerning how to handle administrative reconsideration cases have been issued. Some even go further than the ARL in terms of fairness and greater transparency in the review process. For instance, under the *Measures of the Customs of the PRC for Implementation of Administrative Reconsideration Law* (effective on 1 Oct 1999), it sets out five kinds of situations under which the opinions may be heard by the review organ. They include: the applicant applies to be heard and the review organ consents; the dispute over the facts between the applicant and the administrative decision maker

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<sup>130</sup> China started to legalize the hearing system in Administrative Penalty Law of the PRC (promulgated on 17 March 1996), under which, the model of hearing procedure has subsequently been adopted in other legislation, such as the *Pricing Law of the PRC* which was passed in 1997.

is serious; the applicant applies to be heard and the review organ consents; the applicant dissents the law, administrative regulations and administrative norms applicable to the administrative act at issue; the case is significant, complex, difficult or the object of dispute is highly valuable and the review organ considers it necessary.

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Cross-examination and debate are procedurally important for resolving disputes. But under the ARL, there are no such stipulations to entitle the applicant with these rights. Again, the local regulations are more developed. They stipulate more detailed review procedures, which are more easily to be implemented. Take Jiangsu province as an example, its capital city, Nanjing, passed *Detailed Rules for Administrative Reconsideration Procedures* (effective on 1 Oct. 1999), which provides that administrative reconsideration is to take place on the documents in principle; but if the case is too complex and too important, the applicant and the administrative decision maker may apply for face to face cross-examination, and the officers in charge, subject to the consent of the chief and the director of reconsideration organ,

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<sup>131</sup> Measures of the Customs of the PRC for Implementation of Administrative Reconsideration Law, effective on 1 Oct 1999, article 25 states: administrative reconsideration is to take place on the documents. But under any of below circumstances, the review organ may collect opinions from the applicant, the administrative decision maker and the third party:

- (1) the applicant applies for being heard and the review organ consents
- (2) the dispute over the facts between the applicant and the administrative decision maker is serious
- (3) the applicant dissents the law, administrative regulations and administrative norms applicable for the administrative action at issue
- (4) the case is significant, complex, difficult or the object of dispute is highly valuable. The review organ considers it necessary.

may hold administrative reconsideration hearing.<sup>132</sup> Similar provision is also found under the *Measures of the Customs of the PRC for Implementation of Administrative Reconsideration Law* where detailed procedures of holding a hearing are also provided.<sup>133</sup>

## (ii) Challenge System

There is another drawback of current ARL as regards the review process. There is lack of stipulation of how to organize the review agency. If the party concerned thinks that the officers in charge of the review have interested relationship with the case, whether or not a challenge can be submitted is not provided under the ARL. The limitations, however, are remedied by some rules of administrative ministries and commissions. The *Measures of China Insurance Regulatory Commission for Administrative Considerations* (effective on 5 July 2001), for an example, clearly prescribes the challenge system.<sup>134</sup> The *Measures of the Customs*

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<sup>132</sup> Detailed Rules for Administrative Reconsideration Procedures of Nanjing, (Nanjingshi Xingzheng Fuyi Ban'an Chengxu Shishi Xize), Ning Fu Fa [2003] No. 15, effective on 1 July 2003, Article 45 reads: administrative reconsideration is to take place on the documents in principle. However, as for complex and big cases, at the request by the applicant and the administrative decision maker application for face to face cross-examination, officers in charge, subject to the consent of the chief and the director of review organ, may hold administrative reconsideration hearing.

<sup>133</sup> Measures of the Customs of the PRC for Implementation of Administrative Reconsideration Law, Article 26, 27.

<sup>134</sup> Measures of China Insurance Regulatory Commission for Administrative Considerations, passed and effective on 5 July 2001, Article 24 states: the applicant, the third party or the administrative decision maker, who considers that the staff members or the officers in charge of the review have interested relationship with the case or other relationship which may affect the justness of review, shall be entitled to apply for challenge. The staff members and the officers think they have interested relationship with the case shall withdraw voluntarily. The challenge to

of the PRC for Implementation of Administrative Reconsideration Law also designs the same challenge system.<sup>135</sup>

**(iii) Right to Look up Case Materials**

The ARL provides that the applicant and the third party may look up the written response made by the administrative decision maker, and the evidence, the legislation and other relevant materials applied by the administrative decision maker. The review organ cannot refuse unless the materials contain state secrets, business secrets or individual privacy.<sup>136</sup> However, how about the legal proxy and authorized proxy, since they are also entitled to apply for administrative reconsideration?<sup>137</sup> Also, what is the meaning of “look up”? In practice, when the aggrieved parties apply for administrative review, they are not allowed to photocopy the response and evidence provided by the administrative decision makers. It is alleged that no copying but only reading and writing down is permitted.<sup>138</sup>

**3.2.3 Independence of administrative reconsideration organs**

The review organs, according to the ARL, are the People’s government at the same level as the administrative decision maker and the higher level

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staff members of review is decided by the chief officer for review. The challenge to the chief officer for review is decided by the principle of review organ.

<sup>135</sup> Measures of the Customs of the PRC for Implementation of Administrative Reconsideration Law, Article 31.

<sup>136</sup> ARL, Article 23.

<sup>137</sup> ARL, Article 10.

<sup>138</sup> See Beijing Chenbao (Beijing Morning), 30 Nov. 2001 (Real Estate Weekly).

administrative department.<sup>139</sup> But in respect of decisions at issue made *inter alia* by customs, finance departments, taxation authorities, foreign exchange control authorities and state securities agencies, the ARL excludes the jurisdiction of review organs established in local government.<sup>140</sup>

The Draft Protocol currently demands that tribunals for oversight of administrative decision making be independent of the decision maker. Administrative reconsideration is an important and widely used way to review disputed administrative decisions in China. Accordingly, the review organs are required to be independent from the administrative agency whose decisions lead to the aggrieved parties' complaints.

The ARL is claimed to have established an independent administrative reconsideration mechanism in China which is not merely designed to institutionally accompany the administrative litigation system.<sup>141</sup> However, it may not be exactly the reality. Under the ARL, People's government at the same level and higher level administrative organs are the review organs but it is silent as to how to organize the

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<sup>139</sup> In China, generally, it is administrative departments that are entitled to make administrative reconsideration. But in reality, there are some government-sponsored institutions directly affiliated to the State Council, like China Securities Regulatory Commission (CSRC) and China Insurance Regulatory Commission (CIRC). Although they are not administrative departments in nature, they are granted with administrative power and functions. Administrative reconsideration is one of functions they are entitled to exercise.

<sup>140</sup> ARL, Article 12.

<sup>141</sup> See Yu An, "Several Basic Questions about China's Administrative Reconsideration Law," *Fazhi Ribao (Legal Daily)*, 6 May 1999, p.7.



concrete review institution.

In practice, as for the review institutions of People's Government, there are usually four kinds of situations: first, set up administrative reconsideration division (section), which is substituted by the Office of Legality Affairs of Government; second, set up impermanent administrative reconsideration commission under the Government and its working body is within the Office of Legality Affairs of Government; third, set up administrative reconsideration division (section) within the working bodies of the Government; fourth, set up administrative reconsideration division (section) within the Office of Legality Affairs of Government. The fourth kind is the most common one. As for the review institutions of department, the forms are generally three kinds: first, set up administrative reconsideration division (section) within the Office of Legality Affairs of department; second, set up impermanent administrative reconsideration commission, whose working body is under the Office of Legality Affairs of department; third, set up permanent administrative reconsideration commission, whose director is the principle of department (e.g., the trademark review board and the patent review board).<sup>142</sup>

The independence of administrative reconsideration, therefore, depends on the independence of the review organ and the review institution.

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<sup>142</sup> See He Jun, "Xingzheng Fuyi: Zhengzai Weisuo de Zhidu" (Administrative Reconsideration: A Depauperate System), *Jingji Guancha bao* (*The Economic Observer*), 13 Oct. 2003.

It can be seen from the above models of establishing the review institutions that, in essence, the review institution is one of working bodies of People's Governments at various levels and of different departments. It should, subject to the authorization of the chief administrative officer, handle administrative reconsideration within the legal competence of the review organ. When the review institution makes the decisions concerning the rights and obligations of the review organ, like dismissal of the application, decisions of review, consent from the principle of review organ should be obtained. The review institution is entitled to make the decisions concerning the procedural issues instead of the substantive issues, like accepting the application and conducting the investigation, and advance the preliminary opinions on the case. The review institution, from any respect, has no decisive power and is not an independent body but a body taking orders from the chief administrative principle of the review organ.<sup>143</sup>

As regards the review organ, it seems relatively independent, compared with the review institution. However, governments are affected by notorious localism. They cannot remove the tendency to protect local interests when reviewing the cases. The higher level administrative departments are in the similar vein or even worse to the extent that they are the departments in charge of the administrative decision maker and thus by themselves non-independent. What's more, the administrative decision at

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<sup>143</sup> See Ying Songnian & Yuan Hongshu, "Zouxiang Zhengfu Fazhi" (Taking to Rule of Government) (Beijing: Chinese Law Press, 2001), pp. 299.

issue is usually made according to the normative documents enacted by the higher level administrative departments. They are the judges of themselves, unavoidably taking into account the departmental interests. Thus, administrative reconsideration conducted by both kinds of review organs is to seek a balance and compromise between government or department and the applicants.<sup>144</sup> It is hardly hopeful that the review organs may make the review decisions in the interest of transparency, fairness and justness.

Lack of independence leads to people's lack of confidence in administrative reconsideration and has become a big hindrance for people to seek remedies through this mechanism.<sup>145</sup> It is reported that the number of cases of administrative reconsideration were increased after the *Administrative Reconsideration Law* took effective in 1999. In 2001, the number of cases was over 80,000 which was the historical peak point. Since then, the number has been going down and was even declining in some areas and departments.<sup>146</sup>

The fact that an apparently independent third party can be called upon to correct mistakes and remedy abuses of power helps to legitimate government action by reassuring citizens.<sup>147</sup> The body to accept the application for administrative review

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<sup>144</sup> Fazhi Ribao (*Legal Daily*), 26 Sept 2003.

<sup>145</sup> See Jingji Guancha bao (*The Economic Observer*), 13 Oct, 2003.

<sup>146</sup> Fazhi Ribao (*Legal Daily*), 25 Sept 2003, p. 9

<sup>147</sup> See Andrew Le Sueur, Javan Herberg & Rosalind English, *Principles of Public Law*, (Cavendish, 1999)

of an administrative dispute should be neutral and independent. Otherwise, it would be very difficult to bring the institutional functions of administrative reconsideration mechanism into play. Fortunately, the significance of establishing the comparatively independent review institutions without the interference of localism and departmental protectionism has been increasingly acknowledged in modern China.<sup>148</sup> But given contagious bureaucratic politics in China's context, the essence of the issues is more institutional and cultural rather than just functional or legal.<sup>149</sup> Accordingly, it is expected that the corresponding improvement shall not be limited to the legal regime but extend to institutional setup and cultural setting. (For detailed discussion, see chapter V)

### **3.3 Commercial Disputes: Administrative Adjudication**

Administrative adjudication has been long standing in western countries where despite of the implementation of check and balance systems, administrative agencies are entitled to exercise adjudicative functions and resolve certain disputes, like the administrative tribunals in the UK and Canada, the administrative courts in France, some administrative agencies in the US, etc. It is not only because extremely clear separation of powers among legislation, administration and judiciary is not possible, but also because of the actual needs of society development. In the last century, with the rapid development of industrialization and urbanization, a variety of problems,

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<sup>148</sup> see "Post-WTO China: Adjustment, Reforms and Enhancement of Competitive Strength---Report on High Level Forum of 2000 on China's development", *Takungpao* (HK), 2 April 2002

<sup>149</sup> See the Chapter V.

like economic crisis, unemployment, environment, insurance, etc, changed the government's role from "night watchman" to "welfare country". Many new administrative agencies were established, concomitant with numerous economic regulations emerging. In the course of active participation and macro control by administrative departments, disputes ensue. But the specialty and technology involved in these disputes are beyond the capability of judicial bodies. Under this circumstance, it is thus not a surprise to see that administrative agencies obtain the power to resolve some disputes, no matter how it sounds contradictory to the doctrine of separation of powers.<sup>150</sup>

By contrast to the western countries, administrative adjudication has ancient roots in China. In history there was no separation between administration and judiciary. The government was responsible for dispute resolution. Such tradition still influences the current China. Some people especially in the rural areas may turn to the people's government when disputes occur instead of suing at the court. To some extent, that administrative agencies are granted with the power to resolve some disputes is in compliance with people's long-formed habit. Besides, China does not adopt the system of check and balance, which also makes administrative adjudication more

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<sup>150</sup> See Bernard Schwartz, *Administrative Law* ( Little Brown Inc., 1976), pp. 6-16. The author further points out that due to the needs of modern complex society, administrative organs are expected to have legislative and adjudicative power. In order to effectively manage economy, traditional doctrine of separation of powers shall be abandoned. Some even suggested that the doctrine of separation of powers is no longer a viable principle of government. See, Kinnane, "Some Observations on Separation of Powers", 38 *A.B.A.J.* 19 (1952); J. Landis, *The Administrative Process* (1938), cited in A. Vanderbilt, *The Doctrine of Separation of Powers and Its Present Day Significance* 3, 5, 6 (1953).

easily acceptable to China's social matrix.

As analyzed above, according to law, administrative agencies are entitled to resolve civil and commercial disputes. State administrative organs, expressly authorized by law, adjudicate administration-related civil and commercial disputes occurring between two equal private parties. Current Chinese law authorizes administrative organs with the power of administrative adjudication through the following three ways: first, legal responsibilities of administrative organs. It means the administrative organs, in handling the administrative affairs, must resolve the disputes between the equal parties. For example, article 27 of *Law of PRC on Fishery*,<sup>151</sup> article 13 of *Law of PRC on Land Administration*;<sup>152</sup> second, options of the concerned parties. It means that the concerned parties are entitled to choose between the administrative organs and the courts to get the disputes resolved, like *Law of PRC on Pharmaceutical Administration*, *Law of Water Pollution Prevention*; third, self-determination of administrative organs, which means law only stipulates that the administrative organs may resolve the disputes and there is no other restrictions. So, the administrative organs may take an initiative in resolving the disputes, or do it at the request of the concerned parties, or may just let the concerned parties apply to the

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<sup>151</sup> Fishery Law of the PRC, Article 27 reads, in the event of fishing by stealth, robbing others of fishery products, destroying others' water body and facilities, the fishery administration department or its supervisory organ is entitled to order that the losses be compensated and the fine be imposed.

<sup>152</sup> Land Administration Law of PRC, Article 13 reads, as for the disputes concerning land ownership and land-use right, the parties concerned may make a negotiated settlement; if negotiation fails, the disputes are resolved by the People's Government.

court. Like *Trademark Law of the PRC*, *Patent Law of the PRC*, *Law of PRC on Land Administration*; *Law of PRC on Grasslands*, *Law of PRC on Maritime Environmental Protection*.

Unlike administrative mediation, agreement between two parties is not the necessary condition to start up adjudication. It may be launched by just one of two parties to the dispute. Although like mediation, the adjudication determination is not final, it does have binding force and executive force if the unhappy party fails to apply for arbitration or sue within a certain period. In this sense, it is said that administrative adjudication affects and changes the rights and obligations of the parties. For this reason, how administrative organs resolve the disputes is of importance.

However, even if administrative adjudication, as a common means to resolve disputes, is widely needed and universally applied in China, it is most poorly regulated,<sup>153</sup> especially by contrast to the requirements of transparency.

### **3.3.1 Transparent Applicable Legislation**

It is quite astonishing to find that there are no stipulations about the legal authorities upon which the administrative agency may rely to resolve the commercial disputes between two private parties. The relevant law and regulations usually read like “apply for administrative agency to handle the disputes” without mentioning of

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<sup>153</sup> See Wen Zhengbang et al., *supra* note 77.

application of law.<sup>154</sup> The legal basis utilized to resolve the disputes is unknowable.

The parties concerned may have no idea of the strength of the case.

However, since it is aimed to resolve the disputes, the application of law is always unavoidable. Even if there are no clear provisions about what to apply and how, it can be imagined what kind of legal authorities will be applied usually by the decisionmakers. Law, regulations, administrative rules, normative documents,<sup>155</sup> even the spirits of official administrative notices<sup>156</sup> may all be the possible applicable legislation. Whether they satisfy the requirements of transparency is questionable.

Furthermore, the parties concerned are entitled to know the applicable legislation when the decision is made. Yet, there is no legal obligation imposed on the decisionmakers to produce the legal authorities on the written decisions. That is, the reasons for the decision may not be given.

### **3.3.2 Procedural Fairness**

In contrast to the administrative reconsideration which has been procedurally regulated in an improved way under the ARL, administrative adjudication lags far behind in this regard. Even the circumstances in which the administrative organs are

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<sup>154</sup> See above quoted legislations, Supra note 151-152.

<sup>155</sup> See Wen Zhengbang et al., supra note 77.

<sup>156</sup> See Shanxi Wanbao (Shanxi Province Evening), 16 Sept. 2003.



involved in resolving the civil and commercial disputes are sporadically set out in law, separate law and regulations, not mentioning that there is special legislation addressing the kind of procedures that shall be followed in administrative adjudication.

It is expected that there will be a series of procedures available in order for the parties to bring their applications, for the administrative organs to adjudicate the applications, etc. However, it is noted that there are basically no legal provisions as to how to bring the claims, hear the disputes, and how to make the written decisions or rulings and how they come into effect and are enforced. As to how to produce evidence, distribute the burden of evidence, the prescription is even less.<sup>157</sup> Without legal restrictions, a wide scope of discretion has been remained with administrative officials, which ends in abusiveness of administrative power and non-transparent operation.

Take article 53 of Trademark Law of the PRC<sup>158</sup> as an example, it states:

*In the event that disputes arise from infringement upon right to the exclusive use of a trademark under article 52, the parties concerned may have compromise settlement; if the parties are not willing to do so or compromise settlement fails, registrant of trademark or interested persons may sue at the court or apply to the Industrial and Commercial Administrative Bureau for settlement. If*

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<sup>157</sup> See Lin Zhong, *Zhongguo Shangshi Zhengduan Jiejue* (Commercial Dispute Resolution in China), Law Publishers (1998), Beijing, pp. 185.

<sup>158</sup> Trademark Law of the PRC, passed on 27 Oct. 2002 and came into effect on 1 Dec 2001.

*Industrial and Commercial Administrative Bureau for settlement finds that infringing act is constituted, it is entitled to give the orders the act shall stop, infringing articles and tools used to produce infringing articles and forge registered trademark symbol shall be confiscated and destroyed and fine be inflicted. If the party concerned refused to accept the decision, it may sue according to the Administrative Litigation Law of the PRC within 15 days as of receipt of the notice. If the party concerned neither sues nor implements the decision, Industrial and Commercial Administrative Bureau may apply to the court for compulsory enforcement.*

The provision says under which circumstance the party may apply to the administrative organ for dispute settlement. There is nothing about how to apply, how the application will be processed or how the decision will be made. Exactly the same provision exists in *Patent Law* article 53. Similar provisions can also be found in many other economic laws and regulations.

It is said that administrative adjudication adopts general administrative procedures.

<sup>159</sup> It is also said that some judicial procedures are applied by administrative agencies when handling the disputes. <sup>160</sup> Whatever it is, lack of express rules under the law only ends in the great discretion of administrative agencies in reality.

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<sup>159</sup> See Ying Songnian, "Xingzheng Xingweifa" (*Law of Administrative Acts*) (Beijing: People's Press, 1991), pp. 673, 680.

<sup>160</sup> See Wen Zhengbang et al., *supra* note 77.

Administrative adjudication has the features of both administration and judicature. It is understandable that it is unnecessary to exert the same complicated procedures as the litigation on the administrative adjudication. Otherwise it may lose the efficiency of getting the disputes resolved, which is exactly its strength as a dispute resolution mechanism. The principle of simplicity and convenience is supposed to run through the whole process of administrative adjudication. However, it is, after all, a mechanism of dispute resolution which will influence the rights and obligations of the concerned parties. This means that the procedures should not be just the general administrative procedures but should be more rigorous than that. A balance should be made between the efficiency and fairness by working out certain procedures.

As previously suggested, administrative reconsideration has been subject to a series of procedures. It is thus suggested that reference to these procedures should be made when administrative adjudication is conducted. Especially, it is noted that improvement of administrative procedures has gone even further under the *Administrative Penalty Law*.<sup>161</sup> It is the first time for China to systematically set out the administrative procedural rules in a national law, i.e., the *Administrative Penalty Law*. It changes the tradition that administrative procedures are mostly enacted to restrict the external parties to the administration and sends a signal that procedural restriction is on both administrative agencies and the parties subject to administration.

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<sup>161</sup> Administrative Penalty Law of the PRC, passed on 17 March 1996 and being effective as of 1 Oct 1996.

When it comes to specific procedures, this law absorbs advanced experience from other countries including the spirit of due process. That is, before the administrative organ makes the penalty decision, it shall inform the parties concerned of the facts, the reason, the legal authorities, and the rights they enjoy. In the Shitong Communication Equipment Ltd (1999), the administrative penalty decision was problematic and was quashed by the administrative reconsideration organ in the first as well as second instance court. One of the important reasons was the administrative organ, the Guangzhou Industrial and Commercial Administrative Bureau failed to tell the party concerned of the fact, the reasons and the rights they were entitled before the penalty decision was made. In addition, the parties concerned also enjoy the rights to make statement and argue. It is the obligation of administrative organ to hear the parties' opinions and cannot aggravate the sanction simply because of the parties' argument. The most striking thing is that for the first time the hearing system is introduced into the administrative procedures. The challenge system is expressly prescribed. Strict time limit for making the administrative penalties has been provided. If the administrative agency fails to discover the illegal acts within two years of their happening, no administrative penalties can be imposed. How to preserve evidence in advance and the methods to conduct the on-the-spot fine are provided in detail. Especially, it clearly sets out the legal liabilities of administrative organs in case they fail to follow the procedures and particularly stresses that if the administrative penalty is invalid in the event that there is a lack of legal authorities, or proper procedures are not complied with. The spirits of due process embodied under the *Administrative*

*Penalty Law* should be extended to other administrative acts, one of which is expressed above, i.e., administrative adjudication. It is thus suggested that the procedures therein should be integrated into the administrative adjudication.

According to the above analysis, together with the requirements of transparency mentioned previously, it is also suggested that the openness principle be implemented with the following measures. The concerned parties should be informed of the contents of the administrative adjudication procedures; the legal authorities and factual basis of dispute resolution, the rights and the ways to exercise the rights in case that the decision is not acceptable. Before the decision is made, the concerned parties should be allowed to give opinions, make statements and do cross-examination. The challenge system should be introduced and evidence rules should be improved.

The reality that administrative agencies are more and more involved in dispute resolution calls for a systematic series of procedures. Hopefully, the uniform Law of Administrative Procedures whose enactment is under the way <sup>162</sup> will address the procedures of administrative adjudication.

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<sup>162</sup> More discussions about uniform Law of Administrative Procedures are available in Yang Yin, "Xingzheng Chengxu Lifa yu WTO Guize" (Legislating Administrative Procedures and the WTO Rules), *Journal of China University of Political Science and Law*, Vol. 20, No. 1 (Feb. 2002); Yang Haikun & Liu Yanglin, "Guanyu Zhongguo Xingzheng Chengxu Fadianhua de Taolun" (Discussion of Codification of Chinese Administrative Procedures), *Jiangsu Gong'an Zhuanke Xueyuan Xuebao (Journal of Jiangsu Public Security College)*, Vol. 16 No.2 ( Mar. 2002); and Yang Haikun & Huang Xuexian, *Zhongguo Xingzheng Chengxu Fadianhua – cong Bijiao fa Jiaodu Yanjiu (Codification of Chinese Administrative Procedures – From Comparative Perspective)* (Beijing: Chinese Law Press, 1999).

### **3.3.3 Independence**

In modern China, there are no special administrative organs in charge of dispute resolution within the whole administrative system; there is no special institution or personnel responsible for dispute resolution within a specific administrative organ either. For a long period, there has been no institutional separation between the general administrative acts and administrative adjudication. The independent administrative organizations responsible for dispute resolution have not yet been universally established. So far, the similar adjudicatory systems only exist in the departments of trademark and patent where the trademark review board and the patent review board have been set up. Apart from these, most of civil and commercial disputes are directly resolved by the administrative organs. Can they be neutral and independent when handling the disputes between the equal private partners?

It is said that the administrative organs act as intermediaries instead of the subject of administration in handling the civil and commercial disputes. It is true that the administrative organ is relatively detached since the dispute occurs between two other private parties. It acts as the dispute resolution decisionmaker either at the request of the parties or on its own initiative. However, more or less, local protectionism or departmental protectionism penetrates into the process. It is because there are no adequate procedural restrictions imposed on the administrative organ or any

institutional guarantee of its independence.

Administrative subordination and institutional bureaucracy should be overcome in order to realize the independence of the decisionmakers. Institutional setup is pivotal to achieve this goal. We know in the UK, there are administrative tribunals, and in France, there are administrative courts, and in the US, there are independent administrative institutions. These institutions are not administratively subordinate to any specific administrative department. As the dispute resolution decisionmakers, they are very professional, special, and most importantly, independent to the utmost extent. In this regard, China still has some distance to go.

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Decisions made by administrative reconsideration organs can be challenged at court by bringing administrative litigation.<sup>163</sup> Decisions made through administrative adjudication are not subject to the administrative reconsideration. The unhappy party may apply for arbitration and bring litigation at court.<sup>164</sup> The same question arises about the independence of judicial bodies. This is to be discussed in the next chapter.

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<sup>163</sup> ARL, Article 16.

<sup>164</sup> ARL, Article 8. However, the ARL does not specify which kind of litigation (administrative litigation or civil and commercial litigation) shall be brought in the event that the disputants refuse to accept the administrative adjudication decision. This invites lots of controversy in academic realm. The practice is not consistent in this regard. But mostly it is through civil and commercial litigation that judicial remedies can be claimed. Hopefully relevant law or judicial practice will come out in the future to address this problem. *See* Yang Shiming, "Qiantan Xingzheng Jujian jiqi Sifa Jiuji" (On Administrative Adjudication and Judicial Remedies Thereof), *Fujian Faxue (Law Science of Fujian Province)*, Vol. 73, No. 1 (2003)

## **Chapter IV    Economic Dispute Resolution by Courts**

### **4.1    Introduction**

Parties to commercial disputes have at least three concerns about the process through which their disputes will be resolved: fairness, speed, and cost of the proceedings. In theory, a proceeding may be conducted in a manner that the parties regard as fair, and it may proceed expeditiously at minimum expense. In reality, however, the problem is one of balancing the emphasis to be given to each of the factors. Too much emphasis on fairness may result in considerable delay and cost; likewise, too much emphasis on speed and low cost may impair the fairness of the proceeding.<sup>165</sup>

Court adjudication is one mechanism among a variety of processes used for settling disputes. Although litigation typically is time consuming, frequently dilatory and nearly always expensive, this mechanism does have a reputation of fairness, impartiality and independence. After all, for the judicial system, expeditious resolution of disputes and inexpensive resolution of disputes are not necessarily viewed as independent values that compete with the value of fairness. They are important primarily to the extent that they promote the primary goal of fairness.

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<sup>165</sup> See Robert Force & Anthony J. Mavronicolas, "Two Models of Maritime Dispute Resolution: Litigation and Arbitration", 65 *Tul. L. Rev.* p.1461.



Litigation, as a dispute resolving mechanism, has gone through several hundred years in western countries. But in China, it started just several decades ago. Previously, there was no judicial litigation but feudal adjudication to solve all disputes. Shorter period of development of litigation, more or less feudal characteristics remained, and current China's political regime have resulted in many problems with China's judicial litigation system. Especially since China's entry to the WTO, even more challenges have been raised for China's litigation system which is supposed to be in keeping with WTO rules according to the commitments China has made.

This chapter examines the extent China's judicial proceedings of economic disputes satisfies the requirements of transparency set out at the beginning of the thesis. Notably, in China, most of economic disputes can be resolved by the courts. A few of them has been excluded from litigation according to the *Administrative Reconsideration Law* and will be finally decided by the administrative reconsideration organs.<sup>166</sup>

## **4.2 Transparent applicable legislation**

The court, in handling the cases, shall be based on transparent applicable legislation, which, according to the previous analysis, shall be publicly accessible,

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<sup>166</sup> ARL, Article 14 provides that in the event that the party refuses to accept the administrative reconsideration decision and applies to the State Council for adjudication, the adjudication by the State Council is final; also article 30 of the ARL provides that the administrative reconsideration, made by the provincial and municipal people's government and the government of autonomous region, confirming the ownership and right to use of land, mineral resources, water, forestry, mountain, grassland, wilderness, sands and sea area is final.

certain, uniform, consistent and stable.

In China, commercial suits utilize the civil litigation procedures. The applicable legislation under *Civil Litigation Law of the PRC*<sup>167</sup> (hereinafter “CLL”) is “law”.<sup>168</sup> Obviously, the “law” here does not only refer to the law enacted by the National People’s Congress and its Standing Committee. In practice, numerous regulations and judicial interpretation are applied by the courts. So “law” under the CLL shall be understood in this thesis in a wide sense. Accordingly, the issues of transparency are related to all legislation which might be the legislative authorities of the courts. Challenges mostly derive from unsystematic regulations and numerous judicial interpretation. For an example, according to two judges of Beijing, *Regulations on Handling Cases Involving Foreign Elements*<sup>169</sup> which is oftentimes applied in judicial practice, has some confidential characteristics and can only used as an internal document.<sup>170</sup>

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<sup>167</sup> Civil Litigation Law of the PRC (hereinafter “CLL”), passed and went into effect on 9 April, 1991.

<sup>168</sup> CLL, Article 7 reads that the People’s court, in hearing the cases, shall be based on the facts and according to the law.

<sup>169</sup> Regulations on Handling Cases Involving Foreign Elements, enacted by the Ministry of Foreign Affairs, the Supreme People’s Court of PRC, the Supreme People’s Procuratorate, the Ministry of Public Security of the PRC, the Ministry of State Security of the PRC and the Ministry of Justice on 20 June 1995.

<sup>170</sup> See Li Dayuan & Gu Shaoyong, “Shewai Minshi Falv Guanxi Shiyong Lifa Yanjiu” (A Study on Civil Legal Relation Involving Foreign Elements), *Falv Kexue Zhazhi* (Law Science Magazine), Vol. 24, No. 3 (2004).

The Administrative Litigation Law of the PRC <sup>171</sup> (hereinafter "ALL") is more specific than the CLL in terms of application of law but actually more complicated. The ALL expressly specifies that the courts shall take the law, administrative regulations and local regulations as the criteria and take the rules as references. <sup>172</sup>

Civil Law of the PRC, a great number of separate laws and regulations form the applicable legislation of commercial litigation. It is the court that is responsible for application of law when the dispute invites the litigation. But, in the event of commercial administrative disputes, the situation is different. By contrast, the application of administrative law is the matter of both courts and administrative organs, and the application by the latter precedes the former. This devolves into a question, i.e., which criteria should the courts adopt to examine the administrative acts. Is it the legal authorities already applied by the administrative organs or the legal authorities determined by the courts themselves? This problem is further reflected by

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<sup>171</sup> Administrative Litigation Law of the PRC (hereinafter "ALL"), passed on 4 April 1989 and put into force on 1 Oct 1990.

<sup>172</sup> ALL, Article 52 reads, in handling administrative cases, the people's courts shall take the law, administrative rules and regulations and local regulations as the criteria. Local regulations shall be applicable to administrative cases within the corresponding administrative areas. In handling administrative cases of a national autonomous area, the people's courts shall also take the regulations on autonomy and separate regulations of the national autonomous area as the criteria; Article 53 provides that in handling administrative cases, the people's courts shall take, as references, rules formulated and announced by ministries or commissions under the State Council in accordance with the law and administrative regulations and regulations, decisions or orders of the State Council and rules formulated and announced, in accordance with the law and administrative regulations and regulations of the State Council, by the people's governments of provinces, autonomous regions and municipalities directly under the Central Government, of the cities where the people's governments of provinces and autonomous regions are located, and of the larger cities approved as such by the State Council.

different stipulations of the ARL and the ALL. They adopt different attitude towards the normative documents between administrative reconsideration organs and the courts. The normative documents, which, as previously analyzed, are virtually used by the administrative review organs even if they are internally circulated, are not applicable in the administrative litigation. This is reflected by Jin Man Ke Electric Ltd. (1997), where the court pointed out that the law adopted by the administrative reconsideration organ is an internal document and shall not be applied.<sup>173</sup> Excluding the application of normative documents is a good indication and favored by the ideal of transparency. But, it also means that a same administrative act may be legalized by an administrative review organ but outlawed by the court, as in Jin Man Ke Electric Ltd. (1997) Nevertheless, legal validity of normative documents is not quite certain. As some of normative documents have been approved by the State Council, it is no doubt that they are to be applied in judicial practice. For the rest of them, they are arguably applied, concomitant with much controversy.<sup>174</sup>

Notably, in handling administrative suits, the rules are taken by the courts "as reference". The essential meaning is that courts are not obligated to apply the rules.

As there are no legal criteria about how to take rules as reference, under which

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<sup>173</sup> See Appendix: Jin Man Ke Electric Ltd. v State Revenue of Shenzhen (1997).

<sup>174</sup> The normative documents will be regarded as lawful legislation if the following conditions are satisfied: firstly, the enactment authority must exercise its power in making regulation *intra vires*; any regulations made *ultra vires* shall be unlawful; secondly, proper legal procedures must be followed in the promulgation of any regulations; thirdly, the substance of any regulations must not contradict the Constitution, national laws or administrative regulations. See Lin Feng, *Administrative Law – Procedures and Remedies in China*, (Hong Kong · London: Sweet & Maxwell, 1996), pp.260.

circumstances the rules are applied and how to apply is the discretion of the courts.

<sup>175</sup> In *Mr. Sun Liangren*, although the administrative agency had to remake the decision for it failed to show the applicable law, the court did confirm its opinions on the plaintiff's behavior by taking a normative document.<sup>176</sup> However, such uncertainty of application greatly mitigates the predictability of law. People do not know clearly whether their business activities are legal or not, nor do they know the strength of their business suits at court.

It is much easier to encounter legislative conflicts in the course of administrative trial than civil and commercial litigation. It is because legislative conflicts usually occur between local regulations and national law, administrative rules, and normative documents among the ministries and commissions.<sup>177</sup> In *Mr. Chuanlin Tu* (1996),

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<sup>175</sup> The term "take as reference" has been subject to different interpretation. Three different views exist in China. One view holds that "take as reference" means that the courts shall apply other applicable legislation as any review of the other applicable legislation by the people's courts shall contradict article 12.2 of the *ALL*, which provides that no abstract administrative acts shall be reviewable; the second view maintains that the term does not mean direct application. Instead, the people's courts should only take into account the spirit of regulations, but not the regulations themselves because the *ALL* does not provide that they may be applicable legislation and the quality of regulations is not that good. The third view takes the middle road by suggesting that the term actually means conditional application of regulation in judicial review. That is to say that the people's courts shall examine regulations first to see whether they are applicable. It is a sort of selective application which gives the court the discretion in this aspect. The third approach is supported by the judiciary. See Luo Haocai, 1993, pp. 464-469.

<sup>176</sup> See Appendix: *Mr. Liangren Sun v Administrative Commission of High Technology Development Areas, People's Government of Chongqin* (2001)

<sup>177</sup> Just before Legislation Law of the PRC passed, disputes concerning managerial competence occurred between Agriculture Administrative Department and State Supply & Marketing Department. The former based on Regulations on Pesticide Management enacted by State Council; the latter relied on Measures for Implementing Regulations on Pesticide

the decision made by the defending party, the administrative agency was quashed by the court because the defending party was based on an administrative regulation which was conflict with the law.<sup>178</sup> The problem of legislative conflicts has been partly addressed by the recent *Legislation Law of the PRC*.<sup>179</sup> It provides five principles to define the levels of validity of legislation:<sup>180</sup> the legislation at higher level is superior to the legislation at low level, special legislation is superior to general legislation, new legislation is superior to old legislation, legal validity of legislation at the same level is equal, and doctrine of nonretroaction. Besides, it also designates which organizations are entitled to determine the law application issues in case there is confusion as to dealing with legislative conflicts.<sup>181</sup> The *Legislation law* does contribute to working out legislative conflicts in practice. However, since the *Legislation Law* fails to prescribe the time for the organization with authority to give an interpretation, it means that the interpretation may not be issued or issued in a considerable while. The suspension of litigation may thus fall into great uncertainty.

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Management enacted according to the relevant provisions of this regulation. See *Beijing Wanbao* (*Beijing Evening*), 22 March 2000.

<sup>178</sup> See Appendix: *Mr. Chuanlin Tu v Industrial and Commercial Administrative Bureau, Qinghuai District, Nanjing, Jiandsu Province* (1996).

<sup>179</sup> Legislation Law of the PRC provides the extent of legislative competence of various legislative organizations, Articles 7-11.

<sup>180</sup> As for the legislative conflicts between the legislation with different level of validity, Article 79 of Legislation Law of the PRC says the validity of law is higher than administrative regulations, local regulations and rules, and, the validity of administrative regulations is higher than local regulations and rules. Article 80 states that the validity of local regulations is higher than the rules made by the governments at the same and lower lever, and, validity of rules made by the People's Governments of provinces and autonomous regions is higher than the rules made by the People's Governments of the bigger cities within the same administrative region. As for the legislative conflicts between the legislation with same level of validity, article 82, 85 and 86 set out how to deal with them.

<sup>181</sup> Legislation Law of the PRC, Articles 85-86.

Either time or money would be what the interested parties cannot afford.<sup>182</sup> By this token, this thesis suggests that a clear time limit for issuing interpretation be regulated. And, as for the legislative conflicts between the regulations or rules (not concerning the law), the court should have decisive power to choose the applicable legislation. For the regulations or rules which have not been applied, the courts may issue the judicial suggestion to the relevant administrative organs.

#### **4.2.1 Public accessibility**

Like administrative reconsideration, the law and regulations are usually publicly accessible. The concern is also on the openness of the internal guidelines and the widely-used numerous judicial interpretation. See the previous discussion.

#### **4.2.2 Uniformity, consistency, certainty and stability**

Besides the analysis conducted in the previous paragraphs (under the heading of administrative reconsideration), here the author emphasizes law application issues in relation to the administrative and commercial litigation involving foreign elements. It concerns the issue of how to apply the international rules in the domestic courts. This issue is especially important given China's entry into the WTO.

The WTO agreement should be implemented by China in an effective and uniform

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<sup>182</sup> See Liu Xin, "Lun Baituo Xingzheng Susong de Kunjing" (On Stepping out of Dilemma of Administrative Litigation), *Xingzheng Faxue Yanjiu* (Studies of Administrative Jurisprudence), No.4 (1999)

manner by revising its existing domestic laws and enacting new ones fully in compliance with the WTO agreement.<sup>183</sup> It means that the WTO rules should not be directly applied by the domestic courts. They are, therefore, indirectly applied after they are transformed into the domestic law. On the one hand, the individuals and enterprises cannot rely on the WTO rules to sue and plea at China's courts. On the other hand, the WTO rules cannot be applied in the trial and quoted in the judgements. This has been reflected by the new judicial interpretation, *The Supreme Court of the PRC: Regulations on Hearing Administrative Cases In Relation to International Trade* (2002)<sup>184</sup>. That is, the People's Court, in handling the administrative cases related with international trade, take the law, administrative regulations and local regulations, and take the rules as reference.<sup>185</sup> This is just like the provisions under the ALL.<sup>186</sup>

Either for direct application or for transformed application, ultimately, the result is domestic adherence to international treaties. Application of domestic law through

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<sup>183</sup> Report of the Working Party on the Accession of China (WT/ACC/CHN/49), Article 67.

<sup>184</sup> The Supreme Court of the PRC: Regulations on Hearing Administrative Cases In Relation to International Trade, passed on 27 August 2002 and being effective on 1 Oct. 2002.

<sup>185</sup> This is reflected by Article 7-8 of The Supreme Court of the PRC: Regulations on Hearing Administrative Cases In Relation to International Trade. It is provided as follows, when the People's court shall handle the administrative cases involving international trade according to law, administrative regulations, local regulations enacted *intra vires*, and referring to the normative documents enacted by the ministries and commissions under the State Council pursuant to law and administrative regulations, decisions and decrees made by the State Council, and also referring to normative documents enacted by the people's government of provinces, autonomous region, municipal cities directly under the central government, the cities where provincial government and government of autonomous region are located, according do law, administrative regulations and local regulations.

<sup>186</sup> ALL, Article 53.



interpretation so as to conform to the international treaties is common practice in international community. This has been absorbed by China. The above mentioned judicial interpretation provides that in the event that there are two or more kinds of interpretation of applicable law and administrative regulations, the interpretation in compliance with the WTO rules shall be adopted. So, China's courts try to avoid the conflicts of domestic law and WTO rules through interpretation and application of law.<sup>187</sup> However, some problems remain. What would prevail if there is no interpretation in keeping with the WTO rules at all? How should one deal with the conflicts between the WTO rules and China's law, administrative regulations, local regulations and rules? Due to the low level of legal validity of rules, it is understandable that the courts will not take them as reference in the event conflicts arise. As to law, administrative regulations and local regulations which have conflicts with the WTO, there is no clear answer as to whether they can be the legal authorities of the courts. It is suggested that courts should send to the legislator the judicial suggestions that the law or regulations in conflict with the WTO rules be revised. After the revision, they may be applied by the courts.<sup>188</sup> This suggestion makes sense in the long run. In the short run, i.e., for the case at issue, the manner to apply law to get the dispute settled is still unknown.

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<sup>187</sup> The Supreme Court of the PRC: Regulations on Hearing Administrative Cases In Relation to International Trade, Article 9 provides that when the people's courts handle the administrative cases in relation to international trade and the applicable law and regulations involve two or more than two kinds of interpretation, the interpretation in compliance with the international treaties China participates into shall be adopted, unless China has made reservation.

<sup>188</sup> See Xia Jinlai & Ye Bifeng, "Dui WTO Tizhi xia Guoji Maoyi Xingzheng Susong de Sikao" (On Administrative Litigation In Relation to the International Trade under the WTO), *Faxue Pinglun (Law Review)*, Vol. 119, No. 3 (2003)

Commercial litigation seems clearer than administrative litigation with respect to how to deal with conflicts between the international treaties and domestic law. Under this circumstance, the international treaties prevail pursuant to the CLL (*Civil Litigation Law*) unless China has made reservation.<sup>189</sup>

#### **4.3 Procedural fairness**

##### **4.3.1 Openness System**

Procedural fairness relies on the openness system running through the whole of litigation. As specified previously, the openness system entails openness to the parties and to the public, and also includes a series of legal protective measures to guarantee the realization of openness.

The openness system of trial requires that the trial should be open both to the public and the parties. Openness to the public means the court should announce the name of the parties, cause of action, time and place of trial before the trial is held. During the course of the court trial, people should be allowed to audit and media should be permitted to make report and gather news unless otherwise provided by law. Furthermore, the judgements should be pronounced publicly.

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<sup>189</sup> CLL, Article 238 reads, the international treaties or conventions which China concludes or accedes to shall supersede national laws in cases of conflict between them, except those provisions on which China has made reservations.

For both administrative litigation and commercial litigation, open trial is expressly provided by law.<sup>190</sup> But in judicial practice, there has been a misunderstanding that openness to the public is the same as an open trial. Openness to the public and society is surely necessary. It is a kind of external supervision over trial activities and can be conducive to preventing the judges from abusing their power. But it is also admitted that the role of openness at this level is limited because neither the public nor the media really participates into the litigation and thus can only exert indirect influence on the trial. It is quite understandable that they may lack enough driving force to supervise the trial since they are not the interested parties. Also, their involvement is only limited to the court trial. As for pre-trial and post-trial proceedings, they are not much involved and may not be very helpful in terms of supervision. All these indicate the inadequacy of openness to the public and the significance of openness to the parties, which we call here the substantive openness.

Open trial systems, at a deep level, entail a series of litigious rights entitled and exercised by the parties so as to assure the procedural fairness and guard against abusive discretion of judges. The parties enjoy the rights to learn the truth and to participate into the litigation to the utmost extent. It means that both of the judicial proceedings and case documents should be open to the parties.

More specifically, first, the right to learn the procedures should be safeguarded. The

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<sup>190</sup> ALL, Article 6 and CLL, Article 10.

whole judicial proceedings, including the extrajudicial investigation trial and preparation for the trial, should be open to the parties. That is, the parties are entitled to participate into and be present at the whole process of the litigation except for the judges' private sitting. To prevent the court from making secret or illegal investigations, the court should not exercise power to do investigation unless at the request of the parties. The parties are also entitled to learn the factual basis and legal authorities of the judgements. In the event that the application for action is refused, the reasons and the applicable law should be given too. The right to learn the truth, of course, includes the right to be informed of the litigious rights. The courts are obligated to correctly inform the litigants of their litigious rights like the rights to abdicate, alter and increase claims in litigation; the defendants' right to defense,<sup>191</sup> the parties' rights to authorize the representative to attend the proceedings, to apply for the challenge, to inquire the witnesses, appraisers and on-site examiners subject to the approval of the judges and to debate in litigation; to look up and copy the case files (unless involving the state secrecy and personal privacy); the right to appeal, etc.

Second, pretrial procedures should be open to the parties. In this regard, China's law only requires that the composition of collegial bench should be open. For example, the CLL provides that once the members of collegial bench are confirmed, the parties should be notified within three days. If there are legal reasons, the parties are entitled

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<sup>191</sup> For the civil and commercial litigation, the defendant is entitled to counterclaim, but the defendant in the administrative litigation, the administrative agency, is not entitled to counterclaim; also, the parties enjoy the right to apply for mediation, which is not allowed in the administrative litigation except for the state compensation case.

to challenge the member(s) of the collegial bench. However, some other important pretrial activities conducted by the courts are not open to the parties. For instance, there is no legal guarantee for the parties to learn the evidence collected by the courts prior to the trial, on the kind of procedures the court obtain the evidence. Therefore, it is difficult for the parties to know the legitimacy of the evidence.<sup>192</sup>

Third, the court trial should be totally open to the parties. On the one hand, either side of party should not make a surprise attack on the other side when producing evidence. On the other hand, the judge should guarantee the parties' rights to statement, debate, response, cross-examination and the right to produce the case documents, and provide the parties with adequate opportunities and conditions to exercise above rights. The noteworthy thing here is that the openness of court trial here includes the openness of the second instance of trial.

#### **4.3.2 Recent Progress**

Encouragingly, China has adopted some measures to realize the openness of trial to the public and the parties recently. On 10 May 1998, the No. 1 Intermediate People's Court of Beijing took the lead throughout the country in declaring that any citizen at or above the age of eighteen may audit the court trial with an effective certificate. On 11 July of the same year, the same court held a trial of intellectual

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<sup>192</sup> See Wang Fuhua, "Minshi Shenpan Gongkai Zhidu de Shuangchong Hanyi", (Two-Level Meaning of Openness System of Civil Trial), *Dangdai Faxue (Modern Law Science)*, No. 2 (1999).

property case which was lively broadcast by the China Central TV to the whole country.<sup>193</sup> In March 1999, the Supreme People's Court promulgated *Rules on Strictly Implementing the System of Open Trial*. It expressly points out that unless otherwise provided by law, all the cases shall be heard in public; the whole process of trial shall be open and responsible report by the media shall be allowed.

As for the openness to the parties, recent measures include the following respects including the trial system, evidence and judicial power, etc.

The Open trial system calls for an improved litigation model. On 11 July 1998, *Rules on Reforming the Model of Civil and Economic Trial* was enacted by the Supreme People's Court. The traditional *ex officio* proceedings have been replaced by adversary proceedings. The new ways of court trial, characterized by open evidence-producing, cross-examination, debate, authentication, adjudication and court trial as the core of the whole trial have been carried out by the courts at all levels.<sup>194</sup>

The investigation and collection of evidence are no more undertaken by the courts but mostly by the parties themselves.

Evidence is the essence of litigation. In December 2001, the Supreme Court of the PRC promulgated *Rules on Evidence of Civil Litigation*, which was the first rule on evidence made by the judicial organ of the highest level since the enactment of *Civil*

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<sup>193</sup> See *Renmin Ribao* (People's Daily), 16 Oct. 2002, p.10.

<sup>194</sup> See *Renmin Ribao* (Overseas Version - People's Daily), 14 Nov. 2001, p.4.

*Litigation Law of the PRC*. The Rule is very significant for the parties participating into the litigation and the judges hearing the cases. It introduces a time limit for producing evidence which means the evidence adduced exceeding the time limit cannot be heard or become new evidence to overthrow the original judgement. It strengthens evidential burden. The party who fails to induce evidence may lose the suit. Very importantly, Article 5.7 of this Rule requires that in the event of significant and complex cases, the two parties should unfold the evidence to each other prior to the trial. It indicates for the first time China has its own evidence exchange system.

Also witnessed is the improvement on the administrative litigation in respect of evidence. On 27 July 2002, the Supreme Court of the PRC promulgated *Rules on Evidence of administrative Litigation*, which clearly stipulates that the administrative agency, as the defending party, shall provide factual evidence and legal authorities on which the administrative act at issue was made. In the event of the failure to do so or do so after a stated date without reasonable reasons, it is deemed that the administrative act at issue lacks evidential support.

The above two evidence rules indicate the great efforts done by China to achieve procedural fairness through safeguarding the correct usage of evidence during the litigation.

For a long period, judicial practice, like the administrative model, has followed the

practice of examination and approval level by level, which makes the collegial bench without virtual power and with weakened functions. The collegial bench is unworthy of the title. On 16 August 2000, *Measures on Electing Chief Justice of the People's Court* was promulgated by the Supreme Court. The academic realm regards this rule as the support point of the comprehensive reforms of the courts.<sup>195</sup>

Adopting the election of chief justice, the courts at various levels return the decisive power of the cases to the responsible judge and collegial bench. The heads of divisions and the presidents of the courts do not examine and approve the cases and cannot personally change the decision made by the collegial bench. Boosted by the Supreme Court, all of local courts started to formulate concrete projects to elect their chief justice (e.g., the procedures of recommendation, written exams and interview etc.) Now, most of the courts have finished this reform.

As for the openness of decisions, for a long time many observers in the West have challenged the Chinese courts for their failure to publish the laws applied in their adjudication. They even came to the conclusion that China was a state without law.

<sup>196</sup> Now, things have been changed. The Supreme People's Court opens to the public the first batch of full-text judgement documents from major cases. The Court decides

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<sup>195</sup> See Supra note 193.

<sup>196</sup> For a full discussion of this subject, see Hsia, "Chinese Legal Publications: An Appraisal", in *Contemporary Chinese Law: Chinese Problems and Perspectives* (J. Cohen ed. 1970), p.20, 68-71; also see Shao-Chuan Leng & Hungdah Chiu, *Criminal Justice in Post-Mao China* (1985) pp.10-20; Shao-Chuan Leng, *Justice in Communist China* (1967), pp. 84-87.



to open selected judgement documents to the public in the future to expedite their reform and improve their quality. The exposure will certainly enhance the transparency of trials. Meanwhile, the Supreme People's Court will require local courts to open full-text judgement documents in the future. <sup>197</sup>

#### **4.3.3 Problems to be resolved**

Despite of much progress China has made, this thesis also intends to identify the problems that still remain and the challenges confronted by China on the way to seeking greater transparency in judicial adjudication.

##### **4.3.3.1 Common issues**

Currently, the number of cases in which court rulings are openly defied is decreasing, but cases involving abuse of power and administrative intervention are still high in number. <sup>198</sup> As the power of judicial bodies grows, the problem of corruption in the judicial system is becoming a more serious focal point for public concern. Outmoded trial procedures such as the refusal to allow press coverage of trials, a lack of transparency in trial procedures, and running questions throughout the trial by the judge not only influence the fairness of the trial but also influence the respect and trust of those involved and society at large toward the legal system. The quality of judges has also proved to be a difficult problem, influencing the fairness of trial and the justness of judicial proceedings, and more importantly, there are a

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<sup>197</sup> *Beijing Qingnian bao (Beijing Youth Daily)*, 20 June 2000, p. 2c.

<sup>198</sup> *Fazhi Ribao (Legal Daily)*, 10 Oct. 2000, p.1.

number of structural weaknesses.

*Adjudicatory Committee.* The adjudicatory committee system reflects the strong colors of administration of China's court system.<sup>199</sup> It is one of obstacles to actualize judges' responsibility system. The committee is composed of president, vice president, the chief judge and heads of each division of the court. Those with great trial experience but without a leading title are not entitled to sit in the committee. The functions of the committee include summarizing trial experiences, deciding the challenge against presidents, deciding retrial of cases, etc. One important function is to discuss, examine and approve the cases in trial. According to the relevant law, if the case is so complicated that the collegial bench has difficulties in making judgement, the president of court may refer the case to the adjudicatory committee, whose decision shall be enforced by the collegial bench. As with administrative litigation, if the case concerns whether the defendant's administrative act should be revoked, the collegial bench is not entitled to make the judgement. The case should be referred to the adjudicatory committee which makes the final decision. However, it would be astounding if we had a look at how an adjudicatory committee actually makes the decision. In a word, it is a secret trial like a "meeting". When to hold the "meeting" is uncertain. Except for the committee members, reporters of the case, and the recorders, no one else can be present at the "meeting". Generally, the committee does not review the files or examine evidence, not mention to listen to the statements

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<sup>199</sup> See Zhu Chenxia, "Xingzheng Shenpan Heyiting Xianzhuang Lunxi" (On Collegial System of Administrative Trial), *Zhengzhou Daxue Xuebao* (Journal of Zhengzhou University), Vol. 35, No. 6, (Nov. 2002)

of the concerned parties. What they do is to heed the case report and then each gives his or her opinions and the final decision is formed on the basis of majority principle. Therefore, the right to have a public trial enjoyed by the parties has been deprived. The parties to the final may not even know the true judges because the signers on the judgement may not be the ones who really give the judgement.<sup>200</sup> The system of adjudicatory committee creates room for secret operation during the trial. It goes against the concept of transparency.

*Second Instance.* For both civil and commercial cases and administrative cases of first instance, public hearings should be carried out according to the law. As for those cases of second instance, legally or practically, public hearings are the thing to be expected. Take article 152 of *Civil Litigation Law of the PRC* as an example, it provides:

*“The People’s Court shall, in the case of an appeal, institute a collegial panel for its court hearings. Subject to review of files, investigation and inquiry of the parties, after the facts are checked, the collegial panel may make a direct judgment or ruling as it thinks unnecessary to hold a court.”*

This provision does not consider the scope of cases of the second instance which shall be heard publicly. It, however, implies that it is totally up to the collegial panel of the second instance to decide whether a public hearing is needed. A public hearing is one

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<sup>200</sup> See Wu Xianhua, “WTO yu Zhongguo Sifa Gaige” (WTO & China’s Judicial Reforms), *Guangxi Shehui Kexue* (*Guangxi Social Sciences*), Cumulatively Vol. 87, No. 3 (2002)

of procedural rights enjoyed by the parties. Exercise of this right is not limited to the first instance. The parties concerned should be entitled to require a public hearing of second instance too. Furthermore, since the second instance has been triggered, it indicates the existence of disputes. Thus, the judge at the second instance should hear the opinions of the parties concerned and their debates. On the other hand, the parties are also entitled to be directly heard by the court. Only by holding a court, can all the reasons be elucidated in a transparent way. Otherwise, there may be an operation under the counter. In a word, it is the right of the parties to have or not to have a public hearing of second-instance case. It is the parties not the collegial panel who should decide whether a public hearing is needed.

*Trial Supervision.* China adopts the system whereby the second instance is final. But, it does not mean the finality of judgment at the second instance court. In China, there is a system called trial supervision which is launched by the interested parties, the People's Court itself as well as the People's Procuratorate, if any of them thinks the judgment, which has come into effect, is wrong. In a sense, it suspends the validity of the so-called final judgement. Putting aside the question of propriety of this system, once this procedure starts up, it is noted that mostly the cases are tried on documents. No court session is held. At most, the courts make some investigation or inquire of the parties. One basic requirement to bring the trial supervision is that new evidence is found. No matter whether new evidence is collected by the parties or the court, without cross-examination, authentication, debate between the parties at the hearing, how to adopt such evidence just depends on the judges themselves. The

process is not transparent. The impropriety of this is self-evident. As the parties have no opportunity to give statements at court, fairness of judgment is hardly guaranteed.

*Instruction-request system.* In China, there is a system which is not clearly provided by law but is widely used in judicial practice and has been confirmed by judicial interpretation. This is instruction-request (*qingshi*) system. Where a case is difficult, the court, orally or in written manner, refers the case to the higher level court for an opinion in terms of substantive or procedural issues with the case before it gives the judgment. The higher level court, subject to discussion and research, makes official replies titled *Pifu*.<sup>201</sup> This is a very popular mechanism among the local courts. It can be evidenced by a brief look at gazettes of Supreme People's Court where there are lots of instruction-requests submitted by local courts and replies given by the Supreme People's Court. In despite of active role this system may have played in the past, there are many problems associated with it. It is not in compliance with legal procedures and falls short of the requirement of independent trial under the Constitution and law. It makes public hearing practically null. Before the trial, the judges have already obtained the opinions on the case from the higher level court by requesting instructions. All the activities such as producing evidence, debating and cross-examination, are pointless, no matter how reasonable and convincing they are. It is just unlikely for the court to give up the conclusive opinions given by the court at higher level. Criticism of this mechanism arises also because it prejudices the right of litigants to appeal against decision with which they are dissatisfied, as the higher level

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<sup>201</sup> See Supra note 198.

court of appeal may have already considered the case and formed an opinion before the appeal is heard. It is even worse when one looks at how the court at higher level makes the reply. Generally, it debriefs the case from the lower level court, or refers to written materials. Certainly it does not hear the case directly. The correctness of the reply made in such situation is therefore hard to be secured. In a word, such bureaucratic work-style of courts strikes at the ideal of transparency.<sup>202</sup>

*Political-legal Committee.* Cases which involve important local issues are often discussed by the local Communist Party Political-legal Committee. The committee comprises representatives of the court, procuratorate, public security, state security, judicial bureau, civil affairs, nationality and religious affairs committees and the supervision bureau at that level of the government. A Chinese legal scholar has the following observation: "the court often reports to the local party committee and solicits opinions for solution ... and if contradictions arise among different judicial organs, the Party's political-legal committee often steps forward to coordinate."<sup>203</sup> Although the Political-legal Committee generally rarely involves itself in pure commercial matters, it does play active role in some commercial administrative disputes.

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<sup>202</sup> A western perspective of China's instruction-request (*qingshi*) system is available at Edward J. Epstein, "Law and Legitimation in Post-Mao China", in Pitman, B. Potter ed, *Domestic Law Reforms in Post-Mao China* (New York: M.E. Sharpe, Inc., 1994), pp. 40.

<sup>203</sup> See He Weifang, "Tongguo Sifa Shixian Shehui Zhengyi: Dui Zhongguo Faguan Xianzhuang de Yige Toushi" (The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges), in Xia Yong ed., *Zou Xiang Quanli de Shidai: Zhongguo Gongmin Quanli Fazhan Yanjiu (Toward a Time of Rights: A Perspective of the Civil Rights Development in China)* (Beijing: China University of Political Science and Law Press, 1995), pp. 209, 249.

*Pronouncement of judgment.* According to the law, for an instance, article 134 of *Civil Litigation Law of the PRC*, judgment shall be pronounced in public no matter whether the trial is public or not. Public pronouncement of judgment is very important to secure the transparency of the judgment and make the parties know their relevant due rights like the right of appeal, time limit of appeal and court of appeal. However, unlike western countries, judgment may not be pronounced in court even when public hearing is held. It is common to see judgment coming out several days later after the trial. It is said that judges are clear of the facts of the case at the end of the trial. After a period, it is likely that some facts and evidence may not be recalled. Also, this period may create another possibility in China, that is, some kind of outside interference may come into play and influences the independence of judges to make a fair judgment.

*Open written judgement.* Transparency in judicial judgments is highly stressed under the WTO.<sup>204</sup> The WTO transparency principles require the openness of judicial judgements to the parties concerned and to the public. Judgements include not only those made by the first instance courts and those made by the courts of appeal. It is all of judgements not just selected judgments that should be opened. Consistency of

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<sup>204</sup> Taking TRIPs as an example, Article 63.1 provides that laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of the Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

judgements can be improved by the press of publication requirements under the transparency principle. More importantly, whether Member countries' law and regulations are in compliance with the WTO rules can be revealed through the openness of all judgements. In China, written judgments are not easily accessible except that the selected judgments are published and some courts in big cities put some judgments on their websites. One reason may be that the information system has not yet set up. The second reason may be that the judgments are mostly not "good-looking" enough and cannot stand up to various comments as they are too simple and lack a detailed rationale.<sup>205</sup> Some judgments concerning the application of internal regulations are another possible reason for us not being able to reach them. It is ever argued that unlike common law countries, there is no case law in China and judgments have no binding force on other cases but only the reference value. However, in order to strengthen the predictability of law, making written judgments open to the public is one of measures to reach this goal. It helps people to learn the legal nature of their behavior and exposes judicial activities to the public eyes.

*Sketchy Written Judgement* In written judgments, the applicable legislation, including substantive law and procedural law, should be indicated as well as the reasons of applying them. In China, the applicable law and regulations will be generally quoted. Although in theory, courts are not required to refer to internally

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<sup>205</sup> See Chen Hu & Dong Jinghua, "WTO Toumingdu Yuanze yu Zhongguo Xingzheng Shenpan" (WTO Transparency Principles and China's Administrative Trial), *Wanxi Xuebao* (*Journal of Wanxi University*), Vol. 18, Vol. 1 (Feb. 2002); also see Zhang Zhiming, "Sifa Caipan de Shuolingxing" (Rationale in Judicial Judgements), *Renmin Fayuan bao* (*People's Court*), 19 Oct. 2001, p. 3.



circulated rules or to normative documents. In practice they do, as these documents often form the specific basis for the action. These so-called authorities are usually applied in case of administrative suits and usually do not appear on the written judgments. For civil and commercial suits, judicial interpretation is always applied but not quoted by the judgement. It is outside the litigation that the parties concerned may learn the governing legislation.<sup>206</sup> Besides, the judgement lacks the convincing reasoning about application of law. The parties concerned have to determine the exact reasons by themselves.<sup>207</sup> This might be explained by the judges' qualification which is still to be enhanced. But, one more important reason lies in China's judicial system. As the higher level court is entitled to supervise the low level court and may launch trial supervision proceedings. A sketchy judgement is less likely to be challenged.

#### **4.3.3.2 Specific issues**

Besides the common problems existent in judicial action, both administrative litigation and commercial litigation have their own special issues raising the challenges for the ideal of transparency.

##### **Administrative litigation**

Over the past 10 years, along with the development of the socialist market economy, democracy and the construction of national legal system, awareness of

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<sup>206</sup> See Wang Fuhua, *supra* note 192.

<sup>207</sup> See Wang Fuhua, *supra* note 192.

individual rights and law consciousness have been increasing. More ordinary people confront government organizations by using the law to protect their rights in court. The idea of "privilege" held by government officials is under attack and an awareness that government administration is subject to the rule by law is growing. With the broadening of people's conceptions, the growing practice of handling disagreements through the legal system and the *Administration of Litigation Law*, China's courthouses have processed 500,000 cases and achieved remarkable results over the past 10 years.<sup>208</sup> Moreover, administrative litigation is supposed to contribute more to the administrative dispute resolution after two recent applicable judicial interpretation was issued. They are *Interpretation of the Supreme People's Court on Implementing Administrative Litigation Law of the PRC* (1999) and *Rules of the Supreme People's Court on Administrative Litigation Evidence* (2002).

However, China's administrative litigation is especially affected by Chinese politics and culture. China's long tradition of feudalism has created an attitude of privilege for government officials and servitude for ordinary people. These traditional ideas have had a profound influence on Chinese people for generations and is no way to be removed overnight. Even with the introduction of the *Administration of Litigation Law*, judicial practice still meets challenges from feudal ideologies. Ordinary people are too intimidated to take action against government organizations. Some government officials have contempt for ordinary people and for the judicial system.

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<sup>208</sup> Fazhi Ribao (*Legal Daily*), 10 Oct. 2000, p.1.

They intimidate the plaintiff; refuse to appear in court and issue administrative orders which interfere with judicial procedures. Because of pressure from government organizations, some courts reject applications for litigation and in some cases even pass verdicts they know to be incorrect. <sup>209</sup> Insufficiencies of administrative litigation can be further seen through from the following respects.

Although it is whether the defendant's concrete administrative act is legal that is heard, the courts always conduct pretrial investigation on whether the plaintiff violates law or not. There is a presumption of the courts that if the plaintiff does violate the law, the defendant's administrative act is legal. Such measure actually helps the defendant adduce evidence and therefore worsens the already weak litigious status of the plaintiff. The plaintiff may have lost the case even before the court trial gets started.

Due to the fact that the defending party to the administrative disputes is perpetually administrative agencies, in practice, whether the case should be placed on file is always determined by the president of the court who depends not on whether the case satisfies the essentials of complaint, but on whether the case is complex or not, whether acceptance of the case will influence the relationship between the court and the defendant or not, will affect the image of the leaders of the administrative agency at issue, will impact the external environment of the court or not, or personal position

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<sup>209</sup> *ibid.*

and future of the court leaders, etc.<sup>210</sup>

In the court trial, the defendant, acting like a quasi-judge, hears the plaintiff together with the judges. According to the ALL, the court should scrutinize the legality of defendant's administrative act. But, whether the plaintiff has illegal behavior always becomes the subject and emphasis of the court trial. It is evidenced by the court's pretrial investigation, harmonization and communication with the defendant prior to the trial; in the course of the court trial, both the judges and the defendant question the plaintiff; the defendant introduces evidence to prove that the plaintiff breaches the law and the judges also read out the evidence they have collected to prove the plaintiff has violated the law; the judges are very friendly to the defendant but stiff in manner towards the plaintiff.

Unlike the civil and commercial litigation, mediation is not applied by the administrative proceedings except for state compensation. But, in practice, the judges often persuade the plaintiff to withdraw the action or the defendant to mitigate the penalties so as to make concession and thus avoid the trouble. It occurs when the defendant's administrative act is obviously illegal in order to maintain the authority of the administrative agency. It also occurs when the defendant's administrative act is procedurally illegal. Then the judges may convince the plaintiff to withdraw the case

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<sup>210</sup> See Na Shuyu, "Woguo Xianxing Xingzheng Shenpan Fangshi de Jibi yu Gaige" (Insufficiencies and Reforms of China's Current Administrative Trial), *Xingzheng Luntan* (*Administrative Tribune*), No. 49 (Jan. 2002)

by saying that even if the case is for the plaintiff, the defendant is still entitled to remake an administrative act which is not necessarily advantageous to the plaintiff. If the plaintiff's act is illegal, the judges may assert to the plaintiff that he will lose the case and suggest the case be withdrawn.<sup>211</sup>

All of above insufficiencies and limitations of administrative litigation arise from the nature of the litigation, which leads to unbalance between two parties to the administrative disputes and threatens the ideal of transparency. Entangled with China's traditionally cultural components which may resist the function of administrative litigation, these insufficiencies are even more difficult to be overcome.

### **Commercial litigation**

Unlike administrative litigation where the defendant assumes the burden of proof, the burden of proof in case of commercial litigation rests on the claimant. However, it is also noted that the court enjoys a very wide right to investigate and obtain evidence, which is not changed even under the recent legislation, *Rules on Reforming the Model of Civil and Economic Trial*.<sup>212</sup> Under this rule, the court is

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<sup>211</sup> *Ibid.*

<sup>212</sup> Rules on Reforming the Model of Civil and Economic Trial (passed on 19 June 1998 and being effective on 11 July 1998). Article 3 provides a wide scope of courts' power to collect evidence. It says, the following evidence can be collected by the People's court: (1) the evidence cannot be collected by the parties and their agents due to the objective reasons and the application for requesting the People's courts to collect evidence is submitted; (2) the inquisition shall be done by the People's courts and authentication shall be done under the authorization of the People's court; (3) the evidential materials adduced by the parties on both sides and used to prove the basic facts are contradictory, and their validity cannot be confirmed after the

entitled to obtain the evidence as it thinks fit when handling civil and commercial cases.<sup>213</sup> The court is therefore granted with great discretion in collecting evidence. This creates room for local protectionism as the court may take initiative in obtaining the evidence in the interest of one party for the sake of local interest instead of getting evidence pro and con. Since localism is already the big concern over China's judicial activities, such legislation would only worsen the situations.

Although the *Rules on Reforming the Model of Civil and Economic Trial* introduces the evidence exchange system for the first time in China,<sup>214</sup> it cannot stand a closer examination. The evidence exchange is premised on the fact that the case is complex and there is lots of evidence; and there are no stipulations as to the scope, the content and aim to be achieved through evidence exchange. The litigants' right to learn the truth of the case is realized to some extent. But, due to the lack of auxiliary systems like the time limit for producing evidence, the parties may still make a sudden attack on the other party by inducing new evidence during the court trial. Also, the rule is silent on whether the evidence collected by the court should be disclosed or not prior

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cross-examination in the court trial; (4) other evidence shall be collected by the People's court as it think fit.

<sup>213</sup> Although the court also enjoys the right to obtain evidence when handling the administrative cases, at least under the law, the scope of such power is not so wide. Article 22 of Rules on Evidence of administrative Litigation provides two kinds of circumstances under which the court is entitled to obtain the evidence: (1) in relation to the state interests, public interests and a third party's interests; (2) procedural affairs like adding litigants, suspending the proceedings, terminate the proceedings and challenge.

<sup>214</sup> Article 5.7 of Rules on Reforming the Model of Civil and Economic Trial says when the cases are too complicated and there is lots of evidence, the People's court may arrange the parties to exchange the evidence.

to the trial. It is highly doubtful that the functions of pretrial preparation could play satisfactorily.

Without establishing the rule-based transparent pretrial procedures, the reformed court trial is hardly able to achieve the original aim. In order to prevent the court from forming the decision prior to the trial and enhance openness, democracy and efficiency of trial, some courts start to carry out the direct trial system. It means that the courts do not, before the trial, contact with the parties and their agents, do not undertake any investigation, inquiry or collect evidence or examine the evidence obtained by the parties. What the judges have prior to the trial is the plaintiff's indictment and the defendant's response. All of other evidence will be adduced by the parties in the court trial.<sup>215</sup> However, good expectations are not necessarily transformed into the reality. Without an effective pretrial procedure through which the two parties disclose respective evidence and determine the issues to be resolved, it is difficult for the judges to comprehend the cases thoroughly just from the court trial. The cross-examination appears ineffective and the trial looks unfocused. One of the reasons lies in that the openness to the parties, especially the openness of the pretrial procedures, is inadequate.

In contrast to administrative litigation to which mediation is not applicable except for the state compensation cases, mediation runs through the commercial litigation, from

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<sup>215</sup> See Wu Mingtong, "Zhijie Kaiting yu Shenli qian de Zhunbei Zhi wo Jian" (On Direct Trial and Pre-trial), *Faxue Pinglun* (Law Review), Vol. 94, No. 2 (1999)

the very beginning till the judgement is made. Mediation has many merits to resolve the disputes. One of them is that it dispenses with complicated proceedings. However, it does not mean that no any procedure is needed in the course of court-annexed mediation. In China, the courts should do mediation on the voluntary and legal basis according to law. There are no provisions as to procedural reasonability. In practice, the pretrial mediation and the mediation out of court may be undertaken by the court with two parties respectively. This is so-called back-to-back mediation which is not open to the other party.<sup>216</sup> The openness system is just avoided by doing such kind of mediation. As the mediators and the judges in charge of the case are the same, there is potential compulsory force behind the mediation which threatens the realization of the voluntary principle of mediation and worsens the non-open mediation. Even for the mediation in court, there is no guarantee that the judges, who are the mediators as well, give the legal authorities of mediation.

There is a special problem specially existing in the written judgement of civil and commercial litigation involving foreign elements. Although the rules of legal conflict are still developing in China, there are indeed some of them sporadically considered under *General Principles of Civil Law of the PRC*, *Commercial Instrument Law*, *Contract Law*, etc. However, these rules of conflict are rarely adopted by the courts. Those civil and commercial judgements involving foreign elements reveal that most

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<sup>216</sup> See generally, Wang Yaxin, "Minshi Susong Zhunbei Chengxu yanjiu" (On Preparatory Procedures of Civil Litigation), *Zhongwai Faxue (Law Science of China and Foreign Countries)*, No. 2 (Feb. 2000); see *Beijing Fazhibao (Beijing Legal Times)*, 15 Sept. 2002; *Fazhi Ribao (Legal Daily)*, 10 Feb. 2002, p .3.



courts directly apply the substantive law of China or other countries without being guided by rules of conflict. This phenomenon influences the reasonableness and fairness conveyed by the judgments, as well as the authority of judgments.

#### 4.4 Judicial independence

The principle of judicial independence that originated in the west was put into effect with the establishment of the modern idea of "separation of powers."<sup>217</sup> Judicial independence is a principle universally admitted and entrenched in modern countries implementing rule of law.<sup>218</sup> If judicial proceedings cannot avoid being intervened by administrative organs or other organizations or people in authority, all legal institutions cannot fulfill their legal functions, nor can necessary and expectant security and stability be obtained.<sup>219</sup> As a Chinese scholar points out, "one of basic characteristics of a western constitutionalism and judicial system is to set up tight and rigorous supervisory mechanism...however, judges, also exercising the public power, constitute the hard-won exception."<sup>220</sup>

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<sup>217</sup> In Europe, the idea of "judicial independence" emerged in the England in 17th century. But the French people first created this idea; see C. L. Montesquieu, *The Spirit of Law* (1748). For this reason, many Chinese scholars believe that the idea of "separation of powers" comes from western countries. For detailed information, see Li Long, *Xianfa Jichu Lilun* (The Basic Theory of Constitution) (Beijing: Chinese Law Press, 1999), pp. 4-21; also see Parker, The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy, 12 *Rutgers L. Rev.* (1958), p.449

<sup>218</sup> See W.F. Rylaaydsam, "Judicial Independence - A Value Worth Protecting", 66 *S. Cal. L. Rev.* (1993), p.1653.

<sup>219</sup> See Martin H. Redish, "Federal Judicial Independence", 46 *Mercer Law Review* (1995), p. 707.

<sup>220</sup> See He Weifang, *Sifa de Zhidu yu Linian* (Judicial System and Ideas) (Beijing: China University of Political Science and Law Press, 1998), pp.136; also see Thomas E. Plank, "The

Judicial independence is a judge's ability to decide a case free from pressures or inducements. Judicial independence has an institutional character, which is best seen in the constitutional separation of powers. It has an individual character, which is partially protected by the Constitution in the provisions for life tenure and the guarantee of no diminishment of salary, but which extends further to encompass those conditions in which and under which a judge decides the cases. These ancillary elements of individual judicial independence, including security, facilities, support, workload, rules of procedure, and case management, normally do not impact upon judicial independence but under extreme circumstances may do so. Judicial independence is important not only to the judicial system. The independence of the judiciary must be credible to those being judged. Therefore, the exercise of judicial power requires institutional arrangements which will instill confidence that the power is being properly applied.<sup>221</sup>

For China's judicial reforms, seeking an independent judiciary without supervision perhaps should be a goal because China's courts are subject to too much restriction. Judicial independence has been a slogan or a manifesto for a long time. Article 126 of the China's Constitution provides that the People's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by

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Essential Elements of Judicial Independence and the Experience of Pre-soviet Russia, *William and Mary Bill of Rights Journal*, Vol. 5. (1996)

<sup>221</sup> See L. Ralph Mecham, "Introduction to Mercer Law Review Symposium on Federal Judicial Independence," 46 *Mercer, L. Rev.* (1995), p. 637, 638.

administrative organs, public organization or individuals.<sup>222</sup> Though this provision marks the first time in recent decades that the Constitution has used specific language to give concrete definition to the concept of independent administration of justice in China through the clause “not subject to interference by administrative organs, public organization and individuals”,<sup>223</sup> this specific language has left at least one point unclear: are the Chinese Communist Party and its members included in the above categories? If the answer is negative, the party’s leading role upon the court can hardly be challenged to be unconstitutional under the Chinese Constitution.<sup>224</sup>

In China’s legal context, judicial independence includes the internal independence and external independence. The former refers to the court, as a whole, is entitled to independent decision-making power on judicial affairs so as to prevent outside intervention in adjudication. In the light of law, China’s external judicial independence is in a relative sense. Courts exercise judicial power independently, subject to the supervision by organizations of state power, procuratorial organizations and society. Among of them, the supervision by the organizations of state power, i.e., the People’s Congress, especially infringes upon the judicial independence. Without clear conditions of and restrictions on exercising the supervisory power under the law, the case-by-case supervision may be even utilized by some representatives of the

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<sup>222</sup> Constitution of the People’s Republic of China (1982, amended in 1993).

<sup>223</sup> See Fang Junyi, “The Adjudicating Bodies and Adjudicating System”, in Weng Songran ed., *Zhongguo Xianfa Lunwenji (A Collection of Literature on the Chinese Constitution)* (1987), pp.218, 250.

<sup>224</sup> See Nanping Liu, *Supra* note 48.

congress for personal purposes.<sup>225</sup> Internal independence means the judge, as an individual judge, exercises the judicial power independently during the proceedings, which has been widely recognized in the international community. In China, independence of the courthouse as a whole is admitted while independence of the individual judges is not acceptable. This has led to many problems in practice: the judges hearing the case do not make the judgement while the judgement makers do not hear the case; the judges form views about the case prior to the trial; court session is held just in the sense of form, etc.<sup>226</sup>

Judicial independence is most important in those cases where courts are called upon to resolve disputes between individuals and the state or between different branches of government.<sup>227</sup> In this sense, the judiciary must not only be independent from the other branches of government, but also from any other influences, and, most importantly, it must appear independent to those who would bring their disputes before it for resolution. Judges must be individuals of the greatest integrity and worthy of the people's greatest confidence. They must be subject to no influence other

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<sup>225</sup> See Wang Liming, *Sifa Gaige Yanjiu (Research on Judicial Reform)* (Beijing: Law Publishers, 2000), pp. 462, 465-466; see Liu Hainian, Guanyu Gean Jiandu de Sikao (On Case-by-case Supervision), in Xin Chunxin & Li Lin (eds.), *Yifa Zhigu yu Sifa Gaige (Rule of Law and Judicial Reforms)* (Beijing: China Legal Time Press, 1999), pp. 563-564; see Wang Chenguang, "Lun Fayuan Yifa Duli Xingshi Shenpanquan he Renda dui Fayuan Gean Jiandu de Chongtu jiqi Taozheng Jizhi (On the Conflicts between Courts' Judicial Independence and People's Congress's Case-by-case Supervision and Adjustive Mechanisms), *Falv Kexue (Law Science)*, No. 1 (1998)

<sup>226</sup> See Su Li, *Song Fa Xia Xiang (Rule of Law in Rural Areas)* (Beijing: China University of Political Science and Law Press, 2000), pp. 61-87.

<sup>227</sup> See J. Clifford Wallace, "Independence of the Judiciary: Independence from What and Why", 58 N.Y.U. Ann. Surv. Am. L. 2001, p.241.

than that of the force of the law. A judiciary that is independent of the political branches but beholden to private interests or influences, and therefore, corrupt, is not truly independent. It is simply dependent on another, non-governmental, entity.<sup>228</sup> In China, administrative trial especially suffers from lack of judicial independence. The defendant is the administrative organ which usually enjoys great power and some of them, like local governments, financially support the courts, the judges hearing the administrative cases do face lots of pressure. The administrative organ being sued always utilizes its power to force the court or the judges to give in. Using both coercion and cajolery and even making retaliation by the defendant, like cutting down the financial aid or changing the titles of the judges, is another means to intervene in the independent trial.

That the courts do not have adequate judicial authorities explains the situations of judicial independence in China. The courts' lack of judicial authorities among administrative trial may be further comprehended by a glimpse at the legal level and the cultural level.

At the legal level, firstly, current law is not effective to maintain the court order in hearing administrative cases. According to the relevant litigation law and criminal law, only those who assemble to make trouble, strike court or commit assault and battery on judicial staff and thus seriously disturb the court order will be imposed on by criminal penalty. As for the administrative agency, the defendant, using

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<sup>228</sup> *ibid.*

implementation of public duties as a shield, the court has no power to stop or impose criminal liability. Also, there are no stipulations as to how to deal with the generally illegal acts.<sup>229</sup> Hence, the courts' authorities lack concrete and comprehensive legal protection. It is suggested that the idea of contempt of court should be introduced and thus grant the court with the power to make the temporary compulsory measures.<sup>230</sup> Secondly, procedural restrictions on administrative agencies are scant. If the administrative agency, as the defendant, resisted listening to the court by arguing that it is carrying out its duties, clear procedures on how to implement the public duties would make such excuses unworkable. Fortunately, to make uniform administrative procedural law has been recognized in current China, as mentioned previously.

If the rules may be dramatically changed overnight, there are other difficulties that will take a long time to overcome. Difficulties are more embodied in the cultural format, including the ideology, attitude and understanding held by China's judicial professionals and people.

As for the court, the court does not have a correct understanding of the relationship between it and the administrative agency. In the position of the administrative agency, it asserts that that only if for the sake of implementing the public duties, it should, like

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<sup>229</sup> Lord Denning points out that in all places where law and order shall be maintained, the courthouses are the places most requiring the legal order. Judicial process should not be intervened or interfered. In order to maintain law and order, the judges are entitled to punish those who violate the normal judicial process. See, Lord Denning, *The Due Process of Law*, (Butterworths, 1980).

<sup>230</sup> See Ma Huaide & Wang Yibai, "Tousi Zhongguo de Xingzheng Shenpan Tizhi: Wenti yu Gaige" (Examining China's Administrative Trial System: Problems and Reforms), *Qiushi Xuekan* (*Seeking Truth*), No. 3 (May 2002)

the court, not be subject to any intervention. From the standing point of the court, it will not deny the properness of the administrative agency when it acts in order for exercising administrative power. For judicial power and administrative power, the court equates them. Under the circumstance that the court has no “money” or “sword”, the court appears just helpless in case the administrative agency acts under the disguise of performing official business. Judicial power and administrative power are different in nature. The core of the former is “judgment”; the core of the latter is “compulsion”. They cannot be equated quantitatively or qualitatively. Recent constitutional principles emphasize a check and balance between these two. When there is conflict, it is the judicial power that is superior to the administrative power, not *vice versa*.<sup>231</sup> The courts’ judicial authorities are inviolable. Even if the administrative organ needs to perform its duties, the dignity and authorities of the court cannot be offended.

As for the people, take administrative litigation as an example, in the external dimension, many Chinese people do not believe that the courthouses are capable to handle administrative cases without adequate authority.<sup>232</sup> If a country’s citizens do not believe that the judiciary is independent, but rather perceive it to be influenced by other branches of government or non-government entities, they will not resort to it for dispute resolution. Instead, they will attempt to circumvent the legal process and

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<sup>231</sup> *Ibid.*

<sup>232</sup> See Xia Yong, Zou Xiang Quanli de Shidai (Toward a Time of Rights: A Perspective of the Civil Rights Development in China) (Beijing: China University of Political Science and Law Press, 1995), pp. 62.

resort to corruption, bribery, and intimidation.<sup>233</sup>

China's judicial bodies have acquired a reputation for biased and unprofessional handling of disputes. The judiciary is not totally independent of government and extra-government committees. Judges are typically appointed and enjoy tenure on the basis of political loyalty rather than merit. Far greater efforts need to be made to establish and enforce reasonable rules of evidence, reduce corruption, and prohibit *ex parte* communications and the influence of government departments in arbitral and judicial bodies. The judicial system in China today is still considered more a means to achieve government objectives than a system of protecting the rights of individuals and enterprises, as the administrative government exerts undue influence in affecting the outcome of cases. As long as such conflict of interest is allowed to persist, the benefits of any legal reform will be minimized.

## **Part IV    Closing Commentary**

### **Transparency: an institutional and cultural discourse in China**

China is a huge, rapidly expanding, and as yet an under-explored market. Opportunities are nearly unlimited. But at the same time it is still a developing country with an underdeveloped infrastructure and institutions still not quite up to the standards in the developed countries. This is especially true in the area of law, exemplified by China's efforts in seeking transparency since its accession to the

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<sup>233</sup> See J. Clifford Wallace, *supra* note 227.



WTO.

While there is widespread agreement on the importance of transparency, China's experience in seeking transparency in economic dispute resolution shows that actually improving transparency can be difficult in China. It is because transparency *per se* in a broad sense is closely linked to national institutions, cultures and ways of doing things.<sup>234</sup> Challenges for reform in China are thus identified beyond pure transparency-orientated regulatory construction and also including improving the institutions needed to support transparency, overcoming political obstacles, redressing inconsistent localized performance and obtaining access to technology and human resources. On the way to seeking greater transparency in economic dispute resolution in China, institutional arrangement and cultural considerations shall not be overlooked.

The WTO rules tend to focus on core transparency measures. These are the starting points for other communication processes that are closely linked to national institutions which usually evolve slowly and incrementally. While moving forward on core measures, China has to work with the distinctive national characteristics of transparency practices. China's recent pursuit of transparency-enhancing economic dispute resolution reveals much about the interaction of institutional processes and social norms.<sup>235</sup>

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<sup>234</sup> See Xie Xiaoyao, WTO Toumingdu: Guyou Jiazhi yu Baozhang Jizhi (WTO Transparency: Inherent Value and Protective Mechanism), *Falv kexue (Law Science)*, No.1 (2003).

<sup>235</sup> See Pitman B. Potter, "Legal Reform in China – Institutions, Culture, and Selective Adaptation" (manuscripts).

Starting from a base near zero in 1978, China has achieved impressive progress in sixteen years in building up a legal framework for conduct of foreign business in China and in constructing a domestic legal order as well. The pace has accelerated in recent years since China's entry to the WTO. However, without capable institutions to perform their assigned tasks,<sup>236</sup> even if under a transparent legal framework, transparency practices and performance may not be fruitful. Encouragingly, China's economic and legal reforms have seen significant attention paid to establishing and strengthening institutions for dispute resolution. Recent efforts to reorganize the civil chambers of the People's Courts as courts of general jurisdiction<sup>237</sup> reflect concerns over institutional capacity.<sup>238</sup> Especially in response to calls for institutional reform, as expressed most recently by WTO requirements about transparency and the rule of law,<sup>239</sup> the Chinese government has attempted to transform China's dispute resolution system. Efforts to strengthen the ability of the court system to provide prompt review and correction of administrative action and increase enforcement of foreign arbitral awards, may well be aimed at accommodating international legal

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<sup>236</sup> Professor Pitman B. Potter introduces the concept "institutional capacity" to describe capable institutions performing their assigned tasks. See generally, *ibid.*

<sup>237</sup> Recently, civil chambers of the China's People's Courts are divided into five chambers: Chamber I is to deal with family and marriage law; Chamber II is to handle the ownership right, tort, unjust enrichment, *negotiorum gestio*, property right, personal right, etc; Chamber III and Chamber IV are responsible for the economic disputes, bankruptcy, foreign-related economic disputes; Chamber V is to deal with intellectual property cases. See "Civil case trial system reformed for WTO entry," *Xinhua News Agency*, 30 March 2000.

<sup>238</sup> See Pitman B. Potter, *supra* note 235.

<sup>239</sup> Report of the Working Party on Accession of China. 2001. WTO Docsonline Ref. WT/MIN(01)/31, November 10.

forms, though their satisfaction of accompanying legal norms remains uncertain.<sup>240</sup>

It is said that the increased numbers of commercial disputes brought by market reforms have created a certain degree of institutional competition for a share of the dispute resolution market.<sup>241</sup> As courts and arbitration institutions are driven by considerations of financial gain and political prestige to compete for ever-larger shares of China's dispute resolution market, the possibility arises of increased responsiveness to the needs of disputants for greater rigor and predictability of process and practice.<sup>242</sup> This may bode well for the emergence of independent and effective dispute resolution processes. However, as for the dispute resolution institutions discussed in this thesis, i.e., the courts which, besides the costs of action, are mostly financially supported by the government, and the administrative organs which do not charge the applicants at all, they may not be able to obtain the same driving force as arbitration commissions in terms of institutional improvement. So far there is little to indicate that competition for dispute resolution cases has motivated courts or arbitral organs to increase their autonomy and/or procedural rigor. Instead, institutional competition seems to be taking the form mainly of increased efforts to strengthen ties with government departments.<sup>243</sup>

Actual institutional performance remains contingent on domestic political and

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<sup>240</sup> See Pitman B. Potter, *supra* note 235.

<sup>241</sup> See Pitman B. Potter, *supra* note 13, pp. 142.

<sup>242</sup> see Pitman B. Potter, *supra* note 235.

<sup>243</sup> See generally, Pitman B. Potter, *supra* note 13, pp. 137-142.

socio-economic conditions.

The main obstacles to transparency-enhancing reforms are political. Attempting to overcome the natural political dynamic in favor of "concentrated benefits" is an ongoing struggle for all political systems. Lack of transparency also shields government officials from accountability. Thus, many actors -- both inside and outside the public sector -- can have a stake in non-transparent practices.<sup>244</sup> It is for this reason that, despite the broad apparent agreement in principle about their benefits, actual implementation of transparency-enhancing reforms are likely to involve painful shifts in the way policies are made and implemented, especially in countries with highly opaque policy environments such as China. It is admitted that further obstacles to court autonomy will be resolved only by political change. Political interference with the courts, for example, is still institutionalized. Whilst interference is less evident in civil cases where the party and the state generally have little or no interest in the outcome, in criminal, administrative, and even economic cases political interference is legend.<sup>245</sup> Therefore, the difficulty for greater transparency will be to develop the political momentum for pro-transparency reform and to prevent backsliding. With China's more involvement into international community, transparency commitments under the WTO and international peer pressure may help China face this difficulty.

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<sup>244</sup> See supra note 44.

<sup>245</sup> See Edward J. Epstein, "Law and Legitimation in Post-Mao China", in Pitman, B. Potter ed, *Domestic Law Reforms in Post-Mao China* (New York: M.E. Sharpe, Inc., 1994), pp. 41.

Efforts in seeking greater transparency may not be well paid but for more regulatory institutions and improved institutional practice not only at a national level but also at a local level. It has been widely acknowledged that China's accession to the WTO should be viewed in light of domestic conditions.<sup>246</sup> Hence, given China's local conditions of rapid socio-economic and political transformation, more particular challenges for institutional capacity arise.<sup>247</sup> In the view of many Westerners, China's local organizational interests and ideological perspectives have often resisted the concessions mandated by WTO members considering China's application.<sup>248</sup> However, recently, it has been noted that numerous local organizational norms are not entirely discouraging in terms of China's pursuit of greater transparency. By contrast to the sketchy and rough stipulation of central laws, local regulations in some developed, big municipal cities are more particularized and more practicable and thus may contribute more to local institutional improvement.<sup>249</sup> On this point, unbalanced development of dispute resolving institutions, which will not disappear in

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<sup>246</sup> See Merle Goldman and Roderick MacFarquhar (eds.), *The Paradox of China's Post-Mao Reforms* (Cambridge MA: Harvard University Press, 1999); Elizabeth J. Perry and Mark Selden (eds.), *Chinese Society: Change Conflict and Resistance* (London: Routledge 2000)

<sup>247</sup> See Pitman B. Potter, *supra* note 235.

<sup>248</sup> Pitman. B. Potter, The Legal Implications of China's Accession to the WTO, *The China Quarterly*, Vol. 167 (September 2001), p. 594; also see "China sets deadline for GATT re-entry, slams U.S. Road Blocks'," Agence France Presse English Wire, 10 July 1994, in *China News Digest*; "Foot-stomping helps China in GATT Bid," *South China Morning Post*, 1 August 1994, in *China News Digest*; "China vows not to beg for WTO membership," *China News Digest*, 23 September 1995.

<sup>249</sup> Examples can be referred to the previous discussion in Part II about the procedural fairness of administrative reconsideration, where some local regulations stepping forward than national law in terms of procedural fairness of administrative reconsideration are mentioned.

a short time, strengthens the complexity of doing business in China.

The impressive progress of the past sixteen years has laid down and clarified the rules for doing business in China, but enforcement is still unreliable. Sometimes personal relationships still count more than written contracts; conciliation may have to be resorted to rather than going to arbitration or to court even though it may seem the less satisfactory way of resolving a dispute.<sup>250</sup> Due diligence and sensitivity to the cultural environment in which one operates are absolutely essential for doing business in China.<sup>251</sup> Even if the transparency principle is applied to China through the Protocol on China's Accession and to an expanded range of trade relations, the institutions and practices of the Chinese dispute resolution system lag seriously behind, as the local culture that informs the behavior of Chinese legal institutions and actors continues to place a high priority on local parochial concerns and political arrangements.<sup>252</sup>

Institutional and cultural factors make the improvements to the less concrete aspects of China's legal environment not easy. Although foreign trade investment has been booming these years, the degree to which foreign investors' legal rights and interests can be protected in China will still largely influence their decision to invest here.

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<sup>250</sup> See Rajib N. Sanyal & Turgut Guvenli, American Firms In China: Issues In Managing Operations, 9 *Multinational Bus. Rev.* (1 Oct. 1 2001), p.41.

<sup>251</sup> See George O. White III, Navigating the Cultural Malaise: Foreign Direct Investment Dispute Resolution in the People's Republic of China, *Transactions: the Tennessee Journal of Business Law* (Fall 2003), p. 55.

<sup>252</sup> See generally, Pitman B. Potter, *supra* note 13, pp. 137-142.

There are frequent cases where the legal rights and interests of foreign investors are violated due to improper activities by judicial organs, administrative interference and local protectionism.<sup>253</sup> Foreign investors are frustrated by year-long cases, which take them time, energy and money to resolve. In some cases, problems are still pending. This situation, unless thoroughly improved, will substantially shake foreign investors' confidence in investing in China. This improvement depends not only on perfecting the professional and moral attitude of judges and the eradication of local protectionism, but also on the reform of China's judicial system and the perfection of the overall legal environment. Such changes, however, will take longer and will require more effort than creating laws and regulations as these kinds of improvements require changes at a deeper social level and will entail changing deeply rooted ideas and concepts that are now a part of people's thinking. The time and effort required for these changes leave China still a long way from its goal.

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Needless to say, establishing and maintaining an efficient, transparent, and impartial legal system is essential to China's economic and social development, particularly with respect to foreign investment and trade. In order to establish transparency-enhancing economic dispute resolution mechanisms in China, this thesis therefore calls for more comprehensive efforts by realizing complicated yet important institutional and cultural issues rather than pure legal construction.

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<sup>253</sup> *Zhongguo Jingji Shidai (China Economic Times)*, 4 Nov. 2000, p. 2c.

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## Appendix: Chinese Cases Cited

**Fengxiang Trade Ltd., Shanghai v Salt Administrative Bureau, Shanghai** (2002)

### **Source:**

Shanghai No.2 Intermediate People's Court: Administrative Judgment (2002) No. 60

Hu Er Zhong Zi

- Gazette of the Supreme Court of the PRC, vol 81, 1 Jan 2003
- Shanghai No.2 Intermediate People's Court Website:

<http://www.shezfy.com/BigCaseDetail.asp?id=42>

### **Parties:**

Plaintiff (Appellant): Fengxiang Trade Ltd., Shanghai

Defendant (Appellee): Salt Administrative Bureau, Shanghai

### **Dispute Resolving Institutions:**

Administrative Reconsideration Organ: Commerce Commission of Shanghai

First Instance Court: People's Court, Jingan District, Shanghai

Court of Appeal (final decision): Shanghai No.2 Intermediate People's Court

### **Date:**

Final decision: 24 May 2002

**Summary of Facts:**

The plaintiff introduced industry salt to Shanghai from An Hui Province on 16 May 2001. At the train station, the defendant found that the plaintiff violated the “Shanghai Regulations on Management of Salt” for lack of a business license of industry salt. The defendant made an administrative coercive measure to detain the industry salt on 21 May 2001 and serve the notice of this decision. The plaintiff refused and applied to the Commerce Commission of Shanghai for administrative reconsideration, which maintained the decision of administrative coercive measure on 21 August 2001. The plaintiff sued.

**Issues:**

Whether the decision of administrative coercive measure made by the defendant on 21 August 2001 is proper?

**Decision:**

Maintained the decision of administrative coercive measure on 21 August 2001.

**Reasons:**

There were clear facts and adequate evidence that the plaintiff introduced the industry salt from another province. The argument that the behavior happened before the “Shanghai Regulations on Management of Salt” and thus shall not be bound by this

was objected. The introduction of industry salt into Shanghai was a continuous behavior. It continued till when this regulation came into force.

**Appeal and Basis:**

The plaintiff appealed. It was argued that the first instance failed to apply the law properly.

**Decision on Appeal (with Reasons):**

Judgment rescinded.

The Appellee failed to apply the right law. The *Regulations on Salt of the PRC* stipulated the kind of the salt, which shall be managed by the state. Industry salt is not the subject. Since the appellant's business license did include the industry salt, the appellant was entitled to do such business. The administrative decision at issue made according to the "Shanghai Regulations on Management of Salt" was not proper. The *Official Reply Salt Administrative Bureau, Shanghai: On Whether the Wholesale of Salt Shall Be Managed on a United Basis* " belonged to internal document given by Light Industry Department of the PRC. It could not be regarded as a legislative authority and had no external binding force.

\*



**Source:**

Renmin Fayuan Anli Xuan (Cases Selection of People's Court), Vol 3, 2000;  
cumulatively vol. 33.

**Parties:**

Plaintiff: Jin Man Ke Electric Ltd.

Defendant: State Revenue of Shenzhen

**Dispute Resolving Institutions:**

Administrative Reconsideration Organ: State Revenue of Shenzhen (defendant)

Court: Shenzhen Intermediate People' Court

**Date:**

18 August 1997

**Summary of Facts:**

On 12 June 1996, the 2<sup>nd</sup> branch bureau of the defendant found that the plaintiff concealed and unreported taxes during the previous two years and then made an administrative decision that the plaintiff shall pay the due tax as well as the late fee and the fine. The plaintiff objected and applied to the defendant for administrative

reconsideration.

On 31 Dec 1996, the defendant made the decision of administrative reconsideration. It confirmed the administrative penalties imposed on the plaintiff while it also changed the specific amount of tax payment and the fine and cancelled the late fee (“decision at issue”). The plaintiff sued against the defendant.

**Issues:**

Whether the defendant shall make the decision of administrative reconsideration (“decision at issue”) which confirmed the original administrative penalties imposed on the plaintiff?

**Decision:**

Quash the decision of administrative reconsideration.

**Reason:**

The legislative authorities which the defendant’s decision at issue based on were not open to the public. In addition, the hearing should have been held according to the *State Revenue: Implement Measures of Hearing Procedures of Administration Penalties on Tax Management*.

\*

**Shitong Communication Equipment Ltd. of Guangzhou v**

**People's Government of Guangzhou (1999)**

Superior People's Court of Guangdong province: Administrative Judgment (1999) No.

33 Yue Gao Fa Xing Zhong Zi

**Source:**

State Information Center: State Regulations Database

Number: 90193001999007

**Parties:**

Plaintiff (appellant): Shitong Communication Equipment Ltd. of Guangzhou

Defendant (Appellee): People's Government of Guangzhou

Third Party: Bowling Company

**Dispute Resolving Institutions :**

Administrative organ for resolving dispute: Guangzhou Industrial and Commercial

Administrative Bureau

Administrative reconsideration organ: People's Government of Guangzhou

(defendant)

First Instance: Guangzhou Intermediate People's Court

Court of appeal (Final decision): Superior People's Court of Guangdong province

**Date:**

Final decision: 1999/12/03

**Summary of Facts:**

The third party was an effectively established company. Mr. Cui Rong was the legal representative. The plaintiff company, Mr. Xihao. Mr. Zhang Shujun and Mr. Zhang Shaoyin were the shareholders. The third party company applied to the Guangzhou Industrial and Commercial Administrative Bureau for changing the registration of stock right and legal person by submitted relevant documents including Agreement of Stock Rights Transfer, Decision of Revising the Articles, Certificate of Legal Person Holding Post (hereinafter "relevant documents"). The application got approved. The shareholders were changed into the plaintiff and Mr. Xihao. Later, Mr. Cui Rong (original legal person), Mr. Zhang Shujun and Mr. Zhang Shaoyin filed the complaint to the Guangzhou Industrial and Commercial Administrative Bureau, by arguing that the relevant documents provided by the third party company when applying for changing the registration of stock right and legal person was forged. At the same time, they sent the relevant document materials (original version) to the Criminal Science Technology Institute of Guangzhou for authentication, together with their personal handwriting. After authentication, it was found that the signature on the relevant documents was not done by these three complainants. Based on this experts'

conclusion, Guangzhou Industrial and Commercial Administrative Bureau revoked the approval (hereinafter “cancellation decision”) and imposed fine on the third party company.

The plaintiff applied to the defendant for administrative reconsideration. The defendant quashed the cancellation decision made by Guangzhou Industrial and Commercial Administrative Bureau. The reasons were: firstly, the validity of the experts’ conclusion was uncertain because handwriting was provided by the complainants themselves, who had direct interested relation to the application for authentication; second, that Guangzhou Industrial and Commercial Administrative Bureau imposed the fine when it had made the cancellation decision violated Company law (article 205) which did not say these two kinds of punishment could be applied at the same time. Third, the legal procedures were not properly followed by the Guangzhou Industrial and Commercial Administrative Bureau when it made the administrative penalty decision. It violated the article 31 of Administrative Penalty Law of the PRC, which says, before the administrative penalty decision is made, the administrative agency should inform the concerned party of the facts, reasons and their due rights. The plaintiff refused to accept the administrative reconsideration decision and sued at the Guangzhou Intermediate People’s Court.

**Issues:**

Whether the decision of administrative reconsideration made by the defendant was

proper?

**Decision:**

The decision at issue maintained.

**Reason:**

It was right for the defendant to decide that Guangzhou Industrial and Commercial Administrative Bureau applied the law incorrectly and violated the legal procedures because Guangzhou Industrial and Commercial Administrative Bureau failed to inform the due rights

**Appeal and Basis:**

The plaintiff appealed. It was argued that the application for the administrative reconsideration had expired the legal limitation and thus the Appellee shall not accept the application at all.

**Decision on Appeal (with Reasons):**

Appealed dismissed. The Guangzhou Industrial and Commercial Administrative Bureau apparently violated the legal procedures in making the administrative decision. The Appellee was entitled to accept the application for the administrative reconsideration.

\*

**Mr. En Wang v People's Government. Heping District, Tianjin (1997)**

**Source:**

Cases Selection of the People's Court (Renmin Fayuan Anli Xuan), Vol 4, 1997 (vol 30 in all)

**Parties:**

Plaintiff (Appellee): Mr. En Wang

Defendant (appellant): People's Government. Heping District, Tianjin

**Dispute Resolving Institutions:**

First Instance: Tianjin No. 1 Intermediate People's Court

Court of appeal (final decision): Superior People's Court of Tianjin

**Date:**

Final decision: 6 June 1997

**Summary of Facts:**

The plaintiff was an individual proprietor with all necessary licenses. One of his license, License of Temporary Occupation of Road was valid from 1 Jan 1 1996 till 31 Dec 1996. On Oct 1996, the defendant made an administrative decision ("the

decision at issue”) to clear up the plaintiff’s stall. The plaintiff sued on the basis that the defendant infringed on his managerial authority.

**Issues:**

Whether the administrative decision at issue made by the defendant was proper?

**Decision:**

The decision at issue quashed.

**Reason:**

The defendant was *ultra vires* in making the decision at issue.

**Appeal and Basis:**

The defendant appealed. They argued that they did not demand the Appellee to stop the operation.

The Appellee argued that but for appellant’s oral notice, he would not cease the operation and would not suffer the economic loss.

**Decision on Appeal (with Reasons):**

Appeal dismissed. Although the appellant provided new regulation as the basis for their administrative act, they failed to provide the legislative authorities before the



first instance. Based on these, according to *Administrative Procedural Law of the PRC* (article 32, 54 (2)), the administrative act shall be withdrawn. The new regulation the appellant provided at the second instance could not be regarded as the legislative authorities of the adjudication.

\*

**Mr. Sun Liangren v Administrative Commission of High Technology Development  
Areas, People's Government of Chongqin (2001)**

**Source:**

Renmin Fayuan Anli Xuan (Cases Selection of People's Court), Vol. 4, 2001  
(Cumulatively Vol. 38)

**Parties:**

Plaintiff (appellant): Mr. Liangren Sun

Defendant (Appellee): Administrative Commission of High Technology Development

Areas, People's Government of Chongqin

**Dispute Resolving Institutions:**

First Instance Court: Chongqin No. 1 Intermediate People's Court

Court of Appeal (final decision): Superior People's Court of Chongqin

**Date:**

Final decision: 21 march 2001

**Summary of Facts:**

The defendant defined the enterprise in which the plaintiff worked as a collective-owned enterprise. The plaintiff objected and sued, arguing that the enterprise belonged to the private enterprise.

**Issues:**

Whether the defendant's decision that the enterprise at issue was collective-owned was proper?

**Decision:**

The decision at issue quashed. The defendant shall make a new administrative decision.

**Reason:**

It was correct that the defendant defined the enterprise at issue was collective-owned according to *Provisional Measures on How to Define the Property Right of Collectively-owned Enterprises in Cities and Towns*. However, the defendant failed to show the applicable law on the written decision, which, therefore, shall be remade.

**Appeal and Basis:**

The plaintiff appealed on the basis that the enterprise at issue was collective-owned on the face while it was private actually.

**Decision on Appeal (with Reasons):**

The appeal dismissed. The reasons adopted by the first instance court affirmed.

\*

**Mr. Chuanlin Tu v Industrial and Commercial Administrative Bureau, Qinghuai**

**District, Nanjing, Jiandsu Province** (1996)

**Source:**

State Information Center: State Regulations Database

Number: 115611998025

Issued by: Applied Law Institute of the PRC, Supreme Court of the PRC

**Parties:**

Plaintiff: Mr. Chuanlin Tu

Defendant: Industrial and Commercial Administrative Bureau, Qinghuai District,  
Nanjing, Jiangsu Province

**Dispute Resolving Institutions:**

Administrative reconsideration organ: Industrial and Commercial Administrative  
Bureau, Nanjing, Jiangsu Province  
Court: Nanjing Intermediate People's Court

**Date:**

30 Oct 1996

**Summary of Facts:**

The defendant, finding that the plaintiff carried tobacco without license, decided that the plaintiff violated *State Council: Provisional Regulations of Administrative Penalties on Speculation and Profiteering* (article 3 (1) (i)) and made the decision of administrative penalties ("decision at issue"). The plaintiff applied to the Industrial and Commercial Administrative Bureau, Nanjing, Jiangsu Province for administrative reconsideration, which maintained the decision at issue. The plaintiff sued.

**Issues:**

Whether the decision at issue was made properly?

**Decision:**

The decision at issue quashed.

**Reason:**

It was wrong for the defendant to apply the *State Council: Provisional Regulations of Administrative Penalties on Speculation and Profiteering*. The plaintiff's behavior shall be governed by the *Law of the PRC on Tobacco Monopoly* (article 38). The former law belongs to administrative regulation while the latter is law. The legal validity of the former is lower than the latter. In the event of legislative conflicts arising between the law and administrative regulations, the law shall be abided by.