

# The Implementation of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) in China

Paolo Davide Farah and Elena Cima

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## The Implementation of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) in China

Paolo Davide Farah\* and Elena Cima\*\* \*\*\*

### I. INTRODUCTION

China's transition from a planned economy to the so-called "socialist market economy" started at the end of 1978, with a process that has gradually changed the trajectory of development previously adopted. The first thirty years (1949-1979) of the People's Republic of China's (PRC) policy development was modeled after the Soviet planned economy, but with specific characteristics (Chinese path to socialism). Peculiar aspects of Maoist strategy were the emphasis on economic self-sufficiency at both a national and local level and, as a consequence, the emphasis on the ability of exploiting human and technical resources through collective mobilization and organization. With the goal of the "Four Modernizations" (industry, agriculture, national defense and science & technology),<sup>1</sup> a pragmatic approach was adopted, where

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\* Visiting Scholar at Tsinghua University School of Law in Beijing. Assistant Professor and Research Fellow of International law and WTO Law at Università degli Studi di Milano, Faculty of Law, Department of Public, Civil Procedure, International and European Law. Research Fellow of Chinese Law at the Center of Advanced Studies on Contemporary China (CASCC), Turin. Research for this article was conducted with the assistance of funding from the Center of Advanced Studies on Contemporary China (CASCC), Turin. A special acknowledgement should be addressed also to the Science & Technology Fellowship Programme in China, the European Commission in Brussels, the Delegation of the EU commission in Beijing and Europeaid (EuropeAid/127024/L/ACT/CN\_STF/08). For any comment: paolofarah@yahoo.com

\*\* Visiting Researcher (2009-2010), Harvard Law School, East Asian Legal Studies; J.D. Candidate (2010), University of Milan, Faculty of Law, Department of Public, Civil Procedure, International and European Law.

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<sup>1</sup> In October 1978, Deng Xiaoping said that: "China cannot develop by closing its door, sticking to the beaten track and being self-complacent.... It will be quite difficult for us to realize the four modernizations, [without] learning from other countries and we must obtain a great deal of foreign

“economic development becomes a priority over class struggle.”<sup>2</sup> This new strategy led to three transformations in China’s economic development: the transformation from a centrally-planned to a market-oriented economy; the transformation from an agricultural-based to a manufacturing-and-services-based economy; and the transformation from a closed to an open economy. The ensuing trade liberalization reforms included opening up an export-oriented processing segment, implementing a unilateral trade liberalization process and joining the World Trade Organization (WTO). Further actions concerned the opening to foreign investment, through the creation of four “Special Economic Zones” (SEZ), ruled by three main guidelines: (1) creation of structures mainly designed to attract and employ foreign capital; (2) arrangement of economic activities through joint-ventures between Chinese and foreign companies; and (3) production of goods mainly addressed to foreign markets export. Since the beginning of the reforms, the Chinese economy has been expanding dramatically with annual GDP growth of 9%. The expansion of China’s participation in international trade has been one of the most outstanding features of the country’s economic development.

The WTO was only a partial worldwide trade organization before China’s accession.<sup>3</sup> The road to the signature of the final agreement of accession was long, but these difficulties pale in comparison to

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assistance.” Deng Xiaoping proposed this concept on October 1978, during his speech to a press delegation from the Federal Republic of Germany, *available at* <http://www.peopledaily.com.cn/english/dengxp/contents2.html>. This position was confirmed by the December 1978 Third Plenary Session of the Communist Party of China’s Eleventh Central Committee. The focus of the party and state’s work has officially shifted from class struggle to modernization. *See* Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China, XH (Dec. 14, 1978), in *People’s Republic of China*, FBIS DAILY REP., at E4, E10 (Dec. 26, 1978) as quoted in Frances H. Foster, *Codification in Post-Mao China*, 30 AM. J. COMP. L., 395 (1982).

<sup>2</sup> See Ulric Killion, “Building Up” China’s Constitution: Culture, Marxism, and the WTO Rules, 41 LOY. L.A. L. REV. 563, 563-66 (2008); *see also* Randall Peerenboom, *Resistance, Revision and Retrenchment in the Transition to a Competitive Market Economy in China* (La Trobe Univ. Sch. of Law Legal Studies Working Paper, No. 8, 2008) (Austl.), *available at* <http://ssrn.com/abstract=1265114>.

<sup>3</sup> The China’s WTO accession documents are: the Protocol of China’s accession to the WTO (WT/L/432); the Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, ¶70, WT/ACC/CHN/49 (Oct. 1, 2001); and the Annexes containing market access commitments (WT/ACC/CHN/49/Add.2). Regarding the general WTO’s accession procedures, *see* PAOLO PICONE & ALDO LIGUSTRO, DIRITTO DELL’ORGANIZZAZIONE MONDIALE DEL COMMERCIO 51-61(2002); *see also* GIOVANNA ADINOLFI, L’ORGANIZZAZIONE MONDIALE DEL COMMERCIO, PROFILI ISTITUZIONALI E NORMATIVI 105-122 (2001) (Italy).

those that have not yet been tackled in terms of achieving real implementation of its provisions throughout the PRC.<sup>4</sup> China's accession surely presents opportunities in world trade, but also poses the challenge of integrating a market with strong structural, behavioral and cultural constraints. A great number of analysts have been arguing that not only will China's integration be long and difficult, but also could be damaging to the organization. Being a party of the international agreement and the participation to the WTO could involve China in state responsibility under the general principle "*pacta sunt servanda*" in case of non-compliance to its obligations. This fundamental legal principle clearly applies in the context of international negotiations and it refers to the obligation to "keeping one's promises."<sup>5</sup> In the opinion of the authors, the most relevant obstacle to effective implementation of the WTO and bilateral agreements is the problem of "internal barriers"<sup>6</sup> that have distinctive features because of China's unique historical background<sup>7</sup> including the communist period, long-standing imperial traditions and feudalism. Moreover, the lack of stable rules to define relations between the central authority and the increasingly powerful local entities undermines the good intentions of the Chinese central Government.

<sup>4</sup> See Paolo D. Farah, *Five Years of China's WTO Membership, EU and US Perspectives about China's Compliance with Transparency Commitments and the Transitional Review Mechanism*, 33 LEGAL ISSUES ECON. INTEGRATION 263, 263-304 (2006); Donald C. Clarke, *Legislating for a Market Economy in China*, 191 CHINA Q. 567 (2007) (U.K.); He Lingling & Razeen Sappideen, *Reflections on China's WTO Accession Commitments and Their Observance*, 43 J. WORLD TRADE 847 (2009).

<sup>5</sup> For further analysis about the principle of "*pacta sunt servanda*" and the voluntary element behind that, see TULLIO TREVES, DIRITTO INTERNAZIONALE, PROBLEMI FONDAMENTALI 359-63 (2005) (Italy); see also NGUYE QUOC DIHN & ALAIN PELLET & PATRICK DAILLIER, DROIT INTERNATIONAL PUBLIC 54 (L.G.D.J. 5th ed., 1994) (Italy). Regarding the Chinese position on regionalism and multilateralism, see Ulric Killion, *Chinese Regionalism and the 2004 ASEAN-China Accord: the WTO and Legalized Trade Distortion*, 31 N.C.J. INT'L L. & COM. REG. 1, 1-64 (2005); Francis Snyder, *China, Regional Trade Agreements and WTO Law*, 43 J. WORLD TRADE 1, 1-57 (2009); Jiangyu Wang, *China's Regional Trade Agreement: the Law, Geopolitics, and Impact on The Multilateral Trading System*, 2004 SING. Y.B. INT'L L. 119, 119-47, available at <http://ssrn.com/abstract=559382>.

<sup>6</sup> Ljiljana Biukovic, *Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan*, 11 J. INT'L ECON. L. 803, 803-25 (2008) (U.K.); Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699, 699-715 (2007) (U.K.). See generally PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* (2001).

<sup>7</sup> Paolo D. Farah, *L'influenza della concezione confuciana sulla costruzione del sistema giuridico e politico cinese*, in IDENTITÀ EUROPEA E POLITICHE MIGRATORIE 193, 193-226 (Giovanni Bombelli & Bruno Montanari eds., 2008) (Italy).

During the negotiations, the difficulties of Chinese government to ensure compliance with the WTO requirements and conditions were already apparent. The awareness of the market situation and the need for a reform of the Chinese legal, economical and financial order to ensure a long-term functioning of the WTO is spreading among all the member states, especially the US and the EU. For these reasons, beside the ordinary WTO Trade Policy Review Mechanism (TPRM), a special “precautionary” instrument, the Transitional Review Mechanism (TRM),<sup>8</sup> was included in Section 18 of the Protocol of China’s accession to the WTO, as requested by the US and supported by the EU. Both the US and the EU were pinning a great part of their hopes and financial support on the good performance of the TRM. The TRM is more comprehensive than the TPRM. The TRM has the objective of monitoring and enforcement of implementation of WTO commitments (which TPRM does not), promoting transparency and exchange of information in trade relations with China. On the other side, the TPRM final report by the WTO secretariat does not need consensus approval of the WTO members. The review under TRM started to take place after accession and would continue each year for eight years with a final review in the tenth year or at an earlier date decided by the General Council. This mechanism requires China to provide WTO members with specific information, such as economic data, economic policies, policies affecting trade in goods, policies affecting trade in services, the trade-related intellectual property regime and specific questions in the context of the TRM. These questions are different from those required by the general notification requirement of the WTO members. The examination of this information is conducted by 16 subsidiary bodies and at the end of the year at the general council meeting. The TRM grants WTO members with additional multilateral forums to ask the Chinese Government for clarification and to improve mutual understanding in the field of China’s accession. At the 2002 TRM, it was China’s first year of WTO membership and China had to overcome its lack of

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<sup>8</sup> See Farah, *supra* note 4, at 291-98; see also Paolo D. Farah, *L’adesione della Cina all’Organizzazione mondiale del commercio: come conciliare cultura e diritto*, MONDO CINESE, 2005(3), at 34, 34-42 (Italy); see generally Pasha L. Hsieh, *China-United States Trade Negotiations and Disputes*, 4 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 369, 369-99 (2009).

experience, resources and a lack of sufficient time for preparation.<sup>9</sup> At the TRM in 2005, 2006, 2007 and 2008, while appreciating the efforts made by China, the EU and the US also had to recognize the necessity of further progress on WTO commitments related to several specific fields, such as transparency, banking, telecommunications, automobile, construction, intellectual property rights, and agriculture sectors. More specifically, problems occurred have been examined in the wholesale services such as the importation and distribution restrictions applicable to copyright intensive products (books, newspapers, journals, theatrical films, DVDs and music) and to crude oil and processed oil, in the retailing services such as licensing processes, the urban commercial network plans, the direct selling services, the customs valuations (such as valuation determinations), the importing licensing, the China's Conduct of Antidumping Investigations and in the others legislations.<sup>10</sup>

From the Chinese general behavior in the framework of TRM committees at the WTO though, it seems that China does not accept this mechanism. China considers it discriminatory, because it is applicable just to China.<sup>11</sup> But the negotiations for the accession of a new country to the WTO often establish more commitments than those included in the multilateral agreements (WTO plus obligation).<sup>12</sup> China negotiated and signed the final agreement which had also provided the inclusion of the TRM. However China's Protocol of Accession to the WTO does not specify all the

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<sup>9</sup> General Council of WTO, *China Transitional Review under Section 18.2 of the Protocol of Accession to the WTO Agreement, Minutes of Meeting*, ¶ 34, WT/GC/M/77 (Feb. 13, 2003) (oral statement delivered by Representative of the European Communities), available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDdocuments/t/WT/GC/M77.doc>.

<sup>10</sup> U.S. Trade Rep., *Report to Congress on China's WTO Compliance 20 passim* (2008), available at [http://www.ustr.gov/sites/default/files/asset\\_upload\\_file192\\_15258.pdf](http://www.ustr.gov/sites/default/files/asset_upload_file192_15258.pdf) [hereinafter USTR]; see also Charles Tiefer, *Sino 301: How Congress Can Effectively Review Relations with China after WTO Accession*, 34 CORNELL INT'L L.J. 55, 55-93 (2001); see generally U.S. Gov't Accountability Off. [hereinafter U.S. GAO], Report to the Chairman, Committee on Finance, U.S. Senate, USTR's China Compliance Reports and Plans Could Be Improved, NO. GAO-08-405 (2008), available at <http://www.gpoaccess.gov/gaoreports/index.html>.

<sup>11</sup> U.S. GAO, Report to Congressional Committees: First Year US Efforts to Monitor China's Compliance, NO. GAO-03-461, at 27 (2003) available at <http://www.gpoaccess.gov/gaoreports/index.html>.

<sup>12</sup> Julia Ya Qin, "WTO-Plus" Obligation and Their Implications for the WTO Legal System, 37 J. WORLD TRADE 483, 491 (2003); CLAUDIO DORDI, LA DISCRIMINAZIONE COMMERCIALE NEL DIRITTO INTERNAZIONALE, 306-10 (2002) (Italy).

TRM procedural rules, so China has had some discretion for providing timely answers to the questions in the TRM subcommittees. Without the introduction of supplementary procedural rules to improve the timelines of Chinese answers, the TRM procedures cannot work properly. In fact, China is constantly challenging them, since such procedures were not in the commitments and appeared to China as an attempt to renegotiate and add to the terms of its accession.<sup>13</sup> During the last years, China has lowered the expectations of some of the WTO members for the outcome of the TRM.<sup>14</sup> It follows that the WTO members' participation in the review had declined<sup>15</sup> in favor of bilateral negotiations<sup>16</sup> which result in the best means to overcome many problems in China's WTO compliance. According to some scholars, the general Chinese behavior not in favor of the TRM could be explained with reference to the Chinese cultural tradition,<sup>17</sup> where the best way to resolve the disputes is through mediation and conciliation.<sup>18</sup> The multilateral system can more easily disclose unpredictable problems or risks. It is more difficult to foresee the reactions of each part in a multilateral forum than those of one counterpart in a bilateral negotiation.

As it has already been stressed, China's legal system was not totally and entirely ready for the accession, since most of its laws and regulations were not fully consistent with WTO provisions. Moreover, the Uruguay Round Negotiation is a Single-Undertaking, which means that every single multilateral agreement is part of a whole and indivisible package and cannot be agreed separately. During the negotiations and after the accession China has started a massive process of amendment of its domestic laws and regulations regarding all the sectors covered by WTO rules. As any new member of the WTO, China needs to reform the main sectors of its

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<sup>13</sup> U.S. GAO, *Supra* note 11, at 28.

<sup>14</sup> CONG.-EXEC. COMM'N ON CHINA, 108TH CONG., ANNUAL REPORT 2004, at 85 (2004), available at <http://www.cecc.gov/pages/annualRpt/annualRpt04/CECCannRpt2004.pdf>; Julie Walton, *WTO: Year 4*, CHINA BUS. REV., Jan.-Feb. 2005, at 24-34; see USTR, *supra* note 10, at 20.

<sup>15</sup> Terence P. Stewart, *China in the WTO - Year 3*, 2005 UC-CHINA ECON. & SEC. COMM'N, 96.

<sup>16</sup> See STEFAN NAPEL & BILATERAL BARGAINING, THEORY AND APPLICATIONS (2002) (F.R.G.).

<sup>17</sup> Farah, *supra* note 7, at 193-226.

<sup>18</sup> STALEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 40-70*, 217-49 (1999); Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201 (1966); Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 270-77 (1991).

legislation. In this article the analysis will focus on the trade-related intellectual property rights and the more general WTO transparency principle.<sup>19</sup>

## II. CHINA'S COMPLIANCE WITH TRANSPARENCY COMMITMENTS

The WTO agreements, the Protocol of China's Accession to the WTO and all of China's accession documents include China's commitments to such things as the rule of law and the transparency principles. There are a wide range of transparency related problems such as the formal publication of laws and regulations, procedural fairness in decision-making, the judicial review and the non-discrimination principle. The trade regime should be applied to the entire customs' territory of China without exception. A monitoring mechanism should be implemented at the national level to detect any discrepancy to the uniform application of the trade regime.. The local governments have to legislate and adapt their current laws in conformity with the obligations undertaken by China's central government in compliance with the provisions of the WTO Agreement and the Protocol. From a legal point of view, the regional governments should normally comply with the central regulations, but they seem unwilling to accept the standards.<sup>20</sup> They feel threatened by demands for transparency that would prevent them from controlling and influencing business deals.

### 1. *Uniform Administration Rule*

In China, legislative authority is unitary and hierarchical. Although the provincial and local governments only have to pass laws coherent with the national ones and "the higher bodies have the authority to disallow conflicting rules, [however] national supervision has little effect on the numerous provincial and local

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<sup>19</sup> With reference to the transparency requirements of China, see Biukovic, *supra* note 6, at 803-25; Choukroune, *Chine et OMC: l'état de droit par l'ouverture au commerce international?*, 6 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 666, 666-68 (2002) (Fr.); Leila Choukroune, *L'internationalisation du droit chinois des affaires: une première évaluation des conséquences juridiques de l'accession de la Chine à l'OMC*, 5 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 513, 513-20 (2003) (Fr.).

<sup>20</sup> See Tiefer, *supra* note 10, at 74-76.



rules created each year.”<sup>21</sup> According to Article 57 of the PRC Constitution, the National People’s Congress of the People’s Republic of China is the highest organ of state power. At the beginning of the 1990s, the NPC’s role had started to gradually change, because of the “leadership efforts . . . to unify the legislative system to prevent conflicts of law and to improve the overall quality of the legislation.”<sup>22</sup> The Legislation Law of 2000 and the creation of a special legislative panel with the responsibility of reviewing legislation and regulations for consistency with the Constitution are other important steppingstones towards the long-term programmatic reform of the administrative law. Under supervision of the NPC and of the Standing Committee, the State Council exercises the power to create ministries and commissions involved in the drafting of administrative measures and in laws for economic reform. Therefore, the State Council’s department in charge of the foreign trade and economic relations rules foreign trade in China. The new Ministry of Commerce (MOFCOM), created after the merger between the Ministry of the Foreign Trade and Economic Cooperation (MOFTEC) and the State Economic and Trade Commission (SETC), is responsible for implementing the Foreign Trade Law which regulates several trade matters, in particular those related to WTO requirements.

Protocol I, 2, A, 2 reflects the provisions of art. X (3) of GATT and establishes that:

China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights (TRIPS) or the control of foreign exchange.<sup>23</sup>

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<sup>21</sup> MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, *TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION* 63 (1999).

<sup>22</sup> CONG.-EXEC. COMM’N ON CHINA, 108TH CONG., ANNUAL REPORT 2003, at 57 (2003), *available at* <http://www.cecc.gov/pages/annualRpt/2003annRpt>; *see also* CONG.-EXEC. COMM’N ON CHINA, 108TH CONG., ANNUAL REPORT 2009 (2009).

<sup>23</sup> General Agreement on Tariffs and Trade [GATT], art. X(3), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf); *see also* General Agreement on Trade in Services [GATS], art. VI, Jan. 1, 1995, 1869 U.N.T.S. 183, 33 I.L.M. 1167

Also at Paragraph 73 of Working Party Report on the Accession of China, it is stated that “the provisions of the WTO Agreement, including the Draft Protocol, would be applied uniformly throughout its customs territory. . . .”

Since China wished to achieve real integration into the WTO, while at the same time proceeding towards sustainable growth, the country was obliged to go through an extensive reform of its administrative law system.<sup>24</sup> The processes of implementation, monitoring and enforcement for a nation such as China must take place within the context of domestic political and economic institutions. This context is defined as “fragmented authoritarianism”<sup>25</sup> or as “a multi-layered complexity.”<sup>26</sup> All these interpositions make it more difficult for China to respect these obligations and have a strong effect on the compliance of the WTO’s accession rules. Incidentally, the Chinese Government has clearly vowed to respect the agreement, to keep its promises and to cooperate with the other WTO Members’ wishes.<sup>27</sup>

Other authors have also given particular importance to the necessity of formal harmonization of China’s laws and regulations.<sup>28</sup> A new WTO Member State should comply with formal harmonization. New regulations must take place, a number of laws and regulations should be revised, obsolete laws contradictory to WTO rules should be eliminated<sup>29</sup> and harmonized standards must be implemented.<sup>30</sup> In short, a thorough integration is necessary. China began this colossal task before the accession and, during its nearly nine years of membership, the Chinese Government has made

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(1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf) (addressing that each and every measures of application of any domestic regulation should be reasonable, objective and impartial).

<sup>24</sup> See Biukovic, *supra* note 6, at 803-25; see also Sarah Biddulph, *The Production of Legal Norms: A Case Study of Administrative Detention in China*, 20 UCLA PAC. BASIN L.J. 217, 269 (2003).

<sup>25</sup> KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 169 (2004).

<sup>26</sup> Sarah Biddulph, *Through a Glass Darkly: China, Transparency and the WTO*, 3 AUSTL. J. ASIAN L. 59, 59-95 (2001).

<sup>27</sup> Working Party on the Accession of China, *supra* note 3.

<sup>28</sup> See GROOMBRIDGE & BARFIELD, *supra* note 21, at 63.

<sup>29</sup> Lei Wang & Shengxing Yu, *China’s New Anti-dumping Regulations: Improvements to Comply with the World Trade Organization Rules*, 36 J. WORLD TRADE 903, 903-04 (2002).

<sup>30</sup> U.S. Trade Rep., *Report to Congress on China’s WTO Compliance* 3 (2005); Hu Shengtao, Speech at the In House Congress Beijing 2002: Foreign Investment in China-Post WTO (2002).

great progress. In fact, the NPC has institutionalized the creation of specialized committees involved in peculiar areas of law.<sup>31</sup> Both the NPC and the Standing Committee have increased the number of officials who are more competent and specialized than before. These officials can draft higher quality legislation and better supervise the enforcement of NPC laws, but this supervision should not replace WTO Members' external monitoring to ensure that any lower-profile measures do not become standard bureaucratic practice. The Chinese laws are often vague and not precise,<sup>32</sup> but as to the "Trade-related laws, regulations and other measures," some Chinese scholars attribute this inadequacy to the extreme complexity and technical nature of the WTO words to be adapted to Chinese language and to the necessity to create a WTO Chinese language standard. Therefore, it is challenging for the Chinese legislator to transpose the WTO commitments in the Chinese legal system,<sup>33</sup> and the potential lack of specificity of the Chinese laws will not grant full compliance with the WTO agreement.

With regard to the provincial and local authorities, it has been pointed out that, under the 1954 Soviet-inspired Constitution, the leadership had clearly set the objective of a unified legislative system which aimed at preventing conflicts of law. In this way, the obvious conflict between the formal law making powers of the NPC and the use of normative documents by other state bodies rose clearly to the surface. For these reasons, in 1956, Mao Ze-dong stated that, "under the Constitution, legislative power is concentrated at the centre. But where central policies are not violated and it is in accordance with the needs of the situation and the work at hand, localities may issue regulations." Local and provincial administrative implementation and enforcement is often behind with formal objectives, but recently there has been some improvement. Before China's accession to the WTO on 21 April 2001, the State Council, in view of complying with the WTO requirements, adopted the Regulations Concerning Prohibiting the Implementation of

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<sup>31</sup> CONG.-EXEC. COMM'N ON CHINA, *supra* note 22.

<sup>32</sup> CONG.-EXEC. COMM'N ON CHINA, 108TH CONG., ANNUAL REPORT 2005, at 16 (2005), *available at* <http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf>.

<sup>33</sup> WTO: *Will China Keep its Promises? Can it?*, Hearing Before the Cong.-Exec. Comm. on China, 107th Cong. 9 (2002), *available at* <http://catalogue.nla.gov.au/Record/4164690> [hereinafter *Hearing*] (prepared statement of Susan S. Westin).

Regional Barriers in the Course of Market Economy Activities, establishing more powers of control for the central authorities on provincial entities and specifically on the local government officials implementing and transposing national laws in the provincial regulations. The State Council has also requested the local government “to review local regulations, administrative rules, policies and measures in line with the principles of uniform application, non-discrimination and transparency.” There is a lower standard of compliance where the regional governments have more autonomy and economic independence. This independence from the central government is replaced by the local government’s dependence upon local enterprises taxes on revenues. The result is that local governments would protect local enterprises’ interests, and they would consider some WTO commitments as a danger for their businesses.<sup>34</sup> Currently, even though a sort of body of parameters exists, which is a sign of goodwill by the central government, it is not enough to assure that the regional powers will respect these rules or that the conflicts of powers between the central authorities and the localities will be always avoided. Protocol, I, 2, A, 4 states that “China shall establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application of the trade regime.” This is an important element, which recognizes the necessity of establishing an enforceable mechanism in the event of non-uniform application of the trade regime. The Working Party Report in comparison with Protocol I, 2, A, 4 has an additional element, which is important to point out. Paragraph 75 specifies that the Chinese “authorities would act promptly to address the situation utilizing the remedies available under China’s laws, taking into consideration China’s international obligations. . . .”<sup>35</sup> The definition of “China’s international obligations” could imply broader commitments for the Chinese government well beyond the WTO obligations, such as non trade concerns (meaning labor rights, human rights, and environmental protection).

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<sup>34</sup> Arjun Subrahmanyam, *China and the WTO: Perspective on a Changing Environment*, CHINA L. & PRAC., Feb. 2005, at 21.

<sup>35</sup> Paragraph 75 of the WPR is one of the commitments listed in paragraph 342 of the WPR directly incorporated in the Protocol, so it is a commitment *per se* and independent from Protocol, I, 2, A, 4. See Working Party on the Accession of China, *supra* note 3, ¶342.

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

Protocol, I, 2, C, 1 reflects the provisions of the second part of Article X (3) of GATT:

China undertakes that only those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange that are published and readily available to other WTO Members, individuals and enterprises, shall be enforced. In addition, China shall make available to WTO Members, upon request, all those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange before such measures are implemented or enforced. . . .<sup>36</sup>

The Protocol in Paragraph 2, C, 1, if compared with Article X (3) of GATT, goes in the direction of strengthening the previous provisions demanding supplementary requirements for the public availability of the “Trade-related laws, regulations and other measures.” Indeed, the WTO agreements demand that all these “Trade-related laws, regulations and other measures” be administered in a uniform, impartial and reasonable manner, but also that those measures not be implemented and enforced before they are published promptly and readily available to the other WTO Members with the right to comment.<sup>37</sup>

On the other hand, Article X limited this statement only on any increase in barriers. Moreover, unlike in Article VIII, Article X established the creation of a single inquiry point with a time limit for response. All these formal rules, which are the core of the WTO agreements, meet difficulties in the Chinese context. A scholar

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<sup>36</sup> GATT, *supra* note 23; see also GATS, *supra* note 23, art. III (addressing that each and every measures of application of any domestic regulation should be reasonable, objective and impartial).

<sup>37</sup> SYLVIA OSTRY, *Article X and the Concept of Transparency in the GATT/WTO, in CHINA AND THE LONG MARCH TO GLOBAL TRADE* 127 (Sylvia Ostry, Alan S. Alexandroff & Rafael Gomez eds., 1st 2002).

opined that the term 'transparency' does not completely fit in with the Chinese culture and bureaucratic system. Neither the regulations in the 1990s nor the new laws brought China toward a more transparent system.<sup>38</sup> In fact, the formal body of laws and administrative regulations is not the only one applicable. It is necessary to remember the importance of the disorganized body of rules, complex secondary legal sources called "normative documents," which are not included in the administrative and legal framework. They are scraps of the old regime from the pre-reform period when China was governed by administrative decrees and not by legislation.

Accession to the WTO is changing the situation. Nonetheless, the normative documents are still used at local levels by the state officials in the administrative bodies (ministries, commissions and enforcement agencies).<sup>39</sup> Since 'year three' after the accession, there were signs that these conditions were being upgraded, but even these improvements are insufficient to comply with WTO transparency obligations. The system of law resulting from this general and complex situation has fundamental divergences, and it is bedeviled not only by normative documents, but also by procedures, regulations, circulars and orders that often contradict one another. Even though it is not clear if they are really legal, it is totally clear that they are not published. They often are adopted for provisional or experimental use and are binding for the bureaucrats who should apply them.<sup>40</sup>

This body of rules can affect the rights and duties of the external actors because it defines the ways in which state agencies carry out their work and implement the law. There also exists a quantity of unwritten rules and regulations. In order to construct a transparent and rule based system, statutes and clear laws should replace opaque local and internal instructions. Conversely, if these general conditions persist, they can create uncertainty and instability on the foreign investors' actions, which are obliged to operate with a higher

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<sup>38</sup> Icksoo Kim, *Accession into the WTO: External Pressure for Internal Reforms in China*, 11 J. CONTEMP. CHINA 438 (2002).

<sup>39</sup> Sylvia Ostry, *China and WTO: the Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 12 (1998).

<sup>40</sup> PETER H. CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* (Transnational Publishers, Inc. 1997) (1996).

degree of caution and prevented from planning their economic activities freely. For these reasons, the Chinese central government is strongly determined to eliminate these sources, but “it is clear that such a reform will be a part of an extended and gradual process by which internal procedures and guidelines are to be brought into line with the new legislative mandates.”<sup>41</sup>

As stated by the Protocol I, 2, C, 2:

China shall establish or designate an official journal dedicated to the publication of all those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange and, after publication of its laws, regulations or other measures in such journal, shall provide a reasonable period for comment to the appropriate authorities before such measures are implemented. . . .

China shall publish this journal on a regular basis and make copies of all issues of this journal readily available to individuals and enterprises. The MOFCOM established its own gazette after authorization of the State Council and the negotiations of 1993, but since then it has been sporadically publishing the adopted “Trade-related laws, regulations and other measures.”<sup>42</sup> This journal includes neither the relevant provincial and local ordinances nor normative documents. It only contains laws and regulations published at the national level. The official journal requirement has also been included in the Protocol of China’s accession at paragraph 2, C, 2, as quoted above, and under which it demands its publication in a regular basis. Moreover, China has agreed to provide the translation of the “Trade-related laws, regulations and other measures” into one or more of the WTO languages.<sup>43</sup> During the General Council Meeting of December 2002, the Chinese government declared it “had . . . designated the Foreign Economic and Trade Gazette as the official journal’ for ‘Trade-related laws,

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<sup>41</sup> GROOMBRIDGE & BARFIELD, *supra* note 21, at 66.

<sup>42</sup> Chinese State Planning Commission on April 2001 as quoted in Bruce GILLEY, ‘Breaking Barriers’, *cit.* at 17

<sup>43</sup> The WTO official languages are English, French and Spanish. *See* Working Party on the Accession of China, *supra* note 3, at 69-70.

regulations and other measures.”<sup>44</sup> However, according to the United States Trade Representative (USTR) in 2004, China did not designate or establish one single journal, and several foreign lawyers and practitioners have recently confirmed they did not know about this journal. After further investigation, it was possible to discover the existence of the journal “Duiwai maoyi wengao,” which contains some of the national legislations, but not the local ones. Therefore, the appropriate authorities had to continue to refer to several different sources such as newspapers, journals, and also ministry websites, often without any translation at all.

Lately, the Chinese government stated that its officials were working hard to establish a single official journal. The provision of a single journal was also predicted to help WTO members enhance their active role of checking the drafting and implementation procedures held by the Chinese Government. In 2006, China finally adopted a single official journal, to be administered by the Ministry of Commerce (MOFCOM).<sup>45</sup> However, MOFCOM was unable to secure full participation by all relevant government entities. In December 2007, China recommitted to publishing all trade related measures in a single official journal. Subsequently, in April 2008, the National People’s Congress (NPC) instituted notice and comment procedures for draft laws.<sup>46</sup> In addition, in June 2008, China similarly committed to publish all proposed trade and economic related regulations and departmental rules for public comment, subject to specified exceptions.<sup>47</sup> As these steps are implemented, they should lead to improved transparency, particularly for proposed Chinese laws and regulations. China’s commitments in this area also signal an increasing recognition by many Chinese government officials that improved transparency and greater input from stakeholders and the public contribute to better regulatory practices and improved policymaking.<sup>48</sup>

The provision of paragraph 2, C, 2 should be read together with paragraph 2, C, 3 of the Protocol according to which the interested parties are thus granted a type of right of consultation before the

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<sup>44</sup> General Council of WTO, *supra* note 9, at ¶29.

<sup>45</sup> USTR, *supra* note 10, at 94-98.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



promulgation of the “Trade-related laws, regulations and other measures,” which involves the creation of a single enquiry point, a central enquiry point to which any individual, enterprise or WTO Member could address its questions and obtain all information relating to the measures. Before the accession, two scholars proposed a new state institution on administrative procedures, located within the MOFTEC.<sup>49</sup> After the NPC reform plan of March 2003, the MOFCOM has become the new enquiry point replacing MOFTEC after its merger with SETC. The enquiry point remains the MOFCOM and, when there is an individual demand, it will be a problem of internal administration to determine the agency directly involved with that demand.<sup>50</sup> Because of this subdivision of tasks, the level of compliance is differentiated by the varied sectors of legislation taken into consideration.<sup>51</sup> As a consequence, the MOFCOM has established training courses with a view to improve the knowledge of WTO commitments among the Ministries and institutions, which are indirectly involved in “Trade-related laws, regulations and other measures” and risk not acting in compliance with WTO rules.<sup>52</sup> In general, Chinese officials from the Ministry of Commerce are considered the best interlocutors due to their efforts to improve transparency. There are some institutions that publish regulations and other measures, for both trade-related laws and other kinds of legislation, also in draft form before the implementation, seeking for public comment. Other institutions adopt new regulations without any prior distribution of drafts but, at least, include commentaries with systematic description of all the details. Others disclose neither prior drafts nor commentary.<sup>53</sup> In addition, even in the cases when comments are sought, the period of public comment has generally been too short to grant the appropriate foreign authorities an effective opportunity to exercise their right.

In 2004, China adopted significant trade-related laws and regulations. As reported by the USTR, the Chinese Government furnished the appropriate authorities with the drafts of the insurance

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<sup>49</sup> See GROOMBRIDGE & BARFIELD, *supra* note 21, at 66.

<sup>50</sup> U.S. Trade Rep., *supra* note 10, at 97.

<sup>51</sup> See SUBRAHMANYAN, *supra* note 34, at 21.

<sup>52</sup> See Hearing, *supra* note 33, at 57.

<sup>53</sup> See U.S. Trade Rep., *2004 Report to Congress on China's WTO Compliance* 81–82 (2004); See also BIDDULPH, *supra* note 37, at 169. See also BIDDULPH, *supra* note 37, at 169.

regulations, most of the government procurement measures and the proposed measures in the area of intellectual property rights. Unfortunately, the same behavior has not been adopted for the Foreign Trade Law, the rules of origin regulations, the customs regulations, the automobile industrial policy or the *2005 Measures on the Importation of Parts for Entire Automobiles*. The drafts of these trade-related laws were not circulated or provided according to the Protocol and to the WTO standard requirements. It is also important to mention that in 2004, the MOFCOM started to follow the rules included in the *Provisional Regulations on Administrative Transparency*, with the objective to increase transparency at MOFCOM by establishing procedures and deadlines for publication of information.<sup>54</sup> These new regulations could be taken as a model for other ministries and agencies seeking to improve their own internal procedures with respect to the WTO transparency requirements. However, the necessary consultation between the Chinese government and the foreign companies remains inconsistent and the Provisional Regulations on Administrative Transparency are not fully applied.

Though, we cannot underestimate the progress made during the last years and throughout 2009. There have been many good examples of public consultation on important legislation. For example, MOFCOM issued two rounds of solicitation for comments on five draft implementation rules for the Anti-Monopoly Law. Likewise, the China Securities Regulatory Commission (CSRC), China Banking Regulatory Commission (CBRC), State Administration for Industry and Commerce (SAIC) and other ministries also posted draft rules on their official website for public comment.<sup>55</sup> However, in June 2009, SAIC issued the first procedural rules on anti-trust investigations without making a draft consultation document available for comment first. The promulgation by ministries of administrative rules and interpretations is still generally characterized by lack of transparency. In many cases comments are solicited only from selected persons or groups.<sup>56</sup>

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<sup>54</sup> Am. Chamber of Com., *2004 White Paper - Part Two: China's WTO Implementation Process* (2004).

<sup>55</sup> E.U. Chamber of Com., *European Business in China Position Paper 2009-2010: Transparency in Legislation and Implementation* (2009).

<sup>56</sup> *See id.*

With regard to the Local People's Governments regulations safeguarding the right of access to information, for example, Shanghai and the Beijing People's Congress and some other municipalities started holding open hearings on a number of draft legislation.<sup>57</sup> In particular, since the accession, Shanghai has increasingly become a point of reference for many other Local People's Congress (LPCs), which are willing to improve public participation and transparency in the drafting process. The Guangdong People's Congress and the Sichuan People's Congress have started to publish all legislation on their websites before formal approval. More recently, Shenzhen has also begun soliciting legislative proposals through its websites and the Guangdong has even started to diffuse these requests through newspapers, direct invitations and open hearings. The principal uncertainties are related to the modalities of exercise of this right of access to regulations. In fact, the provisions in the Protocol leave many doubts as to the extensions of its concessions to the other WTO Members. It is not clear, for example, when the interested parties can have access to these drafts or if they can refer to the draft legislation before promulgation, or if this right covers also the administrative rules and regulations. It is important to recognize all the efforts made by the Chinese government, but many problems remain unsolved. Sometimes, the WTO rules are transposed in Chinese legislation, but some requirements are added which make it more difficult to exercise the granted right. If China is not going to honor its commitments, the foreign trading companies will continue to suffer from the lack of certainty,<sup>58</sup> the incongruity between laws and unexpected political interventions.

### III. INTELLECTUAL PROPERTY RIGHTS

#### 1. *China's Background*

During its thousand-year history, the Chinese Empire has never had a structured and uniform system devolved to Intellectual Property protection. According to most scholars, copyright

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<sup>57</sup> CONG.-EXEC. COMM'N ON CHINA, *supra* note 32, at 92.

<sup>58</sup> See E.U. Chamber of Com., *supra* note 54, at 148.

protection was born together and as a consequence of the introduction of printing.<sup>59</sup> Nevertheless, juxtaposing the Western World on the one side and China on the other, it is easy to mark how their development lines appear strongly different. In the West, a new concept was created, which was totally absent in Chinese history and mentality. It is the idea that the author or the inventor should own their creations and should then get protection from the State against any kind of infringement.<sup>60</sup> Though China has seen, since the first imperial age, some incidental cases of protection of intellectual works, it never occurred in the perspective of protecting the individual but rather the imperial power.<sup>61</sup> No trace can be found instead of protection of inventions through what we now call “patents.” This whole peculiar situation is a consequence of the absence in Chinese mentality of the idea of intellectual creation as property of individuals or entities, which therefore should be protected by the State.<sup>62</sup> According to the Chinese tradition, knowledge is of a public nature.<sup>63</sup> Confucius himself argued that he had conveyed rather than created knowledge.<sup>64</sup> By the end of the XIX century, China experienced significant changes. The nation underwent large economic growth and increased participation in the international trade, as a result led to a growth in problems related to intellectual property protection, especially with regards to marks counterfeiting. Nevertheless, China did not join the Berne and Paris Conventions, making it really hard and risky for foreign traders to trade with and in China. Some decades later, due to Western Countries pressure (mainly the US, the EU and Canada), the Qing Dynasty introduced in its domestic laws the concept of trademark protection first, and then of copyright and patent protection. During the first years of the PRC, intellectual property protection was still seen as beneficial for the State. A clear example can be found in the 1963 Regulations on Awards for Inventions, where it is said that

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<sup>59</sup> ZHENG CHENGSI & M. PENDLETON, COPYRIGHT LAW IN CHINA 11 (1991).

<sup>60</sup> See LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

<sup>61</sup> See WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENCE 18 (1995); See William P. Alford, *Intellectual Property, Trade and Taiwan: A GATT-Fly's View* 1, COLUM. BUS. L. REV. 99 (1992).

<sup>62</sup> See PETER K. YU, INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173-220 (D. J. GÉRAIS ed. 2007).

<sup>63</sup> See JIANQIANG NIE, THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 178 (2006).

<sup>64</sup> CONFUCIUS, THE ANALECTS ¶1 (Arthur Waley trans., 1999).

“all inventions belong to the State.”<sup>65</sup> A further change was experienced during the Cultural Revolution, since it was common belief that intellectual property protection was functional to the four modernizations (agriculture, industry, science and technology). Chinese Government adopted Patent, Copyright and Trademark Laws, and joined the main intellectual property international conventions. None of these, though, can be compared, as far as completeness, orderliness and far-reaching consequences are concerned, to the TRIPS agreement, which China has to deal with now, after its accession to the WTO.<sup>66</sup>

## 2. *The TRIPs Agreement*

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

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<sup>65</sup> See NIE, *supra* note 63, at 180.

<sup>66</sup> Since the early 2000s, in the intellectual property area, EU and US have initiated and pushed bilateral or regional agreements introducing laws that go beyond the multilateral standards required by the TRIPs Agreement. These agreements have ignored the local needs, national interests, technological capabilities, institutional capacities, and public health conditions of many less developed members of the WTO. For an overview of the China-initiated bilateral or regional agreements, see PETER K. YU, SINO TRADE AGREEMENTS AND CHINA’S GLOBAL INTELLECTUAL PROPERTY STRATEGY, in *IP ASPECTS OF FREE TRADE AGREEMENTS IN THE ASIA PACIFIC REGION* (Christoph Antons & Reto M. Hilty eds. 2009), available at <http://ssrn.com/abstract=1333431>.

created and recalled in Article 2 TRIPs (“Berne Convention” and “Paris Convention”).

After Articles 3-8 which set the core principles of the whole system, the Agreement can be divided into two parts which coincide with two categories of provisions: Articles from 9 to 40 establish substantive rules for each IP form (copyright and related rights, trademarks, geographical indications, patents, layout designs of integrated circuits, undisclosed information), while Articles 41-61 (Part III of the Agreement) contain provisions related to their enforcement. From 1999 to 2001 many laws and regulations were amended and others were introduced for the first time. To set some examples, the Copyright Law was amended and came into effect on October 27, 2001, the Implementing Regulations of the Copyright Law on September 15, 2002, while Regulations on Computer Software Protection were amended on January 1, 2002. On July 1, 2001, the Patent Law was amended and came into effect, while the Implementing Regulations came into force on July 1, 2001 and the IC Regulations (Layout-Designs of Integrated Circuits Protection Regulations) on October 1, 2001. As far as Trademarks are concerned, the Trademark Law was amended on December 1, 2001, whereas the Implementing Regulations came into effect on September 15, 2002.<sup>67</sup> After this period of changes, the reform process is still continuing.

### *A. Substantive Rules*

#### *(a) Patents*

Chinese Patent Law was first adopted on March 12, 1984. The same year China became a party of the Paris Convention for the Protection of Industrial property (after joining the World Intellectual Property Organization in 1980) and therefore this first version of the Law clearly reflects many principles set in the Paris Convention. During the process to regain GATT membership, in 1992, the Law was then amended for the first time, but when in 1994 the TRIPs was

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<sup>67</sup> Kristie Thomas, *Changes to Intellectual Property Law in China since WTO Entry: Compliance or Defiance?* 97-115 (Durham East Asian Papers Series, No. 19, 2004), available at <http://ssrn.com/abstract=1437628>.

adopted, several and important differences remain between the WTO Agreement and Chinese Patent Law. It was then amended again on August 25, 2000.<sup>68</sup> In 2005 the third revision of China's Patent Law started, which was then completed in December 2008. It introduced several changes in many areas, such as the patent granting procedure or the ownership and management of patent rights.<sup>69</sup>

As far as "eligibility" is concerned, which refers to the specific features of an invention or a utility model which make it patentable, Article 22 of the Patent Law was amended and now reproduces Article 27 TRIPs, since it requires "*novelty, inventiveness and practical applicability*." There was no need of modifying Article 25 of the Law which deals with basic exemptions (1) Scientific discoveries; (2) Rules and methods for mental activities; (3) Methods for diagnosis or treatment of diseases; (4) Animal and plant varieties; (5) Substances obtained by means of nuclear transformation, already consistent with WTO requirements. The same must be said for the term of protection granted to patents, which is 20 years in both texts. Changes were introduced in Article 11, which did not originally include among the rights conferred to patent owners the one to prohibit the offer for sale of the patented invention. It then sets out that "(...) *no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes*" and is therefore fully consistent with Article 28 TRIPs.<sup>70</sup> Chapter VI Chinese Patent Law deals with Compulsory Licenses for Exploitation of a Patent and in its essence it was consistent with the TRIPs even before WTO entry. In order to obtain a compulsory license Chinese provisions require for the applicant to prove that it was not possible to conclude a license contract with the patentee within a reasonable time. It is further established that the right of the licensee shall not be exclusive and that whoever is granted a

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<sup>68</sup> See INTELLECTUAL PROPERTY AND TRIPs COMPLIANCE IN CHINA: CHINESE AND EUROPEAN PERSPECTIVES 12 (Paul Torremans, Hailing Shan & Johan Erauw eds., 2007).

<sup>69</sup> EU-CHINA INTELLECTUAL PROPERTY RIGHTS 2 PROJECT, THIRD REVISION OF CHINA'S PATENT LAW LEGAL TEXTS AND DOC. ON THE DRAFTING PROCESS 2006-2008, (2008), available at [http://www.ipr2.org/images/eu\\_patent\\_law-090805-7-final.pdf](http://www.ipr2.org/images/eu_patent_law-090805-7-final.pdf).

<sup>70</sup> See *id.* at 13.

compulsory license shall pay the patentee a reasonable exploitation fee. The only rule not consistent with the TRIPs was the one dealing with compulsory licenses in relation to dependant patents, where it was just required that the dependent invention should involve a “technical advance” in relation to the first, which differed from this TRIPs article, requiring “an important technical advance of considerable economic significance.” Therefore, Article 50 of the Patent Law adopted the exact wording of TRIPs. Article 48 was introduced in 2008, according to which compulsory licenses can be granted in two more cases: when the exploitation of the patent by the patentee eliminates or restricts competition and when the patentee “after the expiration of three years from the grant of the patent right, has not exploited the patent or has not sufficiently exploited the patent without any justified reason.”<sup>71</sup> The third revision introduces some new provisions related to enforcement as well, in order to make it more effective.<sup>72</sup>

*(b) Trademarks*

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

As it regards the essential features of a trademark, the Chinese Trademark Law after its first amendment was not fully consistent with Article 15 TRIPS since it only included “words, graphics or their combination.” To meet TRIPs requirements, Article 8 was modified in 2001 and reproduces now the exact words of the WTO agreement including “words, graphics, letters, numerals, three dimensional signs and combinations of colors as well as any combination of abovementioned elements.” One of the main gaps in the Chinese Law concerned “well-known marks” since they were not formally protected in the original version, even though they

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<sup>71</sup> 专利法, *Zhuan li fa* [Law on Patent] (third amendment promulgated by the Standing Comm.. Nat’l People’s Cong., Dec. 27, 2008, effective Oct. 1, 2009) art. 48, §2 LAWINFOCHINA (last visited May 30, 2010) (P.R.C).

<sup>72</sup> EU-CHINA INTELLECTUAL PROPERTY RIGHTS 2 PROJECT, *supra* note 69.



received some protection under the Provisional Regulations on Recognition and administration of Well-Known Marks, adopted in 1996 and then amended in 1998.<sup>73</sup> In the 2001 amended version Article 13 protects well-known marks in the way it establishes to refuse registration and prohibit use of trademarks which constitute the reproduction, imitation or translation liable to create confusion and mislead the public, of a well-known mark. Furthermore, Article 14 provides the criteria for identifying well-known marks as requested by Article 16(2) TRIPs.

*(c) Geographical Indications*

Geographical indications are defined at Article 22 (1) TRIPs as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.” The same Article then asks Member states to provide the legal means to prevent the use of false geographical indications liable to mislead the public and to invalidate the registration of a trademark which contains such a misleading indication. Before the 2001 reforms, geographical indications were not taken into consideration in any Chinese Intellectual Property laws. The definition of “geographical indication” was then introduced in the 2001 amended Trademark Law, which provides that a trademark shall not be registered and its use shall be prohibited where it contains a misleading indication. This is perfectly consistent with Article 22 TRIPs.<sup>74</sup>

*(d) Copyright*

The Copyright Law of the People’s Republic of China (the Copy Right Law) was adopted on September 7, 1990 and to make it consistent with TRIPs’ requirements, it was amended on October 27, 2001.

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<sup>73</sup> See INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA, CHINESE AND EUROPEAN PERSPECTIVES, *supra* note 67, at 17.

<sup>74</sup> See *id.* at 19-20.

The new amended version of the law is mostly consistent with TRIPs provisions on the subject. According to Article 21 of the Copyright Law, the term of protection includes the author's lifetime plus 50 years or just 50 years if the creation belongs to an entity, as it is required by Article 12 TRIPs. In 2001, Articles 10(7) and 41 of the Copyright Law were amended and now establish that owners of computer programs, cinematographic works, phonograms and videos have the right to prohibit or authorize the commercial rental to the public of originals or copies for their works, thus reproducing the exact words of Article 11 TRIPs on "rental rights."<sup>75</sup> As far as computer programs are concerned, TRIPs establishes that they should be protected as literary works. Without amendments, China's Copyright Law also gave the State Council the task of adopting measures for their protection.

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

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

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<sup>75</sup> See *id.*

## *B. Enforcement*

### *(a) The Enforcement of IPRs under the TRIPs Agreement*

From the beginning of the TRIPS Agreement negotiation, the general purpose was to provide and grant the highest possible level of protection, which could not be reached through a high material standard alone. It was then necessary to adopt corresponding procedural means to grant and ensure the enforcement of this protection. It is the need which underlies Part III of the TRIPS, significantly entitled “*Enforcement of Intellectual property Rights*,” introduced by Article 41(1), obliging members to adhere to the fundamental principles and procedures of law enforcement. On the other hand, the considerable heterogeneity of the members prompted them to establish minimum procedural obligations rather than to bring about a proper harmonization of certain provisions<sup>76</sup>. Before the TRIPs was adopted, international conventions dealing with intellectual property issues devoted little space to IPRs enforcement, it was indeed common belief that each State should set its own rules, since necessary measures could change according to social political and economic factors which vary from country to country.<sup>77</sup> During the Uruguay Round industrialized economies insisted on the introduction of several provisions devoted to enforcement and it appears against the wishes of developing countries, which were against it. From 1994, all WTO members had to change their IP laws and adapt them to TRIPS requirements. Moreover, they had to grant the “enforcement” of those laws and rules. Today’s China’s Patent, Copyright and Trademark Laws meet most of the TRIPS requirements, but still there are several problems and deficiencies regarding their enforcement. The whole situation is indeed more complicated: it is necessary to make laws and regulations “workable.” Amending domestic laws was not easy but put these amendments into effect is an even harder and more challenging task.

China’s international obligations regarding enforcement of IPRs under the WTO come from both the TRIPs Agreement and China’s WTO Accession protocol. Upon accession, China undertook the

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<sup>76</sup> PETER T. STOLL, JAN BUSCHE & KATRIN AREND, *WTO – TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS* 678-86 (2009).

<sup>77</sup> NIE, *supra* note 63, at 109.

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

*(b) Administrative, Civil and Criminal Enforcement in China*

Formally, the changes made by the Chinese government after the accession to the WTO in terms of enforcement are very admirable and China has quickly changed "from a country with practically no IP protection to one with a broad and systematic IP structure."<sup>78</sup> Chinese IP enforcement system is defined as "double-track" as it is based on two distinct mechanisms, administrative and judicial. An IP holder in China can take four different paths: require an (1) administrative enforcement through several agencies, (2) criminal enforcement through the PDB, (3) civil enforcement through the courts or (4) border enforcement through the customs authorities.

In the Chinese system, administrative enforcement is most commonly used for a number of reasons which include cost-effectiveness, authority of administrative action, while being part of a wider IP strategy, social and cultural factors and the general role of public enforcement in Chinese legal system. With the second amendment of China's IPR Laws, it has consolidated its administrative enforcement of TRIPs and there have thus been positive results in terms of numbers. During the years which followed the reform period, the number of IP disputes received by administrations nationwide have strongly increased, growing from 977 in 2001 to 1,517 in 2003 as it regards patent violations, from

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<sup>78</sup> Kate Colpitts Hunter, *Here There Be Pirates: How China is Meeting its IP Enforcement Obligations under TRIPs*, 8 SAN DIEGO INT'L L.J. 523, 541-46 (2007).

26,488 in 2003 to 40,171 in 2004 and then 56,634 in 2008 with respect to trademark violations, and up to 6,408 in 2002 when it comes to copyright. Despite these steps forward, much criticism is still addressed to this enforcement system. The Out-of-Cycle Results issued in 2005 by the US Trade Representative pointed out that China's inadequate IPRs protection leads to infringement levels at 90% for virtually every form of intellectual property.

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

*enforcement procedures (...) are available under their law*” and that these procedures be “*fair and equitable*.” Furthermore, Article 59 TRIPs, recalling Article 46, requires authorities to have the authority “*to order the destruction or disposal of infringing goods*.” Though this power though is granted only in case of copyright or trademark violations, no such remedy exists for authorities under the Patent Law, since they only have the authority to order the infringer to stop the infringing act.

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

As far as criminal protection is concerned, the main problems focus on three aspects: (1) poor coordination between administrative and judicial authorities, (2) insufficient knowledge of the subject by judicial authority and (3) ineffective of sanctions, despite Article 61 TRIPs requiring that remedies shall “*include imprisonment and/or monetary fines sufficient or provide a deterrent*.”

### 3. US-China Dispute

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

was asked to rule on three main claims: copyright protection, custom measures and criminal thresholds.<sup>79</sup>

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

According to Article 59 TRIPS, “*competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46.*” Chinese “Customs measures” provide for three disposal options beside destruction and the US claimed that they therefore created a compulsory scheme so that the Chinese Customs authorities could not exercise their discretion to destroy the goods and must give priority to disposal options that allowed infringing goods to enter the channels of commerce causing harm to the right holder. Shortly, the US claimed that the competent Chinese authorities lacked the scope of authority to order the destruction or disposal of infringing goods required by Article 59 of the TRIPS Agreement. The Panel arrived at the conclusion that the obligation was to “*have*” authority, not an obligation to “*exercise*” authority.<sup>80</sup> Article 59 requires the “*Authority to order the disposal OR destruction*” (emphasis added), which means that when authorities have the authority to order either disposal or destruction, this is sufficient to implement the obligation of the provision. Thus the limitations on Customs’ authority to order destruction of infringing goods are relevant only if they show that the Customs has authority to order neither disposal nor

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<sup>79</sup> Donald P. Harris, *The Honeymoon is Over: the U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT’L L.J. 96 (2008); Yang Fanshu, Wang Ping & Kristie Thomas, *Recent WTO Disputes Involving the Protection and Enforcement of Intellectual Property Rights in China: Legal and Political Analysis* 1-12 (China Policy Institute Briefing Series, No. 24, 2007), available at <http://ssrn.com/abstract=1437642>.

<sup>80</sup> Panel Report, China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, § 7.236 DS362, (Jan. 26, 2009), available at [http://www.wto.org/english/news\\_e/news09\\_e/362r\\_e.htm](http://www.wto.org/english/news_e/news09_e/362r_e.htm). The Panel recalls the view of the Panel in India-Patents (EC), where it found that the function of the words “shall have the authority” is to address the issue of judicial discretion.

destruction,<sup>81</sup> which was not the case. The last claim was brought under the first and second sentence of Article 61<sup>82</sup> and Article 41(1). The first sentence of Article 61 provides that “*Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.*” On the one hand, it is upheld that, unlike GATT provisions, Intellectual Property protection set out in the TRIPS Agreement weighs in a far more piercing way upon national sovereignty, since TRIPS obligations require Governments to operate actively to protect and enforce these rights. On the other hand, the principle expounded above stresses the discretionary power given to the Member States in the enforcement process. The Panelists are therefore asked to balance national sovereignty with TRIPS obligations. Nevertheless it has been often said that this discretion should never shift to inactivity. All the transparency requirements described in Article 63 show that a systematic denial of remedies is an abuse of discretion and thus inconsistent with the TRIPS Agreement.<sup>83</sup> The US claimed the inconsistency with this Article of Chinese Criminal Law insofar as it fixes specific criminal thresholds (based on some tests and factors which are as well challenged by the US) avoiding any punishment for all instances that are below these thresholds, among which there can be cases of “willful trademark counterfeiting or copyright piracy on a commercial scale.” Even though the Panel found this provision mandatory, it stressed that The US could not prove that some cases of piracy or counterfeiting were below the criminal thresholds and were at the same time “on a commercial scale” in relation to Chinese market, and hence the criminal thresholds could not be found as inconsistent with the first sentence of Article 61 TRIPS.<sup>84</sup>

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<sup>81</sup> *Id.* at § 7.251.

<sup>82</sup> STOLLET AL, *supra* note 76, at 781-785.

<sup>83</sup> Tuan M. Samahon, *TRIPs Copyright Dispute Settlement after the Transition and Moratorium: Nonviolation and Situation Complaints Against Developing Countries*, 31 L. & POL’Y INT’L BUS. 1051, 1068 (1999).

<sup>84</sup> The Panel finds it unnecessary to rule on the claims brought under the second sentence of Article 61 and under Article 41.1, since they both are consequent upon the outcome of the claim regarding the criminal measures under the first sentence of Article 61.



#### IV. CONCLUSION

China's accession to the WTO has both strong positive aspects and also great and dangerous risks. China has undoubtedly profited from its strengthening partnership with the WTO and its growth is "an impressive example of how a country can foster development."<sup>85</sup> Several legal and regulatory frameworks were drastically changed to comply with WTO requirements and sectors which are extremely important for its partners were opened, earning the approval of all the other Member States. Nevertheless, China is still facing a number of challenges, especially with respect to the need to grant adequate enforcement of these rules at all levels, including the provincial and municipal ones, in order to remove obstacles which could undermine the Country's progress.<sup>86</sup> It is also predictable that China could resolve its internal limits faster and work to amend the local barriers with external interventions.

In October 1978, Deng Xiaoping was the first one to propose the "open door policy" and the increasing collaboration between China and the EU (and between China and the US) could be a potential solution for China. China showed good will in the bilateral relations with the EU. If the EU wants to reach an effective "matured partnership"<sup>87</sup> with China, it is necessary for the EU, through the bilateral meetings, to convince the Chinese government to have a better score in the WTO multilateral forums, such as TRM. The TRM should not be considered just as a political forum, but it could more and more become a key instrument for China to improve and also resolve substantive problems in its internal system in compliance with its transparency issues and, in general, with all WTO commitments. On the other hand, increased cooperation of China in the TRM (in all the subcommittees) would improve China's international standing and reputation as a global player in multilateral forums and not just as a good-compromising partner in

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<sup>85</sup> Press Release, WTO Secretariat, Trade Policy Review: China, Concluding Remarks by the Chairperson (May 21 and 23 2008), available at [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp299\\_crc\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp299_crc_e.htm).

<sup>86</sup> Thomas Rumbaugh & Nicholas Blancher, *China: International Trade and WTO Accession* 7-8 (Int'l Monetary Fund, Working Paper, 2004).

<sup>87</sup> Commission Policy Paper, *A maturing partnership - shared interests and challenges in EU-China relations*. (Sep. 10, 2003), available at [http://europa.eu.int/comm/external\\_relations/china/com\\_03\\_533/com\\_533\\_en.pdf](http://europa.eu.int/comm/external_relations/china/com_03_533/com_533_en.pdf).

bilateral trade negotiations. If China starts to adopt a more WTO-friendly behavior by respecting WTO procedures such as the TRM system, it would “obviate any need . . . to seek alternatives to multilateralism”<sup>88</sup> and indirectly reinforce the WTO system. According to the Consultative Board to the Director-General Supachai Panitchpakdi, “the WTO constrains the powerful.”<sup>89</sup> Even if the GATT and the WTO have always tried to convince all WTO Members to choose multilateral arrangement for their disputes, lately, the most powerful WTO Members started to privilege regional and bilateral solutions,<sup>90</sup> and China is one of the most recent and impressive examples.

Despite the fact that bilateralism appears to become the rule while multilateralism the exception in several areas of international economic integration,<sup>91</sup> Member States lean on China’s participation to future negotiations on a multilateral level stresses the fact that, as Pascal Lamy pointed out in September 2006, “China has a long term interest to safeguard the multilateral trading system.”<sup>92</sup> Therefore, China must improve the enforcement of all new adopted laws and regulations and take advantage of the means granted by the WTO to improve its internal system. China’s transparency should also be improved, alongside with its intellectual property rights related matters and all the other WTO agreements for the well development

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<sup>88</sup> Consultative Board to the Director-General Supachai Panitchpakdi: *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, (2004), available at [http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* With reference to the negative aspects of bilateralism for least-developed countries, see Nerina Boschiero, *Le biotecnologie tra etica e principi generali del diritto internazionale* in *BIOETICA E BIOTECNOLOGIE NEL DIRITTO INTERNAZIONALE E COMUNITARIO, QUESTIONI GENERALI E TUTELA DELLA PROPRIETÀ INTELLETTUALE* 78-84 (Nerina Boschiero ed. 2006); Mitsuo Matsushita, *Interest of Developing Countries in the WTO Dispute Settlement in CHINA’S PARTICIPATION IN THE WTO* 283 *passim* (Henry Gao & Donald Lewis eds., 2005). As regards the differential treatment for developing countries in the WTO, see Cesare Pitea, *Il trattamento differenziato dei paesi in via di sviluppo nella prassi contenziosa dell’OMC* 22 *COMUNICAZIONI E STUDI DELL’ISTITUTO DI DIRITTO INTERNAZIONALE DELL’UNIVERSITÀ DEGLI STUDI DI MILANO* 803, 803-842 (2002).

<sup>91</sup> Arie Reich, *Bilateralism Versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity* (Bar-Ilan Univ. Pub. Law & Legal Theory Working Paper Group, No. 14-09, 2009), available at <http://ssrn.com/abstract=1489845>; see Ralph Folsom, *Bilateral Free Trade Agreements: A Critical Assessment and WTO Regulatory Reform Proposal* (San Diego Univ. Legal Studies Paper, No. 08-070, 2008), available at <http://ssrn.com/abstract=1262872>.

<sup>92</sup> Pascal Lamy, Address at Shanghai: China Was Strong When it Opened to the World (Sept. 6 2006).

of the multilateral relations and to avoid any risk of increasing the disputes with the other WTO Members.<sup>93</sup>

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<sup>93</sup> See Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009) and WT/DS363/AB/R (Dec. 21, 2009). The panel and the Appellate Body found that China's measures were inconsistent with China's Accession Protocol, China's Accession Working Party Report, the GATS and the GATT; see generally PAOLO D. FARAH & R.SOPRANO, DUMPING & ANTIDUMPING IN IL SOLE 24 ORE 24-183 (2009).