CHINA AND THE WTO: THE TRANSPARENCY ISSUE

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I. INTRODUCTION

Often, I have (only partly in jest) described the word *transparency* as the "most opaque in the trade policy lexicon." There is support for such a pronouncement because, while transparency is considered one of the basic rules governing the post-war trading system, as formerly embodied in the General Agreement on Trade and Tariffs (GATT) and now the World Trade Organization (WTO), its genesis is obscure, its definition--captured in Article X of the 1947 GATT[1]--is imprecise, and the extent and nature of its implementation is unknown.

The use of the word transparency, however, has become so widespread that it has reached an exalted status--a column by William Safire in the New York Times.[2] The use of the term transparency now goes well beyond trade circles: As Safire notes, it is key to the "diplolingo" of arms control; has become *the* buzzword of the Asian

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[1] General Agreements on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. Article X of the GATT is attached as Appendix I.

[2] *See* William Safire, *On Language; Transparency, Totally*, N.Y. TIMES, Jan. 4, 1998, Sec. 6, pg. 4.

financial crisis; and is an icon of civil society through Transparency International, a non-governmental organization created to expose and destroy bribery and corruption.

It is important to assure the reader, though, that the title of this article was not derived from Safire's annointment of the term. However imprecise the GATT/WTO definition of transparency, the core of the definition goes to the heart of a country's legal infrastructure, and more precisely to the nature and enforcement of its administrative law regime. Importantly, the current nature of China's administrative legal infrastructure lacks this trait. Before China's full and effective WTO integration will be possible, the country will be required to undergo an extensive transformation. Without such transformation, Chinese accession could be seriously damaging to the long-term viability of the WTO.

This article will briefly review the growing legalization of the international trading system that makes the WTO, especially in this respect, a very different institution from its predecessor, the GATT. This legalization is largely a reflection of changes in American trade policy that began in the 1970s, and culminated in the increased transparency required under the aegis of the WTO. Finally, I will examine the nature and status of administrative law in China and specifically how its lack of transparency will serve as an obstacle to fulfilling WTO accession.

II. THE LEGALIZATION OF THE TRADING SYSTEM[3]

The post-war architecture of international economic cooperation was largely the product of U.S. leadership and, understandably, primarily reflected American values and views of that period. The idea of transparency as a norm for the trading system was based on American administrative law, a new legal terrain connected to the expanding role of government initiated by the New Deal. Indeed it

[3] This analysis is based on SYLVIA OSTRY, THE POST-COLD WAR TRADING SYSTEM: WHO'S ON FIRST? (1997).

was in 1946, while the negotiations for the new trading system were underway, that Congress codified views on the law of administrative procedure with passage of the Administrative Procedure Act (APA).

The negotiations for creation of a new trading system, the International Trade Organization (ITO), were originally discussed at the Bretton Woods Conference but did not begin in earnest until after the United Nations adopted a resolution to draft the ITO Charter in 1946.[4] Simultaneously, nations were negotiating for a general agreement on tariffs and trade. In 1948, the UN finalized the ITO Charter in Havana, and delegates approved the interim GATT, which was intended to serve as a temporary measure until the ITO was ratified. The GATT, however, entered into force immediately because it did not require ratification.

Article 15 of the September 1946 State Department document, Suggested Charter for an International Trade Organization of the United Nations, was entitled "Publication and Administration of Trade Regulations--Advance Notice of Restrictive Regulations."[5] This article was ultimately incorporated as Article 38 in the Havana Charter for the International Trade Organization[6] and also as Article X of the GATT,[7] which survived the death of the ITO.[8] While the title of the GATT's Article X, "Publication and Administration of Trade Regulations" does not include the words "advance notice of restrictive regulations," its language does not vary significantly from the original State Department drafting in 1946. By way of contrast, most other articles of the original American proposals involving international trade regulation involved considerable haggling and compromise,

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[4] The ITO was intended to be a permanent organization that would govern international trade, enforce rules against unfair trade barriers and practices, and settle trade disputes between member nations much as the WTO does today.

[5] U.S. Dep't of State, Suggested Charter for an International Trade Organization of the United Nations (1946).

[6] U.S. Dep't of State, Havana Charter for an International Trade Organization (1948), Pub. No. 3206.

[7] 1 WORLD TRADE ORGANIZATION, GUIDE TO GATT LAW AND PRACTICE, 309 (1995).

[8] The draft ITO Charter was ultimately submitted to the nations for ratification but the U.S. Congress refused to approve it. Subsequently, no other nation desired to enter the ITO. By default, the GATT, which was initially intended to apply provisionally for several years and then be submitted to control of the ITO, became the dominant treaty system.

especially with the British. The Canadians, who participated in the negotiations from their launch in London in October 1946, to their conclusion in Havana in November 1947, wrote a memorandum to the Secretary of State for External Affairs that tracked the negotiating process and the changes in each article at each stage. The Canadian delegation noted that Article 38 of the Havana Charter for the ITO (which later became GATT Article X) "was not altered nor were any interpretive notes" required. The memo further states: "This article imposes no obligations upon Canada not already complied with, and the general benefit to international trade needs no elaboration."[9]

Evidently each of the fifyt-six delegations at Havana felt exactly the same! Why this indifference to and/or endorsement of the American position as a pillar of the new international trading system? There obviously is no way of definitively answering this question, but a look at the nature and origins of administrative law are suggestive.

Administrative law is not substantive but procedural. It establishes norms to control what government bureaucrats do and how they do it. One could say the goal is to prevent the types of bureaucratic or administrative nightmares Kafka depicted. Administrative law arose essentially because of the delegation of power from legislators to administrative bodies propelled by the expanded role of government in the industrialized countries that began in the 1920s and 1930s. While all Western countries developed administrative law regimes in the period after World War I, the American system has some characteristics that distinguish it from continental European regimes and the English common law legal family. The American system's unique diffusion of power among the three branches of government and its system of checks and balances ensures against any accretion of power. Such a system reflects not only its common law roots but also its origins in the American Revolution. Thus, the U.S. system is significantly different from common law parliamentary systems in the UK, Canada, or Australia, which rest on legislative primacy and a strong executive.

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[9] CANADIAN LEGATION, REPORT OF THE CANADIAN DELEGATION TO THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT AT HAVANA 32 (July 13, 1948).

Among the more important distinguishing characteristics of the American system are greater use of independent regulatory agencies, often with quasi-judicial as well as quasi-legislative and executive/administrative functions; greater emphasis on notice-and-comment for administrative rules and on freedom of information laws; and a greater reliance on judicial review of the rulemaking activity (as well as quasi-judicial actions) of administrative agencies or departments. By and large, the American system is more adversarial and hence more fact- or evidence-intensive. It is designed to limit the room for administrative discretion and by it nature encourages high levels of transparency.[10]

Article X in the GATT replicates most of the American approach. The word transparency does not appear (Safire tracks its origin to the 1970s), but the article spells out in detail the rules for "publication and administration" of trade regulations, with the latter emphasizing only the *desirability* (rather than *necessity*) of independent tribunals and judicial review.[11] Perhaps this "dilution" reflected a compromise with the UK in earlier negotiations or recognition by the State Department that some of the participating countries had not yet fully established their legal infrastructure. Be that as it may, the inclusion of Article X at the time of GATT's origin in 1947 appeared to be non-controversial. It was even deemed, in some sense, insignificant to the drafters of the new system because the main focus of trade policy at the end of the war was to reduce the border barriers erected, with disastrous results, during the 1930's. Border barriers such as tariffs and quotas are, for the most part, quite transparent. Successive rounds of GATT negotiations in the 1950s and 60s were termed the "golden age" of trade liberalization, defined implicitly as the reduction of border barriers. Thus, at the time Article X was drafted, transparency had not yet become the "new term for organized, agreed-upon mutual

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[10] For a review of different administrative law regimes *see* Lief H. Carter, Administrative Law and Politics: Cases and Comments (1983); H.B. Jacobini, An Introduction to Comparative Administrative Law (1991); John Peter Giraudo, *Judicial Review and Comparative Politics: An Explanation for the Extensiveness of American Judicial Review Offered from the Perspective of Comparative Government*, 6 Hastings Const. L.Q .1137, 1137-1185 (1979); Peter H. Schuck, Foundations of Administrative Law (1994).

[11] *See* GATT, art. X, 2(b) in Appendix I.

veil-dropping" in foreign policy discourse as Safire describes it today.[12]

Future GATT negotiations saw a change of focus toward a different mode of trade liberalization. The onset of this change began in the 1970s, with the Tokyo Round, which began in 1973.[13] The mid-decade Organization of Petroleum Exporting Countries oil shock had produced a new economic malady termed stagflation; a marked increase in so-called "new protectionism," including voluntary export restraints (VER's); quasi-legal market sharing agreements (orderly marketing arrangements (OMA's)); and an explosion of subsidies to support declining industries, especially in Europe, adding to the enormous subsidy support in the Common Agriculture Policy. The GATT system was not equipped to handle either non-transparent measures such as VER's and OMA's or domestic declining industry strategies. The GATT's weak dispute settlement mechanism added to American frustration with system.[14] The U.S. Administration's response to the rise of the new protectionism was to begin to move the trade policy agenda inside the border. The Tokyo Round included negotiations on trade-impeding barriers arising from domestic policies such as industrial and agricultural subsidies; government procurement, and regulation of product standards; as well as a strengthening of anti-dumping rules to facilitate the use by business of its favorite remedy against "unfair" trade.[15]

Thus, the focus of the Tokyo Round was, for the first time in GATT experience, no longer simply on reducing border barriers to trade. Rules governing domestic policy with trade spillover were now on the table. Perhaps increased legalization was inherent in the shift

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[12] Safire, *supra* note 1, at 4.

[13] The Tokyo Round negotiations took place from 1973-1979. For a general discussion of the GATT round of negotiations, *see* D.M. McRae and J.C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 A.J.I.L. 51 (1983); and GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION (1987).

[14] For a thorough analysis of the highly criticized mechanism, *see* R.E. HUDEC, THE GATT REGAL SYSTEM AND WORLD TRADE DIPLOMACY, (2nd ed. 1990).

[15] For a fuller exposition, *see* Gilbert R. Winham, *NAFTA Chapter 19 and the Development of International Administrative Law: Application in Anti-Dumping and Competition Law*, 32 J. WORLD TRADE 65-84 (1998).

from reciprocal bargaining over tariffs to rulemaking.[16] But arguably more important was the changing nature of American trade policy. There was growing conviction among U.S. business groups and labor unions that other countries were engaged in unfair trade practices and that the "free ride" from programs such as the Marshall Plan during the 1950s and 1960s had to stop.

For the U.S., the best trade policy option seemed to be a strengthening of its trade remedy laws. Congress demanded detailed legalistic prescriptions to prevent circumvention by any future administration unwilling to defend "national interests." One notable result of the Tokyo Round was the enormous increase in the application of anti-dumping policy by both the U.S. and the European Union (EU). Equally impressive was the rise in the number of administrative actions for countervailing duties brought by Americans against "unfair subsidies" abroad. Such administrative activism marked the onset of the 1980s.[17] This rise in the use of trade remedy laws was dubbed "administered protectionism."[18]

One interesting side-effect of "administered protectionism" was the U.S.-Canada Free Trade Agreement (FTA) of the late 1980s in which Canada, the *demandeur*, failed to persuade the U.S. to abandon anti-dumping policies but did secure its agreement to a bi-national judicial review of domestic agency actions (Chapter 19). Under Chapter 19, article 1904, Canada and the U.S. established a unique dispute settlement mechanism which allows either government to seek a review of an antidumping or countervailing duty determination by a bilateral panel with binding powers. The bi-national panel's role is to determine whether existing laws were applied correctly and fairly. The process described by Chapter 19 is the first, but doubtless not the last, example of international administrative law designed to ensure *due*

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[16] *See* OSTRY, *supra* note 1, at 86, 89.

[17] *See* id. at 91.

[18] This "administered protectionism" was bemoaned during the FTA negotiations as discussed in Alan M. Rugman, *A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement*, 40 M.E. L.REV., 305 (1988); James F. Smith & Marilyn Whitney, *The Dispute Settlement Mechanism of the NAFTA and Agriculture*, 68 N.D.L. Rev., 567, 594 (1992) (citing the Mexican and Canadian view of US AD/CVD law as "administered protectionism").

process. When the FTA became the North American Free Trade Agreement (NAFTA), Mexico, with its civil rather than common law inheritance, agreed to re-draft its anti-dumping and countervail legislation to conform with U.S. and Canadian statutes.[19]

Finally, the Tokyo Round also nudged transparency a bit further. An "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" was adopted at the close of the Round. Importantly, Paragraph 3 of the Understanding introduces a modified version of surveillance and underlines the desirability of advance notice.[20] These concepts are greatly expanded in the new WTO Trade Policy Review Mechanism (TPRM),[21] which was promoted by the Functioning of the GATT System (FOGS)[22] negotiating group in the Uruguay Round. The FOGS group covered three subjects: improved monitoring of trade policies; increasing effective organization of the GATT; and greater coherence of international economic policies. The TPRM and the institutionalization of regular minister meetings were the product of the FOGS negotiations. Based on the Organization for Economic Cooperation and Development (OECD) "country studies,"

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[19] *See* Winham, *supra* note 11, at 65-84.
Winham argues that even in the WTO Antidumping Code, there is a move to international administrative review, but one far weaker than Article 19. The "standard of review" in the Code is weak largely because of opposition by both the EU and the U.S. in the final bargaining stage of the Tokyo Round. If it is strengthened in the next set of negotiations to begin in 1999, this will further reinforce the move to an international administrative law regime and create stronger pressure for regime convergence.

[20] 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 be without prejudice to views on the consistency of measures with or their relevance to 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.
WTO, *supra* note 5, at 300.

[21] Trade Policy Review Mechanisms, GATT Doc. MTN/FA II-A3 (Dec. 15, 1993).

[22] Functioning of the GATT System, GATT, B.I.S.D. (36th Supp.), 403 (1989). *See also*, J. WEAVER AND D. ABELLARD, THE GATT URUGUAY ROUND: A NEGOTIATION HISTORY (1986-1992): THE FUNCTION OF THE GATT SYSTEM (1993).

the TPRM was designed to enhance the effectiveness of the policymaking process through informed public understanding--in other words, transparency. Very little, however, was produced on coherence.[23]

If the Tokyo Round was the first step in trade policy legalization, the Uruguay Round, launched in 1986, moved the regime much further down that road. Such progress is best exemplified by the inclusion in the agenda of the so-called "new issues" of services, intellectual property and investment. The U.S. demanded inclusion of the new issues (which were strongly opposed by a coalition of developing countries led by Brazil and India) to correct the basic structural asymmetry of the GATT, which did not cover areas of current American preeminence that were of little significance immediately after World War II.

However, the new issues were new in a far more radical sense than solely in their attempt to rebalance GATT structure. They exemplified a world of deepening integration toward a single global market. In trade policy terms, the barriers to access in the areas of services, intellectual property, and investment are not controlled by borders, but involve domestic regulatory regimes and domestic institutional infrastructure including, of course, formal legal regimes and enforcement practices. *Substantive statutory law* establishes the regulatory regime covering areas such as financial markets or basic telecommunications services. Nonetheless, administrative law governs the *procedure* of these regulatory institutions.

Since the establishment of the WTO, however, *transparency* has a radically different meaning. Transparency now requires publication of laws, regulations, and the mode of administration in tradable services or, to a more limited extent, investment regimes. In the case of intellectual property, the U.S. concern was primarily with enforcement. Thus, the agreement on trade-related-intellectual property (TRIPs) included a detailed enforcement procedure which mirrors the administrative and judicial mechanisms in the United

[23] See OSTRY, *supra* note 1, at 175-200. *See also* JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 154-162 (1995).

States.[24] Further, to underline the legalization trend, TRIPs permits a domestic challenge procedure and thus an avenue for extensive and expensive litigation. This new and significant concept of "direct effect" is also included in the government procurement agreement and is likely to be a condition for any further negotiations on investment to begin in 1999. Thus, the investment provisions of the North American Free Trade Agreement included procedures for resolving disputes by which private parties may seeking binding arbitral rulings against a host government in an international forum. These provisions were also included in the OECD's Multilateral Agreement on Investment (MAI).[25]

Finally, the TRIPs agreement underlines the *transparency issue*; the word is used as a heading in article 63. The agreement establishes a separate council, the Council for TRIPs, to monitor compliance. Countries must provide notification of all regulations and administrative arrangements to the council. A new, quasi-judicial process will now adjudicate disputes, representing a major achievement of the Uruguay Round and also, of course, underlining the legalization momentum.[26]

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[24] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement].

[25] For an evaluation, *see* Sylvia Ostry, *Regional Dominos and the WTO: Building Blocks or Boomerang?*, Michigan State University Tenth Anniversary Conference, U.S.-Canada Free Trade Agreement, September 1998 (publication forthcoming).

[26] The Uruguay Round included major reform of the GATT dispute settlement process including strict time frames for every step of the process; establishment of a Dispute Settlement Body to administer and oversee the process; explicit procedures for consultations; automatic establishment of a panel if parties failed to settle the dispute within 60 days of consultations; standard terms of reference to ensure expeditious and impartial composition of panels; "automatic" adoption of panel reports and Appellate Body reports; establishment of the Appellate Body to review legal issues; explicit requirement that a party had to implement results or the complaintant may automatically be granted authorization to retaliate; a specific obligation that in matters involving the WTO agreement the WTO rules must be followed, together with a prohibition on certain "unilateral actions."

This strong an juridified system stands in sharp contrast to its GATT forefather. *See* HUDEC, *supra* note 10.

The Uruguay Round dealt with many other agenda items including traditional GATT-type negotiations on tariffs; the corrosive and long-standing issue of agricultural subsidies; and other "leftovers" from the 1970s such as the new protectionism. The shift of trade policy inside the border has created a trading system profoundly different from that designed in the post-war world of shallow integration. One key feature of this new system is a vastly expanded concept of transparency. This includes, as a central feature, the administrative law regime of any WTO member country. Therefore, the prospect of accession to the WTO will be profoundly affected by deepening integration and increased transparency. A lack of transparency within the administrative law regime of a country, such as China, frustrates the expectations of the increased legalization in international trade law.

III. CHINA'S ACCESSION TO THE WTO[27]

China's position as an important world trade partner is among the many reasons for the country's interest in pursuing accession to international governmental organizations (IGOs) such as the WTO. The growing political, social, and economic benefits of membership, though questioned by some, remain advantages difficult to ignore. After reviewing the transparency requirements for accession and the current status of China's administrative legal regime, it will become clear that the hope for China's accession faces serious obstacles.

A. *Requirements Under the WTO Protocol of Accession*

China's accession is complicated partly by the requirements of the WTO. The draft protocol of accession of the WTO[28] encompasses the

[27] This is mainly based on Sarah Biddulph, Legal System Transparency and Administrative Reform, China/WTO Project Background Paper (1997) (unpublished manuscript) (on file with author).

accession requirements for new membership. This protocol includes, under the heading "Administration of the Trade Regime," separate sections on transparency and judicial review.

The transparency section of the WTO draft protocol supplements the prior requirements described by Article X of the GATT. Among the new features of the WTO are: an extension of coverage (it includes goods, services, TRIPs and foreign exchange control); publication before implementation--with right of comment (a replication of the APA, which requires some sort of consultation phase.);[29] enforcement only of those laws and regulations that are published (Article X was restricted to cover only an increase in barriers); and creation of a single inquiry point with a time limit for response (not in Article VIII).

The WTO's judicial review section *requires* China to provide independent institutions for "prompt review" of all "administrative action." Such requirements exceed GATT Article X specification, which allowed a "loophole."[30] Under the old GATT Article X provision, when institutional arrangements were absent, alternative procedures that provided for an "objective and impartial review of administrative action" were deemed acceptable.

As noted, these new transparency and review requirements of the WTO present a formidable challenge to the Chinese legal system. It may be productive to address the most basic elements of transparency first.

B. *Problems with Transparency in China*

The multi-layered complexity of the evolving Chinese legal system makes this apparently simple and straightforward requirement impossible to implement at present. Although administrative procedural laws were passed in 1987 and 1989, they apply only to the top level of the legislative system. Thus, only the National People's

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[28] The enabling portion of the WTO allowing accession is found in Marrakesh Agreement Establishing the World Trade Organization, opened for signature Apr. 15, 1994, 33 I.L.M. 1144 (1994), art. XII.

[29] *See* Appendix Two, Sections 4(b), (c) and (d) of the 1946 APA.

[30] As stated earlier, the GATT's Article X emphasizes only the *desirability* (rather than *necessity*) of independent tribunals and judicial review.

Congress; the Standing Committee, which is the operating arm of the Congress; and the State Council, which is the executive branch of government, must adhere to the new laws. Consequently, the legislative and administrative action at the local level, which technically is controlled by Beijing, still operates with very limited supervision and virtually no transparency. This opacity is the basis of the growth of what is termed "local protectionism," a problem of growing concern to foreign investors and others.

The inadequacy of the 1987 and 1989 reforms themselves is not the only obstacle preventing acceptable levels of transparency. Below the formal system of laws and administrative regulations is another body of "rules," termed normative documents. These documents are used extensively by administrative bodies, especially at the local level. Indeed, they are a relic of the pre-reform period when legal mechanisms were largely absent. Whether they are legal or not (and no clear ruling exists), they are not published and are probably binding on the bureaucrats who use them.

Beijing, or rather the Ministry of Trade and Economic Cooperation (MOFTEC), is purportedly trying to eliminate them. Although MOFTEC established its own gazette for publication of all laws (regulations and administrative rules related to foreign trade and investments) in October 1993, the gazette does not include state and local laws and, of course, excludes normative documents. Thus, there is really no "single inquiry point" that provides comprehensive coverage of all the legislation and regulations in China. Such access, however, is required by the WTO.

Further, to add to the problem, the Chinese laws tend to be highly generalized and lack any specified procedures through or by which policy will be developed. Thus, bureaucrats who implement law are given enormous scope and discretion. While there is now an effort to improve legislative drafting, this too will take some time. Given the present state of both substantive regulatory and administrative procedural law, China cannot fulfill the WTO requirement for transparency.

Trends underway suggest efforts to improve the present state of transparency. Nonetheless, it is not clear how long this will take.

Without some re-balancing of legislative and administrative power, however, the opacity of local level rulemaking will continue.

Another feature of the Protocol of Accession that is problematic for China is the "right of comment" rule based on the APA. No Chinese legislation at either the highest level or the local level incorporates a mandatory requirement for consultation with either the general public or foreigners. While consultation does take place during legislative drafting (sometimes even with foreigners), virtually no consultation occurs while drafting implementing regulations, especially at the lower level. Thus, the lack of publication of many Chinese laws, continued local protectionism, and the "right of comment rule" of the WTO are all present characteristics of the Chinese administrative legal structure that impede China's accession.

C. *Judicial Review in China*

Turning to judicial review, the problems are equally challenging, albeit of a different nature. The essence of the problem is that there is no clear separation of *powers* in China--only a separation of *functions*. There cannot be, therefore, an independent judiciary. This is entrenched in the provisions of the new (1982) Constitution. If the courts cannot interfere in the exercise of administrative powers of the state, it follows that it is not possible for China to fulfill the requirement in the draft Protocol of Accession for review of administrative actions.

This characteristic of the current Chinese polity is worth underlining. As one noted expert on Chinese law has described it, while there has been an enormous increase in new laws and the role of lawyers since the onset of economic reform in 1978,

> [T]hese accomplishments have created legal institutions but not a legal *system*. There is no underlying principle that law is supreme. Although Chinese leaders talk about the rule of law, they seem to mean rule by law, which is to use rules as instruments to maintain social discipline rather than to limit the power of the state. The

> conflict between a rule of law and supremacy of the Chinese Communist Party has not even been addressed.[31]

Nowhere is this absence of the rule of law best exemplified than in the field of administrative law. The origin of administrative law in Western countries, the growth of government and the *raison d'être* of the law sought to constrain the expanding administrative power--to control the bureaucrats. The profound cultural chasm between the Western legal families and the Chinese tradition, with its deep historical roots in Confucianism, is indeed best exemplified in this legal domain. The Chinese image of the mandarin is not Kafkaesque. The poor training and qualifications of judges is not only due to the impact of Mao, but also echoes a longer historical tradition.

> [This] impedes the capacity of China's courts to compel production of evidence and enforce awards. The often parochial view (local protectionism) taken by local courts and security departments toward enforcement of judicial awards rendered outside the immediate area of jurisdiction reflects ingrained traditions of localism and the centrality of personal relations as the basis of behaviour.[32]

The problem of securing reliable information has created severe problems for effective resolution of commercial disputes within China.[33] Given the increasing legalization of the WTO dispute settlement mechanism, which involves considerable evidentiary input,

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[31] Stanley B. Lubman, *There's No Rushing China's Slow March to a Rule of Law*, L.A. TIMES, Oct. 19, 1997, at M2. For a fuller exposition of the implications of the law as an instrument of policy enforcement, *see* Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities, and Strategy*, 39 AM. J. OF COMP. L. 293 (1991).

[32] Pitman B. Potter, China and the WTO: Tensions Between Globalization and Local Culture, China/WTO Project Background Paper 7-8 (1998) (unpublished manuscript) (on file with author).

[33] Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245 (1991); Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, THE CHINA QUARTERLY, June 1994; Matthew Bersani, *The Enforcement of Foreign Arbitral Awards in China*, 10 J. INT'L ARB. 47 (1993).

Chinese accession will certainly affect the functioning of the WTO (see Conclusion below).

While convergence between the Western and Chinese legal cultures seems unlikely (except perhaps over the very long run), adaptations are plausible. First of all, it is important to underline that there are significant differences in the extent and nature of judicial review between the American version of the common law and other versions of this legal family in English-speaking countries as well as differences between common law and continental European systems. Moreover, the American system itself is changing. The reaction against the "big government" launched in the New Deal and entrenched in the post-war welfare state (albeit less in the United States than any other member of the OECD) has given rise to a momentum to re-invent (or de-invent) government.

As recent analysis suggests, this proliferation of market-like approaches, often involving a mix of private and public actors, may generate a new administrative law approach. This new model would require, inter alia, greater reliance on bargaining and negotiation models of decision-making by agencies and a new "doctrinal feasibility" for the courts because "the automatic judicial imposition of 'activist procedures' in situations that call for more nuanced and efficient governmental approaches can be counter-productive"[34] These changes imply greater administrative discretion and a less adversarial system.

Perhaps, then, an incremental adaptation of the Chinese regime over a time-certain transition period is a more feasible approach today than it was in earlier decades when differences between the American and other regimes were so extreme. However, coordination of the extensive legal assistance programs of both multilateral and bilateral

[34] Alfred C. Aman Jr., *Administrative Law for a New Century*, in THE PROVINCE OF ADMINISTRATIVE LAW 97, 117, (Michael Taggart ed., 1997). While the evolving American regime enhances administrative discretion, the new Japanese Administrative Procedures Law (1993) does not eliminate but does constrain the scope for "administrative guidance" largely as a result of American pressure over several decades. *See also* Ken Duck, *Now That the Fog Has Lifted: The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance*, 19 FORDHAM INT'L L.J. 1686 (1993).

agencies plus an effective mechanism to link the technical assistance program with the WTO accession negotiations would be vital.

A number of recent changes in Chinese administrative law suggest that there may be a receptivity to significant reform but also underline both the complexity and risks of doing nothing. For example, the Chinese Administrative Litigation Law (ALL) of 1990 gave the courts power to review the lawfulness of administrative acts such as the imposition of fines, denial of business licenses, and restriction of property rights. Moreover, the ALL permits challenges against individual officials abusing their power to elicit bribes. But the ALL fails to empower courts to review rulemaking, standard setting, and other administrative norm-making activity. All of which constitute important powers under typical administrative law. In other words, most *procedural activity* is beyond the scope of review of the courts.[35] Not to bemoan only this piece of legislation, the ALL was followed by a flurry of other administrative statutes in the 1990s. A maze might be a more appropriate analogy to capture the current state of administrative law in China.

D. *A New Initiative*

While opening up an increasing number of channels for complaint, the recent legislation leaves the problem of transparency in China unresolved. Improving these conditions must be based on full information and a uniform administrative regime grounded in the right of an individual to challenge a government official.

Perhaps facilitating the establishment of something as "arcane" as WTO-compatible administrative norms and principles could throw light on something more fundamental than the transparency of the trading system--in other words, a rights-based regime. A similar view is expressed by William Alford, writing about the highly contentious problem of protecting intellectual property rights in China. He wrote:

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[35] *See* Pitman B. Potter, *Judicial Review and Bureaucratic Reform: The Administrative Litigation Law of the PRC*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA (Potter ed. 1994).

> If the purpose of U.S. policy towards the PRC concerning intellectual property is to secure meaningful protection for American property interests, it is necessary, therefore, first to understand why such protection is no more readily available for Chinese ... (T)he most important factor in explaining the late appearance and relative insignificance of the idea of intellectual property in the Chinese world lies in what, for lack of a better term, we might describe as its political culture, and especially in the central importance of the state, for purposes of legitimation and power, of controlling the flow of ideas. A system of state determination of which ideas may or may not be disseminated is fundamentally incompatible with one of strong intellectual property rights in which individuals have the authority to determine how expressions of their ideas may be used and ready access to private legal remedies to vindicate such rights.[36]

Of course, political cultures do change. The process of economic reform in China has already begun to affect the pace and direction of that change. So would full and effective integration into the global economy through membership in international institutions such as the WTO.

IV. CONCLUSION

A key element in China's accession to the WTO relates to the transparency of laws, regulations and other rules related to trade and investment. There is at present a very considerable mismatch between the WTO transparency requirements and the Chinese legal regime. A fundamental reason for the mismatch is embedded in Chinese historical and cultural traditions. While the legal reforms over the past decade do suggest a positive reaction to the situation, they will not permit China, as of yet, to implement the transparency requirements of the WTO protocol.

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[36] WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 119 (1995).

Without some new initiative to facilitate significant change in China's administrative law regime, Chinese accession to the WTO will create serious problems both for China and the institution. One aspect of the legalization of the WTO system has been the juridification of the dispute settlement arrangements.[37] Panel judgments are increasingly based on more and more detailed information as this evidentiary-intensive mode of operation is seen as necessary in case of appeal. The accession of China could both overburden the WTO dispute mechanism (if the weak record of Chinese enforcement of foreign arbitral awards does not markedly improve) and would create a very serious problem for both the panels and the WTO secretariat in securing relevant information. A series of dispute judgments against China would be seen by many Chinese as politically humiliating and could affect the support for continued reform. As noted earlier, a concerted and coordinated technical assistance program plus a mechanism to link this program with the accession protocol would be essential if WTO membership is to serve the dual purpose of encouraging Chinese reform and strengthening the global, rules-based trading system.

[37] See Agreement Establishing the World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, opened for signature Dec. 15, 1993, 33 I.L.M. 13, art. 17.

APPENDIX 1

Article X
Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

(a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or

procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(c) The provisions of sub-paragraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this sub-paragraph.

APPENDIX 2

Federal Administrative Procedure Act

553.	**Rule making**
Parallel Sections of 1946 Act	
	(a) This section applies, according to the provisions thereof, except to the extent that there is involved--
	(1) a military or foreign affairs function of the United States; or
	(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
Sec. 4(a)	(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--
	(1) a statement of the time, place, and nature of public rule making proceedings;
	(2) reference to the legal authority under which the rule is proposed; and
	(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
	Except when notice or hearing is required by statute, this subsection does not apply--
	(A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or
	(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
Sec. 4(b)	(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
Sec. 4(c)	(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--
	(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
	(2) interpretative rules and statements of policy; or
Sec. 4(d).	(3) as otherwise provided by the agency for good cause found and published with the rule.
	(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.