

Article

China's Compliance with WTO Transparency Requirement: Institution-Related Impediments

Sijie Chen*

Abstract

This article examines the institution-related impediments to China's compliance with WTO transparency requirements provided in GATT Article X. The problem of transparency in China's national trade administration was not only the centre of focus in the negotiations before its accession to the WTO, but is one of remaining obstacles and sources of complaints after the accession. It argues that the strategy of imposing WTO-plus obligations on China would not be rational or more effective at promoting compliance in the sense that it requires weaker members to undertake more. For a possible solution of better compliance, an in-depth analysis of those impediments would be a crucial and necessary step. This provides an essential point to be considered for the discussion on the extent to which GATT Article X, as one of the most abstract and intrusive obligations, should be applied in the WTO case law.

I. Introduction

With regard to its oversight of national trade and trade-related regulations, World Trade Organisation (WTO) law requires governments to maintain a certain level of transparency. Article X of General Agreement on Tariffs and Trade (GATT) could be seen as the most representative rule to embody the principle of transparency at national level. It provides that trade-related laws, regulations, judicial decisions and administrative rulings shall be published promptly, and no measure shall be enforced before such measure has been officially published.¹ The essential implication of this requirement is that Members and other

* Sijie Chen is a PhD candidate at VU University Amsterdam, the Netherlands, Faculty of Law. She holds LL.M degree in International Business Law from VU University Amsterdam. The author would like to thank Prof. Wouter Werner and Dr. Erik Denters for their valuable comments and suggestions.

¹ GATT Article X: 1 provides that '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 therefore, 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...'.'

persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.²

The transparency requirement is one of the essential WTO regulatory disciplines³ for domestic administrative legal systems. Its importance is increasingly recognised as a rule of law/good governance norm for the trading system after the expansion of WTO jurisdiction from border measures to many areas that were traditionally under the domestic regulatory domain. This requirement may seem to have been less significant during the GATT period (1947-1995) since it only regulated border measures such as tariffs and quotas that are for the most part relatively transparent already. After the establishment of the WTO in 1995, the mandate of the trading system has been expanded also to cover trade barriers that are regulated in domestic policies within national borders. These trade barriers may have much to do with characteristics of domestic regulatory regimes and are naturally less transparent. The transparency requirement, therefore, is regarded as an important due process discipline for the effectiveness of WTO trading rules.

From a practical perspective, greater transparency and a predictable trading environment are major demands for the business community. The publication and ready availability of information on trade-related laws are necessary for assisting traders in day-to-day management of their transactions. It helps reduce the amounts of time and money that are wasted because of unclear and outdated laws and regulations. Traders seeking access to a market must have adequate information on applicable rules so that they can base their decisions on an accurate assessment of the potential costs, risks and market opportunities.⁴ If they cannot find out such information, trade is less likely to occur.⁵ Transparency can also encourage compliance by traders and reinforce their confidence in the WTO system that WTO commitments are actually implemented by other members.⁶ Therefore, transparency is a vital element in facilitating trade and ensuring implementation of trading rules and procedures.

Despite its importance to effective trade regulation, GATT Article X has been applied by the GATT/WTO adjudicatory body in a very cautious manner. From 1948 to 1995, only one case occurred in which a government's trade measure was challenged pursuant to GATT Article X and found to be a violation.⁷ Litigations has occurred a bit more frequently in the

² United States-Restrictions on Imports of Cotton and Man-made Fibre Underwear, Report of the Appellate Body, WT/DS24/AB/R, at 21, adopted Feb. 25, 1997. Steve Charnovitz, 'Transparency and Participation in the World Trade Organization', *Rutgers Law Review*, Forthcoming; George Washington Law School Public Law Research Paper No. 142.

³ GATT Article X contains also two other due process requirements, uniform application of laws and regulations in Article X: 3(a), and judicial review on administrative actions in Article X: 3(b).

⁴ Vera Nicholas-Gervais et al, 'Background Report on Enhancing Market Openness through Regulatory Reform', in *OECD Reviews of Regulatory Reform: Regulatory Reform in the United States* 230, 1999; Christopher Duncan, 'Out of Conformity, China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions after Accession', *American University International Law Review*, 2002.

⁵ William Davey, *Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Obligations*, Cameron May, 2006, p. 301.

⁶ Christopher Duncan, 'Out of Conformity, China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions after Accession', *American University International Law Review*, 2002; William Davey, *Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Obligations*, Cameron May, 2006, p. 301.

⁷ WTO, Analytical Index: Guide to GATT Law and Practice, 1995, p.295-98.

WTO, but the adjudicators have largely been deferential to national law⁸ and reluctant to confirm violations of this requirement. A narrow and strict interpretation has been adopted with regard to application of this article. Compared to other substantive obligations such as tariff reduction and market access, due-process requirements provided in Article X are more intrusive to the domestic regulation domain since it goes to the heart of the domestic administrative legal system. The reluctance to enforce transparency requirements and the difficulty involved in such an undertaking exemplify a long-term challenge to WTO's goal of balancing two conflicting interests—national regulation autonomy and effectiveness of trading rules.

To ensure China's compliance with the transparency requirement poses an extra challenge to the WTO in their efforts to maintain this balance, as China's administrative legal system was not designed for transparency. The issue of transparency was among the top concerns of major trading partners at the time of China's WTO accession negotiations. Some WTO-plus obligations concerning transparency—i.e. commitments that go beyond the regular WTO rules—have been imposed on China in its accession agreements. Those WTO-plus obligations are designed with the intention that whenever WTO rules are inadequate, the WTO-plus obligations will fill the gap and improve China's compliance. After a decade of Chinese WTO membership, however, transparency, quoted as an important element of legal framework for effective implementation of WTO rules, remains a constant source of complaints.⁹ The principle of transparency has still to take root in China's administrative legal regime. Despite the progress that has been achieved and the fact that 'publication' requirements are actually explicitly provided in Chinese laws, many legal enactments are still not publicly accessible and the overall legal system remains opaque. If China already has difficulties complying with regular WTO requirements, the WTO-plus obligations will not be helpful towards achieving improved compliance. A more productive focus would be the actual nature of the difficulties faced by China in trying to meet its transparency requirements. The failure to achieve satisfactory progress in terms of legislative transparency raises the question of whether its specific institution-related difficulties have been given solid consideration. A comprehensive understanding and consideration of indigenous conditions of China, a country emerging as a new power in the WTO¹⁰, is an indispensable element to the success of the next round of multilateral trade negotiations, especially if the WTO would like to adapt international trade regulatory disciplines to expand and secure liberalised trade. Rather than analysing specific efforts China has made in order to comply with transparency requirement, this article explores obstacles to its compliance in a broader context, related to China's institutional characteristics. It addresses the institutional obstacles to regulatory transparency from three perspectives:

- Non-transparency caused by problems within the Chinese formal legislative system in general;

⁸ Steve Charnovitz, 'Transparency and Participation in the World Trade Organization', *Rutgers Law Review*, Forthcoming; George Washington Law School Public Law Research Paper No. 142.

⁹ WTO, Trade Policy Review Body, 'Trade Policy Review on People's Republic of China, Minutes of Meeting', WT/TPR/M/161, 6 June 2006; WTO, Trade Policy Review Body, 'Trade Policy Review on People's Republic of China, Report by Secretariat', WT/TPR/S/161, 28 February 2006. See also 'China's Implementation of its World Trade Organization Commitments', Written Testimony by US-China Business Council, submitted in response of the office of the US Trade Representatives' request for comment and notice of public hearing concerning China's compliance with WTO commitments, Federal Register, Pages 42886-42887, 28 July 2006.

¹⁰ Amrita Narlikar, 'New Powers in the Club: the challenges of global trade governance', *International Affairs*, vol. 86, issue 3, 2010; Aaditya Mattoo and Arvind Subramanian, 'A China Round of Multilateral Trade Negotiations', Working Paper Series, *Peterson Institute for International Economics*, December 2011.

- Specific difficulties caused by the existence of informal laws that hinder fulfilment of publication requirements;
- Influence of China's legal culture.

This article aims to contribute towards efforts to rethink whether imposing WTO-plus obligations is a valuable or reasonable strategy towards enhanced compliance, not only for the case of China but also for other members in similar situations. More importantly, it will attempt to clarify the significance of the challenge for the WTO of balancing two conflicting goals in China's specific case. An important reference will thus be provided to the Dispute Settlement Body (DSB) regarding the extent to which transparency requirements should be enforced in WTO case law, and to the WTO on how far it could go in promoting good governance or due process disciplines at the domestic level.¹¹

Part II of this article outlines the transparency requirement in the WTO agreements and the way it is interpreted in WTO adjudication, while also sketching China's commitments on transparency. Parts III, IV and V discuss the institution-related obstacles to transparency from the abovementioned three perspectives. Part VI constitutes the conclusion.

II. Transparency Requirements in the WTO Agreements and China's Commitments

Normally described as the 'sunshine strategy', transparency is employed, to varying degrees¹², as one of three major legal strategies¹³ designed to encourage compliance with international agreements in all fields of international law.¹⁴ Generally speaking, there are two reasons for transparency's importance in international law. Firstly, it makes non-compliance more apparent to the public, NGOs and other member countries, and makes it easier for international and national actors to take action to encourage and enforce accountability and compliance.¹⁵ Secondly, transparency deters non-compliance with a treaty by allowing failure to comply to be associated with public visibility.¹⁶ It can act as a deterrent

¹¹ For the discussion of WTO's potential to promote good governance norms in member states, see Richard B. Stewart and Michelle Rattou Sanchez Badin, 'The World Trade Organization: Multiple Dimensions of Global Administrative Law', *International Journal of Constitutional Law*, vol. 9, issue 3-4, 2011.

¹² Harold K. Jacobson & Edith Brown Weiss, 'Accessing the Record and Designing Strategies to Engage Countries', in Edith Brown Weiss & Harold K. Jacobson eds., *Engaging Countries: Strengthening Compliance with International Environment Accords*, MIT Press, 1998, p. 542.

¹³ The other two are positive incentives (to encourage states to comply with the obligations), such as financial and technical assistance, and coercive measures, such as sanctions, penalties to punish non-compliance. See Harold K. Jacobson & Edith Brown Weiss, 'Accessing the Record and Designing Strategies to Engage Countries', in Edith Brown Weiss & Harold K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environment Accords*, MIT Press, 1998, p. 542.

¹⁴ Edith Brown Weiss, 'Strengthening National Compliance with Trade Law: Insights from Environment', in Marco Bronckers and Reinhard Quick (eds.), *New Directions in International Economic Law*, Kluwer Law International, 2000.

¹⁵ Harold K. Jacobson & Edith Brown Weiss, 'A Framework for Analysis', in Edith Brown Weiss & Harold K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environment Accords*, MIT Press, 1998, p. 4. Mark R. Goldschmidt, 'The Role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation', *Boston College Environmental Affairs Law Review*, vol. 29, 2002.

¹⁶ Abram Chayes, 'Managing Compliance: A comparative Perspective', in Edith Brown Weiss & Harold K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environment Accords*, MIT Press, 1998, p. 44.

because behaviour that deviates from treaty obligations will be discovered, and ‘even when direct retaliation seems unlikely, exposure alone can cause behaviour to change’.¹⁷

II.1 Transparency Requirement in the WTO Agreements and its Enforcement

II.1.1 Transparency Requirement and GATT Article X: 1

While transparency can broadly relate to the openness of a government’s political system, to the nature of participation in the decision-making process, and to the access to and distribution of information, the domestic regulatory transparency requirement provided for in the WTO agreements limits itself to minimum standards of transparency, primarily by imposing the ‘publication’ obligation on members. As the most representative transparency provision in the WTO agreements, GATT Article X: 1 sets out the general publication requirement, while Article X: 2 also states that no measure of general application may be enforced before such measure has been officially published. The idea of transparency as a norm for the trading system is recognised as being based on US administrative law,¹⁸ and the language of Article X was borrowed from the 1946 US Administrative Procedure Act (APA).¹⁹ It was in 1946, while the negotiations for the new trading system were underway, that the US Congress codified views on the law of administrative procedure by passing the APA.²⁰ Article 15 of the September 1946 State Department document ‘Suggested Charter for an International Trade Organisation of the United Nations’ was entitled ‘Publication and Administration of Trade Regulations – Advance Notice of Restrictive Regulations’.²¹ This Article was ultimately incorporated into the Havana Charter for the International Trade Organisation (ITO) as Article 38 and also as Article X of the GATT, which survived the demise of the ITO and has remained effective in current WTO trading rules.²²

The Uruguay Round²³ did not change the text of Article X from what had been initially adopted in 1947. What did change was the shift in focus of the GATT from border measures, such as tariffs and quotas, to non-tariff barriers such as technical safety and environmental regulations. The elimination of non-tariff barriers is not controlled by borders, but instead depends on domestic regulatory procedures. Thus, transparency, as an important element in good governance and effectiveness of the administrative regime, has been adopted in the texts of many WTO covered agreements, including the TBT Agreement,²⁴ SPS

¹⁷ Abram Chayes, 1998, p. 44.

¹⁸ Sylvia Ostry, ‘China and the WTO: Transparency Issue’, 3 *UCLA Journal of International Law and Foreign Affairs*, 1, 1998.

¹⁹ Padideh Ala’I, ‘The Multilateral Trading System and Transparency’, in Alan S. Alexandroff (ed.), *Trends in World Trade - Essays in Honor of Sylvia Ostry*, Carolina Academic Press, 2007, p. 107; Sylvia Ostry, ‘External Transparency: the Policy Process at the National Level of the Two-level Game’, in Mike Moore (ed.), *Doha and Beyond: The Future of the Multilateral Trading System*, Cambridge University Press, 2004, p. 112.

²⁰ Sylvia Ostry, ‘China and the WTO: The Transparency Issue’, 1998.

²¹ US Dept. of State, Suggested Charter for an International Trade Organization of the United Nations, 1946. Sylvia Ostry, ‘China and the WTO: The Transparency Issue’, 1998.

²² Sylvia Ostry, ‘China and the WTO: The Transparency Issue’, 1998.

²³ The Uruguay Round was the eighth round of multilateral trade negotiations, conducted within the framework of GATT during the period of 1986 to 1995. It brought about the biggest reform of the world’s trading system since AGTT was created after the Second World War. It covered almost all trade. The Uruguay round transformed GATT into WTO.

²⁴ Agreement on Technical Barriers to Trade, Articles 2.9-2.12 (notification and publication), Article 10 (enquiry points).

Agreement,²⁵ Import Licensing Agreement,²⁶ Agreement on Safeguards,²⁷ Anti-dumping Agreement,²⁸ Agreement on Government Procurement,²⁹ and the SCM Agreement³⁰. The TBT and SPS Agreements, for example, not only require publication of the standards ultimately adopted, but also provision of a reasoned explanation and an *a priori* opportunity for foreign governments to comment and discuss the proposed standards.³¹

Similar provisions are also found in the GATS and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Article III of the GATS and Article 63 of TRIPS are entitled 'Transparency' and largely follow the provisions of Article X: 1. In addition, for example, to the publication requirement, Article III of the GATS requires WTO members annually to inform the WTO Council for Trade in Services of any changes in laws that affect trade in services.³² It also requires members to establish one or more enquiry points for providing specific information to other members.³³

There are multiple references to transparency in the legal framework of the WTO.³⁴ Provisions explicitly or implicitly referring to the term 'transparency' are closely linked to provisions on notification obligations. In addition to the provisions in the agreements, WTO also includes an important tool, the Trade Policy Review Mechanism (TPRM), which aims to enhance transparency and which subjects trade and related policies to a periodic review in order to ensure significantly greater transparency in national policies.³⁵

II.1.2 Enforcement of GATT Article X: 1

As an abstract procedural requirement, the meaning of GATT Article X and the extent to which it would be applied needs to be further clarified. The GATT/WTO adjudicatory body plays an important role in deciding the nature of this article's requirements of the Members and what constitutes compliance with or violation of this article. However, the study on the enforcement of this article by the GATT/WTO adjudicatory body demonstrates that the application and interpretation on this article has been very limited and strict. Basically, the main feature of this enforcement, which is discussed below, involves two aspects: the GATT/WTO adjudicatory body has been reluctant to rule on Article X: 1 at all or to apply it strictly when it does refer to the article; and the WTO appellate body's (AB) interpretation has been inconsistent.

²⁵ Agreement on Sanitary and Phytosanitary Measures, Article 7 & Annex B (publication, enquiry points and notification).

²⁶ Agreement on Import Licensing Procedures, Articles 1.4 and 3.3 (publication).

²⁷ Article 3.1 (publication).

²⁸ Agreement on Implementation of Article VI of GATT 1994, Article 12.

²⁹ The preamble of the Agreement on Governmental Procurement states that parties to this agreement recognise that it is desirable to provide transparency to laws, regulations, procedures and practices regarding to governmental procurement. Many transparency requirements, including publication and notification, are provided in this agreement, including Articles V.11 and VIII (a).

³⁰ Agreement on Subsidies and Countervailing Measures, Article 22 (public notice).

³¹ Carl-Sebastian Zoellner, 'Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law', *Michigan Journal of International Law*, vol. 27, 2006, p. 592.

³² GATS, Article III 3.

³³ GATS, Article III 4.

³⁴ Friedl Weiss, assisted by Silke Steiner, 'Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison', *Fordham International Law Journal*, vol. 30, 2007, p. 1579.

³⁵ Friedl Weiss, 2007, p. 1583.

Firstly, GATT/WTO panels have been reluctant to rule on Article X: 1 or to apply it strictly. The publication requirement provided for in Article X: 1 GATT, which is described as one of the most positive but least-known features of WTO law,³⁶ has received relatively little attention.³⁷ Dispute settlement proceedings demonstrate that the panels were initially very reluctant to rule on this Article. Although it was frequently cited in dispute settlement proceedings and in complaints, violations of Article X have typically been pleaded merely as 'add-ons' to other more promising legal claims of violations of the WTO rules.³⁸ WTO and GATT panels have habitually refused to rule on Article X claims where a measure has already been found to violate another, more substantive GATT or WTO obligation.³⁹ Claims under Article X have tended to be regarded merely as subsidiary matters. In *Indonesia – Autos*, for example, the Panel had to examine whether measures taken by Indonesia to develop its domestic automobile industry were inconsistent with Article X, as well as with Articles I and III GATT.⁴⁰ However, once the panel found that Indonesia had violated the provisions of Article I and/or Article III GATT, it considered it unnecessary to examine the claims under Article X GATT.⁴¹

One possible explanation for panel's reluctance is that Article X was not deemed to be significant when it was drafted. The inclusion of this Article when GATT was established in 1947 seemed more of a coincidence than an intentional arrangement and occurred without the full recognition of the importance of domestic institutions in the trading system that Article X currently demonstrates. As mentioned before, the content of this article is largely based on US administrative law. Although most of the other articles in the original US proposals for international trade regulation involved considerable haggling and compromise, the inclusion of Article X appears to have been non-controversial.⁴² There are two possible reasons for this. Firstly, the drafter saw Article X as not imposing any obligation that they did not already comply with.⁴³ Secondly, Article X was deemed by the drafters of the new system to be, in some sense, insignificant because the main focus of trade policy at the time was on seeking to reduce the border barriers erected during the 1930s.⁴⁴ Trade regulation

³⁶ According to Steve Charnovitz, one of the most positive but least known features of WTO law is the rule requiring national governments to publish laws, regulations, judicial decisions, and administrative rulings affecting trade. Steve Charnovitz, 'The WTO and Cosmopolitics', *Journal of International Economic Law*, vol. 7, 2004, pp. 675 & 678. Friedl Weiss, 2007, p. 1572.

³⁷ Robert Howse, 'How to Begin to Think about the Democratic Deficit in the WTO', in Stefan Grillier (ed.), *International Economic Governance and Non-Economic Concerns*, Springer, 2003, p. 91. Friedl Weiss, 2007, p. 1573.

³⁸ Friedl Weiss, 2007, p. 1573.

³⁹ Warren Maruyama, 'The WTO: Domestic Regulation and the Challenge of Shaping Trade', *International Lawyer*, vol. 37, issue 3, 2003, p. 677.

⁴⁰ Report of the Panel, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998.

⁴¹ Report of the Panel, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998. Friedl Weiss, 2007, p. 1574.

⁴² Sylvia Ostry, 'China and the WTO: Transparency Issue', 3 *UCLA Journal of International Law and Foreign Affairs*, 1, 1998.

⁴³ The Canadian delegation noted, for example, that Article 38 of the Havana Charter for the ITO, which later became GATT Article X, had not been altered and nor were any interpretive notes required. It further noted that 'This Article imposes no obligations upon Canada not already complied with, and the general benefit to international trade needs no elaboration.' Canadian Legation, Report of the Canadian Delegation to the United Nations Conference on Trade and Employment at Havana, 32, 13 July 1948; Sylvia Ostry, 'China and the WTO: Transparency Issue', 1998.

⁴⁴ Sylvia Ostry, 'China and the WTO: Transparency Issue', 3 *UCLA Journal of International Law and Foreign Affairs*, 1, 1998.

was limited to border measures, which had little to do with characteristics of domestic institutions and procedures. Since its importance was not really recognised, claims under Article X were often deemed add-ons or subsidiary matters. Moreover, the abstract nature of this article may also have added to panels' reluctance to give much interpretation.

In many WTO cases, there has been a concerted attempt to rule on the applicability of Article X, and claims that it had been violated were not dismissed as subsidiary matters.⁴⁵ However, the Panel and the AB seem to have adopted a very restricted approach to interpreting the scope of Article X, thus making it difficult to find that it had been violated.⁴⁶ There have been relatively few interpretations made under Article X: 1 in respect of the publication requirements, except one on its 'general application'. Article X: 1 requires publication of all trade-related laws, regulations, and administrative rulings of 'general application'. The AB has stated that, for a measure to be within the scope of Article X, it must be of 'general application' and that administration of a measure in a 'specific case' is not within its scope.⁴⁷ In *EC – Importation of Certain Poultry Products*, Brazil objected to the application of quotas on imports of poultry by the EC and argued that it was a violation of Article X if traders did not know upon arrival whether a particular shipment would be subject to in-quota or out-of-quota trade rules.⁴⁸ The AB held that the scope of Article X was limited to measures of general application and that licenses issued to a specific company or applied to a specific shipment were not measures of general application.⁴⁹

The Panel's ruling in *Japan – Customer Photographic Film and Paper* also demonstrated another difficulty as regards the 'burden of proof' in establishing violations of Article X: 1. The US argued that the government of Japan had operated under a 'shield of opacity' in undertaking a concerted and coordinated programme to replace formal tariff and investment restrictions with regulatory and structural barriers that would be less identifiable as inconsistent with Japan's international obligations.⁵⁰ Although *Japan – Customer Photographic Film and Paper* was not a violation and US did not claim a violation of Article X, transparency was central to the claim of the US and the Panel did discuss Article X.⁵¹ The Panel held that Article X 'applied to administrative rulings in individual cases if such rulings establish or revise principles or criteria applicable in future cases'.⁵² But, in that case, the US had failed to 'clearly demonstrate the existence of such unpublished administrative rulings in individual matters'.⁵³ The Panel's analysis is circular to the extent that it is always difficult to prove the existence of an unpublished administrative ruling if it is unpublished, non-transparent and 'shrouded in secrecy'.⁵⁴ After acknowledging this problem, the Panel still maintained that

⁴⁵ Padideh Ala'i, 2007, p. 123.

⁴⁶ Padideh Ala'i, 2007, p. 129.

⁴⁷ WTO Analytical Index – Guide to WTO Law and Practice, World Trade Organization, 2003.

⁴⁸ Report of the Appellate Body on *European Communities – Measures Affecting the Importation of Certain Poultry Products*, July 13, 1998, WT/DS69/AB/R, paras. 115-116.

⁴⁹ Report of the Appellate Body on *European Communities – Measures Affecting the Importation of Certain Poultry Products*, July 13, 1998, WT/DS69/AB/R, para. 102. Padideh Ala'i, 2007, p. 128.

⁵⁰ Report of the Panel on *Japan – Measures Affecting Consumer Photographic Film and Paper*, paras. 7.2, 10.22-10.24, 31 March 1998, WT/DS44/R. Padideh Ala'i, 2007, p. 128.

⁵¹ Padideh Ala'i, 2007, p. 128.

⁵² Report of the Panel on *Japan – Measures Affecting Consumer Photographic Film and Paper*, para. 10.388.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, para. 10.390. The Panel acknowledged this reality as follows: 'We acknowledge that the nature of the US claim makes it difficult to cite examples – if a ruling is unpublished how can the United States know that it effects such changes?', Padideh Ala'i, 2007, 128.

the US had failed to ‘cite examples of changed policies that it believes were in fact implemented first in unpublished decisions’.⁵⁵

Secondly, the AB’s interpretation of this Article was inconsistent. In *US – Import of Carbon Quality Line Pipe*, the Panel ruled that the US had violated the transparency requirements in Articles 3.1 and 4.2 (c) of the Agreement on Safeguards⁵⁶ by failing to publish a report on the application of the safeguard that included a finding or reasoned conclusion.⁵⁷ However, the AB reversed the Panel’s determination⁵⁸ by stating that:

We are not concerned with *how* the competent authorities of WTO Members reach their determinations in applying safeguard measures. The Agreement on Safeguards does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the *determination itself*, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement.⁵⁹

Although these rulings were not made in connection with Article X, the AB’s reluctance to delve into the internal decision-making process of a member may explain its attitude to the general transparency requirement reflected in Article X.⁶⁰ The statement that the internal decision-making process is outside the WTO’s competence, but falls entirely within a member’s sovereignty is at odds with the spirit of Article X, as well as with the AB’s ruling in an earlier case. In fact, the AB recognised the spirit of Article X in the *Shrimp* case,⁶¹ in which it ruled that although the measure itself was permitted under Article XX (g), it had been applied in an arbitrary and discriminatory manner in violation of the preamble of Article XX.⁶² In its ruling it stated that:

Article X: 3 of GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulation which, in our view, are not met here. The non-transparency and *ex-parte* nature of the internal governmental procedures applied

⁵⁵ Report of the Panel on Japan – Measures Affecting Consumer Photographic Film and Paper, para. 10.393, Padideh Ala’i, 2007, p. 128.

⁵⁶ Article 3.1 of the Agreement on Safeguards provides that ‘A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.’ Article 4.2 (c) provides that ‘The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.’

⁵⁷ Panel Report on United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, October 29, 2001, WT/DS202/R, para. 8.1 (3).

⁵⁸ Report of the Appellate Body on United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, February 15, 2002, para. 263 (d).

⁵⁹ Report of the Appellate Body on United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, February 15, 2002, para. 158.

⁶⁰ Padideh Ala’i, 2007, p. 130.

⁶¹ United States – Import Prohibition of Certain Shrimp and Shrimp Products, Panel report was adopted on 15 May 1998.

⁶² Report of the Appellate Body on United States – Import Prohibition of Certain Shrimp and Shrimp Products, 12 October 1998, WT/DS58/AB/R, paras. 181-184.

by the competent officials...are all contrary to the *spirit*, if not the letter, of Article X: 3 of GATT 1994.⁶³

In this ruling, the AB seemed to bring ‘nature of internal governmental procedure’ into its jurisdiction again. Inconsistent interpretations by the AB suggest that it may have adopted an indeterminate approach to interpreting the transparency requirement. There may be competing interests and concerns behind this.⁶⁴ On the one hand, the AB recognised that, as a general rule, lack of transparency poses a serious challenge to the market access goals of the multilateral trading system.⁶⁵ On the other hand, it deemed that evaluating the functioning of internal administrative policies of members, as expressed in Article X, could be an unacceptable infringement of members’ sovereignty.⁶⁶ The competing concerns are also reflected in the restricted provisions on domestic transparency. Annex 3 of the Agreement Establishing the World Trade Organisation on Trade Policy Review Mechanism contains the provisions on ‘domestic transparency’:

B. Domestic transparency

Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both members’ economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a *voluntary basis* and take account of each member’s legal and political system.⁶⁷

This definition of transparency goes to the heart of a country’s legal infrastructure, while also connecting with various political and social values, and more specifically affects the nature and enforcement of its administrative legal regime. For fear of undermining the legitimacy of the multilateral trading system, the WTO, as well as the AB, is reluctant to establish substantive standards on transparency to be enforced in all member states that may have conflicting or at least distinct administrative legal systems and political and social values. Thus, a set of procedural requirements, represented by Article X, has been established in various WTO agreements to ensure a minimum degree of transparency. The lack of substantive standards may, however, bring about difficulties in the enforcement of transparency obligations. Article 5 (1) of the Agreement on Trade-Related Investment Measures states, for example, that ‘Members shall notify the Council for Trade in Goods of all trade-related investment measures they are applying that are not in conformity with the provisions of this Agreement’. This provision is only a general obligation and does not set any standards against which violations of this Article can be determined.

In summary, the transparency obligations in the WTO agreements are drafted restrictively, setting minimum standards for domestic transparency through procedural requirements. Although the importance of this requirement has been increasingly recognised, the enforcement and practice of Article X GATT in dispute settlement proceedings remains limited and indeterminate. Claims under Article X GATT rarely play a central role in cases before the WTO,⁶⁸ and the DSB tends to interpret the article narrowly, thus making it

⁶³ Report of the Appellate Body on United States – Import Prohibition of Certain Shrimp and Shrimp Products, 12 October 1998, WT/DS58/AB/R, para. 183.

⁶⁴ Padideh Ala’i, 2007, p. 130.

⁶⁵ Padideh Ala’i, 2007, p. 130.

⁶⁶ Padideh Ala’i, 2007, p. 130.

⁶⁷ The Result of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts, p. 434. Article B, Trade Review Mechanism, Annex 3 of the Agreement Establishing the World Trade Organization.

⁶⁸ The first case in which Article X GATT played a central role is that of *European Communities – Selected Customs Matters*, WT/DS315/R, 16 June 2006. The rulings in this case focused on Article X:3 and will thus be discussed in Chapters IV and V. See Friedl Weiss, assisted by Silke

difficult for members to successfully assert violations of Article X. The main reason for WTO adjudicatory body's reluctance relates to the intrusive nature of this requirement on member's administrative legal system and procedures, which may infringe upon sovereignty. It is a challenging task for the WTO to balance the effectiveness of the trading system and respect of national autonomy. The case of China, which is one of the most important players to the world trading system and whose administrative system has developed without due respect to principle of transparency, presents an extra challenge to the WTO.

II.2 China's WTO-plus Obligations on Transparency

Foreign traders and investors have complained about the lack of transparency in China for years. The large size and diversity of the country, and its unique legal system, have often made it difficult for foreign businesses to establish which rules apply in any given situation.⁶⁹ The Protocol on the Accession of the People's Republic of China (Accession Protocol) includes a separate section on 'transparency' under the heading of 'Administration of Trade Regime'.⁷⁰ The transparency commitments provided in the Accession Protocol are based on, but go beyond, the requirements specified in Article X GATT. By expanding the scope of the normal WTO transparency requirements, the Accession Protocol creates a greater burden for China than for other WTO members and has thus led some to describe the requirements as 'WTO-plus'.⁷¹

There are four main aspects in China's WTO-plus obligations concerning transparency. The first relates to the publication requirement, which expands the scope of the publication requirement in Article X to include all laws, regulations and other measures in respect of trade in goods, services, TRIPS and the control of foreign exchange.⁷² This means that China must make all laws, regulations and other measures readily available to other WTO members requesting information.⁷³ Moreover, all laws, regulations and other measures affecting trade in any area require publication before they can be enforced.⁷⁴ By contrast, Article X restricts this requirement to measures resulting in an advance in a rate of duty or imposing a new or more burdensome barrier on imports.⁷⁵

The second aspect relates to the requirement of a central point to which enquiries might be directed, which goes beyond the scope of Article X. It requires China to establish a single desk, where any individual, enterprise or WTO member may request any information concerning Chinese laws, regulations and other measures within the mandate of the WTO. China must respond to requests within thirty days of receiving them or, in exceptional circumstances, within forty-five days. Since many other WTO members do not have a single

Steiner, 'Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison', *Fordham International Law Journal*, vol. 30, 2007, p. 1574.

⁶⁹ Julia Ya Qin, 'WTO-Plus Obligations and Their Implications for the WTO Legal System - An Appraisal of the China Accession Protocol', *37 Journal of World Trade*, 2003, pp. 483-522.

⁷⁰ Accession Protocol, Part I 2 (c).

⁷¹ Julia Ya Qin, 'WTO-Plus Obligation and Their Implication', 2003, pp. 483-522; Roy A. Schotland, 'Tracking Transparency: An American Administrative Lawyer Stumbles into WTO-land', Georgetown University Law Center, Speech in Shanghai, China, February 2001. See also Christopher Duncan, 'Out of Conformity, China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions after Accession', *American University International Law Review*, 2002.

⁷² Accession Protocol, Part I Article 2 (C), para. 2.

⁷³ *Ibid.*, para. 1.

⁷⁴ *Ibid.*

⁷⁵ GATT, Article X:2.

point of enquiry for information, imposing this requirement on China appears excessive.⁷⁶ It raises doubts about China's ability to fulfil this requirement because China does not have a single domestic office that can provide a comprehensive account of all Chinese legislation. Some believe that while such offices are essential to the distribution of relevant information, the WTO must be realistic as to how much or little authority responses from such a desk can have,⁷⁷ especially when a country, such as China, is plagued by poor governmental and legal structures.⁷⁸

The third aspect concerns the requirement for the right to comment, which also goes beyond the scope of Article X. China is required to allow a reasonable period for comments to be submitted to the appropriate authorities before such measures are implemented. The Accession Protocol allows an exception for laws, regulations and other measures involving national security, specific measures setting foreign exchange rates or monetary policies, and other measures where publication would impede law enforcement. The comment requirement is the most intricate and intrusive transparency commitment that the Accession Protocol imposes on China. It is modelled on the US Administrative Procedure Act,⁷⁹ which US scholars describe as 'one of the most important advances in modern democracy', resulting from the requirement's positive impact on the promulgation of comprehensive laws and regulations.⁸⁰ 'Right to comment' has been deemed to be the most problematic area in China's transparency responsibilities since China has not yet introduced a requirement, in the form of legislation, for mandatory public consultation during the drafting process of laws.

The final aspect relates to the special Transitional Review Mechanism (TRM) established for China. The TPRM was created by the WTO to increase the transparency and understanding of members' trade policies and practices through regular monitoring. A special TRM, which differs from the normal TPRM, was included in China's accession agreements.⁸¹ Under this mechanism, the subsidiary bodies with a mandate covering China's commitments under the WTO agreements or the Accession Protocol have to review China's implementation, as does the General Council. Both the review by the subsidiary bodies and that by the General Council have to be conducted annually for the first eight years after the country's accession, followed by a final review in the tenth year or at an earlier date decided by the General Council. It should be noted that this review mechanism supplements rather than supplants the normal committee review and TPRM.⁸² That is to say, in addition to the annual review by subsidiary bodies and the General Council, China will be subject to a regular TPRM every four years, depending on its share of current world trade.

The TRM has two special features that differ from the TPRM. First, the scope of the review and the WTO bodies involved are much wider than the normal trade review.⁸³ It involves sixteen subsidiary bodies of the WTO, each with a responsibility for China's commitments in the area of that body's mandate.⁸⁴ By contrast, the TPRM is conducted by the Trade Policies Review Body and does not involve as many subsidiary bodies or a higher level of the General

⁷⁶ Christopher Duncan, 2002.

⁷⁷ Roy A. Schotland, 2001.

⁷⁸ Christopher Duncan, 2002.

⁷⁹ Sylvia Ostry, 'China and the WTO: The Transparency Issue', 1998.

⁸⁰ Christopher Duncan, 2002.

⁸¹ Accession Protocol, Part I 18.

⁸² Xin Zhang, 'Implementation of the WTO Agreements: Framework and Reform', *Northwestern Journal of International Law and Business*, Winter, 2003.

⁸³ Xin Zhang, 2003.

⁸⁴ *Ibid.*

Council's comprehensive review.⁸⁵ This latter review covers virtually all the important aspects of China's economic and trade policies and practices, including economic data, economic policies, the framework for making and enforcing policies, and policies affecting trade in goods, services and intellectual property rights. The annual review by the General Council has to be conducted in accordance with the results of reviews by the subsidiary bodies. In addition, it includes an examination of the development of China's trade with WTO members and other trading partners, and recent developments and cross-sectoral issues regarding China's trade regime. Secondly, this review is intended to be more intrusive in that it aims to evaluate not only the general economic and trade policies, but also the specific progress achieved in implementing the WTO agreements, including progress achieved in withdrawing or amending inconsistent legislation and so on.⁸⁶ The latter requirement is beyond the scope of TPRM.⁸⁷

In fact, the WTO-plus obligations undertaken by China are extensive and go far beyond transparency, covering administration of China's trade regime, Chinese economic system, and new WTO disciplines on investment. Prior to China's accession, very few WTO-plus obligations existed for the various WTO acceding members, and their impact on the WTO legal regime was negligible.⁸⁸ The rationale of such a unique treatment for China is, however, unclear. In China's Accession Protocol, there is a notable absence of any WTO explanation for the creation of the China-specific rules.⁸⁹ Apparently, the standard WTO rules of conduct were perceived as insufficient or inadequate for regulating Chinese trade, hence the need for additional rules.⁹⁰ But what are the special conditions in China that could warrant the imposition of the extra disciplines that are not imposed on any other Member of the WTO?⁹¹ Basically what distinguishes China from other countries are the size of its economy and its unique legal and economic system, such as rule of law and market economy status. At the time of its accession, China was the sixth largest trading nation in the world and its potential for economic growth is enormous. Major trading partners were motivated to gain more market access concessions from China, but they were threatened by the competitiveness of certain Chinese products⁹² and the impact China might have on the trading system in the event of its failure to comply. Thus, they were eager to bend WTO rules to further their interests in dealing with China.⁹³ For the WTO-plus obligations on administration of trade regime (rule of law requirements), represented by transparency demands, more stringent rules on the rule of law may be necessary for China to effect implementation of its WTO obligations since China has many problems in this area. However, conditions in China were hardly unique among developing countries and transitioning-economy members.⁹⁴ It is therefore worth questioning why WTO disciplines on transparency, for example, would be considered insufficient only in the case of China.⁹⁵

It appears therefore that the only possible explanation for WTO-plus obligations is China's enormous economy and trade share. However, this could only explain the motivation of

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Julia Ya Qin, 'WTO-Plus Obligations and Their Implications', 2003, p.483.

⁸⁹ Throughout the hundreds of pages of the Protocol and the Working Party Report there is not a single passage setting forth the rationale or the object and purpose of such differential treatment of China. Julia Ya Qin, 'WTO-Plus Obligations and Their Implications', 2003, p.510.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

trading partners to treat China differently, but could not be regarded as rationale for imposing the WTO-plus obligations. Is it rational, one wonders, within the WTO legal system to impose additional trade obligations on one specific country merely because of its relative importance in international trade? China is a comparatively important member in sense of trade share, but it is at the same time a comparatively weak member in terms of institutional framework, capacity and resources to comply with many WTO obligations. It does not seem to be rational to require a weaker member to comply with stricter commitments. The WTO-plus obligation of transparency is particularly difficult to justify. The WTO seems to have adopted a contradictory approach to compliance with this requirement: on the one hand, the DSB is generally reluctant to enforce this requirement strictly—seems to leave plenty of policy space for members. But on the other hand, in the specific case of China, the WTO has imposed stricter requirements that go beyond the WTO provisions—seems to require China to reach a transparency level higher than the standard level required by the WTO. Putting the matter of the rationale aside, the important question is whether the WTO-plus approach will help improve China's weak performance when it comes to transparency. More specifically, will the stricter requirement necessarily be more effective at correcting poor performance, and how may the DSB's indeterminate attitude towards enforcement of this Article affect China's compliance? The study in the following sections of the obstacles to transparency, which are deeply rooted in China's regulatory regime, sheds some light on these questions.

III. General Obstacles to Transparency in China's Legislative Regime in General

As discussed above, the transparency requirement in the WTO agreement goes to the heart of a member's legal and administrative system. Transparency with respect to trade-related laws, regulations and legal measures does not exist in isolation. Rather, it is closely connected to the characteristics of the legal and administrative system in general. Since China's legislative regime was developed without regard to the transparency principle, the real challenge for China in seeking to comply with this requirement goes beyond what is required in Article X: 1. In fact, many non-transparent practices in the country's foreign trade regime result from its problematic legislative regime and non-transparent administration of rules at the local level.

III.1 Brief Introduction of Governmental Structure and Distribution of Legislative Power

In order to understand the opaqueness of the regulatory regime in China, the basic state structure upon which the legislative organs were built first has to be explained. Unlike the Western state structure, which is characterised by separation of the three powers, China's basic political system is theoretically based on the system of the People's Congress. The relationship between judicial, prosecutorial and administrative bodies is neither parallel nor subject to mutual restriction and supervision. These bodies' powers are vested in the National People's Congress (NPC), to which they are responsible and to which they report their work. The NPC is the highest organ of state power, with the Standing Committee as its permanent body. According to China's Constitution, the NPC and its Standing Committee exercise the legislative power of the state.⁹⁶ The NPC exercises its legislative power in amending the Constitution, supervising the enforcement of the Constitution, and enacting and amending basic laws and statutes governing criminal offenses, civil affairs, state organs

⁹⁶ Article 58 of the Constitution of the People's Republic of China, promulgated in 1982, amended in 1999.

and other matters.⁹⁷ The Standing Committee of the NPC is entitled to interpret the Constitution and supervise its enforcement; to interpret laws; to enact and amend laws with the exception of those to be enacted by the NPC; to annul administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or laws, and to annul those regulations or decisions of the provincial organs of state power that contravene the Constitution, laws or the administrative regulations of the State Council. The NPC also has the power to elect the country's president and vice president.

The State Council, which is the highest administrative organ of the state, is entitled to issue administrative regulations and to issue decisions and orders that are in accordance with the Constitution and laws.⁹⁸ It is composed of a Premier, Ministers in charge of ministries and Commissioners in charge of commissions. The Premier of the State Council is elected by the NPC, based on the nomination by the President. The State Council has the power to alter or annul inappropriate directives, orders or regulations issued by ministries and commissions, or directives and orders issued by local organs at different levels. The Supreme People's Court and Supreme People's Procuratorate exercise the highest judicial power and the highest prosecutorial power respectively of the state. Both of them are accountable to the NPC.⁹⁹ The President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuratorate are elected by the NPC.¹⁰⁰

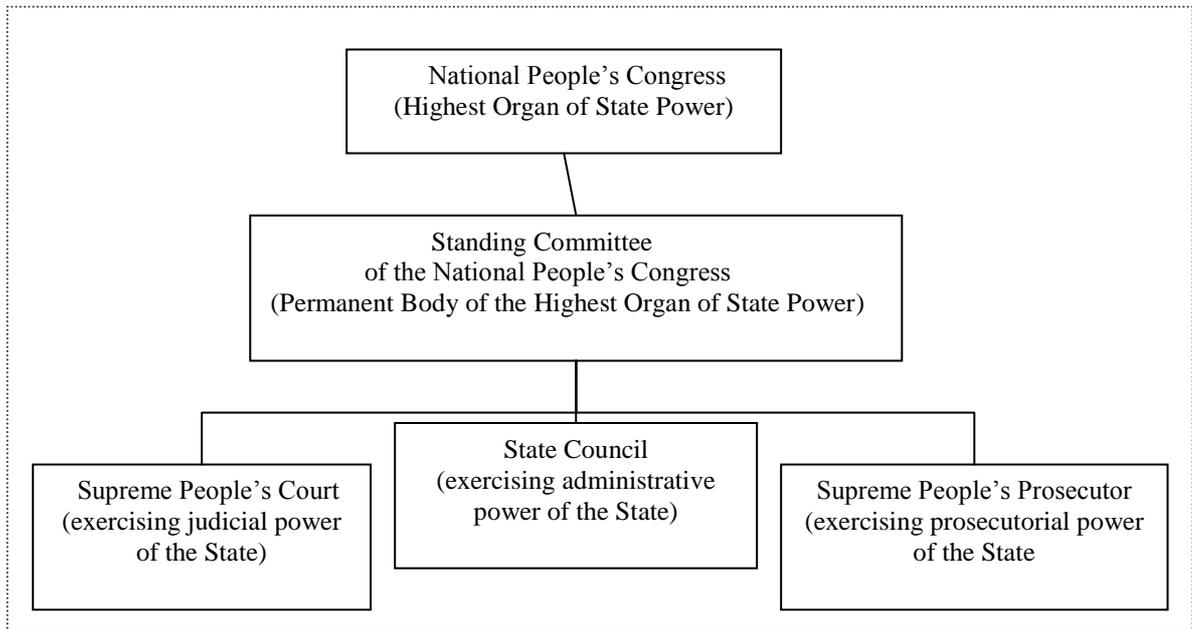
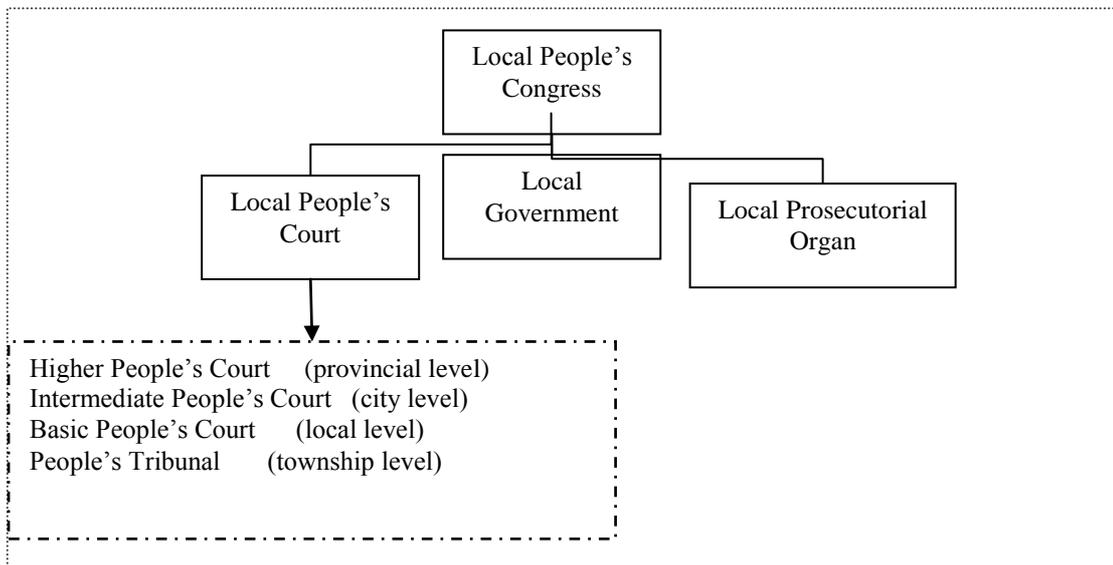
Similar terms apply to the structure of state power at the local levels. People's congresses and people's governments are established at various local levels, such as provinces, cities, counties and towns. Local people's congresses are the local organs of state power, and local governments exercise executive functions. Local people's congresses and local governments all have powers to issue local decrees and rules in accordance with laws and the needs of local areas. However, decrees issued by local people's congresses are superior to rules issued by local governments. The local people's congress at a provincial level may enact local decrees, provided they do not contravene any provision of the Constitution, national laws or administrative regulations of the State Council. Local people's congresses in major cities may also adopt local decrees, provided they are not incompatible with those enacted by people's congresses in provinces where the major cities are located. Local governments also enjoy the right to issues local rules, provided they do not contradict national laws, administrative regulations of the State Council or local decrees of the local people's congresses. Thus, as the representation of the highest state power, laws or regulations enacted by the people's congress will in principle always prevail over those enacted by governments at the same administrative level. The state power structures at both central and local levels are shown in the following tables.

⁹⁷ Article 62 (1), (2) and (3) of the Constitution of the People's Republic of China, promulgated in 1982, amended in 1999.

⁹⁸ Article 85 and 89 of Constitution of People's Republic of China, promulgated in 1982, amended in 1999.

⁹⁹ Article 128 and Article 133 of Constitution of People's Republic of China, promulgated in 1982, amended in 1999.

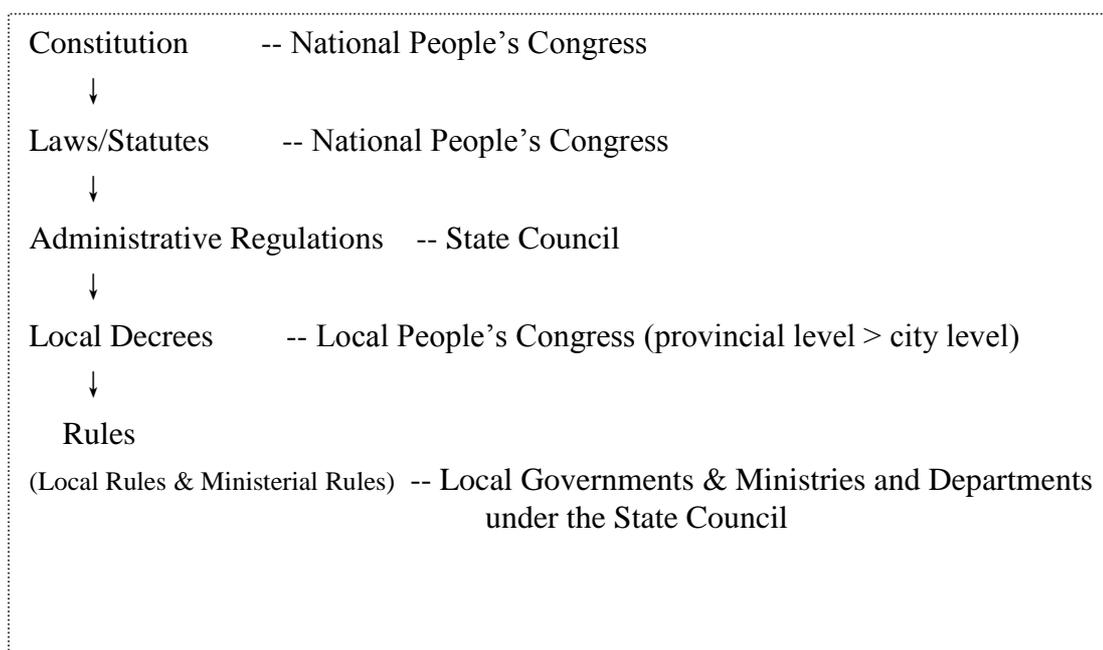
¹⁰⁰ Article 62 (7) and (8) of Constitution of People's Republic of China, promulgated in 1982, amended in 1999.

Table 1: Structure of State Power in China**Table 2: The Structure of State Power at Local / Provincial Level**

3.2 Problems in Legislative Regime

At the risk of oversimplifying, it could be stated that China has a five-tier legal system in accordance with the provisions of the Constitution and the Legislative Law.¹⁰¹ The hierarchy of this five-tier legal system can essentially be summarised as follows.

Table 3: Hierarchy of Five-tier Legal System



Although the distribution of legislative powers and the hierarchy of legislative enactments seem clear, the real situation is much more complicated.

III.2.1 Diffusion of Rulemaking Powers and Conflicting Legal Authority

In China, the legislative and administrative governmental bodies both have the power to issue legislative documents. In addition to the people's congresses at both national and local levels, which are constitutionally regarded as legislative organs of state, many other administrative entities have the right to legislate. As the above table demonstrates, ministries, commissions, and departments under the State Council, as well as the government and administrative organs at various local levels all enjoy the right to issue legal texts with varying degrees of legitimacy.

At the central level, the hierarchy of the Constitution, laws and statutes, and the administrative regulations of the State Council is comparatively clear, and all of them are superior to legislation enacted at local levels. At the local level, by contrast, the relationship

¹⁰¹ The Legislative Law of the People's Republic of China was issued by the NPC in 2000.

between local decrees and rules is quite confusing. ‘Local decrees’ are decrees or regulations enacted by provincial people’s congresses or people’s congresses in major cities.¹⁰² The local decrees enacted by the former are superior to those enacted by the latter. ‘Rules’ are ‘local rules’ issued by local governments and ‘ministerial rules’ issued by ministries, commissions or departments under the State Council. As explicitly provided for in the Legislative Law, ‘local decrees’ are superior to ‘local rules’ issued by the government at the same or a lower administrative level, while the legal authority of ‘local rules’ is equal to ‘ministerial rules’.¹⁰³ According to this formula, ‘local decrees’ should be higher than ‘ministerial rules’. However, there are some confusing provisions as regards the legal authority level of ‘ministerial rules’ in the Legislative Law, implying that ‘local decrees’ are on the same legal authority level as ‘ministerial rules’. Firstly, Article 80 of the Legislative Law provides that ‘local decrees’ are superior only to ‘local rules’, rather than to ‘rules’ in general. It excludes ‘ministerial rules’ from those that are inferior to ‘local decrees’. It implies that ‘ministerial rules’ are probably at the same level with ‘local decrees’. Secondly, Article 86 (2) of the Legislative Law explicitly states that if there is a conflict between ‘ministerial rules’ and ‘local decrees’, the competent authorities will decide which shall prevail. It again implies that ‘ministerial rules’ are at the same level as ‘local decrees’. The confusing and interwoven provisions of legislative enactments and their legal authorities make legislation quite complex and confusing. The situation will be even more complicated in the event of a conflict between legal texts with the same level of legal authority, but issued by different parallel administrative organs.

Table 4: Conflicting Provisions in the Legislative Law Article 80-86 as regards to Legal Authority Level

Local Decrees > Local Rules
Local Rules = Ministerial Rules
Local Decrees = Ministerial Rules

III.2.2 Miscellaneous Legislation

As explained by Lubman, the allocation of rulemaking powers by agencies within the Chinese bureaucracy is a major structural problem in the organisation of the state.¹⁰⁴ Much legislative power has been delegated to the provincial level, with more than twenty functional bureaucracies for the central government. The State Council supervises more than sixty departments (including ministries), commissions, administrations and offices. These agencies are authorised to issue rules to implement specific legislation under powers granted by a legislative body such as the Standing Committee of the NPC. Their authority also stems from a general rulemaking power that is deemed to be inherent in the agencies and enables them to issue any rule that is necessary to carry out their tasks.¹⁰⁵

Administrative rulemaking bodies have adopted miscellaneous formats of legislative enactments. Besides the ‘administrative regulations’ or ‘ministerial rules’, which are clearly regulated and provided for in the Legislative Law, the State Council and its sub-authorities may also enact or issue administrative measures, provisions, directives, decisions, orders,

¹⁰² ‘Major cities’, adopted in Legislative Law, refer to provincial capitals, special economic zones and other major cities approved by the State Council. See Article 63 of Legislative Law.

¹⁰³ Articles 80 and 82 of Legislative Law.

¹⁰⁴ Stanley Lubman, ‘Bird in a Cage: Chinese Law Reform after Twenty Years’, *Journal of International Law & Business*, Spring 2000.

¹⁰⁵ Stanley Lubman, ‘Bird in a Cage’, 2000.

notices, explanations and so forth, all of which are claimed to be normatively binding and treated as such by the creating entities. In contrast to laws and regulations, which are normally drafted with great flexibility and in broad and general language, these less 'formal' but more detailed administrative rules are more frequently used by administrators in various provisional circumstances and are subject to less supervision. The large quantity of these legal documents increases the difficulty of publication and public accessibility in all cases. Indeed, lawyers and officials in China engage in a daily struggle to make sense of vague, inconsistent laws and often questionable legislative authorities.¹⁰⁶

In summary, the chronic disorder in Chinese legislation, composed of interwoven provisions and conflicting legal authority, is a defining feature of the opacity of Chinese legislative enactments. As Keller commented: 'The disparate mass of laws and regulations which makes up the formal written sources of Chinese law does not possess sufficient unity to be regarded as a coherent body of law. In their disarray, the sources of Chinese law seem barely capable of providing the basic point of reference which all complex systems of law require'.¹⁰⁷

IV. Obstacles to Publication Requirements due to the Existence of Informal Laws

The above discussion demonstrates that the opaque legal regime in China may be partially attributed to problems embedded in the law-making process, including an unclear hierarchy, conflicting legal provisions issued by authorities at the same administrative level, and excessively complicated formats of formal and informal legislation. Whether, once issued, legislation can be publicly assessed is another critical factor defining the transparency of China's legal system. While the laws and regulations at the central level are normally published in accordance with the Legislative Law requirements, the rules at the local level, especially those issued by local administrative authorities, constitute a major problem.

IV.1 Publication Requirements Scattered across Laws and Regulations

The Legislative Law is the first law governing the rule-making process and legislative agencies. It standardises the basic transparency requirements for rule-making. Articles 52 and 62 require that, upon promulgation, laws enacted by the NPC and administrative regulations of the State Council must be published in a timely manner in the Bulletin of the NPC Standing Committee, the State Council Bulletin, and in nationally-circulated newspapers. In the case of local decrees, publication is required in a timely manner in the Bulletin of the Standing Committee of the people's congress in that region and the newspaper circulating within that jurisdiction.¹⁰⁸ Local rules are also required to be published in the local government Bulletin and a newspaper circulated in the local jurisdiction.¹⁰⁹ More publication requirements can be found in other laws and administrative regulations, such as the Price Law, the Administrative Punishment Law, the Regulation of Procedures Adopting Administrative Regulations and so on.

Besides the legal provisions, some other legal mechanisms – for instance, the system of hearings – have also been established to improve transparency. Normally there are three kinds of hearings: a legislative hearing, the hearing of administrative decisions and the hearing of specific administrative actions. The hearing of specific administrative actions is better

¹⁰⁶ Perry Keller, 'Sources of Order in Chinese Law', *American Journal of Comparative Law*, vol. 42, No. 4, Autumn 1994

¹⁰⁷ Perry Keller, 1994.

¹⁰⁸ Article 70 of the Legislative Law of People's Republic of China.

¹⁰⁹ Article 77 para.2 of the Legislative Law of People's Republic of China.

developed than the other two kinds of hearings. This is reflected in the Administrative Punishment Law, which includes a separate section on ‘public hearings’.¹¹⁰ With regard to legislative hearings, the Legislative Law contains only some general provisions, which provide that ‘in the process of drafting an administrative regulation, the drafting body shall gather opinions from a wide circle of constituents such as the relevant agencies, organisations and citizens. The gathering of opinions may be in various forms such as panel discussions, feasibility study meetings, hearings etc’.¹¹¹

However, these scattered legal provisions and mechanisms are far from sufficient to be regarded as a unified and effective principle guiding the publication of legislation. Publication requirements imposed on the enactment of laws, regulations, local decrees and rules remain very simple and general. There is no stipulation that only those laws, regulations and so on that have been published can be enforced, and no time limit for publication after promulgation has been set. Moreover, the major transparency requirements provided in the Legislative Law are not applicable to normative documents issued extensively by local administrative authorities, and this may constitute a key obstacle to a transparent legal and administrative regime in China.

IV.2 Adoption of Normative Documents

In addition to formal Chinese legislation (laws, administrative regulations, local decrees and rules), there is another body of ‘rules’ that plays a significant role in the regulatory regime. These ‘normative documents’ are used extensively by administrative bodies, especially at local levels. They may take many forms, such as decisions, notices and provisions, and they have general binding force on all activities.

The normative documents are a relic of the pre-reform period (period before open-door reform commenced in 1978), when legal mechanisms were largely absent.¹¹² Although the progress achieved in improving Chinese legal infrastructure makes normative documents much less of a problem today, these documents continue to exist in all areas at various local levels. The legality of the normative documents is unclear under current Chinese law. They are not covered by the regulation governing legislative procedures and formats in China. The Legislative Law and other relevant national regulations on rule-making are silent on the existence of normative documents, and thus the publication requirements provided for in the Legislative Law do not apply to these documents. In practice, internal decisions or notices may never be made known to the general public, but nevertheless have binding force of law. In some cases, they are published only in obscure local newspapers, thus making it virtually impossible for anyone to know exactly which rules apply.¹¹³ The following case illustrates how normative documents are adopted in practice.

*Case Study*¹¹⁴

¹¹⁰ Articles 42 and 43 of the Administrative Punishment Law, issued on 17 March 1996.

¹¹¹ Article 58 of the Legislative Law of People’s Republic of China.

¹¹² Sylvia Ostry, ‘China and the WTO: The Transparency Issue’, 1998.

¹¹³ Randall Peerenboom, ‘Ruling the Country in Accordance with Law-Reflection on the Rule and Role of Law in Contemporary China’, *Cultural Dynamics*, 1999-3.

¹¹⁴ Since the ‘normative document’ in this case was never published or made publicly accessible through official channels when it was adopted, the source of this case comes from a special report published in the *Southern Weekend* newspaper. In September 2004, however, the auto importers brought their complaints to the courts in Hainan province. The judgments from the intermediate people’s court of Haikou city and the high people’s court of Hainan province provide some extra information on the fact of this case. ‘Administrative Ruling of the High Court of Hainan Province’, Case Number: [2005] Qiongxing Zhongzi No. 53, 23 May 2005.

Normally, the application fee for a car import license in Hainan province is 10 Yuan under the local government's regulation. In September 2002, however, the car importers in Hainan province received an 'oral notice' from the local 'Electromechanical Products Office', which is the administrative authority for imports and exports of electromechanical products in Hainan province. This oral notice stated that 'extra fees will be charged for car import licenses: 40,000 Yuan for normal cars, 30,000 for cross-country cars and 20,000 for vans'. This charge was much higher than the standard. Two months later, in November 2002, the additional charge was officially explained as the collection of a 'foreign trade development fund', and an 'official document' or 'normative document' was accordingly issued to make this charge legally binding. This 'normative document' was jointly issued by the Department of Commerce and the Department of Finance of Hainan province on 27 August 2003, with the result that the 'foreign trade development fund' was set up by the government to support exports and one of its three sources of income was earnings from bidding for or compensable use of import and export quota licenses. The character of the 'normative document' adopted in this case could be categorised as follows: (1) it was issued by departments under the provincial government and had general binding force for all car import license applications in Hainan province; (2) it was not compatible with general regulations on this issue and specifically contradicted a rule issued by the central authority that prohibited local authorities from abusing their rights to make profits on the issuance of import licenses; (3) its provisions were vague and included some disguised terms; (4) the concrete requirements were not set out in the normative document, but were instead implemented by a sub-office of the government in the form of an 'oral notice'; (5) it was not publicly accessible. Normative documents of this kind are widely used at local levels.

IV.2.1 Questionable Legality of Normative Documents

If order is to be predicated on laws, there must be a way of verifying whether they are valid and legally binding.¹¹⁵ The criteria suggested by Peerenboom are useful for verifying the legality of normative documents: (i) they are made by an entity with authority to make laws; (ii) the entity was acting within its scope of authority; (iii) the entity followed proper procedures; and (iv) the regulations are not inconsistent with superior legislation.¹¹⁶ Under this test, the legality of normative documents is questionable. Firstly, normative documents are in many cases issued by entities without legal rule-making rights. According to the Constitution and Legislative Law, the authorities with rule-making rights include the NPC, the Standing Committee of the NPC, the State Council and its sub-ministries or departments, the local people's congress and government at a provincial level, or at the level of major cities (such as provincial capitals). However, normative documents are issued by administrative bodies at every level of the government, including those in small cities, counties and even towns. Secondly, since normative documents are not regarded as formal legislation, there are no standards or unified procedural rules to be followed for their adoption. The rule-making procedures provided in national laws or regulations cannot be applied to them. Thirdly, the requirement that 'the regulations shall not be inconsistent with superior legislation' is especially difficult to satisfy. Most normative documents are 'internal decisions' and not publicly accessible. As they are not transparent enough to be found, it is hard to judge whether they are conflicting. Even if they are found to contravene superior laws, the current review mechanism is not effective enough to correct them.¹¹⁷ In practice, therefore, many normative documents contradict superior laws and regulations.

¹¹⁵ Randall Peerenboom, 'Ruling the Country in Contemporary China', 1999.

¹¹⁶ *Ibid.*

¹¹⁷ There is an administrative mechanism for reviewing the legality of administrative rules. Conflicting legal documents issued by administrative organs can be corrected by administrative

IV.2.2 Publication Requirements for Normative Documents

As mentioned above, the Legislative Law publication requirements for all formal legislation do not apply to normative documents. Some local rules have been progressively issued to regulate the adoption of such documents. The government of Guangzhou city, for instance, promulgated a local rule, the ‘Guangzhou Administration Measures on Normative Documents’, which entered into force on 1 April 2004.¹¹⁸ This defines ‘normative documents’ as ‘legal documents that can be used repeatedly and are issued by government and its sub-authority departments with a general binding force to individuals, legal persons and other organisations’.¹¹⁹ This definition gives normative documents legal authority similar to laws. It provides some basic requirements for the adoption of normative documents. Normative documents may, for instance, take such forms as ‘regulations’, ‘rulings’, ‘measures’, ‘opinions’, ‘decisions’, ‘notices’ and so on,¹²⁰ and must not contradict the Constitution, laws, regulations, decrees and rules, or administrative decisions and rules from higher authorities.¹²¹ Importantly, some transparency requirements have been added, whereby normative documents have to be published in the government policy journal, a newspaper circulated within the administrative jurisdiction and on the government’s official website.¹²² Normative documents also have to be enforced 30 days after publication.¹²³

Similar provisions can be found in a rule recently issued by the government of Beijing city.¹²⁴ Some improvements have been achieved compared with the one issued in Guangzhou in 2004, especially in respect of transparency. This new rule emphasises that normative documents must be published 30 days before enforcement, and those that have not been published cannot be sources of administrative activities.¹²⁵ Ordinary people have the right to access normative documents that have been published, and entities issuing normative documents have the responsibility to facilitate this through, for example, free access to official versions of normative documents at the entities’ locations.¹²⁶ The rule also states that the government’s Documentation Bureau is the designated authority for providing free access to normative documents.¹²⁷

organs at a higher level. As explained in the discussion of market fragmentation problem, however, one of the reasons why this self-review mechanism is not effective is the common interests that are shared by these administrative organs. Although there is also a judicial review mechanism in China, it cannot be used to challenge administrative decisions with general binding force (i.e. administrative rules or regulations), but only to challenge administrative decisions for specific organizations, groups of people or individuals. This limitation is discussed in the following section.

¹¹⁸ ‘Guangzhou Administration Measures on Normative Documents’ was issued on 15 December 2003 and entered into force on 1 April 2004. It was issued by the Guangzhou People’s Government.

¹¹⁹ Article 2 of ‘Guangzhou Administration Measures on Normative Documents’.

¹²⁰ *Ibid.*, Article 7.

¹²¹ *Ibid.*, Article 4.

¹²² *Ibid.*, Article 23.

¹²³ *Ibid.*, Article 24.

¹²⁴ ‘Beijing Administration and Supervision Measure on Normative Documents’ was promulgated on 20 September 2005, and entered into force on 1 January 2006. It was issued by the Beijing People’s Government.

¹²⁵ Article 5 of ‘Beijing Administration and Supervision Measure on Normative Documents’.

¹²⁶ *Ibid.*, Article 6.

¹²⁷ *Ibid.*, Article 7.

The requirement for publication and free public access in the rule issued by the governments of Beijing and Guangzhou can be regarded as an important step forward in making the adoption of normative documents more transparent. However, the limitation is that this rule only regulates the adoption of normative documents in Beijing or Guangzhou. The transparency requirements in these regulations are not uniform, and those provided in Guangzhou are less stringent. Efforts to achieve transparency in the adoption of normative documents are still in a nascent stage, and unitary and consistent provisions are still lacking.

IV.2.3 Limited Supervision and Lack of Legal Remedy for Application of Normative Documents

In China, administrative activities are divided into abstract administrative activities and specific administrative activities. While the former normally refer to the issuance of regulatory measures that may have binding force on the general public, the latter are administrative decisions affecting only a specific person or organisation, such as an administrative punishment imposed on a certain enterprise. Having general binding force means normative documents are categorised as abstract administrative activities.

Under Chinese law, only specific administrative actions can be remedied by legal means, whereby individuals who are dissatisfied with specific administrative actions, irrespective of whether the administrative review mechanism has been exhausted, can file a court case against the specific administrative action. This means that judicial review in China is available only in respect of specific administrative activities. However, the adoption and enforcement of normative documents, as abstract activities, are not subject to any supervision by judicial organs.

Without the opportunity for legal remedies, all the supervision and remedies available in the case of normative documents have to be found within the administrative system. Both the Guangzhou and Beijing governmental rules discussed above, for example, allow any organisation, enterprise or individual with an opinion on the validity and application of a normative document to send a written application for a review to the ‘supervisory body’ – the higher administrative authority – for a final decision.¹²⁸ Take the transparency requirement as an example: if an administrative body enforces a normative document that has not been published, the administrative actions based on this normative document or the normative document itself may be revoked by a higher-level administrative body. However, internal administrative supervision has two shortcomings. Firstly, its direct and close relationship to the administrative body in question may hinder, in many cases, the higher administrative body in its efforts to provide supervision and remedy with adequate fairness and efficiency. Secondly, many individuals and enterprises are reluctant, for fear of disrupting the internal relationship, to complain to the supervisory body. This makes it harder to identify and reveal problems in normative documents. This flaw in the Chinese administrative system means that the regulatory activities of administrative authorities (i.e. the adoption of normative documents) are poorly supervised, and transparency is therefore difficult to ensure.

V. Obstacles to Transparency associated with Legal Culture

The principle of transparency broadly derives from liberal principles of government accountability. Proceeding from tenets of human equality and natural law, the liberal tradition of political ideology asserts that government is essentially an agent of popular

¹²⁸ Article 33 of ‘Guangzhou Administration Measures on Normative Documents’ and Article 18 of ‘Beijing Administration and Supervision Measure on Normative Documents’.

will.¹²⁹ A responsible agent is thus a typology by which regulators and their political superiors are accountable to the subjects of regulation, and as a result are expected to exercise regulatory authority broadly in accordance with norms of transparency and rule of law.¹³⁰ However, these regulatory norms are confronted with powerful forces of legal culture in the case of China. The norms that inform China's regulatory culture may be described in terms of 'patrimonial sovereignty'.¹³¹ Governance is pursued by a sovereign political authority that remains largely immune to challenge.¹³² Regulatory norms serve as instruments of the Party's policies of control, and the supremacy of the Party remains entrenched in the regulatory process even after twenty year of legal reform. 'Patrimonial sovereignty' is thus a typology by which regulators are accountable only to their bureaucratic and political superiors, and as a result have few obligations to heed the subjects of rule or the substance of regulation.¹³³ Under this ideology, political leaders and administrative agencies have responsibilities *for* society, but are not responsible *to* it.¹³⁴

Keeping the above theoretical discussion of legal culture in mind, we have to establish the impact of the country's distinct legal and political culture on levels of transparency in China's legal and administrative system. Extensively adopted and poorly regulated normative documents constitute a major obstacle to transparent rule-making and a coherent legal system uniformly administered by the state. Analysing the root cause of the existence of these normative documents may help shed some light on what the real challenges are for China in seeking to comply with WTO-required transparency.

As discussed above, normative documents are not recognised as formal legislation by the national laws and regulations, and they fall outside rule-making requirements. They may be issued by governmental organs that do not have rule-making power, and their application may not accord with legal requirements. The next question is where the legality of normative documents comes from or, in other words, what makes them valid and legally binding? The answer is not that they are issued in accordance with norms of the rule of law and transparency requirements. A standard answer from ordinary Chinese people is that they are certainly 'legal' and that people have to obey them because they are issued by 'the government'. It is not difficult to see that the legality of the normative documents comes from their issuing authorities themselves – the government or the Party. This once again demonstrates: (1) the supremacy of the Party's power, rather than the law, in the country; (2) that 'laws' or other legal documents are more like instruments for implementing Party policy; the extensive adoption of informal normative documents confirms the legal culture or tradition of the Party relying strongly on 'policy-like laws' in governance; in contrast to Western political ideology, where government is an agent of popular will, the situation in China could be described as one in which 'law' is an agent of the government or Party's will; (3) that the 'patrimonial sovereignty', or supremacy of the Party, weakens the norm of government accountability; in other words, governmental authorities are accountable only to their political superior and, as a result, the importance of transparency, which derives from government accountability, is also weakened.

Overall, the adoption of normative documents falling outside the formal legislation exaggerates the complexity and opacity of the Chinese legal system. Although their legality is

¹²⁹ Pitman B. Potter, 'Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices', *Washington University Global Studies Law Review* 2003-1.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

questionable according to the provisions in the Constitution and relevant national laws governing the legislation, the extensive adoption of normative documents makes them *de facto* regulatory norms with general binding force at the local level. This may trigger many problems in this area, including unpublished internal decisions, conflicts between normative documents and with superior regulations and laws, and a strong 'policy' character that is subject to frequent changes in line with changes in policy. All these problems create difficulties in seeking to improve transparency in China. Although some transparency requirements have been incorporated into administrative rules adopted by governments in several big cities, these rules have not yet been able to ensure the implementation of transparency requirements in a coherent and unitary manner. Therefore, the impediments to improving transparency in China's legislative regime are closely related to its institutional characteristics, including its administrative structure and legislative procedures, and to its distinct legal culture.

VI. Conclusion

The difficulties in China's compliance with WTO transparency requirements are deeply embedded in its complex legislative structure and in the existence of under-regulated informal laws, as well as in the country's distinct legal culture. The sheer complexity of the legislative structure is a defining feature of the legal system's opaqueness. Legislative power has been delegated to multiple levels of agencies, and the legal status of legislative enactments adopted by local authorities is vague. Unresolved conflicts between legal enactments obstruct coherency and transparency in the Chinese legal system. The excessive existence of informal laws, such as normative documents issued by administrative agencies, exacerbates the problem of non-transparency in the regulatory regime. The publication requirements provided in formal Chinese laws simply do not apply to normative documents since they are not recognised as a formal source of law in China. In most cases, these documents are adopted arbitrarily by administrative authorities and are not publicly accessible. Moreover, the country's distinct legal culture also contributes to the difficulty of enhancing transparency in China's legal system. The heavy reliance of the Party and the government on policy-like laws for governance purposes, as verified by the extensive adoption of normative documents, demonstrates that the law has yet to gain supremacy of power in China. The norm of government accountability is weakened in this legal culture and, as a result, the importance of transparency, as a concept deriving from the norm of government accountability, is also weakened.

The transparency requirement provided in Article X: 1 was incorporated as a trade rule without objection, mainly because it imposed no extra obligations on the developed countries that drafted the GATT. For developing countries with substantially different legal and political systems, however, it may require a systemic overhaul. As demonstrated by the institution-related difficulties faced by China, it is not realistic to expect China to be able to comply with the WTO-plus obligations in the Accession Protocol. Indeed the country is almost certain to breach them. Although a national journal has been established and officially made responsible for fulfilling the requirement in the Accession Protocol to publicise all trade-related rules, the scope of trade-related rules published in this journal, for example, is limited to rules issued at the central level. In the case of rules issued at local levels, China is currently not able to publish them in a single official journal due to the complexity and under-regulated status of these formal and informal rules. China's existing legislative and administrative system has been developed without regard for the principle of transparency. It will be hard to achieve the desired result simply by pushing China into undertaking commitments that are beyond the reach of its institutional capacity. Requiring a weaker member to undertake stricter commitments also seems irrational.

Requiring China's compliance with such an intrusive rule pushes the limit of the WTO's governance capacity. The DSB's application of this requirement will play a key role in future in balancing the two goals, i.e. national regulatory autonomy and effectiveness of WTO rules, which need to be achieved by the WTO. The application of this requirement to date does not suggest that the DSB is particularly keen to enforce this rule in a strict manner since the number of cases brought under this Article has so far been limited, and the DSB's interpretations have remained indeterminate. The institutional obstacles demonstrated by China's compliance with the transparency requirement add some extra difficulties to the DSB's decision. If unfavourable rulings are issued against China, the threat that China's possible non-conformity with the rulings could constitute to the trading system's normativity needs to be taken into account.

Comprehensive consideration of a member's institutional capacity to comply is the first step towards finding a solution for better integration. Achieving improvements in the domestic context regarding the implementation of WTO rules is a gradual and long-term process. The WTO and DSB should provide flexible policy space for China with regard to the transparency requirement. Significant progress has been achieved in the first decade of China's WTO membership and the fact that transparency is one of the most important goals set in China's national reform agenda is reason for us to be optimistic, or at least prudently optimistic, regarding a possible solution for China's administrative legal system towards the principle of transparency. Some assistance may be provided for China under the framework of WTO capacity building and development. Nonetheless, efforts and progress should be expected from both sides, that is from China as well as the WTO, for a better implementation and ultimate effectiveness of WTO rules.