

EL COMERCIO CON CHINA

Oportunidades empresariales, incertidumbres jurídicas

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Prólogo

JAVIER SERRA GUEVARA*

Las relaciones económicas y comerciales entre España y China son, como lo es la emergencia de China como gran potencia económica internacional, asuntos de gran actualidad: Pero ni lo uno ni lo otro constituyen realmente novedades, hasta ahora inéditas, de este siglo XXI.

Así, cuando diferentes analistas occidentales realizan comparaciones internacionales (generalmente en términos de Paridad de Poder de Compra) que sitúan a la economía china como la tercera del mundo, y proyecciones a futuro que prevén que se coloque en primer lugar, superando a Estados Unidos, en un momento variable de las próximas décadas, pocas veces se nos recuerda que esa posición como mayor economía del mundo no es nueva para China. Efectivamente, y aunque, como es obvio, los datos de que disponemos sobre épocas anteriores no ofrecen la precisión estadística que tenemos en la actualidad, los estudios realizados presentan una realidad en la que China ya tuvo ese estatus de primera economía mundial durante varios siglos, y hasta más o menos el siglo XVIII. A partir de ahí, entró en una fase de decadencia interna y conflictos externos que la redujeron al papel de comparsa en el concierto internacional, papel del que ahora resurge para reclamar su antiguo rol protagonista. De hecho, algunas proyecciones para 2015, según las cuales para entonces China generaría el 27% de la riqueza mundial, en términos de Paridad de Poder de Compra, coinciden, casi con exactitud, con la estimación de su participación hace 2000 años, que algunos analistas establecen en el 26%. Esto, que, como indicaba antes, pocas veces se recuerda en Occidente, lo tienen clarísimo en China, con su acreditada visión a largo plazo, y conviene que los demás lo tengamos en cuenta.

De la misma manera, las relaciones económicas y comerciales entre España y China vienen de antaño. No se trata de recordar el comercio chino con el área mediterránea a través de las rutas de la seda (la terrestre y la marítima), ya desde antes de nuestra era, sino simplemente acudir a un pasado más próximo y más concreto. Así, desde el siglo XVI, ya existen relatos de experiencias españolas en China, que fueron de entre los pioneros en Occidente, y de entonces datan los testimonios más antiguos de que disponemos sobre el entorno de negocios en China, la capacidad industrial y comercial de sus habitantes, o las oportuni-

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4. China's Participation in the World Trade Organization: Trade in Goods, Services, Intellectual Property Rights and Transparency Issues

PAOLO DAVIDE FARAH*/ ELENA CIMA**

SUMMARY: I. INTRODUCTION. II. TRADE IN GOODS. 1. China's Background. 2. The General Agreement on Tariffs and Trade. A. *Market Access for goods*. B. *Agriculture*. C. *Subsidies*. D. *Technical Barriers to Trade*. III. TRADE IN SERVICES. 1. The General Agreement on Trade in Services. 2. Specific Sectors and China's Background. A. *Financial Services*. B. *Banking Services*. C. *Insurance Services*. IV. INTELLECTUAL PROPERTY RIGHTS. 1. China's Background. 2. The TRIPs Agreement. A. *Substantive Rules*. B. *Enforcement*. 3. US-China Dispute. V. CHINA'S COMPLIANCE WITH TRANSPARENCY COMMITMENTS. 1. Uniform Administration Rule. 2. Publication, Availability of Laws, Fair Procedure and the Creation of an Enquiry Point. VI. CONCLUSIONS¹.

I. INTRODUCTION

China's transition from a planned economy to the so-called "socialist market economy" started at the end of 1978, with a process that has gradually changed the trajectory of development previously adopted. In the first thirty years of the PRC (1949-1979) development policy was modelled on the Soviet planned economy, but with specific characteristics (Chinese path to socialism). Peculiar aspects of Maoist strategy were the emphasis on economic self-sufficiency at bo-

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¹ The article is the result of the joint research of the authors. Paolo D. Farah prepared chapter I, II.1., II.2., II.2.A, II.2.C., III.1., IV.1., IV.2, IV.2.B., V.2., VI. and Elena Cima prepared paragraph II.2.B., II.2.D., III.2., IV.2.A., IV.3., V.1.

th a national and local level and, as a consequence, the emphasis on the ability of exploiting human and technical resources through collective mobilization and organization. With the goal of the "Four Modernizations" (industry, agriculture, national defence and science & technology)², a pragmatic approach was adopted, where "economic development becomes a priority over class struggle"³. This new strategy led to three transformations in China's economic development: the transformation from a centrally-planned to a market-oriented economy; the transformation from an agricultural-based to a manufacturing-and-services-based economy; and the transformation from a closed to an open economy. The ensuing trade liberalization reforms included opening up an export-oriented processing segment, implementing a unilateral trade liberalization process and joining the World Trade Organization (WTO). Further actions concerned the opening to foreign investment, through the creation of four "Special Economic Zones" (SEZ), ruled by three main guidelines: creation of structures mainly designed to attract and employ foreign capital, arrangement of economic activities through Joint-ventures between Chinese and foreign companies, production of goods mainly addressed to foreign markets export. Since the beginning of the reforms, the Chinese economy has been expanding dramatically with annual GDP growth of 9%. The expansion of China's participation in international trade has been one of the most outstanding features of the country's economic development.

Before China's accession to the WTO, the World Trade Organization was only partially a worldwide trade organization⁴. The road to the signature of the final

² In October 1978, Deng Xiaoping said that: 'China cannot develop by closing its door, sticking to the beaten track and being self-complacent. [...] It will be quite difficult for us to realize the four modernizations, [without] learning from other countries and we must obtain a great deal of foreign assistance'. Deng Xiaoping was the first one to propose this concept on October 1978, during his speech to a press delegation from the Federal Republic of Germany. See: <http://www.peopledaily.com.cn/english/dengxp/contents2.html>. This position was confirmed by the December 1978 Third Plenary Session of the Communist Party of China's Eleventh Central Committee. The focus of the party and state's work has officially shifted from class struggle to modernization. See "Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China", XH (23 December 1978), in *Foreign Broadcast Information Service, Daily Report: People's Republic of China* at E4, E10 (26 December 1978) as quoted in F. H. Foster, "Codification in Post-Mao China", *American Journal of Comparative Law*, vol. 30, 1982, pp. 395.

³ U. Killion, "Building up China's Constitution: Culture, Marxism, and the WTO Rules", *Loyola of Los Angeles Law Review*, vol. 41, 2008, pp. 563-566; R. Peerenboom, 'Resistance, Revision and Retrenchment in the Transition to a Competitive Market Economy in China', *La Trobe University School of Law Legal Studies Working Paper Series*, Number 2008/8, September 2008, pp. 1-24. Available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265114.

⁴ The China's WTO accession documents are: the Protocol of China's accession to the WTO (WT/L/432), the Working Party Report (WT/ACC/CHN/49) and the Annexes containing market access commitments (WT/ACC/CHN/49/Add.2). Regarding the general WTO's accession procedures, see P. Picone/ A. Ligustro, *Diritto dell'organizzazione mondiale del commercio*, Cedam, Padova 2002, pp. 51-61 and on China's accession to the WTO pp. 57-59; see also G. Adinol-

agreement of accession was long, but these difficulties pale in comparison to those that have not yet been tackled in terms of achieving real implementation of its provisions throughout the People's Republic of China (PRC)⁵. China's accession surely presents opportunities in world trade, but also poses the challenge of integrating a market with strong structural, behavioural and cultural constraints. A great number of analysts have been arguing that not only will China's integration be long and difficult, but also could damage the organization. As any international agreement, also the participation to the WTO could involve China in state responsibility under the general principle "*pacta sunt servanda*" in case of non-compliance to its obligations. The fundamental legal principle of *pacta sunt servanda* clearly applies in the context of international negotiations and it refers to the obligation to "keeping one's promises"⁶. In the opinion of the authors, the most relevant obstacle to an effective implementation of the WTO and bilateral agreements is the problem of "internal barriers"⁷ that have distinctive features because of China's unique historical background including the communist period, long-standing imperial traditions and feudalism. Moreover, the lack of stable rules to define relations between the central authority and the increasingly powerful local entities undermines the good intentions of the Chinese central Government.

During the negotiations, the difficulties of Chinese government to ensure compliance with the WTO requirements and conditions were already clear. It

fi, *L'organizzazione mondiale del commercio. Profili istituzionali e normativi*, Cedam, Padova 2001, pp. 105-122.

⁵ P. D. Farah, 'Five Years of China's WTO Membership. EU and US Perspectives about China's Compliance with Transparency Commitments and the Transitional Review Mechanism', *Legal Issues of Economic Integration*, Vol. 33, No. 3, 2006, pp. 263-304. Available also online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916768; D. C. Clarke, 'Legislating for a Market Economy in China', *China Quarterly*, No. 191, September 2007, pp. 567-585; Ling-Ling He/ Razeen Sappideen, 'Reflections on China's WTO Accession Commitments and Their Observance', *Journal of World Trade*, Vol. 43, No. 4, August 2009, pp. 847-871.

⁶ For further analysis about the principle of "*pacta sunt servanda*" and the voluntary element behind that, see T. Treves, *Diritto internazionale. Problemi fondamentali*, Giuffrè Editore, Milano 2005, pp. 359-363; Nguyen Quoc Dinh/ Alain Pellet/ Patrick Daillier, *Droit International Public*, L.G.D.J., Paris, 5ème édition, 1994, p. 54. Regarding the Chinese position on regionalism and multilateralism, see U. Killion, 'Chinese Regionalism and the 2004 ASEAN-China Accord: the WTO and Legalized Trade Distortion', *North Carolina Journal of International Law and Commercial Regulation*, Vol. 31, No. 1, Fall 2005, pp. 1-64; F. Snyder, 'China, Regional Trade Agreements and WTO Law', *Journal of World Trade*, Vol. 43, No. 1, 2009, pp. 1-57; JiangYu Wang, 'China's Regional Trade Agreement (RTA) Approach: the Law, the Geopolitics, and the Impact on The Multilateral Trading System', *Singapore Year Book of International Law*, Vol. 8, 2004, pp. 119-147. Available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=559382.

⁷ L. Biukovic, 'Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan', *Journal of International Economic Law*, Vol. 11, No. 4, 2008, pp. 803-825; P. B. Potter, 'China and the International Legal System Challenges of Participation', *China Quarterly*, No. 191, September 2007, pp. 699-715; see generally P. B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture*, Routledge, London 2001.

was spreading among all member states, US and EU especially, the awareness of the market situation and of the need for a deep and strong reform of Chinese legal, economical and financial order, in order to ensure long-term-period WTO functioning. For these reasons, beside the ordinary WTO Trade Policy Review Mechanism (TPRM), a special "precautionary" instrument, the Transitional Review Mechanism (TRM)⁸, was included in Section 18 of the Protocol of China's accession to the WTO, as requested by the US and supported by the EU. Both the US and the EU were pinning a great part of their hopes and financial support on the good performance of the TRM. The TRM is more comprehensive than the TPRM. The TRM has the objective of monitoring and enforcement of implementation of WTO commitments (which TPRM does not), promoting transparency and exchange of information in trade relations with China. On the other side, the TPRM final report by the WTO secretariat does not need consensus approval of the WTO members. The review under TRM started to take place after accession and would continue each year for eight years with a final review in the tenth year or at a earlier date decided by the General Council. This mechanism requires that China provides WTO members with specific information, such as economic data, economic policies, policies affecting trade in goods, policies affecting trade in services, the trade-related intellectual property regime and specific questions in the context of the TRM. These questions are different than those required by the general notification requirement for WTO members. The examination of this information is conducted by 16 subsidiary bodies and at the end of the year at the general council meeting. The TRM grants WTO members with additional multilateral forums to ask the Chinese Government for clarification and to improve mutual understanding in the field of China's accession. At the 2002 TRM, it was China's first year of WTO membership and China had to overcome its lack of experience, resources and a lack of sufficient time for preparation⁹. At the TRM in 2005, 2006, 2007 and 2008 at the TRM, the EU and the US, while appreciating the efforts made by China, also had to recognize the necessity of further progress on WTO commitments related to several specific fields, such as transparency, banking, telecommunications, automobile, construction, intellectual property rights, agriculture sectors. More specifically, problems have been occurred and examined in the wholesale services such as the importation and distribution restrictions applicable to copyright intensive

⁸ P. D. Farah, 'Five Years...' (note 5), pp. 291-298; P. D. Farah, 'L'adesione della Cina all'Organizzazione mondiale del commercio: come conciliare cultura e diritto', *Mondo Chinese*, Anno XXXIII, Vol. 124, No. 3, Luglio - Settembre 2005, pp. 34-42; P. L. Hsieh, 'China-United States Trade Negotiations and Disputes: the WTO and Beyond', *Asian Journal of WTO and International Health Law and Policy*, Vol. 4, No. 2, 2009, pp. 369-399.

⁹ Oral Statement of the representative of the European Communities, *Minutes of Meeting held on 10-12 and 20 December 2002*, WTO General Council, China Transitional Review under Section 18.2 of the Protocol of Accession to the WTO Agreement, WT/GC/M/77, Geneva, 13 February 2003 at paragraph 34, p. 10.

products (books, newspapers, journals, theatrical films, DVDs and music) and to crude oil and processed oil; in the retailing services such as licensing processes; the urban commercial network plans; in the direct selling services; in the customs valuations (such as valuation determinations), in the importing licensing; in the China's Conduct of Antidumping Investigations and in the others legislations¹⁰.

From the Chinese general behaviour in the framework of TRM committees at the WTO though, it seems that China does not accept this mechanism. China considers it discriminatory, because it is applicable just to China¹¹. But the negotiations for the accession of a new country to the WTO often establish more commitments than those included in the multilateral agreements (WTO plus obligation)¹². China negotiated and signed the final agreement which had also provided the inclusion of the TRM. However China's Protocol of Accession to the WTO does not specify all the TRM procedural rules, so China has had some discretion for providing timely answers to the questions in the TRM subcommittees. Without the introduction of supplementary procedural rules to improve the timelines of Chinese answers, the TRM procedures cannot work properly. In fact, China is constantly challenging them, since such procedures were not in the commitments and appeared to China as an attempt to renegotiate and add to the terms of its accession¹³. During the last years, China has lowered the expectations of some of the WTO members for the outcome of the TRM¹⁴. It follows that the WTO members' participation in the review had declined¹⁵ in favour

¹⁰ United States Trade Representative, *2008 Report to Congress on China's WTO Compliance*, December 2008, Washington DC 2008, pp. 20 and ff. Available: http://www.ustr.gov/sites/default/files/asset_upload_file192_15258.pdf; see generally also United States Government Accountability Office (GAO), Report to the Chairman, Committee on Finance, U.S. Senate, *US-China Trade: USTR's China Compliance Reports and Plans Could Be Improved*, GAO-08-405, April 2008, Washington DC 2008. See also C. Tiefer, 'Sino 301: How Congress Can Effectively Review Relations with China after WTO Accession', *Cornell International Law Journal*, Vol. 34, 2001, pp. 55-93.

¹¹ United States Government Accountability Office (GAO), *Report to Congressional Committees: World Trade Organization, First Year US Efforts to Monitor China's Compliance*, GAO-03-461, 31 March 2003, Washington DC 2003, p. 27.

¹² J. Ya Qin, 'WTO-Plus Obligation and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol', *Journal of World Trade*, Vol. 37, No. 3 2003, p. 491; C. Dordi, *La discriminazione commerciale nel diritto internazionale*, Giuffrè, Milano 2002, pp. 306-310.

¹³ United States Government Accountability Office (GAO), *Report to Congressional Committees: World Trade Organization, First Year US Efforts to Monitor China's Compliance*, cit., p. 28.

¹⁴ United States Trade Representative, *2008 Report...* (note 10), pp. 20 and ff.; J. Walton, 'WTO: Year 4', *The China Business Review*, No. 32, January-February 2005, pp. 24-34. Congressional-Executive Commission on China, *2004 Annual Report*, One Hundred Eighth Congress, Second Session, 5th October 2004, US Government Printing Office, Washington DC 2004, p. 85. Available: <http://www.cecc.gov/pages/annualRpt/annualRpt04/CECCannRpt2004.pdf>.

¹⁵ T. P. Stewart, *China in the WTO - Year 3*, A Research Report Prepared for the US-China Economic and Security Commission, 21 January 2005, Washington DC 2005, p. 96.

of bilateral negotiations¹⁶ which result in the best means to overcome many problems in China's WTO compliance. According to some scholars, the general Chinese behaviour not in favour of the TRM could be explained with reference to the Chinese cultural tradition, where the best way to resolve the disputes is through mediation and conciliation¹⁷. The multilateral system can more easily disclose unpredictable problems or risks. It is more difficult to foresee the reactions of each part in a multilateral forum than those of one counterpart in a bilateral negotiation.

As it has already been stressed, China's legal system was not totally and entirely ready for the accession, since most of its laws and regulations were not fully consistent with WTO provisions. Moreover, the Uruguay Round Negotiation is a Single-Undertaking, which means that every single multilateral agreement is part of a whole and indivisible package and cannot be agreed separately. During the negotiations and after the accession China has started a massive process of amendment of its domestic laws and regulations regarding all the sectors covered by WTO rules. As any new member of the WTO, China needed to reform the main sectors of its legislation on: trade in goods, trade in services, trade-related intellectual property rights and start to deeply apply the more general WTO transparency principle¹⁸.

II. TRADE IN GOODS

1. China's Background

The accession to the WTO and the participation in the organization has the objective of opening the market to all the others WTO members. China's entry into the WTO means that China will gradually remove all customs barriers to products from all other member countries of WTO, and vice versa. On the one hand China has a huge consumption of foreign products, on the other it is a leading industrial power in international competition. For this reason, China's Protocol also includes several mechanisms designed to prevent or remedy injury

¹⁶ S. Napel, *Bilateral Bargaining: Theory and Applications*, Springer, Berlin 2002.

¹⁷ S. Lubman, *Bird in a Cage: Legal Reform in China after Mao*, Stanford University Press, Stanford, California, 1999, pp. 40-70 and pp. 217-249; J. A. Cohen, 'Chinese Mediation in the Eye of Modernization', *California Law Review*, No. 54, 1966; D. C. Clarke, 'Dispute Resolution in China', *Journal of Chinese Law*, No. 5, 1991, in particular pp. 270-277.

¹⁸ With reference to the transparency requirements and China, L. Biukovic, 'Selective...' (note 7), pp. 803-825; L. Choukroune, 'Chine et OMC: l'état de droit par l'ouverture au commerce international?', *Revue de droit des affaires internationales*, No. 6, 2002, pp. 666-668; L. Choukroune, 'L'internationalisation du droit chinois des affaires: une première évaluation des conséquences juridiques de l'accession de la Chine à l'OMC', *Revue de droit des affaires internationales*, No. 5, 2003, pp. 513-520.

that other WTO members', whose industries and workers might experience based on import surges or unfair trade practices.

Thus, during the process of liberalization towards Chinese products, in order to make the process of economical globalization gradual and less traumatic, the protocol ratified by China provides for a period of 12 years during which the member countries of WTO may adopt transitional safeguard measures to protect specific economical sectors that can come into serious crisis as a result of the sudden opening to Chinese competition (the so-called TPSSM)¹⁹, a special textile safeguard (available for 7 years)²⁰ and the continued ability to utilize a special non-market economy methodology for measuring dumping in antidumping cases against Chinese companies (available for 15 years)²¹. Regarding the Transitional Product-Specific Safeguard Mechanism, its functioning is stated in Section 16:

'In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution [...]. If consultations do not lead to an agreement between China and the WTO Member concerned within 60 days of the receipt of a request for consultations, the WTO Member affected shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption²²'.

¹⁹ Lingliang Zeng, 'The Legal Effectiveness and Appropriateness of Transitional Product-Specific Safeguard Mechanism against China', in H. Gao/ D. Lewis (eds.), *China's Participation in the WTO*, Cameron May, London 2005, p. 97 and ff.

²⁰ On the impact of globalization on textiles sector, L. Curran, 'Unpicking the Textiles Trade - The Impact of Liberalization on the Global Textiles Sector', *Global Trade and Customs Journal*, Volume 3, Issue 7/8, 2008, pp. 261-274; E. Baroncini, 'Il regime dei tessili cinesi attraverso il treaty making power della Commissione e oltre: gli Accordi di Shanghai e Pechino e gli strumenti di trasparenza dei mercati per un'equa concorrenza negli scambi UE/Cina', *Il diritto dell'Unione europea*, Anno XI Fasc. 4 - 2006, pp. 677-727.

²¹ S. Nardelli, 'Anti-dumping' cinese e "Anti-dumping" CE a confronto: una minaccia per le imprese comunitarie', *Diritto del commercio internazionale*, 2006, Vol. 20, No. 2, pp. 369-398; P. Farah/ R. Soprano, 'Dumping e antidumping. Una guida per le imprese di fronte alle sfide della globalizzazione', *Il Sole 24 Ore*, Novembre 2009 Milano, pp. XXIV-180 (forthcoming); R. Soprano, 'La rilevanza dei precedenti giurisprudenziali OMC come possibile rimedio al problema dello "zeroing"', *Diritto del commercio internazionale*, 2, 2008, pp. 411-436.

²² Section 16 paragraph 1 and 3 of the Protocol of accession of the People's Republic of China to the WTO, Document WTL/432. Available: www.wto.org. In November 2001, during the fourth WTO ministerial conference in Doha, the text of the agreement for China's entry into the WTO was approved by consensus, so China has been an official member of the WTO since 11th December 2001. For a further description of the GATT/WTO negotiations, F. Algeri, 'EU Economic Relations with China: An Institutional Perspective', *China Quarterly*, No. 169, March 2002, pp. 73-77.

2. *The General Agreement on Tariffs and Trade*

The General Agreement on Tariffs and Trade (GATT) is the first historic attempt to legally regulate trade relations between states on a multilateral basis²³. International trade has experienced three stages: the first one, which can be called "classical liberalism", running from the industrial revolution to the First World War, was characterized by governmental abstention from any intervention in economical activities, which were then exclusively pursued privately, low trade barriers and no international trade regulations. The second stage, known as "protectionism", typical of the years between the two world wars, was supported by the economy policy of restraining trade between states through a wide variety of restrictive government regulations, and therefore implied higher and stronger barriers to trade. The third stage began as a reaction to the damage caused by protectionism and is based on the need to regulate international trade in order to achieve simplification and rationalization. It was immediately clear that this goal couldn't be achieved by assuming state cooperation in the UN, since the UN provisions in this field are not far-reaching enough and are not able to influence state relations and conduct. There the GATT came in 1947. The original intention was to create a third institution to add to those created with the Bretton Woods agreement, World Bank and International Monetary Fund, and to be called "International Trade Organization" (ITO). The ITO Charter, signed at Havana in March 1948, however, never entered into force, since it was never approved by the US Congress. As a consequence, at the end of the first round of negotiations the ITO was not formed. Nevertheless, until 1995, GATT was the only legally recognized text, expanded by plurilateral agreements and eight years of negotiations which led to the Uruguay Round which ended in 1995 with the creation of the World Trade Organization (WTO), which came into force on January 1, 1995, and replaced GATT as an international organization. The WTO is meant to "provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements"²⁴ and to achieve higher standards of living, full employment, growth of income and demand, expansion of trade and production of goods and services, trying to find a sort of balance between commercial and environmental values, as stated in the preamble of both the GATT and the WTO settlement agreement. In order to reach these goals it has to ensure that "trade flows as smoothly, predictably and freely as possible", and this is possible through the creation of a platform for negotiation of trade, the achievement of full equality between states and the removal of trade barriers. The word "removal" is not entirely accurate, because

²³ P. Picone/ A. Ligustro, *Diritto dell'organizzazione mondiale del commercio*, Cedam, Padova 2002.

²⁴ WTO, *Agreement establishing the World Trade Organization*, Uruguay Round, Preamble. Available: http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

se the aim is to have these barriers lowered and made more transparent and predictable; as a matter of fact customs duties are allowed (unlike quantitative restrictions which are strictly prohibited), because in the presence of a customs duty the price of goods is growing but it is still possible to export, since it makes movement of goods more expensive without preventing it. Lowering trade barriers is one of the major ways of encouraging trade and creating a free trade area. GATT is based on the "Most Favoured Nation" and "National Treatment principles" and its basic purpose is to "constraint governments from imposing or continuing a variety of measures that restrain or distort international trade"²⁵. GATT is not a single agreement but a series of over two hundred agreements and protocols.

As far as trade in goods is concerned, under the GATT, there are four key sectors in which where China had to introduce massive reforms and changes to meet WTO requirements: Market access, the agricultural sector and subsidies.

A. Market Access for Goods

a. *Tariffs*²⁶

Tariffs can be defined as fiscal measures imposed on imported goods in a specific country, which represent one of the most common ways in which the State intervenes in the economy. They lead to two major economic goals: to create revenue for the government and protect domestic producers from foreign competition. When especially high, they can even have the effect of cutting competitors off the market and consequently act as total bans. Uruguay Round, as previous GATT negotiations, lowered tariffs in many countries in the world.

In China, import tariff rates are assessed using the Harmonised System of Classification Codes. There are two different types of tariffs: the most-favoured-nation rates which apply to other WTO members, and the General rates which, on the other hand, apply to those countries which are neither WTO members nor involved in bilateral agreements with China. Import tariffs also varies regarding to the features and the final use of the considered product. China agreed to reduce its tariffs on industrial products down to 8.9% and to maintain this trend in the future. China's tariff reduction is actually the continuation of a wider process which started back in the 90s. Reforms undertaken before WTO entry had already introduced several import tariff exemptions, which explains why

²⁵ J. H. Jackson/ W. J. Davey/ A. O. Sykes, *Legal Problems of International Economic Relations*, 5th Edition, Thomson West, 2008, p. 215.

²⁶ D. A. Sumner/ V. H. Smith/ C. P. Rosson, 'Tariff and Non-Tariff Barriers to Trade', in J. L. Outlaw/ E. G. Smith (eds.), *The 2002 Farm Bill: policy options and consequences*, Farm Foundation, Oak Brook IL 2001, pp. 139-143.

the majority of Chinese imports were not subject to tariffs before 2001²⁷. Despite these reductions, though, China's tariff rate is still high compared to other developing countries in the WTO. Moreover, China adopted a tariff-exemption policy towards imported equipment and machinery useful to scientific research in order to enhance and promote technological development.

b. Non-Tariff Barriers

Tariffs are the preferred trade barrier under the GATT rules while quotas and other non tariff-barriers (NTBs) are disfavoured²⁸. Article 11 GATT establishes as follows:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

NTBs can be described as non-tax measures adopted in international trade relations in order to narrow the amount of imported commodities. They include quotas, which specify the quantity of a specific commodity that a country allows to be imported during a given time period²⁹, import licences, subsidies to domestic production and technical regulations.

As far as import restrictions are concerned, Chinese authorities divide imports in three categories: *counterfeited goods*, which cannot be imported, *restricted goods* which require an import license or a quota, and *permitted goods*, the broadest category. The Chinese Government periodically issues the so called "Public Information Notices" to inform of current category of goods and policies but none of them are translated in English or in any other foreign language which creates serious problems to foreign exporters. In 2007, to meet the requirements set out in Article XI GATT and in the WTO Agreement on Import Licensing Procedures, China, adding a new Article to the FTL, strongly lowered the import licensing requirements on 338 categories of products, requiring Chinese importers to apply for an "automatic import license". Therefore it is ensured that the Chinese licensing system "will not be used for purposes of quantitative control of the imports of restricted goods"³⁰.

²⁷ T. Rumbaugh/ N. Blancher, 'China: International Trade and WTO Accession', *IMF Working Paper*, March 2004, pp. 7-8.

²⁸ J. H. Jackson/ W. J. Davey/ A. O. Sykes, *Legal Problems...* (note 25), p. 423.

²⁹ J. H. Jackson/ W. J. Davey/ A. O. Sykes, *Legal Problems...* (note 25), pp. 373-374.

³⁰ Ling-Ling He/ Razeen Sappideen, 'Reflections...' (note 5), pp. 854-855.

B. Agriculture

Agriculture has been one of the main and most controversial issues during the Doha Round of negotiations³¹. Paragraph 13 of the Doha Ministerial Declaration adopted on November 14, 2001, states that member states should commit themselves to comprehensive negotiations aimed at "substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support"³² in the agricultural sector. The recent agriculture negotiations have failed due to two main reasons: countries are pursuing different objectives and serving different interests³³, and the process itself tends to exclude and marginalize the concerns of developing countries.

As a WTO member, China must fulfill the WTO Agreements on Agriculture (AoA), whose objective is to improve market access lowering tariffs and eliminating NTBs, narrowing domestic support for agriculture production and reducing export subsidies³⁴. China is then asked to meet the requirements set out in the Agreement on Sanitary and Phytosanitary Measures (SPS). Chinese agriculture faced severe risks and challenges by reducing or eliminating trade barriers and opening the domestic market³⁵. China has agreed to establish a cap of 8.5% subsidies for agricultural products, end export subsidies, reduce tariff barriers and non-tariff barriers (licenses, quotas, technical barriers) end price controls and use market forces. Furthermore, China agreed to liberalize the agricultural-services market, to grant trading rights on agricultural products to both domestic and foreign enterprises and to also grant them an equal treatment, consistently with the non-discrimination principle³⁶.

As far as tariffs are concerned, their reduction in the agriculture sector starts far before the WTO entry, during a series of reforms undertaken in 1979, when China's tariff rate was lower than the average of most developing countries and

³¹ Giulio Peroni, *Il commercio internazionale dei prodotti agricoli nell'accordo WTO e nella giurisprudenza del Dispute Settlement Body*, Giuffrè Editore, Milano 2005, pp. XII-392.

³² WTO Ministerial Conference, Fourth Session, Doha Declaration, Adopted on 14 November 2001, WT/MIN(01)/DEC/1, par. 13, Doha, 9-14 November 2001. Available: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf.

³³ R. Rena, 'WTO and Agriculture Trade Liberalization-a Focus on China', *Madhya Pradesh Journal of Social Sciences*, Vol. 11, No.1, January-June 2006, p. 73.

³⁴ H. Dequiang/ A. Tujan Jr. (eds.), *China and the WTO: Implications and New Challenges of China's Accession to the WTO*, Proceedings of the 4th Annual Conference of the Asia-Pacific Research Network, November 4-6, 2002, International Seaman's Hotel, Guangzhou, P.R.C., 2003, pp. 23-39.

³⁵ R. Rena, "WTO..." (note 33) p. 76.

³⁶ R. Rena, "WTO..." (note 33) p. 76.

even below some industrial economies. After the accession this process continued significantly³⁷.

C. Subsidies

The basic WTO principles regarding subsidies are incorporated in the Subsidies and Countervailing Measures Agreement (SCM) and address two issues: First of all, they narrow the freedom of Governments in the use of subsidies in their own domestic economy; secondly, they regulate the use of countervailing measures so that they not turn into trade barriers themselves³⁸.

The object and purpose of the SCM Agreement is "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, at the same time, recognizing the right of Members to use such measures under certain conditions"³⁹. Unlike its predecessor, the agreement contains a definition of subsidy and introduces the concept of "specific" subsidies which only would be subject to the disciplines set out in the agreement.

Three subsidies' effects have been identified: subsidies may lead to displacement of imports in the subsidizing country, subsidized products may displace otherwise competitive domestic products in the importing country and subsidies may cause displacement of otherwise competitive exports from third countries⁴⁰. The agreement establishes three categories of subsidies: prohibited actionable and non-actionable.

Subsidies have figured prominently in Chinese industrial policy and could be increasingly problematic as China's share of world trade grows⁴¹.

China makes use of direct transfers and non-tax subsidies. These are provided for poverty alleviation; development of small and medium-sized enterprises (SMEs); and certain agriculture related activities. Two of China's policy banks,

the Agricultural Development Bank of China (ADBC) and the Export-Import Bank of China (EXIM Bank) continue to provide subsidized loans. The ADBC is responsible for, inter alia: supporting the construction of a national reserve system for grain, cotton, and edible oil; providing funds for the purchase of grain and cotton; facilitating the processing of agricultural products; and promoting agricultural industrialization as well as the development of agriculture and the rural economy. Direct assistance for farmers has been introduced since 2004 and in addition, with the increasing regional disparities, several regional development programmes have been adopted to facilitate the development of western regions, and some poverty-stricken areas⁴².

D. Technical Barriers to Trade⁴³

The TBT Agreement sets specific provisions as far as technical barriers to trade such as standards, certifications and other technical requirements are concerned. Chinese legislation on standards includes mainly the Standardization Law and the Regulations for the Implementation of the Standardization Law. The Standardization Administration of China (SAC), under the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) administers standardization work in China. China has gradually increased the alignment of its national standards with international norms. Between April 2004 and September 2005, China reviewed all its national standards (around 21,000). It was decided that 2,513 standards would be abolished, and 9,536 would be revised by 2008. Moreover, in addition to national standards, there are also sectoral, local, and enterprise standards.

III. TRADE IN SERVICES

1. The General Agreement on Trade in Services

Despite its importance, trade in services was not originally subject to multi-lateral negotiations and agreements. It was only with the Uruguay Round that a specific agreement, the General Agreement on Trade in Services (GATS) dealt with this subject. The GATS does not provide a definition of "services" but it is commonly considered applying to "any service in any sector, except services supplied in the exercise of governmental authority"⁴⁴, which are those supplied

³⁷ D. H. Rosen/ S. Rozelle/ J. Huang (eds.), *Roots of Competitiveness: China's Evolving Agriculture Interests*, Institute for International Economics Development, United Book Press, Washington DC July 2004, chapter 2.

³⁸ P. Van Den Bossche. *The Law and Policy of the World Trade Organization. Text, Cases and Materials*, Cambridge University Press, New York 2005, pp. 551-593; P. Picone/ A. Ligustro. *Diritto dell'Organizzazione mondiale del commercio*, Cedam, Padova 2002, pp. 229-267; D. Luff, *Le droit de l'Organisation mondiale du commerce. Analyse critique*, Bruylant, Bruxelles 2004, pp. 375-512; M. Benitah. *The Law of Subsidies under the GATT/WTO System*, Kluwer Law International, London 2001, pp. 1-353; K. Adamantopoulos and M. Pereyra-Friedrichsen. *EU Anti-Subsidy Law & Practice*. Sweet & Maxwell, London 2007; Alberto Santa Maria. *Competition and State Aid - An Analysis of the EC Practice*. International Competition Law Series, Kluwer Law International, Alphen aan den Rijn 2007

³⁹ J. Magnus, 'Subsidies in the Context of China's WTO Accession', Paper presented at the ABA Program, *What's New on Subsidies?*, June 6, 2000.

⁴⁰ J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, The MIT Press, 2nd ed., Cambridge, MA 1997, pp. 280-281.

⁴¹ J. Magnus, 'Subsidies...' (note 39).

⁴² Trade Policy Review Body - Trade Policy Review - Report by the Secretariat - China - Revision, part 2.

⁴³ Trade Policy Review Body - Trade Policy Review - Report by the Secretariat - China - Revision, part 4.

⁴⁴ WTO-GATS Agreement, Article I (3) (b).

"neither on a commercial basis nor in competition with one or more service suppliers"⁴⁵. The Agreement then applies to a wide variety of "services", including, commercial, communication, banking, distribution, financial, sanitary, environmental services. Article I(2) establishes four different modes of supply: (A) cross border supply (from the territory of a member to that of another), (B) provision of services implying the movement of the consumer to the location of the supplier, (C) provision of services implying the permanent presence of the supplier (as a legal entity) in the territory of one member, and (D) provision of services requiring the temporary movement of the supplier (as a natural person). As far as its structure is concerned, Part I contains its scope and definition and explains the four modes of supply; Part II contains general obligations, which apply to all measures affecting trade in services; Part III contains specific commitments, which apply only to the service sectors listed in a member's country schedule and generally focus on market access; The other Parts contain mainly institutional provisions⁴⁶.

In general, services are characterized by state involvement through SOEs and restrictions on private-sector involvement. Both are gradually being liberalized although there are foreign investment equity restrictions or prohibitions for most services. In liberalizing services, China has tended to follow closely its commitments under the GATS rather than liberalize autonomously, although its GATS commitments tend, in general, to be more extensive than those of other developing countries. In the GATS, China made specific commitments in nine out of the 12 large sectors contained in the classification list generally used by Members for GATS scheduling purposes: business services; communication services; construction and related engineering services; distribution services; educational services; environmental services; financial services; tourism and travel related services; and transport services⁴⁷.

2. Specific Sectors and China's Background⁴⁸

A. Financial Services

Financial sector reforms began in China in 1979, when the monopoly of the People's Bank of China (PBC) was removed and its commercial functions were separated into four state-owned banks (Agricultural Bank of China, Bank of China, China Construction Bank and Industrial and Commercial Bank of Chi-

⁴⁵ WTO-GATS Agreement, Article I (3) (c).

⁴⁶ J. H. Jackson/ W. J. Davey/ A. O. Sykes, *Legal Problems...* (note 25), pp. 940-942.

⁴⁷ WTO document GATS/SC/135, 14 February 2002.

⁴⁸ WTO-China-Trade Policies by Selected Sectors, Trade Policy Review WTO/TPRS/161, 2006, pp. 207-235.

na). Joint-stock banks were introduced later to diversify the ownership structure in the banking sector⁴⁹.

B. Banking Services

Restrictions on the operations of foreign banks have declined gradually. These banks were first permitted to operate in China in the early 1980s, but only through representative offices. Since then, as reforms have led to a gradual opening up of the sector, they have been permitted to establish branches, although with geographic, product, and client restrictions⁵⁰.

C. Insurance Services

Domestic companies had a market share of almost 100% until recently, although concentration in the market had dropped to 97.7% by the end of 2004. Foreign insurance companies are permitted to enter the market as 100% foreign-owned subsidiaries for non-life insurance and up to 50% foreign-owned for life insurance⁵¹.

D. Telecommunications Services

China's GATS commitments relate to market access through commercial presence: foreign service providers were permitted to establish joint ventures, with foreign equity restricted to 30%, or 25% depending on the type of service supplied, and provide services in some cities.

⁴⁹ For a comparative analysis, S. Balibrea, "Financial Services under the GATS", Presentation at the Conference *EU Commitments and Proposals for the Doha Round*, Beijing, 5 December 2007, available at http://www.euchinawto.org/index.php?option=com_content&task=view&id=179&Itemid=46; see also China-Measures affecting financial information services and foreign financial information suppliers (DS 373).

⁵⁰ C. Booth, 'Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam', *Columbia Journal of Asian Law*, No. 18, pp. 93-147; Wei J. Lee, 'China and the WTO: Moving toward Liberalization in China's Banking Sector', *DePaul Business & Commercial Law Journal*, No. 1, pp. 481-507.

⁵¹ Booz & Company, *EU-China Comparative Study on Insurance Service: Market Openness*, EU-China Trade Project. Support to China's Integration into the World Trading System, July 2008, pp. 1-48. Available: http://www.euchinawto.org/index.php?option=com_content&task=view&id=246&Itemid=46. See also P. Baier/ Z. Brodecki/ V. Henke/ N. Kiss/ H. Müller, *EU-China Insurance Supervision Study*, EU-China Trade Project. Support to China's Integration into the World Trading System, June 2008. Available: http://www.euchinawto.org/index.php?option=com_content&task=view&id=247&Itemid=46.

IV. INTELLECTUAL PROPERTY RIGHTS

1. China's Background

During its thousand-year history, the Chinese Empire has never had a structured and uniform system devoted to Intellectual Property protection. According to most scholars, copyright protection was born together and as a consequence of the introduction of printing⁵². Nevertheless, looking at the Western World on the one side and China on the other, it is easy to mark how their development lines appear strongly different. In the West, a new concept was created, totally absent in Chinese history and mentality. It is the idea that the author or the inventor should own their creations and should then get protection from the State against any kind of infringement⁵³. Though China has seen, since the first imperial age, some incidental cases of protection of intellectual works, it never occurred in the perspective of protecting the individual but rather the imperial power⁵⁴. No trace can be found instead of protection of inventions through what we now call "patents". This whole peculiar situation is a consequence of the absence in Chinese mentality of the idea of intellectual creation as property of individuals or entities, which therefore should be protected by the State⁵⁵. According to the Chinese tradition, knowledge has a public nature⁵⁶. Confucius himself argued he had conveyed rather than created knowledge⁵⁷. By the end of the XIX century, China experienced some changes: the economic growth and increased participation in the international trade led to a growth in problems related to intellectual property protection, especially as it regards marks counterfeiting. Nevertheless, China did not join the Berne and Paris Conventions at once, making it rally hard and risky for foreign traders to trade with and in China. Some decades later, due to Western Countries pressure (mainly the US, the EU and Canada), the Qing Dynasty introduced in its domestic laws the concept of trademark protection first, and then of copyright and patent protection. During the first years of the PCR, intellectual property protection was still seen as beneficial for the State. A clear example can be found in the 1963 Regula-

tions on Awards for Inventions, where it is said that "all inventions belong to the State"⁵⁸. A further change was experienced during the Cultural Revolution, since it was common belief that intellectual property protection was functional to the four modernizations (agriculture, industry, science and technology). Chinese Government adopted Patent, Copyright and Trademark Laws, and joined the main intellectual property international conventions. None of these, though, can be compared, as far as completeness, orderliness and far-reaching consequences are concerned, to the TRIPS agreement, which China has now to deal with, after its accession to the WTO⁵⁹.

2. The TRIPs Agreement

The Trade-Related Aspects of Intellectual Property Rights (TRIPs) is one of the multilateral treaties adopted at the end of the Uruguay Round in 1994. The Agreement establishes the requirements that the laws of the member states must meet in order to protect intellectual property in all its forms: copyright, patents, trademarks, geographical indications, industrial design. The agreement represents an attempt to overcome the differences in the way member states protect IPRs, in order to bring them under common international rules. It therefore sets the minimum level of protection that each government should grant to intellectual property of WTO members. The starting point in all main international agreements dealing with intellectual property is the nondiscrimination principle: Article 3 TRIPs establishes the "National Treatment" principle, according to which locals and foreigners should be treated equally. It is a principle that we not only find in the other WTO multilateral agreements (GATT and GATS) but even in those WIPO international agreements adopted before the WTO was created and recalled in Article 2 TRIPs ("Berne Convention" and "Paris Convention").

After Articles 3-8 which set the core principles of the whole system, the Agreement can be divided into two parts which coincide with two categories of provisions: Articles from 9 to 40 establish substantive rules for each IP form (copyright and related rights, trademarks, geographical indications, patents, layout designs of integrated circuits, undisclosed information), while Articles 41-

⁵² Zheng Chengsi/ M. Pendleton, *Copyright Law in China*, CCH International, Sidney, 1991, p. 11.

⁵³ L. R. Patterson, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville 1968.

⁵⁴ W. P. Alford, *To Steal a Book is an Elegant Offence*, Stanford University Press, Stanford (CA) 1995, p. 18; see also W. P. Alford, 'Intellectual Property, Trade and Taiwan: A GATT-Fly's View', *Columbia Business Law Review*, No. 1, 1992, p. 99.

⁵⁵ P. K. Yu, 'Intellectual Property, Economic Development, and the China Puzzle', in D. J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in A Trips Plus Era*, Oxford University Press, 2007, pp. 173-220.

⁵⁶ Jianqiang Nie, *The Enforcement of Intellectual Property Rights in China*, Cameron May, London 2006, p. 178.

⁵⁷ Confucius, "Lun Yu" (The Analects), translated by Arthur Waley, Beijing, 1999, book 7, paragraph 1.

⁵⁸ Jianqiang Nie, *The Enforcement of...* (note 56), p. 180.

⁵⁹ Since the early 2000s, in the intellectual property area, EU and US have initiated and pushed bilateral or regional agreements introducing laws that go beyond the multilateral standards required by the TRIPs Agreement. These agreements have ignored the local needs, national interests, technological capabilities, institutional capacities, and public health conditions of many less developed members of the WTO. For an overview of the China-initiated bilateral or regional agreements, see P. K. Yu, 'Sino Trade Agreements and China's Global Intellectual Property Strategy', in C. Antons/ R. M. Hilty (eds.), *IP Aspects of Free Trade Agreements in the Asia Pacific Region*, Kluwer Law International, forthcoming 2009. Available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1333431.

61 (Part III of the Agreement) contain provisions related to their enforcement. From 1999 to 2001 many laws and regulations were amended and others were introduced for the first time. To set some examples, the Copyright Law was amended and came into effect on October 27, 2001, the Implementing Regulations of the Copyright Law came into force on September 15, 2002, while Regulations on Computer Software Protection were amended on January 1, 2002. On July 1, 2001, the Patent Law was amended and came into effect, while the Implementing Regulations came into force on July 1, 2001 and the IC Regulations (Layout-Designs of Integrated Circuits Protection Regulations) on October 1, 2001. As far as Trademarks are concerned, the Trademark Law was amended on December 1, 2001 while the Implementing Regulations came into effect on September 15, 2002⁶⁰. After this period of intensive and massive changes, the reform process is gone and is still going on.

A. Substantive Rules

a. Patents

Chinese Patent Law was first adopted on March 12, 1984. The same year China became a party of the Paris Convention for the Protection of Industrial Property (after joining the World Intellectual Property Organization in 1980) and therefore this first version of the Law clearly reflects many principles set in the Paris Convention. During the process to regain GATT membership, in 1992, the Law was then amended for the first time, but when in 1994 the TRIPs was adopted, several and important differences remain between the WTO Agreement and Chinese Patent Law. It was then amended again on August 25, 2000⁶¹. In 2005 the third revision of China's Patent Law started, which was then completed in December 2008. It introduced several changes in many areas, such as the patent granting procedure or the ownership and management of patent rights⁶².

As far as "eligibility" is concerned, which refers to the specific features of an invention or a utility model which make it patentable, Article 22 of the Patent Law was amended and now reproduces Article 27 TRIPs, since it requires "*novelty, inventiveness and practical applicability*". There was no need of modifying Article 25 of the Law which deals with basic exemptions (1. Scientific discove-

⁶⁰ K. Thomas, 'Changes to Intellectual Property Law in China since WTO Entry: Compliance or Defiance?', University of Nottingham, p. 11. Available at <http://ssrn.com/abstract=1437628>.

⁶¹ P. Torremans/ H. Shan/ J. Erauw (eds.), *Intellectual Property and TRIPs Compliance in China. Chinese and European Perspectives*, Edward Elgar Publishing Limited, 2007, p. 12.

⁶² EU-China IPR2 Project, *Third Revision of China's Patent Law Legal texts and Documents on the Drafting Process 2006-2008*, with also Comments from the EC Delegation and DG Trade of the European Commission on August 2008 Draft Patent Law, August 2008, Beijing. Available: http://www.ipr2.org/images/eu_patent_law-090805-7-final.pdf.

ries; 2. Rules and methods for mental activities; 3. Methods for diagnosis or treatment of diseases; 4. Animal and plant varieties; 5. Substances obtained by means of nuclear transformation), already consistent with WTO requirements. The same must be said for the term of protection granted to patents, which is 20 years in both texts. Changes were introduced in Article 11, which didn't originally include among the right conferred to patent owners the one to prohibit the offer for sale of the patented invention. It then now sets out that "(...) *no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes*" and is therefore fully consistent with Article 28 TRIPs⁶³. Chapter VI Chinese Patent Law deals with Compulsory Licences for Exploitation of a Patent and in its essence it was consistent with the TRIPs even before WTO entry. In order to obtain a compulsory licence Chinese provisions require for the applicant to prove that it was not possible to conclude a licence contract with the patentee within a reasonable time. It's further established that the right of the licensee shall not be exclusive and that whoever is granted a compulsory licence shall pay the patentee a reasonable exploitation fee. The only rule not consistent with the TRIPs, was the one dealing with compulsory licences in relation to dependant patents, where it was just required that the dependent invention should involve a "technical advance" in relation to the first, which differed from this TRIPs article, requiring "an important technical advance of considerable economic significance". Therefore, Article 50 of the Patent Law adopted the exact wording of TRIPs. Article 48 was introduced in 2008, according to which compulsory licenses can be granted in two more cases: when the exploitation of the patent by the patentee eliminates or restricts competition and when the patentee "after the expiration of three years from the grant of the patent right, has not exploited the patent or has not sufficiently exploited the patent without any justified reason"⁶⁴. The third revision introduces some new provisions related to enforcement as well, in order to make it more effective⁶⁵.

b. Trademarks

China's first trademark law was adopted on August 23, 1982 and amended for the first time on March 1, 1993. In order to meet the obligations of WTO accession, it was then amended a second time on October 27, 2001. This amendment has basically eliminated all remaining inconsistencies with TRIPs.

⁶³ EU-China IPR2 Project, *Third Revision...* (note 62), p. 13.

⁶⁴ Patent Law of the People's Republic of China (2008), Article 48 (2).

⁶⁵ EU-China IPR2 Project, *Third Revision...* (note 62).

As it regards the essential features of a trademark, Chinese Trademark Law, after the first amendment, was not fully consistent with Article 15 TRIPS since it only included "words, graphics or their combination". To meet TRIPS requirements, in 2001 Article 8 was modified and reproduces now the exact words of the WTO agreement including "words, graphics, letters, numerals, three dimensional signs and combinations of colours as well as any combination of above-mentioned elements". One of the main gaps in the Chinese Law concerned "well-known marks" since they were not formally protected in the original version, even though they received some protection under the Provisional Regulations on Recognition and administration of Well-Known Marks, adopted in 1996 and then amended in 1998⁶⁶. In the 2001 amended version article 13 protects well-known marks in the way it establishes to refuse registration and prohibit use of trademarks which constitute the reproduction, imitation or translation liable to create confusion and mislead the public, of a well-known mark. Furthermore, Article 14 provides the criteria for identifying well-known marks as requested by Article 16(2) TRIPS.

c. Geographical Indications

Geographical indications are defined at Article 22 (1) TRIPS as "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*". The same Article then asks Member states to provide the legal means to prevent the use of false geographical indications liable to mislead the public and to invalidate the registration of a trademark which contains such a misleading indication. Before the 2001 reforms, geographical indications were not taken into consideration in any Chinese Intellectual Property laws. The definition of "geographical indication" was then introduced in the 2001 amended Trademark Law, which provides that a trademark shall not be registered and its use shall be prohibited where it contains a misleading indication, perfectly consistent with Article 22 TRIPS⁶⁷.

d. Copyright

The Copyright Law of the People's Republic of China was adopted on September 7, 1990 and amended on October 27, 2001 to make it consistent with TRIPS' requirements.

⁶⁶ Xuezheng Wang, 'WTO Accession and Trademark Protection in China', in *Frontline Issues of Protection of Intellectual Property Rights in China and TRIPS*, Beijing, 2004, Law Press China, p. 146, as cited in P. Torremans/ H. Shan/ J. Erauw (ed.), *Intellectual Property...* (note 61), p. 17.

⁶⁷ P. Torremans/ H. Shan/ J. Erauw (ed.), *Intellectual Property...* (note 61), pp. 19-20.

The new amended version of the law is mostly consistent with TRIPS provisions on the subject. According to Article 21 of the Copyright Law, the term of protection includes the author's lifetime plus 50 years or just 50 years if the creation belongs to an entity, as it is required by Article 12 TRIPS. In 2001 Articles 10(7) and 41 of the Copyright Law were amended and now establish that owners of computer programs, cinematographic works, phonograms and videos have the right to prohibit or authorize the commercial rental to the public of originals or copies for their works, thus reproducing the exact words of Article 11 TRIPS on "rental rights"⁶⁸. As far as computer programs are concerned, TRIPS establishes that they should be protected as literary works. Originally China's Copyright Law gave the State Council the task of adopting measures for their protection.

The document that was subsequently adopted established as a condition *sine qua non* for protection, the registration of the computer program, being inconsistent with TRIPS, which doesn't provide for such a condition. In 2002, a new Regulation was then adopted in order to meet TRIPS' provisions, and the previous registration is thus no more required. During 2001 amendments, some other gaps were filled and provisions on data compilations and the right of performers and producers of phonograms were included in the Chinese Law.

On the whole, it may therefore be said that the changes China introduced in its domestic laws and regulations since WTO membership are having positive results. Nevertheless, some mismatches and incongruencies still remain. As far as trademark protection is concerned, Chinese Trademark Law does not include services (including only goods) when it deals with well-known marks protection, and no provisions deal with geographical indications for wines and spirits. The main criticisms Western countries (especially the US and the EU) address to China, though, rather concerned enforcement issues.

B. Enforcement

a. The Enforcement of IPRs under the TRIPS Agreement

From the beginning of the TRIPS Agreement negotiation, the general purpose was to provide and grant the highest possible level of protection, which could not be reached through a high material standard alone. It was then necessary to adopt corresponding procedural means to grant and ensure the enforcement of this protection. It is the need which underlies Part III of the TRIPS, significantly entitled "*Enforcement of Intellectual property Rights*", introduced by Article 41.1, obliging members to adhere to the fundamental principles and procedures of law enforcement. On the other hand, the considerable heterogeneity of the

⁶⁸ P. Torremans/ H. Shan/ J. Erauw (ed.), *Intellectual Property...* (note 61), pp. 19-20.

members prompted them to establish minimum procedural obligations rather than to bring about a proper harmonization of certain provisions⁶⁹. Before the TRIPs was adopted, international conventions dealing with intellectual property issues devoted little space to IPRs enforcement, it was indeed common belief that each State should set its own rules, since necessary measures could change according to social political and economic factors which vary from country to country⁷⁰. During the Uruguay Round industrialized economies insisted on the introduction of several provisions devoted to enforcement; it appears against the wishes of developing countries, which were against it. From 1994, all WTO members had to change their IP laws and adapt them to TRIPs requirements. Moreover, they had to grant the "enforcement" of those laws and rules. Today's China's Patent, Copyright and Trademark Laws meet most of the TRIPs requirements, but still there are several problems and deficiencies regarding their enforcement. The whole situation is indeed more complicated: it is necessary to make laws and regulations "workable". Amending domestic laws was not easy but put these amendments into effect is an even harder and more challenging task.

China's international obligations regarding enforcement of IPRs under the WTO come from both the TRIPs Agreement and China's WTO Accession protocol. Upon accession, China undertook the task to amend its IPRs enforcement laws to meet TRIPs' requirements. As it regards civil judicial procedures, China agreed to implement effectively Article 42, which requires Members to "make available to right holders civil judicial procedures concerning enforcement of any intellectual property right" covered by the TRIPs, Article 43 which deals with "evidence" and Article 50(1-4) which provides provisional measure such as preventive injunction. As far as administrative enforcement is concerned, China promised to strengthen administrative authorities' powers as well as the penalties they are allowed to impose, and to make its regulations consistent with TRIPs' provisions related to border measures.

b. Administrative, Civil and Criminal Enforcement in China

Formally, the changes made by the Chinese government after the accession to the WTO in terms of enforcement are very admirable and China has fast changed "from a country with practically no IP protection to one with a broad and systematic IP structure"⁷¹. Chinese IP enforcement system is defined as

"double-track" as it is based on two distinct mechanisms, administrative and judicial. An IP holder in China can take four different paths: require an administrative enforcement through several agencies, criminal enforcement through the PDB, civil enforcement through the courts or a border enforcement through the customs authorities.

In the Chinese system administrative enforcement is the most commonly used for a number of reasons which include cost-effectiveness, authority of administrative action, being part of a wider IP strategy, social and cultural factors and the general role of public enforcement in Chinese legal system. With the second amendment of China's IPR Laws, it has consolidated its administrative enforcement of TRIPs and there have thus been positive results in terms of numbers. During the years which followed the reform period, the number of IP disputes received by administrations nationwide have strongly increased, growing from 977 in 2001 to 1,517 in 2003 as it regards patent violations, from 26,488 in 2003 to 40,171 in 2004 and then 56,634 in 2008 as far as trademark violations are concerned, and up to 6,408 in 2002 when it comes to copyright. Despite these steps forward, much criticism is still addresses to this enforcement system. The Out-of-Cycle Results issued in 2005 by the US Trade Representative, which point out that China's inadequate IPRs protection leads to infringement levels at 90% for virtually every form of intellectual property.

Through a deeper analysis, it is possible to see how this system is still characterized by problems and faults. One of the reasons for Chinese poor administrative enforcement is attributable to the fact that China is an extremely vast and heterogeneous country, affected by strong decentralization. In fact, the task to enforce IP rights is conferred to several different and independent agencies and subsequently one of the possible risks is the overlapping of responsibilities. The central government tried to improve the situation through the adoption of a series of regulations to encourage a stronger cooperation and a better coordination between agencies, but the results were not as expected. Another reason is linked to the fact that administrative sanctions, though increased over the years, have not reached the level required by Art. 41 and 61 TRIPs yet. The WTO agreement asks for procedures which "permit effective actions against any act of infringement of intellectual property rights" stressing the importance of remedies which constitute "a deterrent to further infringements". Chinese administrative penalties, instead, are not deemed to work as a deterrent, mostly per the level of discretionality possessed by administrative authorities. Third, in Chinese system, Intellectual Property owners are required to bear almost all costs for administrative enforcement actions, which does not seem to be consistent with Article 41(2) TRIPs when it requires these procedures not to be "unnecessarily complicated or costly". The main reason, though, is protectionism, which is one of the main features of the whole country. Local objectives rather than national interest are pursued and local officials are given an excessive discretionary power. There have been cases where local officials returned the con-

⁶⁹ P. T. Stol/ J. Busche/ K. Arend, *WTO - Trade-related Aspects of Intellectual Property Rights*, Max Planck Commentaries on World Trade Law, Martinus Nijhoff Publishers, 2009, pp. 678-686.

⁷⁰ Jianqiang Nie, *The Enforcement...* (note 56), p. 109.

⁷¹ K. Colpitts Hunter, 'Here There Be Pirates: How China is Meeting its IP Enforcement Obligations under TRIPs', *San Diego International Law Journal*, 2007, pp. 523 and ff.

fiscated goods to the infringer and furthermore, being the officials free to choose which cases to pursue and how fast to conduct a race, this system has experienced tremendous delays. This situation is totally inconsistent with Article 41 TRIPs, which requires members "to ensure that enforcement procedures (...) are available under their law" and that these procedures be "fair and equitable". Furthermore, Article 59 TRIPs, recalling Article 46, requires authorities to have the authority "to order the destruction or disposal of infringing goods". This power though is granted only in case of copyright or trademark violations, while no such remedy exists for authorities under the Patent Law, since they only have the authority to order the infringer to stop the infringing act.

Civil enforcement has been criticized too for being inefficient and weak. Some scholars stress the role played by the burden of proof, which rests too heavily on IPRs holders, despite TRIPs' provisions on evidence (specifically, Article 43). Others rather consider the fact that when compensation is allowed, it rarely manages to cover all the losses and expenses suffered by the IPR holder, or the fact that the duration of trials is sometimes extreme, while Article 41(2) TRIPs establishes that procedures concerning IPRs enforcement shall not entail "unwarranted delays".

As far as criminal protection is concerned, the main problems focus on three aspects: poor coordination between administrative and judicial authorities, insufficient knowledge of the subject by judicial authority and ineffective of sanctions, despite Article 61 TRIPs requiring that remedies shall "include imprisonment and/or monetary fines sufficient or provide a deterrent".

3. US-China Dispute

Enforcement provisions, and especially Articles 41, 46, 59 and 61 were raised in a recent WTO dispute involving China. In April 2007, the US started a WTO case against China claiming that some Chinese measures and laws were inconsistent with China's obligations under the TRIPs agreement. Counterfeiting and piracy are obviously huge concerns in China. The U.S. actually submitted press articles to the WTO Panel to illustrate its points regarding the seriousness of the problem, covering a wide range of infringing. However, TRIPs only contains a general obligation for its members to enforce its provisions, and the U.S. claims rested on the language of China's laws, not on how well they work in practice. The Panel was asked to rule on three main claims: copyright protection, custom measures and criminal thresholds⁷².

⁷² D. P. Harris, 'The Honeymoon is Over: Evaluating the United States' WTO Intellectual Property Complaint Against China', *Fordham International Law Journal*, Vol. 32, p. 801 (forthcoming 2009). Available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272021; K. Thomas/Ping Wang/ Fanshu Yang, 'Recent WTO Disputes Involving the Protection and Enforcement of

According to Chinese Copyright Law, there is no copyright protection for works that are not allowed under law to be published in the country. Whether a work is "immoral or unconstitutional" and therefore prohibited is determined by a content review process. The U.S. claimed that this violated Article 5 of the Berne Convention (which is incorporated into TRIPs). China still clearly lost on this point, and is now required to change its laws so that all works, regardless of content, are protected by copyright.

According to Article 59 TRIPs, "competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46". Chinese "Customs measures" provide for three disposal options beside destruction and the US claims that therefore they create a compulsory scheme so that the Chinese Customs authorities cannot exercise their discretion to destroy the goods and must give priority to disposal options that allow infringing goods to enter the channels of commerce causing harm to the right holder. Shortly, the US claims the competent Chinese authorities lack the scope of authority to order the destruction or disposal of infringing goods required by Article 59 of the TRIPs Agreement. The Panel gets to the conclusion that the obligation is to "have" authority, not an obligation to "exercise" authority⁷³. Article 59 requires the "Authority to order the disposal OR destruction" (emphasis added), which means that when authorities have the authority to order either disposal or destruction, this is sufficient to implement the obligation of the provision. Thus the limitations on Customs' authority to order destruction of infringing goods are relevant only if they show that the Customs has authority to order neither disposal nor destruction⁷⁴, which is not the case. The last claim is brought under the first and second sentence of Article 61⁷⁵ and Article 41.1. Article 61, first sentence, provides as follows: "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale". On the one hand, it is upheld that, unlike GATT provisions, Intellectual Property protection set out in the TRIPs Agreement weighs in a far more piercing way upon national sovereignty, since TRIPs obligations require Governments to operate actively to protect and enforce these rights; on the other hand, the principle expounded above stresses the discretionary power given to the Member States in the enforcement process. The Panelists are therefore asked to balance national

Intellectual Property Rights in China: Legal and Political Analysis', *University of Nottingham, China Policy Institute, Briefing series - Issue 24*, pp. 1-12.

⁷³ WTO Secretariat, *Panel Report China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, DS362, 26 January 2009, Geneva, para. 7.236. Available: http://www.wto.org/english/news_e/news09_e/362r_e.htm The Panel recalls the view of the Panel in *India-Patents (EC)*, where it found that the function of the words 'shall have the authority' is to address the issue of judicial discretion.

⁷⁴ WTO Secretariat, *Panel Report China...* (note 73), para. 7.251.

⁷⁵ P. T. Stoll/ J. Busche/ K. Arend, *WTO - Trade-related Aspects...* (note 69), pp. 781-785.

sovereignty with TRIPS obligations. Nevertheless it has been often said that this discretion should never shift to inactivity. All the transparency requirements described in Article 63 show that a systematic denial of remedies is an abuse of discretion and thus not consistent with the TRIPS Agreement⁷⁶. The US claims the inconsistency with this Article of Chinese Criminal Law insofar as it fixes specific criminal thresholds (based on some tests and factors which are as well challenged by the US) avoiding any punishment for all instances that are below these thresholds, among which there can be cases of "wilful trademark counterfeiting or copyright piracy on a commercial scale". Even though the Panel finds this provision mandatory, it stresses that The US couldn't prove that some cases of piracy or counterfeiting are below the criminal thresholds and are at the same time "on a commercial scale" in relation to Chinese market, and therefore the criminal thresholds cannot be found inconsistent with the first sentence of Article 61 TRIPS⁷⁷.

V. CHINA'S COMPLIANCE WITH TRANSPARENCY COMMITMENTS

The WTO agreements, the Protocol of China's Accession to the WTO and all of China's accession documents include China's commitments to such things as the rule of law and the transparency principles. There are a wide range of transparency related problems such as the formal publication of laws and regulations, procedural fairness in decision-making, the judicial review and the non-discrimination principle. The administration of the trade regime, which establishes the provisions of the WTO Agreement and the Protocol, would apply to the entire customs' territory of China without exception, the necessity that local governments legislate and adapt their current laws in conformity with the obligations undertaken by China's central government and the implementation of a mechanism applicable at the national level in case of a non-uniform application of the trade regime. This problem is apparent in the laws and regulations promulgated by the central government, and is especially present in the local rules, at the sub-national level in general. From a legal point of view, the regional governments should normally comply with the central regulations, but they seem unwilling to accept the standards⁷⁸. They feel threatened by demands for

⁷⁶ T. M. Samahon 'TRIPs Copyright Dispute Settlement after the Transition and Moratorium: Nonviolation and Situation Complaints Against Developing Countries', *Law & Policy in International Business*, No. 31, 2000, p. 1068.

⁷⁷ The Panel finds it unnecessary to rule on the claims brought under the second sentence of Article 61 and under Article 41.1, since they both are consequent upon the outcome of the claim regarding the criminal measures under the first sentence of Article 61.

⁷⁸ C. Tiefer, 'Sino 301...' (note 10), pp. 74-76.

transparency that would prevent them from controlling and influencing business deals. Some Chinese leaders are still opposing the reforms implicit in the WTO rules, because under these regulations their discretionary power risks being reduced definitively and brought under the rule of law.

1. Uniform Administration Rule

In the PRC, legislative authority is unitary and hierarchical. Although the provincial and local governments only have to pass laws coherent with the national ones and "the higher bodies have the authority to disallow conflicting rules, [however] national supervision has little effect on the numerous provincial and local rules created each year"⁷⁹. Art. 57 of the PRC Constitution states that "the National People's Congress of the People's Republic of China is the highest organ of state power. At the beginning of the 1990s, the NPC's role had started to gradually change, because of the "leadership efforts [...] to unify the legislative system to prevent conflicts of law and to improve the overall quality of the legislation"⁸⁰. The Legislation Law of 2000 and the creation of a special legislative panel with the responsibility of reviewing legislation and regulations for consistency with the Constitution are other important steppingstones towards the long-term programmatic reform of the administrative law. Under supervision of the NPC and of the Standing Committee, the State Council exercises the power to create ministries and commissions involved in the drafting of administrative measures and in laws for economic reform. Therefore, the State Council's department in charge of the foreign trade and economic relations rules foreign trade in China. The new Ministry of Commerce (MOFCOM), created after the merger between the Ministry of the Foreign Trade and Economic Cooperation (MOFTEC) and the State Economic and Trade Commission (SETC), is responsible for implementing the Foreign Trade Law which regulates several trade matters, in particular those related to WTO requirements.

Protocol, I, 2, A, 2 reflects the provisions of art. X (3) of GATT⁸¹ and establishes that: "China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level pertaining to or affecting trade in goods, services, trade-related as-

⁷⁹ M. A. Groombridge/ C. E. Barfield, *Tiger by the Tail: China and the World Trade Organization*, AET Press, Washington DC 1999, p. 63.

⁸⁰ Congressional-Executive Commission on China, *2009 Annual Report*, One Hundred Eighth Congress First Session, 10th October 2009, US Government Printing Office, Washington DC 2009; Congressional-Executive Commission on China, *2003 Annual Report*, One Hundred Eighth Congress First Session, 2nd October 2003, US Government Printing Office, Washington DC 2003, p. 57 Available: <http://www.cecc.gov/pages/annualRpt/2003annRpt.pdf>.

⁸¹ See also the statement of art. VI of GATS.

pects of intellectual property rights ("TRIPS") or the control of foreign exchange". Also at Paragraph 73 of Working Party Report on the Accession of China, it is stated that: "the provisions of the WTO Agreement, including the Draft Protocol, would be applied uniformly throughout its customs territory(...)".

If China wants to achieve real integration into the WTO, while at the same time proceeding towards sustainable growth, the country is obliged to go through an extensive reform of its administrative law system⁸². The processes of implementation, monitoring and enforcement for a nation such as China must take place within the context of domestic political and economic institutions. This context is defined as "fragmented authoritarianism"⁸³ or as "a multi-layered complexity"⁸⁴. All these interpositions make it more difficult for China to respect these obligations and have a strong effect on the compliance of the WTO's accession rules. Incidentally, the Chinese Government has clearly vowed to respect the agreement, to keep its promises and to cooperate with the other WTO Members' wishes⁸⁵.

Other authors have also given particular importance to the necessity of formal harmonization of China's laws and regulations⁸⁶. A new WTO Member State should comply with formal harmonization. New regulations must take place, a number of laws and regulations should be revised, obsolete laws contradictory to WTO rules should be eliminated⁸⁷ and harmonized standards must be implemented⁸⁸. In short, a thorough integration is necessary. China began this colossal task before the accession. During its four years of membership, the Chinese Government has made great progress. In fact, the NPC has institutionalized the creation of specialized committees involved in peculiar areas of law⁸⁹. Both the NPC and the Standing Committee have increased the number of officials who are more competent and specialized than before. These officials can draft higher quality legislation and better supervise the enforcement of NPC laws, but this

⁸² L. Biukovic, 'Selective Adaptation...' (note 7), pp. 803-825; S. Biddulph, 'The Production of Legal Norms: A Case Study of Administrative Detention', *UCLA Pacific Basin Law Journal*, Vol. 20, 2003, p. 269.

⁸³ K. Lieberthal, *Governing China: From Revolution through Reform*, W.W. Norton & Co., New York, 2004, p. 169.

⁸⁴ S. Biddulph, 'Through a Glass Darkly: China, Transparency and the WTO', *Australian Journal of Asian Law*, No. 3, 2001, pp. 59-95.

⁸⁵ Paragraph 70 of the Working Party Report on the Accession of China, *Report of the Working Party on the Accession of China*.

⁸⁶ M. A. Groombridge/ C. E. Barfield, *Tiger...* (note 79), p. 63.

⁸⁷ Lei Wang/ Shengxing Yu, 'China's New Anti-dumping Regulations: Improvements to Comply with the World Trade Organization Rules', *Journal of World Trade*, Vol. 36, No. 5, 2002, pp. 903-904.

⁸⁸ United States Trade Representative, *2005 Report to Congress on China's WTO Compliance*, 11 December 2005, Washington DC 2005, p. 3. Hu Shengtao, 'Foreign Investment in China - Post WTO', Speech at the 'In House Congress Beijing 2002', Beijing, China.

⁸⁹ Congressional-Executive Commission on China, *2003 Annual Report*, p. 57.

supervision should not replace WTO Members' external monitoring to ensure that any lower-profile measures do not become standard bureaucratic practice. The Chinese laws are often vague and not precise⁹⁰, but as to the 'Trade-related laws, regulations and other measures', some Chinese scholars attribute this inadequacy to the extreme complexity and technical nature of the WTO words to be adapted to Chinese language and to the necessity to create a WTO Chinese language standard. Therefore, it is challenging for the Chinese legislator to transpose the WTO commitments in the Chinese legal system⁹¹, and the potential lack of specificity of the Chinese laws will not grant full compliance with the WTO agreement.

With regard to the provincial and local authorities, it has been pointed out that, with the 1954 Soviet-inspired Constitution, the leadership had clearly set the objective of a unified legislative system, aimed at preventing conflicts of law. In this way, the obvious conflict between the formal law making powers of the NPC and the use of normative documents by other state bodies rose clearly to the surface. For these reasons, in 1956, Mao Tse-tung stated that, "under the Constitution, legislative power is concentrated at the centre. But where central policies are not violated and it is in accordance with the needs of the situation and the work at hand, localities may issue regulations. Local and provincial administrative implementation and enforcement is often behind with formal objectives, but recently there has been some improvement. Before the WTO accession on 21 April 2001, the State Council, in view of complying with the WTO requirements, adopted the 'Regulations Concerning Prohibiting the Implementation of Regional Barriers in the Course of Market Economy Activities', establishing more powers of control for the central authorities on provincial entities and specifically on the local government officials implementing and transposing national laws in the provincial regulations. The State Council has also requested the local government 'to review local regulations, administrative rules, policies and measures in line with the principles of uniform application, non-discrimination and transparency'. There is a lower standard of compliance where the regional governments have more autonomy and economic independence. This independence from the central government is replaced by the local government's dependence upon local enterprises taxes on revenues. The result is that local governments would protect local enterprises' interests, and

⁹⁰ Congressional-Executive Commission on China, *2005 Annual Report*, One Hundred Eighth Congress First Session, 11th October 2005, US Government Printing Office, Washington DC 2005, p. 16. Available: <http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf>.

⁹¹ S. S. Westin, 'Prepared Statement' in Congressional-Executive Commission on China, *WTO: Will China Keep its Promises? Can it?*, One Hundred Seventh Congress, Second Session, 6th June 2002, p. 57. Available: <http://www.cecc.gov>.

they would consider some WTO commitments as a danger for their businesses⁹². Currently, even though a sort of body of parameters exists, which is a sign of goodwill by the central government, it is not enough to assure that the regional powers will respect these rules or that the conflicts of powers between the central authorities and the localities will be always avoided.

Protocol, I, 2, A, 4 states that: 'China shall establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application of the trade regime'. This is an important element, which recognizes the necessity of establishing an enforceable mechanism in the event of non-uniform application of the trade regime. The Working Party Report in comparison with Protocol, I, 2, A, 4 has an additional element, which is important to point out. Paragraph 75 specifies that the Chinese "authorities would act promptly to address the situation utilizing the remedies available under China's laws, taking into consideration China's international obligations (...)".

2. Publication, Availability of Laws, Fair Procedure and the Creation of an Enquiry Point

Protocol, I, 2, C, 1 reflects the provisions of the second part of Article X (3) of GATT⁹³: "China undertakes that 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, individuals and enterprises, shall be enforced. In addition, China shall make available to WTO Members, upon request, all those 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. (...)". The Protocol in Paragraph 2, C, 1, if compared with Article X (3) of GATT, goes in the direction of strengthening the previous provisions demanding supplementary requirements for the public availability of the 'Trade-related laws, regulations and other measures'. Indeed, as already stated, the WTO agreements demand that all the 'Trade-related laws, regulations and other measures' be administered in a uniform, impartial and reasonable manner, but also that those measures not be implemented and enforced before they are published promptly and readily available to the other WTO Members with the right to comment⁹⁴. On the other hand, Article X limited this statement only on any increase in barriers.

⁹² A. Subrahmanyam, 'China and the WTO: Perspective on a Changing Environment', *China Law and Practice*, February 2005, p. 21.

⁹³ See also the statement of art. III of GATS.

⁹⁴ S. Ostry, 'Article X and the Concept of Transparency in the GATT/WTO', in S. Ostry/ A. S. Alexandroff/ R. Gomez, *China and the Long March to Global Trade*, Routledge, London, 2002, p. 127.

Moreover, unlike in Article VIII, Article X established the creation of a single inquiry point with a time limit for response. All these formal rules, which are the core of the WTO agreements, meet difficulties in the Chinese context. A scholar opined that the term 'transparency' does not completely fit in with the Chinese culture and bureaucratic system. Neither the regulations in the 1990s nor the new laws brought China toward a more transparent system⁹⁵. In fact, the formal body of laws and administrative regulations is not the only one applicable. It is necessary to remember the importance of the disorganized body of rules, complex secondary legal sources called "normative documents", which are not included in the administrative and legal framework. They are scraps of the old regime from the pre-reform period when China was governed by administrative decrees and not by legislation. Accession to the WTO has not drastically changed the situation. Indeed, the normative documents are still used at local levels by the state officials in the administrative bodies (ministries, commissions and enforcement agencies)⁹⁶. Since 'year three' after the accession, there are signs that these conditions are being upgraded, but even these improvements are insufficient to comply with WTO transparency obligations. The system of law resulting from this general and complex situation has fundamental divergences; not only normative documents, but also procedures, regulations, circulars and orders often contradict one another. Even though it is not clear if they are really legal, it is totally clear that they are not published. They often are adopted for provisional or experimental use. Even more they have clearly binding effects on the bureaucrats who should apply them⁹⁷. This body of rules has the concrete potential to affect the rights and duties of the external actors because it defines the ways in which state agencies carry out their work and implement the law. There also exists a quantity of unwritten rules and regulations. In order to construct a transparent and rule based system, statutes and clear laws should replace opaque local and internal instructions. Conversely, if these general conditions persist, they can create uncertainty and instability on the foreign investors' actions, which are obliged to operate with a higher degree of caution and prevented from planning their economic activities freely. For these reasons, the Chinese central government is strongly determined to eliminate these sources, but "it is clear that such a reform will be a part of an extended and gradual process by which internal procedures and guidelines are to be brought into line with the new legislative mandates⁹⁸".

⁹⁵ Icksoo Kim, 'Accession into the WTO: External Pressure for Internal Reforms in China', *Journal of Contemporary China*, Vol. 32, No. 11, 2002, p. 438.

⁹⁶ S. Ostry, 'China and WTO: the Transparency Issue', *UCLA Journal of International Law & Foreign Affairs*, No. 3, 1, 1998, p. 12.

⁹⁷ P. H. Corne, *Foreign Investment in China: The Administrative Legal System*. Transnational Publishers, Inc., New York 1997.

⁹⁸ M. A. Groombridge/ C. E. Barfield, *Tiger...* (note 79), p. 66.

As stated by the Protocol, I, 2, C, 2: "China shall establish or designate an official journal dedicated to the publication of all those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange and, after publication of its laws, regulations or other measures in such journal, shall provide a reasonable period for comment to the appropriate authorities before such measures are implemented (...)". China shall publish this journal on a regular basis and make copies of all issues of this journal readily available to individuals and enterprises. The Ministry of Commerce, after authorization of the State Council and since the negotiations of 1993, established its own gazette, but it has been sporadically publishing the adopted "Trade-related laws, regulations and other measures". This journal includes neither the relevant provincial and local ordinances nor normative documents. It only contains laws and regulations published at the national level. The official journal requirement has also been included in the Protocol of China's accession at paragraph 2, C, 2, quoted above, and a regular basis of its publication is demanded. Moreover, China has agreed to provide the translation of the "Trade-related laws, regulations and other measures" into one or more of the WTO languages⁹⁹. During the General Council Meeting of December 2002, the Chinese government declared it "had (...) designated the *Foreign Economic and Trade Gazette as the official journal for 'Trade-related laws, regulations and other measures'*"¹⁰⁰. However, according to the United States Trade Representative (USTR) in 2004 China did not designate or establish one single journal, and several foreign lawyers and practitioners have recently confirmed they did not know about this journal. After further investigation, it was possible to discover the existence of the journal 'Duiwai maoyi wengao', which contains some of the national legislations, but not the local ones. Therefore, the appropriate authorities have to continue to refer to several different sources such as newspapers, journals, and also ministry websites, often without any translation at all. The Chinese government recently stated that its officials are working hard to establish a single official journal. The provision of a single journal is also predicted to help WTO members enhance their active role of checking the drafting and implementation procedures held by the Chinese Government. In 2006, China finally adopted a single official journal, to be administered by the Ministry of Commerce (MOFCOM)¹⁰¹. However, MOFCOM proved unable to secure full participation by all relevant government entities. In December 2007, China re-committed to publishing all trade-related measures in a single official journal. Subsequently, in April 2008, the National People's Congress (NPC) instituted

⁹⁹ The WTO official languages are English, French and Spanish. See Working Party Report on the Accession of China, *Report of the Working Party on the Accession of China*, pp. 69-70.

¹⁰⁰ Oral Statement of the representative of China, *Minutes of Meeting held on 10-12 and 20 December 2002*, at paragraph 29, p. 9.

¹⁰¹ United States Trade Representative, *2008 Report to Congress on China's WTO Compliance*, pp. 94-98.

notice and comment procedures for draft laws¹⁰². In addition, at the June 2008, China similarly committed to publish all proposed trade and economic related regulations and departmental rules for public comment, subject to specified exceptions¹⁰³. As these steps are implemented, they should lead to improved transparency, particularly for proposed Chinese laws and regulations. China's commitments in this area also signal increasing recognition by many Chinese government officials that improved transparency and greater input from stakeholders and the public contribute to better regulatory practices and improved policymaking¹⁰⁴.

The provision of paragraph 2, C, 2 should be read together with paragraph 2, C, 3 of the Protocol according to which The interested parties are thus granted a type of right of consultation before the promulgation of the 'Trade-related laws, regulations and other measures', which involves the creation of a single enquiry point, a central enquiry point to which any individual, enterprise or WTO Member could address its questions and obtain all information relating to the measures. Before the accession, two scholars proposed a new state institution on administrative procedures, located within the MOFTEC¹⁰⁵. After the NPC reform plan of March 2003, the MOFCOM has become the new enquiry point replacing MOFTEC after its merger with SETC. The enquiry point remains the MOFCOM and, when there is an individual demand, it will be a problem of internal administration to determine the agency directly involved with that demand¹⁰⁶. Because of this subdivision of tasks, the level of compliance is differentiated by the varied sectors of legislation taken into consideration¹⁰⁷. As a consequence, the MOFCOM has established training courses with a view to improve the knowledge of WTO commitments among the Ministries and institutions, which are indirectly involved in 'Trade-related laws, regulations and other measures' and risk not acting in compliance with WTO rules¹⁰⁸. Unfortunately, the overall compliance with basic requirements in other Ministries and agencies is still unsatisfactory. In general, Chinese officials from the Ministry of Commerce are considered the best interlocutors due to their efforts to improve transparency. There are some institutions that publish regulations and other measures, for both trade-related laws and other kinds of legislation, also in draft form before

¹⁰² United States Trade Representative, *2008 Report to Congress on China's WTO Compliance*, pp. 94-98.

¹⁰³ United States Trade Representative, *2008 Report to Congress on China's WTO Compliance*, pp. 94-98.

¹⁰⁴ United States Trade Representative, *2008 Report to Congress on China's WTO Compliance*, pp. 94-98.

¹⁰⁵ M. A. Groombridge/ C. E. Barfield, *Tiger...* (note 78), p. 66.

¹⁰⁶ United States Trade Representative, *2008 Report to Congress on China's WTO Compliance*, p. 97.

¹⁰⁷ A. Subrahmanyam, 'China...', (note 92), p. 21.

¹⁰⁸ S. S. Westin, 'Prepared Statement' (note 88), p. 57.

the implementation and seek for public comment. Other institutions adopt new regulations without any prior distribution of drafts but, at least, include commentaries with systematic description of all the details. Others disclose neither prior drafts nor commentary¹⁰⁹. In addition, even in the cases the comments are sought, the period of public comment has generally been too short to grant the appropriate foreign authorities an effective opportunity to exercise their right.

In 2004, China adopted significant trade-related laws and regulations. As reported by the USTR, the Chinese Government furnished the appropriate authorities with the drafts of the insurance regulations, most of the government procurement measures and the proposed measures in the area of intellectual property rights. Unfortunately, the same behaviour has not been adopted for the Foreign Trade Law, the rules of origin regulations, the customs regulations, the automobile industrial policy or the *2005 Measures on the Importation of Parts for Entire Automobiles*. The drafts of these trade-related laws were not circulated or provided according to the Protocol and to the WTO standard requirements. It is also important to mention that in 2004, the MOFCOM started to follow the rules included in the *Provisional Regulations on Administrative Transparency*, with the objective of increasing transparency at MOFCOM by establishing procedures and deadlines for publication of information¹¹⁰. These new regulations could be taken as a model for other ministries and agencies seeking to improve their own internal procedures with respect to the WTO transparency requirements. However, the necessary consultation between the Chinese government and the foreign companies remains inconsistent and the Provisional Regulations on Administrative Transparency are not fully applied.

Though, we cannot underestimate the progress made during the last years and throughout 2009. There have been many good examples of public consultation on important legislation. For example, MOFCOM issued two rounds of solicitation for comments on five draft implementation rules for the Anti-Monopoly Law. Likewise, the China Securities Regulatory Commission (CSRC), China Banking Regulatory Commission (CBRC), State Administration for Industry and Commerce (SAIC) and other ministries also posted draft rules on their official website for public comment¹¹¹. However, in June 2009 SAIC issued the first procedural rules on anti-trust investigations without making a draft consultation document available for comment first. The promulgation by ministries of administrative rules and interpretations is still generally characterised by

¹⁰⁹ United States Trade Representative, *2004 Report to Congress on China's WTO Compliance*, cit., pp. 81-82; S. Biddulph, 'China's Accession to the WTO: Legal System Transparency and Administrative Reform' in S. Ostry/ A. S. Alexandroff/ R. Gomez, *China and the Long March to Global Trade*, Routledge, London, 2002, p. 169.

¹¹⁰ American Chamber of Commerce in China, *2004 White Paper - China's WTO Performance* Beijing, 2004.

¹¹¹ European Union Chamber of Commerce, *European Business in China Position Paper 2009-2010*, Chapter on Transparency in Legislation and Implementation, Beijing, China, 2009.

lack of transparency. In many cases comments are solicited only from selected persons or groups¹¹².

With regard to the Local People's Governments regulations with respect to the right of access to information, for example, Shanghai and the Beijing People's Congress and some other municipalities started holding open hearings on a number of draft legislation¹¹³. In particular, since the accession, Shanghai has increasingly become a point of reference for many other Local People's Congress (LPCs) willing to improve public participation and transparency in the drafting process. The Guangdong People's Congress and the Sichuan People's Congress have started to publish all legislation on their websites before formal approval. More recently, Shenzhen has also begun soliciting legislative proposals through its websites and the Guangdong has even started to diffuse these requests through newspapers, direct invitations and open hearings. The principal uncertainties are related to the modalities of exercise of this right of access to regulations. In fact, the provisions asserted in the Protocol leave many doubts as to the extensions of its concessions to the other WTO Members. It is not clear, for example, when the interested parties can have access to these drafts or if they can refer at all to the draft legislation before promulgation, or if this right covers also the administrative rules and regulations. It is important to recognize all the efforts made by the Chinese government, but many problems remain unsolved. Sometimes, the WTO rules are transposed in Chinese legislation, but some requirement is added which makes it more difficult to exercise the right granted. The Chinese government is not allowed to grant unjustified privileges on the whole with unfair procedures¹¹⁴. If China is not going to honour its commitments, the foreign trading companies will continue to suffer from the lack of certainty¹¹⁵, the incongruity between laws and unexpected political interventions.

VI. CONCLUSIONS

China's accession to the WTO has both strong positive aspects and also great and dangerous risks. China has undoubtedly profited from its strengthening partnership with the WTO and its growth is "an impressive example of how a

¹¹² European Union Chamber of Commerce, *European...* (note 111).

¹¹³ Congressional-Executive Commission on China, *2005 Annual Report*, One Hundred Eighth Congress First Session, 11th October 2005, US Government Printing Office, Washington DC 2005, p. 92.

¹¹⁴ European Union Chamber of Commerce, *European...* (note 111), pp. 146-150.

¹¹⁵ European Union Chamber of Commerce, *European...* (note 111), p. 148.

country can foster development"¹¹⁶. Several legal and regulatory frameworks were drastically changed to comply with WTO requirements and sectors which are extremely important for its partners were opened, earning the approval of all the other Member States. Nevertheless, China is still facing a number of challenges, especially with respect to the need to grant adequate enforcement of these rules at all levels, including the provincial and municipal ones, in order to remove obstacles which could undermine the Country's progress¹¹⁷. It is also predictable that China could resolve its internal limits faster and work to amend the local barriers with external interventions. As already said, in October 1978, Deng Xiaoping was the first one to propose the "open door policy" and the increasing collaboration between China and the EU (and between China and the US) could be a potential solution for China. China showed good will in the bilateral relations with the EU. If the EU wants to reach an effective 'matured partnership'¹¹⁸ with China, it is necessary for the EU through the bilateral meetings to convince the Chinese government to have a better score in the WTO multilateral forums, such as TRM. The TRM should not be considered just as a political forum, but it could more and more become a key instrument for China to improve and also resolve substantive problems in its internal system in compliance with its transparency issues and, in general, with all WTO commitments. On the other hand, increased cooperation of China in the TRM (in all the subcommittees) would improve China's international standing and reputation as a global player in multilateral forums and not just as a good-compromising partner in bilateral trade negotiations. If China starts to adopt a more WTO-friendly behaviour by respecting WTO procedures such as the TRM system, it would 'obviate any need [...] to seek alternatives to multilateralism'¹¹⁹ and indirectly reinforce the WTO system. According to the Consultative Board to the Director-General Supachai Panitchpakdi, 'the WTO constrains the powerful'¹²⁰. Even if the GATT and the WTO have always tried to convince all WTO Members to choose multilateral arrangement for their disputes, lately, the most powerful WTO Members started to privilege regional and bilateral solutions¹²¹,

¹¹⁶ WTO Secretariat, *Trade Policy Review: China*, Press Release: PRESS/TPRB/299, 21 and 23 May 2008, Concluding Remarks by the Chairperson, available at http://www.wto.org/english/tratop_e/tp_r_e/tp299_crc_e.htm.

¹¹⁷ T. Rumbaugh/ N. Blancher, 'China: International Trade... (note 27)', pp. 7-8.

¹¹⁸ Commission Policy Paper for transmission to the Council and the European Parliament, *A maturing partnership - shared interests and challenges in EU-China relations*.

¹¹⁹ Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, World Trade Organization, Switzerland, 2004, p. 18. Available: http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf.

¹²⁰ Consultative Board to the Director-General Supachai Panitchpakdi, *The Future...* (note 119).

¹²¹ Consultative Board to the Director-General Supachai Panitchpakdi, *The Future...* (note 119). With reference to the negative aspects of bilateralism for least-developed countries, N. Boschiero, 'Le biotecnologie tra etica e principi generali del diritto internazionale', in N. Boschiero (ed.), *Bioetica e biotecnologie nel diritto internazionale e comunitario. Questioni generali e tutela della proprietà intellettuale*, G. Giappichelli Editore, Torino, forthcoming, pp. 78-84. M. Matsushita, 'Interest of Developing Countries in the WTO Dispute Settlement', in H. in H. Gao/ D. Lewis (eds.), *China's Participation in the WTO*, Cameron May, London 2005, pp. 283 and ff. As regards the differential treatment for developing countries in the WTO, C. Pitea, 'Il trattamento differenziato dei paesi in via di sviluppo nella prassi contenziosa dell'OMC', in *Comunicazioni e Studi dell'Istituto di Diritto Internazionale dell'Università degli Studi di Milano*, Vol. XXII, 2002, pp. 803-842.

and China is one of the most recent and impressive examples. Despite this, and despite the fact that bilateralism appears to become the rule while multilateralism the exception in several areas of international economic integration¹²², Members lean on China's participation to future negotiations on a multilateral level stressing the fact that, as Pascal Lamy pointed out in September 2006, "China has a long term interest to safeguard the multilateral trading system"¹²³. Therefore, China must continue on the right track in view of reaching at least a 'better' (if not perfect) legal system and take advantage of all the means granted by the WTO to improve its internal system and the multilateral relations with the other WTO Members.

ro (ed.), *Bioetica e biotecnologie nel diritto internazionale e comunitario. Questioni generali e tutela della proprietà intellettuale*, G. Giappichelli Editore, Torino, forthcoming, pp. 78-84. M. Matsushita, 'Interest of Developing Countries in the WTO Dispute Settlement', in H. in H. Gao/ D. Lewis (eds.), *China's Participation in the WTO*, Cameron May, London 2005, pp. 283 and ff. As regards the differential treatment for developing countries in the WTO, C. Pitea, 'Il trattamento differenziato dei paesi in via di sviluppo nella prassi contenziosa dell'OMC', in *Comunicazioni e Studi dell'Istituto di Diritto Internazionale dell'Università degli Studi di Milano*, Vol. XXII, 2002, pp. 803-842.

¹²² A. Reich, 'Bilateralism Versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity', *Bar-Ilan Univ. Pub Law Working Paper*, No. 14-09, October 2009. Available: <http://ssrn.com/abstract=1489845>; R. Folsom, 'Bilateral Free Trade Agreements: A Critical Assessment and WTO Regulatory Reform Proposal', *San Diego Legal Studies Paper*, No. 08-070, September 2008. Available: <http://ssrn.com/abstract=1262872>.

¹²³ P. Lamy, *China Was Strong When it Opened to the World*, WTO News-Speeches, Shanghai, 6 September 2006.