

Analysing the WTO Transparency Norms in the China Legal System

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Abstract: With China's accession to the World Trade Organization, the implementation of principles of Transparency has brought a historical opportunity of deepening Chinese economic reform and development, as well as legislative and judicial reform. In the first step, the implementation of transparency led to substantial reform in China's legal system when all level of governments require to publish regulations, rules or measures concerning major basic obligations of the WTO, as well as, to disclose information for public. In second step, the implementation of transparency promotes the development of democracy and the rule of law in China, especially in creating independent tribunals, catalysing China's legislative reform, enhancement of uniformity and impartiality in the enforcement of law. One of effective reform in this step is the conversion of the functions of the Chinese government from a large and all-powerful government to a smaller government with more limited power. This article try to analysis the effect of China's accession to the WTO based on the implementation of principle of transparency.

Keywords: Transparency, the WTO, China, Legal System.

I. INTRODUCTION

China has a long and mysterious history and civilization. China -like most other great civilizations of the world- has always faced with many challenges regarding contradiction and even conflict between modernity and tradition. Actually, tradition can be considered as double-edged sword. On the one hand, traditional values can provide appropriate ground for national dignity and prosperity in social, political and economic development, on the other hand, traditional values can led to promote superstition, ignorance, fanaticism and backwardness. China has made many efforts to modernize the country's legal and administrative system in different periods of times, such as, in the late of Qing period, in the Republican period and in the 1950s. However, none of these efforts could lead to a satisfactory result, which provides the proper context for the development of economic, political and legal system in china. The main reasons for these failures can be summarized as "the fall of the Qing dynasty, the intervention of the sino-Japanies war followed by the civil war, the Kuomintang's flight to Taiwan and leftist policy of dispensing with the legal system since the late 1950s"¹. Establishment of People's Republic of China (PRC) based on the ideology of Marxism-Leninism provided major changes in the China's legal and administrative system. One of the incredible events that happened in this period had a significant impact on China's legal system is related to the "Great Proletarian Cultural Revolution". The Cultural Revolution was associated with brutal violence that all is rooted in faith and certainty of ideology to make a utopia, according to Popper² bring heaven on earth, Instead, what society will get nothing except suffering , pain, blame and despair.

During "cultural revolution", justice has been killed by radical ideologies and china's legal system suffered from lack of stability, rationality and responsibility. According to some statistics "nearly a 100 million people were subject to persecution or victimization in one way or another"³. In this regard, the official materials were published in connection

¹ See Albert Hung-yee Chen, *An Introduction to the Legal System of the People's Republic of China*, LexisNexis, 2004, p 2.

² See Karl R. Popper, *The Open Society and its Enemies*, Princeton University Press, 2003, p 81.

³ See Albert Hung-yee Chen, *op. cit.*, p 31.

with the subsequent trail of the Gant of Four, 720000 persons were directly persecuted during the Cultural Revolution and 34000 among them lost their lives⁴. Mr. Albert Hung-ye Chen in his book "An Introduction to the Legal System of the People's Republic of China" describes a scope of incredible violence during the Cultural Revolution⁵:

The struggle of the Cultural Revolution took the forms of struggle meetings, arrest, detention, interrogation, torture, imprisonment, exile to labour reform, or execution. The struggle meetings were inhuman and cruel; the accused persons would be shouted at, denounced, insulted, and beaten to death or until they confessed that they were counter-revolutionaries. They were often forced to wear dunces' caps and other signs or labels describing their reactionary crimes; after the struggle sessions they were usually paraded and further humiliated in the streets.

Moreover, the Chinese revolutionaries started to pure all counter-revolutionaries, including revisionist and liberal believers. For few years many professors, lectures, elites and students have fired from the universities. In this period the legal system of China became a perfect body of government. Many of the principles of the constitution were ignored, such as the right to fair trial, right to counsel and the charge because the revolutionaries absolutely do not believe the opponents have a right to fair trail and other human rights values. Actually, china- like other type if Revolutionaries Marxism governments- also usually believed the fair trail is just for Marxism believers and non-Marxism believers or anti-Marxism believers should not have right for fair trial. Many people were thrown in jail without the knowledge of the offense committed. Many independent judges were dismissed. In this period also government refused to implement many laws and regulations passed in the constitution law in order to support fundamental rights of citizens in relation to right to language, right to defense, freedom of speech, right to fair trail and so on that all was based on the Constitution Law of China. However, the modernization and market reform in China has begun six years after the end of the chose and disorder of the Cultural Revolution based on the Deng Xiaoping's theory. Indeed, the conversion of china's economic system and structure from planed economy to market economy was a result of Deng Xiaoping's reforms⁶. Mr. Deng believed essential role of China's legal system for the sustainable development and protecting people's democracy. In fact, he known the biggest problem of China for economic, political and administrative development of China is related to the lack of a coherent structure and modernized legal system to protect a country against political fickleness and challenges. In the session of the Eleventh Central Committee of the CPC in December 1978, he said⁷:

In order to safeguard people's democracy, the legal system must be strengthened. Democracy need to be institutionalised and legalized so that such system and such laws would not change merely because of a change of leadership or a change of in leaders' views and attention. The present problem is that the laws are incomplete; many laws have not yet been enacted. Leaders' words are often taken as "law", and if one disagrees with what the leaders say, it is called "unlawful". And if the leaders change their words, the "law" changes accordingly.

In the result, the socialist legal system has been systematized and written into law in such a way as to ensure the stability, continuity and full authority of this legal system and these laws. The radicals in the Cultural Revolution destroyed the legal structure of a country. Thus, many new laws and regulations have been enacted for people to follow, these laws, in accordance with Constitution must be observed and enforcement must be strict and breakers should be dealt with. Judicial organs must maintain its independence from intervention of other political bodies and also they must abide by law to serve the people's rights and interests, "keep to the facts, guarantee the equality of all people before the people's law, and permit no one to have the privilege of being above the law"⁸. The National People's Congress and its Standing Committee should have important role for legislative works and enactment of laws and regulations based on the people's interest and basic rights of citizens⁹. In the period 1979-2003, much work has been done in China to rebuild a legal system and improve economic situations in all aspects (such as foreign investments, intellectual property and so on) based on important role of legal system to contribute economic development and socialist modernisation. According to statistics in this period of time¹⁰:

⁴ Ibid.

⁵ Ibid, p 31.

⁶ See Karen Halverson, China's WTO Accession: Economic, Legal, and Political Implications, at <www.bc.edu.>

⁷ See Albert Hung-ye Chen, *op. cit.*, p 33.

⁸ Ibid.

⁹ Ibid, pp 36-37.

¹⁰ Ibid.

Approximately 1200 items of law and regulations have been enacted, including nearly 400 major codes, laws or law-related decisions made by the National People's Congress or its Standing Committee. A new Constitution, the fourth one of the PRC, was promulgated in 1982, affirming the idea of legality and related concepts and principles. In the new constitution of the CPC Adopted in 1982, it is also expressly provided that the Party must operate within the scope of the state constitution and state law. Progress has also been made in legal institution building. For example, legal education has been revived and lawyers in have once again begun to practice. By 2003, there were 120000 lawyers in mainland China. Legal textbooks, periodicals and newspapers have appeared in increasing quantity.

China's entry into the World Trade Organization (WTO) should be also considered as part of the development legal, economic and political situation of a country in recent years. This event happened in November 2001, where the member states of the WTO approved explicitly China's offer to participate in the international trading body in the Doha Ministerial Conference¹¹. In fact, after 15 years exhaustive negotiations between representatives of China and the WTO, China officially became the 143rd member of the WTO on December 11, 2001¹². It should be considered as a great success for the Chinese government because it increases the influence of China in international relations in both dimension of politic and economy¹³. As many analysts believe that the fall of the Soviet Union after the Cold War reduced balance of powers between the great powers that led growth unilateralism and political radicalism in global relation in the shape of double standards, instrumental use of international law and international organizations, disregarding the regional geopolitical issues and the increasing role of " force" in international politics and lack of attention to the cultural diversity of different nations¹⁴.

China accession to the WTO has attracted the attention of many Scholars to realize the WTO's influence in many aspects of Chinese administrative law and the legal consequences arising therefrom¹⁵. Indeed, when we try to view the WTO Agreement from a legal aspect, rather than merely economic aspect, WTO obligations imposed on China led to large changes in the legal system in China even though the WTO Agreements were originally written to regulate only domestic laws relating to international trade¹⁶. In result, the basic question is how the WTO obligations will lead to profound changes in China's administrative law? It is really truth that China's WTO obligations in many respects were further than the obligations of other WTO's members. We can outline some of the more significant concessions that China agreed to in its protocol: 1) Market access in goods; 2) Market access in services; 3) Agriculture.4) Subsidies 5) Transparency-related commitments; 6) Nonmarket economy treatment in anti-dumping cases. 7) Discriminatory safeguard rule¹⁷. According to most experts the principle of "transparency" has played a significant role in the reform of China's legal system. It is stated that principle of transparency is considered as central element of the WTO Agreement because it "promote predictability, stability, safety and equality among nations in matters involving international trade"¹⁸. The principle can be found in almost every part of China's Protocol for accession to the WTO. The principle was expressly announced in Article_2(C) (1) of Protocol on the Accession on the People's Republic of China and later interpreted in Article 324 of the Report of the Working Party on the Accession of China¹⁹.

II. EVOLUTION OF TERM TRANSPARENCY IN GLOBAL TRADE

The principle of "Transparency" has been among the most influential principle of WTO Agreement, especially after the establishment of WTO on January 1, 1995. The most important reason for that is the principle of transparency goes to the heart of the legal structure and infrastructure of States Parties. In a better and more accurate term, it should be said the principle of transparency has a direct relationship with the nature and enforcements of administrative law regime in the

¹¹ See Peter K. Yu and Gordon G. Chang, China and the WTO: Progress, Perils, and Prospects, Columbia Journal of Asian Law, 2003, pp 1-17.

¹² Ibid.

¹³ See Li Shishi, China's Accession to the WTO and the Development of Its Legal System, English Edition of Qiushi Journal, Vol.4 No.2 April1, 2012, at< <http://english.qstheory.cn>>.

¹⁴ See Richard Falk et al, International Law and the Third World: Reshaping Justice, Routledge, 2008.

¹⁵ See Karen Halverson, *op. cit.* p 6.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Liu Wenjing, Approaching Democracy Through Transparency: A Comparative Law Study on Chinese Open Government Information, American University International Law Review (LexisNexis), 2011, pp 1-19

¹⁹ See Karen Halverson, *op. cit.*, p 6.

State Parties²⁰. However, some economists believe the term transparency as the "most opaque in the trade policy lexicon"²¹. This is due to several reasons: First) its creation in international economic law and legal system is obscure. Second, its definition in Article X of the 1947 GATT is imprecise yet. Third, the extent and nature of its implementation is unknown²². This can be correct relatively, although this concept has been indispensable role in post-war economic system, however, none of the rules and regulations of international trade is not provided precise definition of Principle, as well as, its nature is not known. Indeed, we realized the importance of the Principle in international economic system not according to its definition, nature and functions in the laws and regulations, rather than in accordance with its influence and impact on the administrative system of States Parties. Thus, it is not surprising that to be declared there is no comprehensive definition of the Principle in the international economic law. However, the principle of transparency is recognized as one of the undeniable rules governing in trading system, such as General Agreement on Trade and Tariffs (GATT) and the World Trade Organization (WTO)²³. For the first time, US department of state suggested Article 15 (Publication and Administration of Trade Regulations-Advance Notice of Restrictive Regulations) during the negotiation for establishing International Trade Organization (ITO)²⁴. Article 15 of the ITO rooted in the American Administrative Law during the President Franklin D. Roosevelt²⁵. Indeed, administrative law in America for the first time introduced the idea of transparency as "norm" in trading system²⁶.

However, this Article changed to Article 38 of the Havana Charter for the International Trade Organization. Thus, Article X of the 1947 GATT was created from a combination of both Articles 15 and 38. Article X of the GATT was based on the liberal approach of United States in economic structure of global trading system. Thus, the Article X of the GATT has introduced the rules for "publication and administration" of trade regulations, as well as, emphasize substantial role of independent tribunals and judicial review in this respect to promote global trade²⁷. Article x of GATT expressly require all Contracting Parties that to be published promptly trade-related measures; administered in a uniform, impartial, and reasonable manner, as well as, provided for independent review of administrative action related to custom matters²⁸. According to Article of X of the GATT briefly²⁹:

1. Laws, regulations, judicial decisions and administrative rulings related to trade shall be published promptly and in such a manner as to enable governments and entities to become acquainted with them.
2. No measure of general application taken by any contracting party related to trade shall be implemented and enforced before such measure has been officially published.
3. Each contracting party shall implement all its laws, regulations, decisions and rulings in a uniform, impartial and reasonable manner.
4. Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, of the prompt review and correction of administrative action.

However, it is true that Article X of the GATT was not controversial during the implementation of GATT' regulations in global trade because legal and economic infrastructure of many contracting parties was not based on the liberal approaches³⁰. Sylvia Ostry believes after end of the war the main trade policy was to reduce the border barriers such as

²⁰ See Sylvia Ostry, CHINA AND THE WTO: THE TRANSPARENCY ISSUE, 3 UCLA J. INT'L L. & FOR. AFF. 1, 1998, pp 1-22.

²¹ Ibid.

²² Ibid.

²³ Donald C. Clarke, China's Legal System and the WTO: Prospects for Compliance, Washington University Global Studies Law Review, VOL. 2:97, pp 97-118.

²⁴ Sylvia Ostry, *op. cit.* pp 1-22.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Patrick F. J. Macrory et al, The World Trade Organization, Legal, Economic and Political Analysis, Springer, 2005, p 123.

²⁸ Ibid.

²⁹ The Text of the General Agreement on Tariffs and Trade (GATT), Article X.

³⁰ Sylvia Ostry, Looking Back to Look Forward: The Multilateral Trading System after 50 Years. Chapter 9 of Book (From GATT to the WTO: The Multilateral Trading System in the New Millennium, Kluwer Law International, 2000, pp 97-112.

tariffs and quotas. Thus, the meaning of transparency in this time was just reducing border barriers to trade³¹. Besides, there is no document for full implementation of Article X of GATT for contracting parties. Padideh Ala'i describes this matter correctly³²:

During the GATT 1947 years, Article X was a silent provision dismissed by panels as 'subsidiary' to other substantive GATT provision. Since the creation of the World Trade Organization (WTO), Article X has emerged from obscurity and has developed into a provision of fundamental importance as the embodiment of the principles of transparency as due process....The increased emphasis on Article X also highlights the potential role for the WTO in promoting "good governance" norms in both the transnational and domestic context.

The term of transparency has become a bit further in Tokyo Round which began in 1973. In fact, Tokyo Round was the first step in trade policy legalization. The result of Tokyo Round Agreement in field of transparency was to conclude an "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance"³³. Indeed, the need to improve the exchange of notification was one of the main reasons for more notice the term of transparency in global trade³⁴. In this respect, paragraph 2 and 3 of this Understanding states³⁵:

2. Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification.

3. Contracting parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly ex post facto. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned.

The term transparency had become one of the key elements of negotiating group in the Uruguay Round. The WTO Trade Policy Review Mechanism (TPRM) was designed to enhancing the transparency of Members' trade policies³⁶. Indeed, Annex 3 of the Marrakesh Agreement provides the legal basis for the TPRM. In accordance with Annex 3, the main objectives of TPRM can be described in 3 parts³⁷:

- I) "To enhance the transparency in and the understanding of WTO members trade policies, regulation and practices;
- II) To undertake a regular collective application and evaluation of these policies and practices, and assess their impacts on the functioning of the multilateral trading system; and
- III) To enable a debate on WTO member trade policies and practices, taking into account their wider economic and development needs policies and objectives".

In the case of intellectual property, Article 63 of Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS) recognizes a separate Council for TRIPS, to monitor compliance³⁸. In this regard, Contracting Parties should provide notification of all regulations, as well as, administrative arrangements to the council³⁹.

³¹ Ibid.

³² See Padideh Ala'i, From the Periphery to the Centre: The Evolving WTO Jurisprudence on Transparency and Good Governance (chapter of book: Debra P. Steger, Redesigning the World Trade Organization for the Twenty-First Century, EDGE, 2010, pp 165-192.

³³ See Sylvia Ostry, *op. cit.*, pp 97-112.

³⁴ Ibid.

³⁵ See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Paragraph 2 and 3, adopted on 28 November 1979.

³⁶ Peter K. Yu and Gordon G. Chang, China and the WTO: Progress, Perils, and Prospects, Columbia Journal of Asian Law (LexisNexis), 2003, p 1-17.

³⁷ Steffen Grammling, WTO's Trade Policy Review Mechanism: Explanations and Reflections, FES Geneva, 2009, pp 1-2. See also Trade Policy Review Mechanism, Annex 3.

³⁸ Sylvia Ostry, China and the WTO: the Transparency Issue, 3 UCLA J. INT'L L. & FOR. AFF. 1 1998, pp 1-22.

³⁹ Ibid.

III. IMPLEMENTATION OF TRANSPARENCY IN CHINA'S LEGAL SYSTEM

A. Domestic Level:

Domestic motivations for transparency in china's legal system have begun with economic reform in rural provinces in 1978⁴⁰. In this respect, on 1985, Villagers' Committees (VCs) provided fiscal, land use, and home planning records available to interested villagers as one of the first steps for Disclosure of information related to public affairs⁴¹. Transparency has progressed remarkably from rural areas to urban areas. In this period, the main achievements of transparency was open administration of village affairs, encouragement of china's political parties to push for further transparency in economic and administrative affairs in the urban areas, state-owned enterprises (SOEs), collectively owned enterprises (COEs) and other public organizations⁴². Information Disclosure including disclosure of all administrative regulations, procedures, and decisions, right to know, differences between rule of law and rule by law, open government and necessity of right to information as a pre-request for economic developments have been introduced by Chinese scholars as a key elements of preparation for democratic system⁴³. In this period, the National Panel on Coordination of Open Enterprise Affairs estimated "over 250,000 enterprises, including over 190,000 public organizations (SOEs and COEs) as well as over 57,000 private enterprises" had introduced as a transparent management⁴⁴. The Guangzhou Municipal Provisions on Open Government Information are labelled as the first official legislation on open government information in China's economic and legal system⁴⁵. According to Article 6 of this legislation⁴⁶:

As a general principle, government information shall be made public, and information that is not made public shall be the exception.

There are two means of government's information disclosure in accordance with the 2003 Guangzhou Rules: first) agencies may release government-held information upon their own initiative or upon request. Second) agencies should disclose requested information unless such disclosure is clearly prohibited by law⁴⁷. Following the Guangzhou Municipal Provisions on Open Government Information, other cities such as Shanghai, Beijing, Shen-zhen, Hangzhou, Chongqing, Chengdu, and Wuhan all adopted local open government information policies⁴⁸. China's State Council adopted the Regulations on Open Government Information (State OGI Regulations) on January 17, 2007- that become into force on May 1, 2008- to promote government's transparency based on the experience of earlier local legislation, as well as, establishing a uniform procedure for administration of OGI for localities and administrative agencies⁴⁹. The main aim of this legislation is promulgated in Article 1 that is stated⁵⁰:

In order to ensure that citizens, legal persons and other organizations obtain government information in accordance with the law, enhance transparency of the work of government, promote administration in accordance with the law, and bring into full play the role of government information in serving the people's production and livelihood and their economic and social activities, these Regulations are hereby formulated.

Articles 3 of OGI Regulations determine special offices "in charge of open government information work"⁵¹. This office is "responsible for promoting, guiding, coordinating and supervising open government information work throughout the

⁴⁰ Liu Wenjing, *Approaching Democracy Through Transparency: A Comparative Law Study on Chinese Open Government Information*, American University International Law Review, LexisNexis, 2011, p 1-19.

⁴¹ Ibid.

⁴² Chunlai Chen, *China's Integration with the Global Economy: WTO Accession, Foreign Direct Investment and International Trade*, Edward Elgar Publishing Limited, 2009.

⁴³ Ibid.

⁴⁴ See Liu Wenjing, *op. cit.*, pp 1-19.

⁴⁵ Ibid.

⁴⁶ Kent Hughes, Gang Lin, and Jennifer et al, *the WTO Domestic Challenges and International Pressures*, Woodrow Wilson Center, 2002, pp1-40.

⁴⁷ Liu Wenjing, *op. cit.*, pp 1-19.

⁴⁸ Hughes and et al, *op. cit.*, pp 1-40.

⁴⁹ Regulations of the People's Republic of China Open Government Information, (Adopted by the State Council on January 17, 2007; Effective May 1, 2008), The China Law Center, Yale Law School.

⁵⁰ Ibid. Article 1.

⁵¹ Ibid. Article 3.

whole country"⁵². Local governments and their department at the county level and above must designee this office. The main function of this special office is promulgated in Article 4 of OGI Regulations⁵³:

- 1) To undertake specific open government information matters for that administrative agency;
- 2) To maintain and update government information disclosed by that administrative agency;
- 3) To organize for that administrative agency the compilation of an open government information guide, open government information catalogue and annual reports on open government information work;
- 4) To conduct examinations for secrecy of government information to be disclosed; and
- 5) To carry out other responsibilities related to open government information stipulated by that administrative agency.

Articles 9,10,11,12 and 13 of the OGI regulations provide the scope of disclose information⁵⁴. In this regard, all levels of governments have obligation to disclose certain information, including information that involves the vital interests of citizens, legal persons, or other organizations, including information pertaining to such topics as food and drugs, land appropriation and compensation, and sudden emergencies⁵⁵. Beside, to information that is proactively disclosed by administrative agencies, citizens, legal entities, or other organizations may, "based on the needs of such matters as their own production, livelihood and scientific and technological research," request information from relevant government agencies⁵⁶. Article 15 of the OGI Regulation regarding method of and procedures for disclosure requires all levels of governments to disclose information on an agency's own initiative⁵⁷. This must be happen through government gazettes, official websites, press conferences, newspapers and other publications, radio, and television⁵⁸. In this regard, public libraries and State archives have a same responsibility to make access to government information convenient for the general public⁵⁹. Article 16 of the OGI encourage administrative agency to " set up, as needed, Places and facilities such as public reading rooms, materials request stations, information bulletin boards, and electronic information screens to disclose government information"⁶⁰. Moreover, according to Articles 17 and 18 the Administrative Agencies are responsible for releasing information that "they made or stored within twenty business days from the date that it was generated or updated"⁶¹. The Agencies are also required "to comply and publish OGI guides and catalogues, and to update them in a timely manner"⁶².

B. International Level:

Without doubt, international motivations have significantly influenced China's march towards transparency. One of inescapable consequence of becoming party to WTO is related to consistency and conformity of domestic legal order with WTO regulations⁶³. According to the 1994 Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement), each WTO Member requires to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements"⁶⁴. This is big deal for many states parties because they have to be compliance with the WTO regulations. Thus, they must implement regulations and legislation for foreign trade which cover a wide range of economic and legal sectors. China's requirements and commitments for accession to the WTO was more than other WTO members, especially in the field of "transparency" requirements⁶⁵. In this respect, China had to compile, modify or abolish its current domestic laws and regulations, and formulate new laws

⁵² Ibid.

⁵³ Ibid. Article 4.

⁵⁴ Ibid. Articles 9, 10, 11, 12 and 13.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ See Article 15, Regulations of the People's Republic of China Open Government Information.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ See Article 16, Regulations of the People's Republic of China Open Government Information.

⁶¹ See Articles 17 and 18, Regulations of the People's Republic of China Open Government Information.

⁶² Ibid.

⁶³ See Padideh Ala'i, p 165-192.

⁶⁴ See Multilateral Marrakesh Agreement establishing the World Trade Organization (with final act, annexes and protocol). Concluded at Marrakesh on 15 April 1994, Registered by the Director-General of the World Trade Organization, acting on behalf of the Parties, on 1 June 1995

⁶⁵ See Peter K. Yu and Gordon G. Chang, p 1-17.

and regulations in accordance with the requirements of the WTO⁶⁶. During the negotiation for China's entry into WTO the transparency of regulations and other measures was essential part of challenging debates because some members of the Working Party promulgated their concern about the weakness of transparency regarding China's laws and regulations that must be in conformity with WTO Agreement⁶⁷. Some members of the Working Party also noted for ensuring information available from all government bodies at all levels, it will be good idea to create authoritative journal and enquiry point to facilitate dissemination of information and help promote compliance⁶⁸. The members of the Working Party expressly wanted from China to ensure "the import purchasing practices and procedures of state trading enterprises were fully transparent, and in compliance with the requirements of the WTO Agreement"⁶⁹.

IV. CHINA'S TRANSPARENCY-RELATED COMMITMENTS

A. Publication and Access to Information:

According to its protocol, China undertook that only those WTO-related laws, regulations, and other measures that are published and readily available to other WTO members, individuals and enterprises shall be enforced⁷⁰. Beside, "China shall make available to WTO Members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange before such measures are implemented or enforced⁷¹. In emergency situations, laws, regulations and other measures shall be made available at the very latest when they are implemented or enforced"⁷². In fact, the key point here is related time requirements concerning the publication and implementation of legal norms⁷³. This WTO-related commitment can be divided into three parts: first) implementation of law and regulations are not affected to the situation of other members and the public without publication. In this regard, the publication of law and regulations is not enough, rather the regulations must be available normally. It means if china published some law and regulations, but however, WTO members or the public could not access "readily", those law and regulations cannot be implemented for them. Indeed, one of the essential part of China's transparency is to provide a situation for easy availability and accessibility of information because for non-native Chinese speakers is quite difficult to access information⁷⁴. However, this will be challengeable matter when some parties can have an access to the rules readily, but some of them cannot. There is no clue to show the china's obligation to the solicitation of opinions regarding laws and during the stages of deliberation, drafting and consideration⁷⁵. Second, prior to implementation or enforcement of laws and regulations, China shall make available the texts of relevant regulations and other policy measures, if some WTO member request⁷⁶. Third, in emergency situations, said texts shall be made available when such measures are implemented at the very latest⁷⁷. However, the US-China Business Council in 2007 promulgated its dissatisfaction from China's transparency in this respect⁷⁸:

[t]ransparency is one of the most important problems that companies face in China, both in term of the ability to do business and China compliance with major WTO principle...There can be no question that China legislative and regulations affecting trade in service, intellectual property, or foreign exchange to be published in MOFCOM's *Gazette*, about 60 percent of USBC 2007 survey respondents noted no improvements in transparency in the past year.

⁶⁶ Ibid.

⁶⁷ See Doc. World Trade Organization, Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432

⁶⁸ Chunlai Chen, *China's Integration with the Global Economy: WTO Accession, Foreign Direct Investment and International Trade*, Edward Elgar Publishing Limited, 2009.

⁶⁹ Ibid.

⁷⁰ See Doc. World Trade Organization, Accession of the People's Republic of China.

⁷¹ Ibid.

⁷² Ibid.

⁷³ See Li Shishi, *China's Accession to the WTO and the Development of Its Legal System*, English Edition of Qiushi Journal, Vol.4 No.2 April,2012, at <<http://english.qstheory.cn>>

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ See Doc. World Trade Organization, Accession of the People's Republic of China.

⁷⁷ Ibid.

⁷⁸ See Chunlai Chen, *China's Integration With the Global Economy: WTO Accession, Foreign Direct Investment and International Trade*, Edward Elgar Publishing Limited, 2009.

In addition, China agreed to establish or designate an official journal dedicated to the publication of all 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, except for those laws, regulations and other measures involving national security, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement⁷⁹. In recent years, China law requires the publication of all legislation in the gazette of the body that issued the legislation and sometimes in the national daily newspaper⁸⁰. This requirement imposed by China law is not only included NPC-level legislation and amendments, but also administrative regulations, local and regional regulations, departmental rules, and local level rules. However, the Protocol puts some exceptions for matters pertaining to national security, foreign exchange rates, and monetary policy, stipulating that regulations and policies in this regard may come into effect immediately upon publication.

Finally, the representative of China further confirmed that China would establish or designate one or more enquiry points where all information relating to the laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange, as well as the published texts, could be obtained and would notify the WTO of any enquiry point and its responsibility. The information would include the names of national or sub-national authorities (including contact points) responsible for implementing a particular measure⁸¹. China accession to WTO has accompanied with many changes in administrative legal structure of China in order to meet its obligation in relation to WTO-related commitments⁸². Just prior to China's WTO accession, an enquiry point and method for request for information has been established by the China's Ministry of Foreign Trade and Economic Cooperation (MOFTEC), that later become Ministry of Commerce (MOFCOM)⁸³. In this respect, WTO/TBT National Notification Authority & Enquiry Point of the PRC has a special website for official enquiry point for technical barriers to trade (TBT)⁸⁴. The WTO/TBT-SPS Notification and Enquiry of China website is under the General Administrative of Quality Supervision, Inspection and Quarantine of the PRC (AQSIQ)⁸⁵. In the English version of the WTO/TBT-SPS Notification and Enquiry of China website provides a list of notification and summaries of standards for TBT (Technical barriers to trade) and SPS (sanitary and phytosanitary measure). This website also provides contact by telephone and E-mail for both TBT and SPS⁸⁶. However, some expert critiques the lack of single official journal for WTO-related law⁸⁷. Nonetheless, establishment of official WTO website by Ministry of Commerce (MOFCOM) could greatly facilitate the ability of outsiders to gather legal information⁸⁸.

B. Uniform Administration:

China agreed in its protocol to "apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level (collectively referred to as "laws, regulations and other measures") pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights ("TRIPS") or the control of foreign exchange"⁸⁹. In addition, "China's local regulations, rules and other measures of local governments at the sub-national level shall conform to the obligations undertaken in the WTO Agreement and this Protocol"⁹⁰. In this respect, China undertook to "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"⁹¹. There is some general principle regarding WTO

⁷⁹ See Doc. World Trade Organization, Accession of the People's Republic of China.

⁸⁰ Kong Qingming, *China and the World Trade Organization: A Legal Perspective*, World Scientific Publishing, 2002, pp 1-32.

⁸¹ Doc. World Trade Organization, Accession of the People's Republic of China.

⁸² Qingming, *op. cit.*, pp 1-32.

⁸³ See Chunlai Chen, *op. cit.*, p 57.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Yu and Gordon, *op. cit.*, pp 1-21.

⁸⁸ Liu Wenjing, *op. cit.*, pp 1-19.

⁸⁹ See Doc. World Trade Organization, Accession of the People's Republic of China.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

Agreements that its rules must be apply to the entire customs territory of each Member, including its political and economic subdivisions such as special economic zones border trade regime, minority autonomous areas and other special zones⁹². In this respect, WTO Members must administer all their law, regulations, decisions and rulings "in a uniform, impartial and reasonable manner"⁹³. Like other WTO Members, China also agreed to apply and administer its trade laws in a uniform, impartial and reasonable manner and local and provincial authorities are bound by WTO obligations⁹⁴. Beside, in accordance with China obligation related WTO, all individuals and entities in China are eligible to bring the attention of central government authorities cases of non-uniform application of China's trade regime, including China commitments under WTO Agreements and Protocol⁹⁵. Such cases will be referred promptly to "the responsible government authorities and when non-uniform application is established, the authorities must act promptly to address the situation utilizing the remedies available under China's laws, taking into consideration China's international obligations and the need to provide a meaningful remedy"⁹⁶.

C. Review of Administrative Decisions:

According to the Protocol" China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X: 1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter"⁹⁷. Review procedures must include the opportunity to ultimately appeal to a judicial body⁹⁸. Generally, lawyers believe the judicial decisions have played an important role in the dynamics and mobilizing a legal system. A modern judicial system should be such that possible weaknesses and shortcomings of the statutes, rules and regulations overcome through judicial decisions and judicial review. In this case, the freedom of information can be guaranteed through judicial review and new statutes can create like what happened in the making of the U.S. FOIA⁹⁹. There are several legislations regarding judicial review of administrative actions in China. The first is the Administrative Litigation Law of the People's Republic of China (ALL) enacted on April 4, 1989 and effective on October 1, 1990. According to the ALL, all china's citizens persons or other organizations whose legitimate interests are infringed upon by certain types of administrative acts have rights to bring lawsuits to courts¹⁰⁰. The ALL cases will be usually tried by the basic courts as the courts of first-instance. There is also possible to lawsuit in the courts at upper levels – intermediate courts, high courts, or even the Supreme People's Court (SPC) in the complexity of the case. According to the ALL" Each court must establish an administrative division to handle ALL cases"¹⁰¹. After China's accession to the WTO, Supreme People's Court (SPC) announced a judicial interpretation that requires judicial review of WTO-related administrative actions should be based on the ALL. In this regard, the administrative divisions of intermediate courts as the court of first-instance must handle the case¹⁰². In November 2002, "the SPC promulgated two other judicial interpretations to prescribe that first-instance anti-dumping or countervailing ALL cases should be tried by the high court where the defendant administrative organ is located or by any intermediate court designated by such high court"¹⁰³. On July 29, 2011, the Chinese Supreme People's Court promulgated a judicial interpretation on OGI litigation. "This judicial interpretation provides a clear legal guidance on accepting an OGI lawsuit, which agency should be the defendant, the relevant burden of proof, and what kind of judgment should be made under different circumstances"¹⁰⁴.

⁹² Guiguo Wang, Evolution of Chinese Legal System in the Globalized World, <http://www.juridicas.unam.mx>, pp 1-23.

⁹³ Doc. World Trade Organization, Accession of the People's Republic of China.

⁹⁴ Wang, *op. cit.*, pp 1-23.

⁹⁵ *Ibid.*

⁹⁶ Doc. World Trade Organization, Accession of the People's Republic of China.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Veron Mei-Ying Hung, China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform, *The American Journal of Comparative Law*, Vol. 52, at <http://carnegieendowment.org>, pp 77-132.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ See Liu Wenjing, Approaching Democracy Through Transparency: A Comparative Law Study on Chinese Open Government Information, *American University International Law Review*, LexisNexis, 2011, pp 1-19.

¹⁰⁴ *Ibid.*

V. CONCLUSION

China's accession to the WTO has accompanied with the implementation of principles of transparency as a binding obligation for accession. The implementation of this obligation provides a historical opportunity for deepening legislative and judicial reform. Actually, the implementation of transparency led to substantial reform in China's legal system when all levels of governments require to publish regulations and disclosure information for public. In the second step, the implementation of transparency promotes the development of democracy and the rule of law in China, especially in creating independent tribunals, catalysing China's legislative reform, enhancement of uniformity and impartiality in the enforcement of law. One of the effective reforms in this step is the conversion of the functions of the Chinese government from a large and all-powerful government to a smaller government with more limited power. With the implementation of the principle of transparency, China has created an investment-friendly environment to attract foreign capital, and promote China's international status and image in the global trading system. China can now understand better international markets and the legal systems of various other countries that help domestic enterprises in implementing the strategy of "going abroad" to explore international markets.

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