



Department of Law

**The WTO Memberships of China, Taiwan,
Hong Kong, China and Macau, China:
Their Contribution to Judicial Settlement
of Trade Disputes**

Chien-Huei Wu

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws of the European University Institute

Florence, March 2009

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Looking back from the vantage point of today, it seems that I have travelled a long way from Taipei to Florence, from the first sentence of my thesis to these acknowledgements. This journey in space and time has not always been pleasant. For much of the time, indeed, pressure outweighed pleasure. I am in debt to many for reaching the end of my doctoral life still in one piece.

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This thesis was written as my children began first to toddle, then to run around, playing and shouting. As I write these acknowledgements they continue to do so! How, you may be asking, is this connected with my work? The words, 'Peace' and 'Security', are probably the two that appear most often in this thesis. What I do not spell out, however, is the human dignity underpinning these two concepts. It is out of concern for the world which my children will face that I chose this subject for my thesis. It is my dearest hope that someday in the generations to come, my children will be able to live in a world where they are free from the fear of war.

Being a doctoral student, and at the same time, a father, a son and a husband can never be easy. I want to express my deepest gratitude to my parents, my love to my son and my daughter, and most importantly, my gratefulness to the endless companionship and support of my wife.

Florence, 28 February 2009

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LIST OF ACRONYMS AND ABBREVIATIONS

ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)
ASCM	Agreement on Subsidies and Countervailing Measures
ASG	Agreement on Safeguards
ARTAS	Association for Relations across the Taiwan Strait (China)
BOFT	Bureau of Foreign Trade (Taiwan)
CEPA	Closer Economic Partnership Arrangement
CFA	Court of Final Appeal (Hong Kong Special Administrative Region; Macau Special Administrative Region)
DSB	Dispute Settlement Body (WTO)
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GATT 1994	General Agreement on Tariffs and Trade 1994
GPA	Agreement on Government Procurement
HKBL	Hong Kong Basic Law
HKSAR	Hong Kong Special Administrative Region
MABL	Macau Basic Law
MAC	Mainland Affairs Council (Taiwan)
MASAR	Macau Special Administrative Region
MOEA	Ministry of Economic Affairs (Taiwan)
MOFCOM	Ministry of Foreign Commerce (China)
MOFTEC	Ministry of Foreign Trade and Economic Cooperation (China)
NPCSC	National People's Congress Standing Committee
PSI	Agreement on Pre-shipment Inspection
SAR	Special Administrative Region
SEF	Strait Exchange Foundation (Taiwan)
SETC	State Economic and Trade Commission
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
URAA	Uruguay Round Agreement Act
WTO	World Trade Organization

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CHAPTER I: INTRODUCTION

The constitutional feature of the World Trade Organization (the WTO) - that it does not limit its membership to sovereign states - allows Taiwan, albeit as a separate customs territory, to accede to it and thus creates an unusual legal landscape in the international trading system, where both Taiwan and China enjoy full membership.¹ The complexities are further intensified when the other two separate-customs-territory members, Hong Kong, China and Macao, China,² are examined altogether. The interaction among the four WTO Members of China, Taiwan, Hong Kong, China and Macau, China (the Four WTO Members) is unique.

Hong Kong, China and Macau, China are among the founding members of WTO since they became the Contracting Parties to the General Agreement on Tariffs and Trade (the GATT³ or the Agreement) through the sponsorship of the United Kingdom (the UK) in 1986 and of Portugal in 1991, respectively. China and Taiwan acceded to the WTO subsequently at the Doha Ministerial Conference, where China's application for accession was accepted on 10 November 2001 and Taiwan's application was approved one day later. Consequently, China became the 143rd member of the WTO on 11 December 2001, while Taiwan, as a separate customs territory, became the 144th member on 1 January 2002.⁴

¹ John H. Jackson observes that Taiwan crafted its application for the GATT (and then the WTO) as a separate customs territory so as not to offend China. He also mentions that Hong Kong, China, through the sponsorship of the United Kingdom, became a contracting party to the GATT, and continues as an original member of the WTO. However, it seems that Jackson fails to differentiate the accession procedures employed by these two members. As will be seen below, rules governing their accession procedures differ. See JH Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press, Cambridge 2006) 109. Jackson is also among those who are advocating 'the WTO constitution.' He emphasizes the institutional features of the WTO, among which the composition of memberships is a significant one. See JH Jackson, *The World Trading Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs, London 1998) 47-51.

² As will be discussed below, the terms 'Hong Kong, China' and 'Macao, China' are officially used in the WTO. As I focus on their WTO memberships, the official nomenclatures will be followed in this dissertation. The full name of Taiwan in the WTO is Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu (abbreviated as *Chinese Taipei*). However, neither the full name nor the abbreviation will be used in this thesis as the full is too inconvenient a term to employ, and Taiwan is easier to comprehend than Chinese Taipei.

³ In order to avoid the confusion, the GATT, in this dissertation refers to the General Agreement on Tariffs and Trade, namely, the GATT 1947. Otherwise, the author would specify by the terminology of 'the GATT 1994'.

⁴ For a background knowledge of China's accession to the WTO and its relationship to the Chinese Taipei accession and to Hong Kong, China and Macau, China, see the WTO document, available at <http://www.wto.org/english/thewto_e/acc_e/chinabknot_feb01.doc> (last accessed 17/4/2007).

Given the unusual complexities of these four memberships in the WTO, this introductory Chapter aims to offer some background knowledge for this issue. It will not only cover legal issues, but will also include some policy aspects. It will comprise three sections: the legal bases of these four memberships; their accession history to the GATT and to the WTO; and major impact of China and Taiwan's memberships. This introductory Chapter will conclude itself with a roadmap of this dissertation, outlining the overall structure and main contents of each Chapter.

I. DIFFERENT ROADS TO GENEVA: LEGAL BASES AND ACCESSION HISTORY

A. HONG KONG, CHINA AND MACAU, CHINA

1. LEGAL BASIS OF THE ACCESSION OF HONG KONG AND MACAU TO THE GATT

As noted in the very beginning, Hong Kong, China and Macau, China, as separate customs territories, became the GATT Contracting Parties through the sponsorship of the U. K. and of Portugal. With the certification of China, Hong Kong, China and Macau, China were able to sign the Marrakesh Agreement Establishing the World Trade Organization and thus became founding members of the WTO. China and Taiwan subsequently acceded to the WTO in the Doha Ministerial Conference in 2001. As is widely known, the GATT is the predecessor of the WTO and accession procedures provided in the WTO Agreement are nearly identical to those in the GATT. It is thus logical to examine the legal basis as well as the accession history in a chronological order, namely, from the GATT to the WTO. Therefore, I will firstly discuss the case of Hong Kong, China and Macau, China and then that of Taiwan and China. Based on this arrangement, the following will firstly discuss different legal bases for the accession procedures provided in the GATT and the WTO Agreement, and then examine the accession history of Hong Kong, China and Macao, China to the GATT as well as their memberships in the WTO. This section will then examine the accession history of China and Taiwan to the WTO.

Apart from the 23 original contracting parties, the GATT provided two methods for nations and separate customs territories to become contacting parties to the

Agreement. The normal way was governed by Article XXXIII of the GATT, which provided that governments of countries or separate customs territories could accede to the Agreement, by a two-thirds majority vote, ‘on terms to be agreed between such government[s] and the Contracting Parties.’⁵ No specific guideline or criteria were laid down concerning the ‘terms to be agreed.’ It was submitted that the willingness to negotiate tariff concessions with the existing contracting parties, which was often referred to as ‘negotiating the ticket of admission,’ was essential to obtain enough votes to accede to the Agreement.⁶

The second path to becoming contracting parties to the Agreement was through the sponsorship of parent countries, as prescribed in Article XXVI: 5. Sub-paragraphs 5(a) and 5(c) of Article XXVI of the Agreement provided as follows:

(a) Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Executive Secretary to the CONTRACTING PARTIES at the time of its own acceptance.

(c) If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party

This sponsorship procedure applied primarily to countries that became independent in the early 1960s. In other words, these newly independent countries had been formerly ruled by a country that was a GATT Contracting Party; the Agreement had therefore, been previously applied to them through their parent countries.⁷ The advantage of the sponsorship procedure was that these newly independent countries were not required to negotiate the tariff concessions in order to acquire a ticket of admission. It was generally assumed that commitments in the schedules, if any, originally negotiated on

⁵ GATT, Art. XXXIII.

⁶ JH Jackson, *The World Trading System: Law and Policy of International Economic Relations* (The MIT Press, Cambridge, Massachusetts 1994) 45. The accession through the procedures governed by this article will be discussed in more detail in the part of China and Taiwan’s accession history.

⁷ JH Jackson, *et al.*, *Legal Problems of International Economic Relation: Case, Materials and Texts on the National and International Regulation of Transnational Economic Regulations* (4th edn, West Group, St. Paul, Minn. 2002) 321.

behalf of these new independent countries by their parent countries, would continue to be applicable to them, after they became GATT Contracting Parties through the sponsorship of their parent countries. However, these schedules tended to be very brief and did not cover many tariff commitments; in some cases, there were no such tariff schedules at all.⁸ However, it should also be noted that this procedure was not limited to countries; separate customs territories that satisfied the requirement of ‘possessing or acquiring full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement’ could also acceded to the GATT through this sponsorship procedure.

Several points laid down in these two sub-paragraphs need to be further elaborated. With regard to ‘territories for which it has international responsibility,’ according to paragraph 1 of the Provisional Application Protocol,⁹ the application of the Agreement was limited to metropolitan territories of Belgium, France, the Netherlands and the United Kingdom. Paragraph 2 provided that, the countries listed in paragraph 1 could also make provisional application of the Agreement applicable to their other territories, after giving notice of such application to the Secretary-General of the United Nations.¹⁰ In other words, the Agreement might be applicable to territories other than metropolitan ones, after these countries notified the intent that these territories were to be included.

Concerning the ‘full autonomy in the conduct of its external commercial relations and the other matters provided for in this Agreement’, the responsible contracting party should certify that the customs territory in question had the right *de jure* and /or *de facto* to act on its own behalf and to fulfil its obligations.¹¹ Such information enabled the

⁸ *Ibid*, at 232-233.

⁹ The General Agreement on Tariffs and Trade was essentially expected to be applied provisionally, with the main objective being to relax the government-mandated trade protection. When the GATT 1947 was negotiated, another wider project, the International Trade Organization (ITO), was also being formulated. The ITO was expected to serve as the institutional responsible for the administering of the Havana Charter. Before the final conclusion of the ITO negotiation, the participating governments in the GATT decided to apply the GATT provisionally by virtue of the Protocol of Provisional Application. The entry into force of the GATT on 1 January 1948 was provisional, pending the conclusion and the entry into force of Havana Charter. Article XXIV of the GATT regulates the relation of the GATT to the Havana Charter. However, due to the U.S Congress’s unwillingness to ratify it on 6 December 1950, the Havana Charter never came into force. The provisional application of the GATT lasted until its transformation into the WTO. See PC Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary* (Oxford University Press, Oxford 2005) 1-5.

¹⁰ GATT, *Guide to GATT Law and Practice: Analytical Index* (6th edn, GATT, Geneva 1994) 851.

¹¹ *Ibid* at 853.

GATT Contracting Parties to judge the legal ability of the separate customs territory concerned. Since 1963, the application for accession under Article XXVI:5(c), especially for the new independent states, had been dealt with by a certification by the Executive Secretary (Director General) to the effect that the conditions provided had been fully fulfilled. During the GATT practices, four customs territories under the international responsibility of another state were deemed autonomous in the conduct of their external commercial relations and of the other matters provided for in Agreement. Hong Kong and Macau were two of them.¹²

2. THE ACCESSION HISTORY OF HONG KONG TO THE GATT

Hong Kong was sponsored by the UK in 1986 and Macau was sponsored by Portugal in 1991 through Article XXVI of the GATT and thus became, as separate customs territories, GATT Contracting Parties. When the WTO was established, both Hong Kong and Macau were signatories to the WTO Agreement. Before Hong Kong joined the GATT as an independent entity, Hong Kong's participation in the GATT was governed by a Declaration concerning the application of the Agreement to Hong Kong made by the UK on 28 June 1948.¹³ When Portugal acceded to the GATT, the protocol also identified Portugal's acceptance in respect of all its separate customs territories.¹⁴

As will be discussed below, although Hong Kong and Macau acceded to the GATT under the category of the separate customs territory as Taiwan did, their legal bases differ. The major difference stems from the sponsorships the first two by the UK and Portugal.¹⁵ Regarding Hong Kong's and Macau's status as a separate

¹² The other two were Lesotho and Liechtenstein (L/2701; L/7740).

¹³ Mavroidis, above n. 9, 258.

¹⁴ Portugal's Accession Protocol, in paragraph 11 provides, 'Portugal accepting this Protocol, pursuant to sub-paragraph (b) of paragraph 10 does in respect of all Portugal's separate customs territories.' The Protocol for the Accession of Portugal, BISD 11S/20, 24.

¹⁵ The precedents of Hong Kong and Macau help to explain why China insisted on its earlier accession than Taiwan's and on its confirmation of Taiwan's accession since China has long regarded Taiwan as part of its province. China held that Taiwan should also join the GATT through article XXVI of the Agreement.

customs territory within the WTO, two official communications circulated by Hong Kong¹⁶ and Macau¹⁷ to the WTO best clarify the question at issue.

In Hong Kong's communication, some important historical events were recalled. It firstly noted that the Director General of the GATT circulated a communication from the UK on 24 April 1986. In that communication, the UK declared that Hong Kong, being a separate customs territory, possessed full autonomy in the conduct of its external commercial relations and of the other matters provided for in the GATT. The UK further stated that Hong Kong, according to the wishes of Hong Kong and to Article XXVI:5(c) of the GATT, would be deemed as a GATT Contracting Party. Following the certification process mentioned above, the Director-General then certified that Hong Kong would become a Contracting Party to the GATT on 23 April 1986 since the conditions required by Article XXVI:5(c) of the GATT had been met.

At the same time, the Director General circulated a communication from China, stating that Hong Kong would become a Special Administrative Region (SAR) when China resumed its exercise of sovereignty over Hong Kong. Hong Kong would retain the status of a separate customs territory, continue to decide economic and trade policies on its own, and maintain and develop relations in economic, trade, and other fields under the name of 'Hong Kong, China.' This communication also referred to Section VI of Annex I to the *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong* (the *Sino-British Joint Declaration*) which specifically provided that the Hong Kong Special Administrative Region (the HKSAR) would be able to participate in relevant international organizations and international trade agreements, such as the GATT.

Consequently, when the WTO came into being on 1 January 1995, Hong Kong, being a Contracting Party to the GATT and a full participant in the Uruguay Round, became an original member of the WTO, since it assumed all of the corresponding rights and obligations through formally accepting the Final Act Embodying the

¹⁶ WTO document, WT/L/218 (3 June 1997).

¹⁷ WTO document, WT/L/333 (8 November 1999).

Results of the Uruguay Round of Multilateral Trade Negotiations. Nevertheless, when China resumed its exercise of sovereignty over Hong Kong on 1 July 1997, Hong Kong began using the name ‘Hong Kong, China.’

3. THE ACCESSION HISTORY OF MACAU TO THE GATT

In the communication distributed by Macau, similar information was presented. It referred to Portugal’s communication on 14 January 1991, stating that Macau, being a separate customs territory, possessed full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement. Portugal’s communication was circulated by the Director General’s certification that Macau had become a Contracting Party to the GATT from 11 January 1991 since requirements prescribed by Article XXVI:5(c) of Agreement had been met. Simultaneously, China circulated a communication to the Director General where China stated that Macau would also become a SAR of China from the date on which China resumed the sovereignty. Macau ‘would maintain the current social and economic systems and retain its economic and trade policies, on its own, using the name of ‘Macau, China’, maintain and develop relations, and conclude and implement agreements, with all States, regions and relevant international organizations in the economic, trade and other fields.’¹⁸ As a result, Macau became a GATT Contracting Party on 11 January 1991 and subsequently became a founding member of the WTO. As foreseen, Macau started to participate in the WTO under the name of ‘Macau, China’ after the hand-over on 20 December 1999.

B. CHINA AND TAIWAN

1. FROM GATT TO WTO: LEGAL BASES FOR THE ACCESSION OF CHINA AND TAIWAN

Rules governing the accession procedures were not significantly changed when the WTO was established. The ‘terms to be agreed’ remains the key element for new members to accede to this organization. Following the GATT practices, a WTO Working Party will be established after the receipt of application for accession. The

¹⁸ *Ibid.*

mandate of this Working Party is to examine the accession procedure, to conduct multilateral negotiation, and to draft the accession protocol. The accession decision will be finalized by the Ministerial Conference. Although voting is prescribed in the WTO Agreement, it is rarely used.¹⁹ Similar to its predecessor, the WTO Agreement provides few hints about ‘terms to be agreed.’ As a result, the GATT practices have great influence in shaping those in the WTO.²⁰ The important feature – that of allowing customs territories to accede has been carried over. The procedure of the sponsorship of parent countries was, however not reproduced in the WTO Agreement.

Article XXXIII of GATT and Article XII of WTO Agreement, respectively, govern the accession procedures. Article XXXIII of GATT provides:

A government not party to this Agreement, or a government acting on behalf of separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

And paragraph 1 of Article XII of the WTO Agreement reads as follows:

Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

These two articles provide a few hints about the accession procedures. Three elements should be carefully examined: the subject, condition and decision. The subject which is eligible for the accession concerns the terminology of ‘a government.’ It is submitted that, ‘the Contracting Parties were defined as ‘governments’ and not as ‘nations’ or ‘states’ so that governments with less than complete sovereignty could be Contracting Parties to GATT.²¹ Among the 23 original GATT Contracting Parties, Ceylon (Sri Lanka), Burma (Myanmar), Southern Rhodesia (Zimbabwe) were not yet independent

¹⁹ Jackson, *et al.*, above n. 6, at 232-32.

²⁰ *Ibid.*, at 234.

²¹ *Guide to GATT Law and Practice: Analytical Index*, above n. 10, at 943. See also the following discussion on Taiwan’s accession.

states, but were nevertheless admitted to participate in the negotiating process with the United Kingdom's submitting the information concerning their full autonomy in the conduct of their external commercial relations and of the other matters provided for in the Agreement.²² Apart from the state, the separate customs territory 'possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for' in the GATT/WTO Agreement can also accede to the Agreement.

'Terms to be agreed between such government and the Contracting Parties' and 'terms to be agreed between it and the WTO' are far from clear. The *Secretariat's Technical Note on the Accession Process* (hereinafter 'the *Technical Note*'),²³ offers some guidance on this point. The negotiation process falls into two main categories: the multilateral negotiation on rules and bilateral (plurilateral) negotiation on market access.²⁴ After an accession application is submitted, a Working Party will be established to conduct the multilateral negotiation. The Working Party will also finalize its report, embodying the market access commitments in bilateral negotiations, and prepare the draft accession protocol. China's Accession History to the GATT and WTO

When China and Taiwan applied for their accession to the GATT, and subsequently the WTO, some political concerns, especially in relation to the so-called 'One China policy' were raised. Thus, in order to resolve the political controversies, Taiwan chose to submit its application for the accession as a separate customs territory. This was partly because of the political reality. The following will be devoted to the accession process of China and Taiwan; emphasis will be placed upon multilateral and bilateral negotiations.

²² GATT document, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Report of the Ad Hoc Sub-Committee of the Tariff Agreement Committee on Paragraph 3 of Article XXIV, E/PC/T198, available at http://www.wto.org/gatt_docs/English/SULPDF/92290253.pdf (last accessed 29/01/2007).

²³ WTO document, *Technical Note on the Accession process*, WT/ACC/7/Rev.2 (1 December 2000). The technical note also refers to a set of procedures covered in WT/ACC/1, 4, 5, 8 and 9, which are drawn by the secretariat in consultation with WTO members.

²⁴ *Ibid.*, at 3.

It took 15 years for China to accede to the WTO. China's accession is widely regarded as the most significant event in the WTO to date.²⁵ The reason China is so unique remains contested and unsettled. As argued, there were constant concerns among some existing members, who worried that their domestic markets would be swamped by China's large and potentially enormous productive capacity. Besides, even though China's economic reform had been highly successful, China's non-market economy was troubling to other members of the WTO, as the experiences of the GATT in integrating non-market economy proved to be mostly unpleasant. Moreover, the accession of China tended to exemplify the weakness of the governance and regulatory capacity in the existing world trading system.²⁶

Although China was one of the 23 GATT Contracting Parties, after the civil war between the Communist Party and the Nationalist Party (Kuomintang) broke out, the defeated government, led by Chiang Kai-Shek and subsequently retreating to Taiwan, notified the GATT that China (Republic of China) would withdraw from the GATT system. In 1965, the government in Taiwan requested and was conferred observer status in the GATT. Nonetheless, the observer status was subsequently removed in 1971, following a decision by the United Nations General Assembly that recognizes the People's Republic of China as the only legitimate government of China. As the Chairman, Carlos Besa declared that the GATT would 'follow the decisions the United Nations on essential political matters' and in light of the afore-mentioned U.N. Resolution, he invited Taiwan's representative to withdraw. The Chairman then enquired whether there was a wish for vote to be taken on this issue. Since no request was made, he then declared that a consensus to remove Taiwan's observer status had been reached, while some delegations subsequently stated that they did not agree with this consensus.²⁷

²⁵ See e.g., JH Jackson, 'The Impacts of China's Accession to the WTO' in DZ Cass, *et al.* (eds) *China and the World Trading System: Entering the New Millennium* (Cambridge University Press, Cambridge; New York 2003) 19. Jackson regards China's accession as the most significant activity in WTO's seven-year life. For an overview of the accession process, see R Bhala, 'Enter the Dragon: An Essay on China's WTO Accession Saga' (2000) 15 *American University International Law Review* 1469.

²⁶ AS Alexandroff and R Comez, 'Where Do We Go from Here' in DZ Cass, *et al.* (eds), above n. 25, at 231-32.

²⁷ GATT document, SG 29/1 (19 November 1971) 1-4.

In 1986, nearly thirties years after Taiwan's withdrawal from the GATT, China notified the GATT Secretariat of its wish to resume its status as a GATT contracting member²⁸ and its willingness to renegotiate the terms of its membership in 1986. A Working Party was established in 1987 and was converted into a WTO Working Party when the WTO was established in 1995. There have been several decisive events that have affected the pace and course of the negotiation. Prior to the Tiananmen massacre, some significant progress had been made on the accession front which this massacre blocked for almost two and a half years. Although China participated in the Uruguay Round negotiations, it failed to conclude negotiations on its status as a 'GATT Contracting Party' in time be considered as an original member of the WTO. The GATT Working Party was subsequently converted into a WTO Working Party. Notwithstanding its effort to finalize the accession at the Singapore Ministerial Conference, its failure make a deal with the United States prevented it from successfully acceding to the WTO at this meeting. However, the political change in the United States after the US bombing of the Chinese Embassy in Belgrade in May 1999 made the final deal between the US and China possible.²⁹ With regard to the bilateral negotiation, the Sino-EU and Sino-US bilateral agreements are the most important ones. The Sino-US agreement on China's accession to WTO was also bundled with US's conferral of Permanent Normal Trade Relation status (the PNTR status) on China.³⁰ It was not until November 1999 and May 2000 that China finally

²⁸ The preamble of China's accession protocol also recalls that China was an original Contracting Party to the GATT 1947.

²⁹ JL Gertler, 'Negotiating China's Protocol of Accession' in AS Alexandroff, *et al.* (eds) *China and the Long March to Global Trade : the Accession of China to the World Trade Organization* (Routledge studies in the growth economies of Asia, Routledge, London, New York 2002) 23. *See also* G Yang and J Cheng, 'The Process of China's Accession to the WTO' (2001) 4 *Journal of International Economic Law* 297.

³⁰ The Normal Trade Relation is a concept in U.S trade law, similar to the Most-Favored-Nation Treatment. Under the Trade Act of 1974, the Normal Trade Relation (or Most-Favored-Nation Treatment) can be granted to the non-market economies conditionally. Since Most-Favored-Nation Treatment is the core principle of the WTO rules, it would be necessary for the U.S to stop the review for granting the Normal Trade Relation to China after China acceded to the WTO. The resolution to confer the PNTR status to China was made on 19 September 2000 in U.S Senate. For the discussion of PNTR in relation to China's accession, *see* AS Alexandroff, 'Concluding China's Accession to the WTO: The U.S. Congress and Permanent Most Favored Nation Status for China' (1998) 3 *UCLA International Law & Foreign Affairs* 23. *See also* SA Rhode and JH Jackson, 'The Process of China's Accession to the WTO' (1999) 2 *Journal of International Economic Law* 497; C Tiefer, 'Concluding China's Accession to the WTO: The U.S. Congress and Permanent Most Favored Nation Status for China' (2001) 34 *Cornell International Law Journal* 55.

made deals with the EU and the U.S and paved its way to Geneva. These two bilateral agreements are to be briefly noted below.

As was testified by the former United State Trade Representative Ambassador Barshefsky before the House of Representatives, the 'US-China bilateral agreement on China's accession to the WTO was comprehensive,'³¹, and 'fully enforceable' since the commitments would be included into the Working Party Report. The results would be 'rapid' as the market access would be immediately opened upon China's accession to the WTO.³² The bilateral agreement dealt with all agricultural products, industrial goods, and service areas; some unresolved key issues such as the import surge mechanism, anti-dumping and telecommunications were settled down. The highlights included trading rights, distribution service, tariffs, non-tariff barriers, information technology products, chemicals, wood and paper products, autos, domestic support and export subsidies in agricultural products, sanitary and phytosanitary standard, specific service areas, like banking, insurance, security, telecommunication and the audiovisual services. It also touched upon the import surge protection, non-market economy dumping methodology, textiles and state-owned and state-invested companies.³³

With regard to the EU-China bilateral agreement, similar concerns were also expressed.³⁴ The agreement was divided into different sectors: industrial goods, agriculture, services and horizontal issues. The same emphasis was placed on the tariffs, agriculture, telecommunication, insurance, distribution, non-discrimination, transparency, National Treatment, state monopoly, import, export restrictions, and motor vehicles.³⁵ It should also be noted that, 'though the US-China agreement had

³¹ United States Congress House, *US-China Bilateral Trade Agreement and the Accession of China to the WTO: Hearing before the Committee on Ways and Means, House of Representatives, One Hundred Sixth Congress, Second Session, 16 February 2000* (US GPO, Washington 2001) 39.

³² *Ibid.*, at 45.

³³ See White House National Economic Council, *Summary of the US-China Bilateral WTO Agreement* (15 November 1999), reprinted in 16 International Trade Reporter (BNA) 1888 (17 November 1999), available at <<http://www.uschina.org/public/991115a.html>> (last accessed 4/5/2006).

³⁴ 'The Sino-EU Agreement on China's Accession to the WTO: Results of the Bilateral Negotiations', available at <http://www.delchn.cec.eu.int/en/eu_china_wto/wto7.htm> (last accessed 5/5/2006); see also 'Highlights of the EU-China agreement on WTO', available at <http://trade-info.cec.eu.int/doclib/docs/2003/september/tradoc_113818.pdf> (last accessed 5/5/2006).

³⁵ The trade in automobiles is the main target of the complaints against China in the WTO Dispute Settlement Mechanism. The Panel finds against China on major grounds and the finding is mostly upheld by the Appellate Body. Panel Report on *China – Measures Affecting the Imports of Auto Parts* (WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, as modified by

already been signed during the EU-China bilateral negotiation, the results of EU-China negotiation would nevertheless affect the on-going US congressional debate on granting the Permanent Normal Trade Relations to China.’³⁶ In fact, when the US-China agreement was signed in November 1999, many topics which were of the same importance to the EU, had already been clarified. Even though the EU surely wished to obtain more concessions from China, its demands were not fully agreed to, as China would have created itself obstacle for the granting of the PNTR status if more concessions were made to the EU than to the US

2. TAIWAN’S ACCESSION HISTORY TO THE GATT AND WTO

As provided by Article XXXIII of GATT and Article XII of WTO Agreement, ‘any state or separate customs territory’ can apply for the accession. Instead of using the official name (Republic of China), Taiwan chose to accede to the GATT and, subsequently, the WTO under the name of ‘‘Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu’’ (TPKM). It aimed to avoid the political difficulty known as the ‘one-China’ policy. However, Taiwan’s application under the category of the separate customs territory through the procedures governed by Article XXXIII, instead of through China’s sponsorship under Article XXVI:5(c), as claimed by China, also indicated the effective autonomy and independent external relations of Taiwan’s government, and, most importantly, that it could act on its own behalf.³⁷

The application was immediately objected to by China. In a letter to the Director General, China’s Representative argued that the application was ‘utterly illegal’³⁸ and should thus not be considered. China contended that the application would be *de jure* invalid without its confirmation. According to China, Taiwan was its local

Appellate Body Report, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R.

³⁶ F Algieri, ‘EU Economic Relations with China: An Institutional Perspective’ in RL Edmonds (ed) *China and Europe since 1978: A European Perspective* (Cambridge University Press, Cambridge 2002) 75.

³⁷ PL Hsieh, ‘Facing China: Taiwan’s Status as a Separate Customs Territory in the World Trade Organization’ (2006) *Journal of World Trade* 1195, 1199-1200.

³⁸ ‘China takes early Action to Block Taiwan’s GATT membership application’, (1990) 7 *International Trade Reporter* (BNA) No.4 (24 Jan. 1990), at 131, citing S Chan, ‘Taiwan’s Application to the GATT: A New Urgency with the Conclusion of the Uruguay Round’ (1994) 2 *Indiana Journal of Global Legal Studies* 275, 285. For this historical controversy, see also Y Qin, ‘GATT Membership for Taiwan: An Analysis in International Law’ (1992) 7 *New York University Journal of International Law and Politics* 1059.

government and shared a similar status to Hong Kong, China and Macau, China. In China's view, China's confirmation about Taiwan being separate customs territory of China was indispensable for a valid application. This controversy extended to the establishment of a Working Party. Even at the final stage of the accession process, China tried to change Taiwan's official name into 'China's Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu,' but this was soon objected to by the United States.

On 29 September 1992, the Chairman of the General Council, Mr. B. K. Zutshi, made an important statement concerning the accession of Chinese Taipei. He stated that he had carried out extensive consultations on the subject of establishing a Working Party to examine the possible accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu (abbreviated as *Chinese Taipei*). He found that, 'all Contracting Parties had acknowledged the view that there was only one China, as expressed in the United Nations General Assembly Resolution 2758 of 25 October 1971.'³⁹ Based on this acknowledgement, the chairman further noted that many Contracting Parties, therefore, had agreed with the view of the People's Republic of China (the PRC) that Chinese Taipei, as a separate customs territory, should not accede to the GATT before the PRC itself. However, some Contracting Parties had not shared this view. Nevertheless, there had been a great desire to establish a Working Party for Chinese Taipei.⁴⁰

The Chairman then concluded that there was a consensus among GATT Contracting Parties on (1) continuing the Working Party on China's status as a Contracting Party, (2) establishing a Working Party on Chinese Taipei, and (3) the sequence of these independent accession applications. That is, the Working Party on China's status as a Contracting Party should continue to work, while a separate and independent Working Party on Chinese Taipei should also be established. With regard to the sequence of these two independent applications, he concluded that '*the Council should give full consideration to all views expressed, in particular that the Council*

³⁹ GATT Document, C/M/259 (27 October 1992) 3.

⁴⁰ *Ibid.*

*should examine the report of the Working Party on China and adopt the Protocol for the PRC's accession before examining the report and adopting the Protocol for Chinese Taipei, while noting that the working party reports should be examined independently.*⁴¹ It was therefore, agreed by the GATT Contracting Parties that, albeit with the understanding that the examination of China's Working Party Report and adoption of its accession protocol should take precedence over those of Taiwan, these two accession applications should be dealt with independently. As some compromise regarding Taiwan's status was reached, a Working Party to examine Taiwan's application was finally established at this Council meeting.

Although this controversy was resolved once China and Taiwan acceded to the WTO, this Chairman's statement still deserves further exploration. It helps to clarify the legal effect of the one China policy/one China principle in the WTO, in light of the potential argument that since Taiwan is a province of China, it has no competence to make a complaint against China, its own central government.⁴² The Report of the Working Party on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, refers, in its first paragraph, to the Minutes of this meeting of 29 September-1 October 1992 (document C/M/259). However, from the context, the context makes it clear that this reference is only meant to indicate the intent of the General Council to establish a Working Party to examine Taiwan's application, as a separate customs territory, to accede to the GATT under Article XXXIII. The Chairman's statement, both with regard to the acknowledgement of the United Nation Resolution, and the priority of China's accession, is not referred to in this introductory paragraph. There is no specific commitment made; nor is this paragraph referred to in paragraph 224 of the Working Party Report and subsequently incorporated in the accession protocol. It is thus clear that the reference to the Minutes

⁴¹ *Ibid*, at 4 (*emphasis added*).

⁴² It is argued the WTO is more politicized than the GATT. The accessions of China and Taiwan contribute to this politicization process. The recent dispute concerning the title of Taiwan's mission in the WTO correspondence directory, also known as the blue book, and China's blocking Taiwan from acceding to the Government Procurement Agreement are cited as the evidences for this argument. See, A Reich, 'The Threat of the Politicization of the WTO' (2005) 26 University of Pennsylvania Journal of International Economic Law 779, 807-808 (2005). It should be noted that, with the warmer political climate, Taiwan seems to have a better change to accede to this agreement.

of this meeting of 29 September-1 October 1992 (document C/M/259) does not constitute any form of legal obligation to Taiwan.

Moreover, the Chairman's statement reads, 'all Contracting Parties had acknowledged the view that there was only one China, as expressed in the United Nations General Assembly Resolution 2758 of 25 October 1971.' The verb 'acknowledge' neither imposes obligations nor confers any rights. In addition, although Taiwan did accede to the WTO exactly one day after China did, it should nevertheless be noted that, even with respect to the priority of China's accession, conflicting views existed. In other words, while the third point of the Chairman's statement indicates that the Council should examine the Working Party Report of China and adopt its accession protocol before examining that of Taiwan and adopting Taiwan's accession protocol, these two working party reports should be examined independently. Above all, the view with regard to China's priority in the accession process was not shared by all of the Contracting Parties, as could be clearly seen from the beginning of the Chairman's statement.

From Taiwan's perspective, its accession to WTO is of vital economic and diplomatic importance. Although most of the negotiation process had been finished in 1999,⁴³ the above-mentioned concerns expressed by the Chairman prevented Taiwan from finalizing the accession process. It was not until China's accession had been accepted that Taiwan was also admitted, the very next day, to the WTO. Apart from this 'political' aspect of Taiwan's accession, other Contracting Parties were concerned about Taiwan's potential claim of being a developing country. As a result, to facilitate the accession process, Taiwan stated that it would not 'claim any right granted under WTO Agreements to developing country Members or to a Member in the process of transforming its economy from a centrally-planned into a market, free-enterprise economy.'⁴⁴

⁴³ The Taiwan – US agreement was signed on 20 February 1998 while the Taiwan – EU agreement was signed on 23 July 1998.

⁴⁴ Report of the Working party on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter TPKM Working Party Report), WT/ACC/TPKM/18 (5 October 2001), para. 8.

II. THE FOUR MEMBERS IN THE WTO

A. WTO MEMBERSHIP AS AN IMPULSE TO CHINA'S LEGAL REFORM

According to Bhattasali, apart from the perspective of the legal rights and obligations to examine challenges in meeting China's legal commitments and in ensuring China's rights, there is another potential angle to see how China's membership serves as a key component in restructuring Chinese economy. It is because China's policy-makers also perceive China's WTO accession as a means to fulfilling its broader goals. The WTO Agreement as well as Protocol on the Accession of People's Republic of China to the WTO (hereinafter China's Accession Protocol)⁴⁵ can provide guidelines of disciplines for China's potential economic market reform. Two goals are identified: The broader strategic goal is to facilitate the peaceful emergence of China as a great trading nation and to avoid the trade tensions commonly associated with the emergence of major new trading powers. The other is to accelerate the process of domestic reform, to lock in the progress of economic liberalization, and to make it irreversible, with the disciplines of WTO rules.⁴⁶

China's Accession Protocol provides an illustrative example. Unlike any other accession protocol of the WTO, it is not a standardized document and presents itself as a unique document in the WTO treaty structure. Covering a wide range of subjects, China's Accession Protocol prescribes a set of special rules to be applied between China and other WTO Members. Among these rules, the obligation to provide an independent and impartial judicial review appears mostly untypical. Under Article 2 (D) of the accession protocol, China shall establish, or designate, and maintain impartial and independent tribunals for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement.

⁴⁵ The Protocol on the Accession of People's Republic of China to the WTO, WT/L/432 (23 November 2001).

⁴⁶ D Bhattasali, *et al.*, 'Impacts and Policy Implications of WTO Accession for China' in D Bhattasali, *et al.* (eds) *China and the WTO: Accession, Policy Reform, and Poverty Reduction Strategies* (World Bank, Washington, D.C. 2004) 1.

The opportunity to appeal the administrative decisions to a judicial body should also be included in the review procedures.

Such unusual arrangements can be interpreted in two dimensions. They indicate other WTO members' doubts and concerns about China's capacity and willingness to implement its legal obligations. Apart from the transitional review mechanism, the domestic judicial review was included into the accession protocol. Such arrangements pre-suppose that an independent and impartial judicial review would strengthen the protection of the rights and interests of its trading partners. Although it is true, however, what remains unanswered is whether and how China could fulfil the judicial review obligation and how the WTO Panel/Appellate Body should review this case, if a complaint with respect to China's failure to implement this obligation is brought into the WTO Dispute Settlement Mechanism.

Such concerns are also apparent with regard China's first trade policy review, conducted in 2006, and during its Free Trade Area negotiations. During the Trade Policy Review, the United States voiced its concerns with respect to the role of the Chinese Communist Party in the proceedings and decisions of the Supreme People's Court as well as the lower courts. The Chinese government replied as follows:

According to the Constitution, the Organic Law of the People's Courts of the People's Republic of China and the Judges Law of the People's Republic of China, the people's courts exercise judicial power independently and are not subject to interference by any administration, public organization or individual. When exercising this power, the people's courts shall strictly abide by the Constitution, the Organic Law of the People's Courts of the People's Republic of China and other substantial and procedural laws related to the specific cases.⁴⁷

However, this reply did not fully answer the question, since it was not made clear whether the Chinese Communist Party fell into the categories of administration, public organizations or individuals, and thus courts should not be subject to its interference. In addition, what Chinese government failed to point out were those

⁴⁷ WTO Document, WT/TPR/M/161/Add.2 (11 September 2006), p. 14.

articles requiring the courts to be responsible to the People's Congress and those regarding the relationship between Chinese Communist Party and People's Congress.

With regard to the Free Trade Area negotiations, as bilateral free trade agreements tend to lay more emphasis on private party rights than does the WTO Agreement, how to ensure these private rights are fully protected constitute a significant issue. It is thus argued that rule-of-law obligations should be well suited in the bilateral free trade agreement with China in order to offer better protection of rights of private parties.⁴⁸

Apart from other members' concerns, as mentioned above, China also sees its accession to the WTO as a vehicle to enhance its domestic reform. It is submitted that China's accession 'acts not only as a lever to force reform, but it also serves to lock in economic reform and make it irrevocable.'⁴⁹ Although China joined the WTO with the major objective of enhancing its economic development,⁵⁰ the extensive rule-of-law obligations and commitments, especially an independent and impartial judicial review, do not only affect the development of China's trade regime, but also have overwhelming impacts on its ongoing legal reform. It should be thus emphasized that the key to making China's development sustainable lies more in its legal reform, where an independent and impartial judicial review plays a pivotal role, than in economic reform. This view is shared by some western lawyers. For example, it is submitted that, 'for China, continuing economic development and prosperity depends

⁴⁸ B Sheehy, 'Fundamentally Conflicting Views of the Rule of law in China and in the West & Implications for Commercial Disputes' (2005) 26 *Northwestern Journal of International Law and Business* 225, 263.

⁴⁹ K Halverson, 'China's WTO Accession: Economic, Legal and Political Implications' (2004) 27 *Boston College International and Comparative Law Review* 319, 334.

⁵⁰ China's accession to the WTO was a state-led, leadership-driven and top-down political process. While the reformists struggled for the accession, the conservatives remained reluctant. Reformists aimed to join the WTO with the calculus of gains with affordable costs. It was expected that the WTO accession would gain much from the global market with China's comparative advantage, to force the state-owned enterprises to operate in a more efficient way in light of foreign competition, to fight against corruption, or even to elevate China's political status in the international scene. It is argued that three factors – elite politics, bureaucratic politics and foreign pressure, contributed to shaping China's accession policy. See H Feng, *The Politics of China's Accession to the World Trade Organization* (Routledge, London, New York 2006).

upon a continued growth and evolution of Chinese constitutionalism, rule of law, and, in particular, an independent and impartial judicial review.’⁵¹

Other scholarly arguments also advocate that WTO law should not be interpreted in purely economic terms, and that its legal and political objectives are no less important than trade liberation. WTO law shares major features of constitutionalism: it employs not only formal constitutional techniques, but it also includes various substantive constitutional principles. WTO law can be conceived as part of the multilevel constitutional framework in multilevel trade governance.⁵² With respect to the domestic constitutional function of WTO rules, China’s Accession Protocol is thus cited as an example to justify such argument. It is argued that China’s accession to the WTO, with the international obligations of guarantees concerning private rights to trade, intellectual property rights, private access to independent and impartial judicial review and rule of law, contributes to its establishment of open market and rule of law, and that ‘the WTO Agreement is one of the most revolutionary transformative agreements in the history of international law.’⁵³

B. TAIWAN’S RETURN TO THE INTERNATIONAL TRADING SYSTEM

As an island poor in natural resources, external trade has always played an indispensable role in Taiwan’s economic development. Notwithstanding a great share of the world trade volume, it had long been excluded from the international trading system, since its observer status in the GATT was removed in 1971. Taiwan was

⁵¹ MU Killion, 'China's Amended Constitution: Quest for Liberty and Independent Judicial Review' (2005) 4 Washington University Global Studies Law Review 43, 48. However, some literature has also argued that the judicial independence and the protection offered by the judiciary are still very limited due to the interference, caseloads, and high withdrawal rates. See VM Hung, 'China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform' (2004) 52 American Journal of Contemporary Law 77, 82-89 (2004).

⁵² EU Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism' in C Joerges and EU Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, Oxford and Portland, Oregon 2006) 32-33. Petersmann argues that WTO law uses the formal techniques of (1) the distinction of long term constitutional rules and post-constitutional decision making; (2) the legal primacy of the WTO agreement over conflicting provisions in the Multilateral Trade Agreements annexed the WTO Agreement; and (3) protection of freedom of trade, most-favor-nation treatment, national treatment, private property rights and rule of law subject to broad exceptions to protect public interests. He also argues that four substantive principles are included in WTO law: rule of international law, the respect of universal human rights obligations of WTO members, separation of powers and the concern of social justice.

⁵³ EU Petersmann, *Dispute Prevention, Dispute Settlement and Justice in International Economic Law* (forthcoming).

anxious to be joined again in the international trading system for various reasons. Economic interests are certainly of great importance. Since its retreat from the United Nations, it has been very difficult for Taiwan to maintain diplomatic relations with other countries. As a result, signing bilateral agreements regarding National Treatment, Most-Favoured-Nation Treatment or market access to ensure its trade interests is usually not possible. Consequently, Taiwan turned to the multilateral framework. The rule of the GATT would have been applied to trade activities between Taiwan and its trading partners, and recourse to the disputes settlement mechanism would have been made possible if Taiwan had been a Contracting Party to the GATT.

For these economic reasons, accession to the GATT and the WTO appears very appealing and seems to be the only way out. The constitutional feature of the GATT and the WTO concerning the eligibility of being a GATT Contracting Party and a WTO Member has enabled Taiwan to find a way to re-enter into the international trading system. However, there were some other concerns. As argued, Taiwan sees its application to the GATT and subsequently to the WTO as an opportunity to return to the international plane⁵⁴ because of its nearly universal memberships and its ever-widening domains, such as issues of trade and environment as well as of trade and human rights. Although the mandate of the WTO Agreement concerns mainly economic aspects, the WTO nevertheless provides Taiwan with an opportunity to present itself as a global actor.

Even within the WTO, some areas are not purely economic, but can potentially be highly politicized. Two examples clearly illustrate this. The first example is Taiwan's accession to the Plurilateral Agreement on Government Procurement since it will inevitably refer to the governmental organization in Taiwan, such as the Office of President. It is clear that China would not welcome such a term being used in any form of legal instruments. Therefore, although Taiwan has finished most of its negotiation process, it has not managed to accede to the Government Procurement

⁵⁴ See, e.g., S Charnovitz, 'Taiwan's WTO Membership and its International Implication' (2006) 1 Asian Journal of WTO and International Health Law and Policy 401, 401-402.

Agreement due to the block of China, via Hong Kong, China.⁵⁵ The other example is Taiwan's absence from the Inter-parliamentary Conference at Hong Kong Ministerial in 2005. This was not because Taiwan boycotted this Conference; it was not invited. As the Directorate-General Pascal Lamy has rigorously advocated that parliamentary participation contributes to the transparency of the WTO, Taiwan's absence in this Inter-Parliamentary Conference was definitely a great loss.⁵⁶

C. CROSS-STRAIT (TRADE) RELATIONS

Another major issue relates to the cross-strait trade after Taiwan and China entered the WTO. When pursuing its membership in the WTO, it was hoped that the WTO memberships of Taiwan and China would help to normalize the cross-strait trade relations. As both Taiwan and China opted not to take the non-application approach toward each other, it was believed that trade relations could be channelled more smoothly through the WTO. Nevertheless, even since its accession to the WTO, external trade with China is still subject to many restrictions, and has yet to be liberalized. This WTO-inconsistency covers, *inter alia*, market access commitments, Most-Favoured-Nation Treatment, National Treatment, and investments toward China.

Many WTO members had voiced their concerns about the cross-strait trade,⁵⁷ as is illustrated in Taiwan's first Trade policy review conducted on 20 and 22 June 2006. The response of the representative of the China when hearing Taiwan's replies

⁵⁵ *Ibid.*, at 418. Taiwan's accession to the GPA was finalized on 9 December 2008 when the philo-China President came into power on 20 May 2008. WTO Press Release, 'Chinese Taipei to Accede to WTO Government Procurement Agreement', available at http://www.wto.org/english/news_e/news08_e/gproc_9dec08_e.htm (last accessed 16/02/2009). While the Chairman of the Committee on Government Procurement, Mr. Nicholas Niggli of Switzerland, views Taiwan's accession to the GPA as 'a historic and path-breaking step' of Taiwan should be very proud, nevertheless, it is generally believed that Taiwan's access was made possible owing to a compromise between Taiwan and China.

⁵⁶ The two examples cited above illustrate the sensitive cross-strait relations between China and Taiwan within the WTO. Taiwan manages to avail itself the rights of a full member while China takes Taiwan's every step as a sign to 'politicize and internationalize the domestic affairs,' and subsequently interpret it as an effort to seek the independence. The sensitive issue of cross-strait (trade) will be discussed in more detail in the following section.

⁵⁷ Apart from China, which had indicated Taiwan's violation of many WTO rules, notably non-discriminatory principle, Switzerland, Japan, EC, and among other members questioned the Taiwan's restrictions on cross-strait trade. The discussant also expressed similar concerns about this issue, see WTO document, Minute of Trade Policy Review on Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. (WT/TPR/M/165, 22 September 2006), paras 33-35, 47, 53, and 65.

referring to the cross-strait relations as ‘special and complex’, ‘unique and complicated’, ‘not a simple trade issue, and that ‘it had not immediately been able to carry out a comprehensive overhaul of the cross-strait trade and economic regulations clearly reflected the impatience of China and other members in relation to little progress being made in this issue. He commented that Taiwan could not excuse itself from running counter to the fundamental principles of non-discrimination. It would be difficult to justify this argument in terms of the fact that four years had passed, and various restrictions persist.⁵⁸

It should, however, be noted that, notwithstanding various restrictions, the economic interdependence between Taiwan and China has become closer and closer. The influence of the private sectors in shaping the external trade policies should never be underestimated. In order to defend and maximize their economic interests, Taiwan’s trade policies toward China will have to be liberalized incrementally. Nonetheless, one should also be aware the decision-making concerning external trade toward China has long been dominated by the political powers in Taiwan. The long-awaited go-ahead for the out-bound investment eight-inch semi-conductor wafer foundry plants in China is a good example. Regardless the stronger call for liberalization since the end of 1990’s, the consensus to liberalize reached at the Conference on Economic Development held in 2001, and the adoption of the *Directions Governing the Review and Supervision of Investment in an IC Foundries in Mainland China* 2002, so far none of the applications for investment has been approved. While the delay can definitely be attributed to political reasons, as clearly illustrated by Taiwan’s response at the Trade Policy Review mentioned above, it also exposes the weaknesses of the enforcement mechanism of the WTO rules if the domestic judicial remedies are not to be strengthened. In other words, although Taiwan’s restrictions on the market access of Chinese’s products and on Taiwan’s outbound investments in China conflict with fundamental non-discrimination principles of the WTO, these WTO-inconsistent measures be eliminated without an effective domestic judicial protection in Taiwan. Since cross-strait trade policies has been long captured by political ideology and may continue to be dominated by these

⁵⁸ *Ibid.*, para.138.

political irrationalities, in the absence of effective judicial review to ensure rational decision-making., these WTO-inconsistent measures may endlessly persist

In light of these, the WTO is thus perceived as a network for Taiwan to substantiate its economic power and to strengthen its economic development and as a forum to present itself as an international actor. Moreover, a potential third function should also be taken into account. The economic interdependence may contribute to the mutual understanding and solidarity of people in both straits, and prevents irrational political decision-making. Although one should not be over-optimistic about the possibility for the WTO to bridge the strait, one should nonetheless not be over-pessimistic either. As economic interdependence has been increasing, and the WTO Dispute Settlement Mechanism offers a possible resolution forum for trade trades between Taiwan and China, one is legitimate to expect that the WTO could help to normalize the cross-strait trade relations and contribute to 'perpetual cross-strait peace.' In this vein, a correct understanding of constitutionalism toward foreign trade policy appears helpful. It also demands effective judicial review in the aspect of foreign trade relations. Decisions in foreign trade areas should be also subject to the same judicial scrutiny in order to ensure rational decision-making. Constitutionalization of the foreign trade relations then appears indispensable and beneficial.

However, one should not be naive. Views in relation to international trade relation based on power politics still dominate numerous Chinese legal scholarships. For example, as argued, being equal members in the WTO does not change the fact that Taiwan is part of China,⁵⁹ This is the typical argument taken by Chinese lawyers when sovereignty issue is at stake. In light of the burgeoning nationalism in China, its antagonism toward Taiwan, and continuous emphasis on the sovereignty issue, and the persisting claim that Taiwan is part of China, one cannot deny the possibility of cross-strait armed conflicts. Nevertheless, it is exactly within this context where we are deeply in need of constitutionalism, economic interdependence, and judicial

⁵⁹ JS Mo, 'Settlement of Disputes between Mainland China and the Separate Territory of Taiwan within the WTO' (2003) 2 Chinese Journal of International Law 145, 168.

governance to safeguard the perpetual peace across the Taiwan Strait. In other words, constitutionalism will control the abuse of powers, in particular foreign policy. It is apparently that most Chinese international lawyers (maybe also most Taiwanese lawyers) do not share this view, but claim the importance of sovereignty, and rely much on power politics. It does not necessarily exclude the possibility of constitutionally control government powers. The effort to constitutionalize the foreign trade relations is not fruitless. The huge amount of rights and interests enjoyed by private parties resulting from the economic interdependence would act as a safeguard to prevent irrational decision-making, since armed conflict would destroy the progress made so far. The judicial control, albeit weak in the meantime, will also gradually evolve when more and more cases are referred to it. It will acquire enough legitimacy for it to act as a guardian in the decision-making of international trade relations. Only on these foundations can 'perpetual cross-strait peace' really be secured.

D. TRADE POLICY OF HONG KONG, CHINA AND MACAU, CHINA AND THEIR ECONOMIC INTEGRATION WITH CHINA

In terms of the economic developments in Hong Kong, China and Macau, China, three events are of great significance: the above-mentioned GATT and the subsequent WTO memberships; the handover to China; and the signatures of the CEPAs. Prior to its formal accession to the GATT, Hong Kong had participated in some GATT activities. The Hong Kong Office in the Mission of United Kingdom had sought recourse to Article XXIII:2 of the GATT to request the establishment of the Panel by the Contracting Parties.

In *Norway – Restrictions on Imports of Certain Textile Products (Norway – Textiles)*, the United Kingdom, acting on behalf on Hong Kong, requested a panel to be established. The subsequently established panel found that Norway's Article XIV action was not consistent with Article XIII, and should be immediately terminated or be brought in accordance with the provisions of Article XIII.⁶⁰ Besides, in the Panel report on *EEC – Quantitative Restriction on Certain Products from Hong Kong*

⁶⁰ GATT Panel Report, *Norway – Restrictions on Imports of Certain Textile Products (Norway – Textiles)*, L/4959, adopted 18 June 1980, BISD 27S/119, paras. 16-18.

(*EEC – Import Restrictions*), France was found to infringe its obligations assumed in Article XI of the GATT and to, prima facie, nullify and impair the benefits of Hong Kong accruing from the Agreement after a complaint was brought against EEC by the United Kingdom on behalf of Hong Kong.⁶¹

Compared to Hong Kong, Macau's experiences in participating in the GATT prior to its accession were much more limited. Even since its accession to the GATT and, later on, to the WTO, Macau has not been as active a member as Hong Kong has. It was partly because the UK had constantly helped Hong Kong to develop its capacity in participating in the international trading system with the aim to ensuring its market economy and political autonomy, since the resumption of the sovereignty over Hong Kong was inevitable. Macau was not able to benefit from this.

Hong Kong, China and Macau, China experienced a significant constitutional change when they were returned to China and Hong Kong Basic Law (the HKBL) and Macau Basic Law (the MABL) became their mini-constitution. As certified by China, these two Special Administrative Regions (the SARs) of China could be qualified as separate customs territories 'possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for the WTO Agreement.' Their memberships in the WTO would thus remain unchanged and would still be able to participate in the international trading system. The two Basic Laws also guarantee their economic autonomy and enable Hong Kong, China and Macau, China to continue to participate in the international trading system.

After the WTO came into being, Hong Kong, China had once acted as a complaining member. In *Turkey – Restrictions on Imports of Textile and Clothing*

⁶¹ GATT Panel Report, *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong (EEC – Import Restrictions)*, L/5511, adopted 12 July 1983, BISD 30S/129, para. 34. This case is extremely interesting in that, the United Kingdom, being a member of EEC, initiated a complaint on behalf of Hong Kong, against France, also an EEC member. It turned out to be the United Kingdom, acting on behalf of Hong Kong against EEC in the panel proceedings. It is also usual in terms of the internal/external liberalization of EEC. While the United Kingdom did not maintain a quota system, it was forced to 'de-liberalize' as EEC had the exclusive competence in external trade.

⁶¹ WT/DS29/1(15 February 1006). As this submission was dated on 15 February 1996, the official name in the WTO was still 'Hong Kong', instead of 'Hong Kong, China'. Nevertheless, when it intervened as third party in the complaint brought by India, the official name was switched to 'Hong Kong, China', as it was already returned to China.

Products,⁶² Hong Kong requested for a consultation with regard to Turkey's quantitative restrictions on imports of textile and clothing products. This consultation request addressed the same issue as the famous *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textile)*,⁶³ complained by India because of the customs union agreement between European Community and Turkey. Although Hong Kong did not request for the establishment of a panel, it intervened as a third party in the complaint brought about against Turkey by India. Overall, Hong Kong, China's participation in the WTO is very active, let alone to mention its hosting 2005 Hong Kong Ministerial Conference.

Trade policies of Hong Kong, China and Macau, China have some important and distinctive characteristics. As claimed in the government report during the 1998 trade policy review, Hong Kong, China's import and export system was characterized by '(a) zero tariffs; (b) minimum controls; and (c) no subsidies or assistance to export.'⁶⁴ With regard to its role as a middleman to China, while some argues that it will soon come to an end with the full opening of China's economic and the emergence of rival hubs, such as Shanghai and Shenzhen, it is also argued that Hong Kong, China is still comparatively competitive, especially in the area of financing and profession services.⁶⁵ In respect of Macau, China, it is characterized by its free-port status and zero-tariff policy, as mandated by article 110 of the Macau Basic Law. Macau, China's economy also relies much on services trade, where the gambling service plays a pivotal role.

However, the Asian financial crisis exploded immediately after the handover. These two economies, especially Hong Kong, China, had suffered from a great depression of their economic development. The gradual recovery was challenged again

⁶² WT/DS29/1(15 February 1006). As this submission was dated on 15 February 1996, the official name in the WTO was still 'Hong Kong', instead of 'Hong Kong, China'. Nevertheless, when it intervened as third party in the complaint brought by India, the official name was switched to 'Hong Kong, China', as it was already returned to China.

⁶³ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345.

⁶⁴ WTO document, *Trade Policy Review Report of Hong Kong, China by Government of Hong Kong, China*, WT/TPR/G/52 (11 November 1998), para. 46.

⁶⁵ Y-W Sung, 'The Evolving Role of Hong Kong as China's Middleman' in LS Ho and R Ash (eds) *China, Hong Kong and the World Economy: Studies on Globalization* (Palgrave Macmillan, New York 2006) 152-169.

when the Severe Acute Respiratory Syndrome (the SARS) burst off. The situation in Macau, China was no better. The stagnating development and the growing crime rate had long plagued Macau, China. Against this background, some efforts must be made with the aim to boost the economic development of these two SARs. The Closer Economic Partnership Arrangement (CEPA) between China and Hong Kong, China (and subsequently Macau, China) is a design to meet this need.

However, the CEPA should be read in a broader context. This arrangement of closer economic partnership was actually proposed with the aim of resolving the legitimacy crisis that Hong Kong, China had encountered. The judicial autonomy had been undermined, since the judgment of the Court of Final Appeal regarding the right to abode was ‘overruled’ by the interpretation of the Standing Committee of the National People’s Congress. Hong Kong People had gradually lost their patience with the long-awaited suffrage election. Resentment of the Chief Executive surged with the continuous economy depression and higher unemployment rate. The CEPA thus serves a means not only to boost the economic development in Hong Kong, China, but also to prevent the ‘One China, Two System’ from collapsing.

As is pointed out by an author, the CEPA is unique in various ways. First, it is the first ‘Free Trade Agreement’ signed by two members of the WTO, but at the same time, of the same state. It is also peculiar in terms of rights and obligations of two parties: while China offers so much ‘concessions,’ Hong Kong, China offers almost nothing. Besides, the size, openness, and economic developments of these two parties draw a sharp contrast: while Hong Kong, China is small, highly developed and very open, China is large, less developed, and relatively closed.⁶⁶ As the CEPA provides Hong Kong, China preferential market access in some services areas, it is believed that Hong Kong, China will much benefit from the China’s opening in services trade. With regard to Macau, China, as the gambling service is the key element of its economy, with the signature of CEPA, tourists from China is believed to contribute a lot to the recovery of the economy of Macau, China.

⁶⁶ Y-W Sung, *The Emergence of Greater China: The Economic Integration of Mainland China, Taiwan and Hong Kong* (Palgrave Macmillan, New York 2005) 199-200.

Another interesting question is why China bothers to sign a 'Free Trade Agreement' with Hong Kong, China and Macau, China, who are both free port and adopt zero-tariff policy. It is not difficult to understand that Hong Kong, China wishes to take advantage of the 'open-up' of China and to contribute to its economic growth, as the economic policy of Hong Kong, China has long emphasized on its role as an 'intermediary.' Hong Kong, China also wanted to locate its services industries in China before China's commitments in respect of trade in services are fully liberalized to all other WTO members.⁶⁷ It is nevertheless confusing and difficult to figure out why China would agree to enter into a 'Free Trade Agreement' with Hong Kong, China. As is a free port, Hong Kong, China seems to have no concessions to offer.

In economic terms, it may be arguably true that China hardly benefits from entering into a Free Trade Agreement with Hong Kong, China. However, a further thought contradicts this easy supposition. In the national context, as noted above, this arrangement of closer economic partnership was precisely proposed with the objective to resolving the legitimacy crisis that Hong Kong, China had been faced with. China has significant interests in preventing the 'One Country, Two Systems' from collapsing. What is of the equal, if not more, importance is the implication of the CEPAs in international economic context. As prescribed in Article 4 of both CEPAs, specific provisions in China's Accession Protocol and its Working Party Report will not be applicable between these contracting parties. The legal text reads as follows:

The two sides recognize that through over 20 years of reform and opening up, the market economy system of the Mainland has been continuously improving, and the mode of production and operation of Mainland enterprises is in line with the requirements of a market economy. The two sides agree that Articles 15 and 16 of the 'Protocol on the Accession of the People's Republic of China to the WTO' and paragraph 242 of the 'Report of the Working Party on the Accession of China' will not be applicable to trade between the Mainland and Hong Kong (Macao).⁶⁸

⁶⁷ As for the case of Macau, China, zero-tariffs in trade in goods seem not very beneficial since its economy relies much on services trade, in particular gambling service. What is of great significance to the economy of Macau, China is its tourism services to Chinese visitors, which is limited in scope in the main text of the CEPA and its annexes. This exposed one of the weaknesses of mirroring the China-Macau, China CEPA to China-Hong Kong, China CEPA, in spite of the fact that the scope of tourism services was expanded in later stage.

⁶⁸ CEPA, Art. 4.

Article 15 of China's Accession Protocol governs the method in determining price comparability in anti-subsidy and anti-dumping investigations. In Anti-dumping procedures, members are entitled to adopt 'a methodology that is not based on a strict comparison with domestic prices or costs in China'. Besides, other methodologies may be employed in identifying and measuring subsidy benefit, in anti-subsidy proceedings, to take into account the 'prevailing terms and conditions in China' and thus to establish appropriate benchmarks. Article 16 lays down a transitional product-specific safeguard measure, to which members may opt for the prevention of and remedy for market disruption. Paragraph 242 of China's Working Party Report deals with the potential market disruption with the expiry of the Agreement on Textile and Clothing, as China's textile exports have amounted to a tremendous market share. As China included Hong Kong, China's recognition of China as a market economy in the CEPA, it has successfully made a step forward toward its market economy status. Even though this practice has only symbolic significance, it paves the way for China to negotiate with other trading partners with regard to its market economy status. Besides, the non-application of Article 15, 16 of China's Accession Protocol and paragraph 242 in the CEPA helps China to negotiate with its trading partners by following the same pattern, and consequently reduces the impacts of these 'WTO-plus' obligations.⁶⁹

III. SHORT CONCLUSION AND THE STRUCTURE OF THIS DISSERTATION

The Four Members in the WTO illustrate the struggle of the international trading system between the power-oriented and rule-based approaches. The sponsorship allowing Hong Kong and Macau to be deemed as Contracting Parties to the GATT

⁶⁹ This approach has proved itself very successful. According to the Trade Policy Review Report conducted in 2006, China has included the recognition of its market economy status into every regional and bilateral free trade agreement, or economic partnership agreement. See Secretariat's Trade Policy Report on People's Republic of China, WT/TPR/S/161 (28 February 2006), para. 46, ff. See also Secretariat's Trade Policy Review Report. WT/TPR/S/199/rev.1 (12 August 2008), para. 53, ff. So far, A Framework Agreement on Comprehensive Economic Cooperation between China and ASEAN, Chile-China FTA, China-Pakistan Preferential Trade Agreement, China-Australia Trade and Economic Framework Agreement (aiming to establish an FTA), China-New Zealand Trade and Economic Cooperation Framework, China and the Southern African Customs Union (SACU) Joint Declaration (with the aim to establishing a FTA), China - Gulf Cooperation Council Framework Agreement on Economic, Trade, Investment and Technology Cooperation, as well as the accompanying talks and negotiations have recognized China as a market economy. Besides, before commencing the negotiation of a FTA, Iceland and Switzerland have also recognized China as a market economy.

illustrates the influence of parent countries upon territories subject to their international responsibility. Prior to China's accession to the WTO, the memberships of Hong Kong, China and Macau, China in the WTO appeared ironical: the central government was not a member while the regional governments were. This 'imbalance' between central authority and special administrative regions also helped China to strengthen its determination to enter to the WTO. However, those who, in China, esteem highly on national sovereignty, and resist China's WTO accession tend to link the two memberships of Hong Kong, China and Macau, China, with the past imperialism. The WTO memberships of Hong Kong, China and Macau, China are thus perceived as an arrangement by the United Kingdom and Portugal to prevent these two special administrative regions from being fully integrated into China. This conception of the GATT and WTO system, based on the logic of power politics, remains influential. On the other hand, from a perspective of the WTO, China and Taiwan's accession indicate its ambition to be a real 'world trade organization' and to comprise universal memberships. Furthermore, China's Accession Protocol can be regarded as a milestone for the constitutionalization of the WTO, since it covers various 'rule of law' obligations.

Although the designation of defining the Contracting Parties as 'governments' and allowing separate customs territories to accede to the GATT was mainly out of functional and realistic concerns, this constitutional feature of the GATT/WTO system turns out to be a good example to illustrate the change of the concept and substance of sovereignty. The 'sovereignty' in this age much differs from as traditionally understood. It is undeniable that this arrangement aimed to meet practical needs for territories subject to the sovereignty of another state to participate in the international trading system during their process of seeking independence. Nevertheless, such functional approach may gradually evolve and point to a different direction when one perceives the WTO not only as a mechanism to meet the needs of Hong Kong, China and Macau, China to participate in the world trading system, but also as a safeguard for their economical and political autonomy.

Besides, China's resumption of the sovereignty over Hong Kong and Macao and the signings of the two CEPAs between China and Hong Kong, China and Macau, China have illustrated new practices in this world trading system. The melting together of Hong Kong, China and Macau, China's market economy and China's socialist economy presents an interesting story. It does not only test the compatibility of a market economy and a non-market economy, but also points out the crucial element which the international trading system tends to neglect: the difficulty in identifying one economy with a purely planned economy and thus being treated as non-market economy. As the two CEPAs had been notified to the WTO Committee on Regional Trade Agreement according to the procedures laid down in Article XXIV;7, it is safe to say that these CEPA are international agreements in everything but the name. These two CEPAs thus also provide good material to explore the possibility of a 'Free Trade Agreement' between two memberships even though they are of the same nation.

However, the legacy of power politics in the world trading system still lingers on. This is best illustrated by the following issues relating to Taiwan: the Chairman's statement on the sequence of the accession; China's failed effort in changing Taiwan's official name in the GATT/WTO 'the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu of the People's Republic of China'; the name of Taiwan in the directory prepared by the WTO Secretariat; and Taiwan's difficulty in acceding to the Government Procurement Agreement. In addition, the influence of power politics is also apparent in various restrictions in Taiwan concerning the cross-strait trade. Such legacy clearly indicates the necessity for further constitutionalization in the international trade area. Foreign trade decisions should not be deemed as the privilege of an administration branch when constitutionalism has no role to play. It also presents the importance of judicial remedies concerning external trade, both at the international level and at the domestic level.

The aim of this introductory Chapter is to facilitate the reader to understand the background of these four memberships in the WTO and to make it easier to comprehend the complexities of this issue. The author hopes that by reading this

introductory chapter, the reader might equip themselves with a basic idea of the context in which these four WTO Members is situated and may be able to appreciate this unique landscape in the WTO. Before this introductory Chapter comes to end, it is feasible and beneficial to outline main contents of this dissertation. This dissertation comprises four parts, which I structure as follows.

The first Part is composed of three Chapters, dealing with the introductory background knowledge, research question, and methodology. The research question aims to examine the necessity of a mechanism for the resolution of trade disputes among these four memberships, both at the international WTO level, domestic/national level and the potential regional level. It examines the current practices by major players in the WTO, namely the US and the EU, and then goes to discuss why a mechanism for the resolution of trade disputes among these four memberships is of even greater importance, in light of the highly politicized cross-strait trade issue. The methodology Chapter begins with the exploration of major debates related to the WTO, illustrates the context in which my methodological approach is situated, and justifies the approach taken in response to the potential challenges.

The second Part of this dissertation also consists of three Chapters. Chapter IV will examine various articles, governing domestic judicial review in the WTO agreement. Chapter V focuses on China's obligation to provide an independent and impartial judicial review, as prescribed in its accession protocol. It will also address potential challenges in the WTO Dispute Settlement Mechanism with regard to its implementation of this obligation, and examine global and regional standards on the independence and impartiality of the judiciary. Chapter VI will be devoted to the impact of Taiwan's WTO membership upon its judicial organ. Specifically, it will deal with the legitimacy and capacity of Taiwan's domestic courts to intervene and participate in cross-strait trade issues, especially when national security is at stake.

Similarly, the third Part comprises three Chapters. Chapter VII examines the cross-strait trade disputes, both at the international WTO level and at the domestic level, namely in national courts of Taiwan and China. Chapter VIII explores potential

trade disputes between China and Hong Kong, China and Macau, China, and examines whether trade issues can constitute the exclusive competence of these two SARs. The two CEPAs between China and Hong Kong, China and Macau, China will also be dealt with. Chapter IX then discusses trade disputes between Taiwan and Hong Kong, China and Macau, China.

The last Part of this thesis, namely, Chapter X, serves as a conclusion. It will firstly summarize main findings and major arguments of this dissertation. It will offer briefly introduce the Cross-strait Common Market advocated by the current vice-president in Taiwan. I will comment and evaluate this proposal based on my findings and arguments through this dissertation, and reflect whether there is a better alternative.

CHAPTER II THE NEED FOR EFFECTIVE JUDICIAL PROTECTION IN EXTERNAL TRADE MEASURES AMONG THE FOUR WTO MEMBERS

I. TRADE DISPUTES COME ALONG WITH AN EVER CLOSER ECONOMIC INTERDEPENDENCE

As mentioned in the introductory Chapter, the economic interdependence among the Four WTO Members has become closer and closer since China began its open reform in 1982, and it has accelerated since China and Taiwan's accession to the WTO. According to the official statistics of Taiwan, the trade volume with China in January 2006 to November 2006 amounted to around 80.4 billion US dollars and constitutes 20.6% of its total trade.¹ In 2003, Taiwan's total trade volume with China exceeded trade with the United States or Japan, and since then China has become the largest trading partner of Taiwan. In 2006, Taiwan ranked as China's 7th trading partner, 5th importing and 7th exporting country respectively. China is also Hong Kong, China's largest trading partner, accounting for a 45% share by value of total merchandise trade in 2005, with a sharp contrast to its second and third largest trading partners, whose shares accounted for 11% and 10%, respectively.² In 2006, Hong Kong, China was the 4th largest trading partner of China. The same situation applied to Macau, China. In 2005, China accounted for an around 25% share of the total trade volume of Macau, China, exceeding by 4% to the 2nd largest trading partner, the United States. The shares of imports and exports of trade between Macau, China and China are 43.1% and 14.9% respectively.³

However, with the enormous trade volume and high degree of economic interdependence, trade frictions, and subsequently trade disputes seem inevitable. There are numerous good examples of such frictions, followed by trade remedies measures, adopted by China and Taiwan against each other. Although China and Taiwan have not officially sought recourse to the WTO Dispute Settlement Mechanism, Taiwan has availed itself of this dispute settlement mechanism by means

¹ Department of International Trade, Ministry of Economic Affairs, available at <<http://cweb.trade.gov.tw/public/Attachment/72511312071.doc>> (last accessed 09/02/2007).

² WTO Document, WT/TPR/G/173 (8 November 2006).

³ WTO Document, WT/TPR/S/181 (26 March 2007), at 12.

of the joint-consultation and intervention as a third party in these complaints to which China is a party.

After the United States' request for consultation with China regarding the latter's value-added tax on integrated circuits,⁴ Taiwan circulated a communication to request for joint-consultation. Taiwan asserted that, being one of China's major integrated circuit suppliers with the total value of exports about 1.8 billion US dollars in 2003, it had 'substantial interest' as well as 'systemic interest' in this matter, and was thus entitled to be joined in the consultation.⁵ In the meantime, European Communities,⁶ Japan⁷ and Mexico⁸ had also requested to be made part of this consultation. In a communication dated 28 April 2004, China notified the WTO Dispute Settlement Body (the DSB) that it had accepted the requests of the European Communities, Japan and Mexico to join the consultations without mentioning its refusal for Taiwan to join the consultation.⁹ It was later notified to the DSB that mutual satisfactory resolution had been reached between the United States and China,¹⁰ and consequently there was no need for a panel to be established.

As provided in article 4.11 of Understanding of Rules and Procedures Governing the Settlement of Disputes (the DSU), a member other than the consulting parties can, within 10 days after the circulations of the requests for consultations, request to be made part of the consultations if it considers that it has 'substantial trade interests' in the consultations. This request for joint consultations can be rejected if the member to which the request for consultations was addressed considers that the claimed 'substantial trade interest' does not exist. The only requirement for joint consultation is that the requesting member should have substantial trade interests. Taiwan, citing the total values of exports and proving itself as one of the major suppliers in these products, indicated its substantial trade interests in this matter. Although China's denial for Taiwan's request to join the consultation was not justifiable, no remedy is

⁴ WTO Document, WT/DS309/1 (23 March 2004).

⁵ WTO Document, WT/DS309/5 (5 April 2004).

⁶ WTO Document, WT/DS309/2 (30 March 2004).

⁷ WTO Document, WT/DS309/3 (1 April 2004).

⁸ WTO Document, WT/DS309/4 (5 April 2004).

⁹ WTO Document, WT/DS309/6 (28 April 2004).

¹⁰ WTO Document, WT/DS309/7 (6 October 2004).

offered by the DSU on this point, as the requesting member can, in any event, refer to the consultation provisions to request, on its own behalf, for consultations.¹¹

While Taiwan's first initiative to avail itself of the WTO Dispute Settlement Mechanism to deal with potential trade disputes with China seemed not so successful, Taiwan had intervened as a third party in the *China – Measures Affecting Imports of Automobile Parts* case (*China – Auto Parts*),¹² brought against China by the European Communities, the United States and Canada. Pursuant to the requests of these three members, a single panel was established in accordance with Article 9 of DSU. As the DSU provides more detailed prescription and fuller protection of third party rights, compared to the request for joint-consultations, Taiwan is entitled to make submissions to panel and to be heard in the panel proceedings. It is also entitled to receive the submissions of the parties to this dispute in the first meeting of the panel.¹³

As of 31 January 2009, seven complaints have been brought about in the WTO against China: *China – Integrated Circuits*; *China – Auto Parts*; *China – Taxes*; *China – Intellectual Property Rights*; *China – Trading Rights and Distribution Services*; *China – Financial Information Service*, and *China – Loans, Grants and Other Incentives*. In the other four complaints, Taiwan intervenes as a third party during the panel proceedings. In *China – Taxes*, as China reached an agreement with the complaining members, namely the US and Mexico, the panel proceedings were consequently suspended. The last two complaints, *China – Financial Information Service* and *China – Grants, Loans, and Other Incentives* are still at the consultation phase.

¹¹ Taiwan could certainly request for consultation independently under Article 4.3 of the DSU. However, Taiwan seemed to take a cautious approach and chose not to prompt to it.

¹² Panel Reports, *China – Measures Affecting the Imports of Automobile Parts* (WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, as modified by Appellate Body Reports, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R).

¹³ Taiwan eventually chose not to make any submission; nor did it make an oral statement in the first meeting of the Panel. The only point noted about Taiwan in the Panel report is its reservation of third-party rights. In the Appellate Body report, it is merely noted Taiwan notified its intention to attend the oral hearing as a third participant. See, Panel reports on *China – Auto Parts*, para. 1.12. Appellate Body reports, *China – Auto Parts*, para. 8.

This issue will be further elaborated in Chapter VII. See, *infra*. Chapter VII, n 115 and text.

With regard to trade remedies measures in domestic level, various examples can be found. As in the area of anti-dumping measures, since its accession to the WTO, China has initiated a number of investigations procedures against products from Taiwan, including unbleached kraft liner/linerboard, polyurethane, polybutylene, terphthalate resin, nonyl phenol, phenol, bisphenol-A (BPA), cold rolled steel products, nylon 6,66 filament Yarn.¹⁴ As of 7 March 2008, according to China semi-annual report under Article 16.4 of the Anti-Dumping Agreement (the ADA), definite anti-dumping duties were imposed upon polyvinyl chloride, phenol; ethanolamine; polybutylene terphthalate resin; polyurethane; nonyl phenol, bisphenol-A; and methyl ethyl ketone 2-butanon. Unbleached kraft liner/linerboard had also been previously imposed upon anti-dumping duties on 30 September 2005, but this measure was subsequently repealed by administrative review on 9 January 2006.¹⁵ On the other hand, Taiwan has also taken some anti-dumping measures against Chinese products. It has so far initiated three investigations procedures against towelling products, footwear, uncoated printing and writing paper since its accession to the WTO.¹⁶ As of 20 February 2008, according to the semi-annual report of Taiwan under Article 16.4 of the ADA, Taiwan imposed definitive anti-dumping measures on the towelling products and certain footwear products. Besides, Taiwan initiated an anti-dumping investigation on uncoated printing and writing paper on 14 October 2006 notwithstanding neither provisional nor definitive anti-dumping measures imposed.¹⁷

As political branches are more susceptible to influences of the interests groups and may sometimes be 'captured', they tend to act in a protectionist manner. By contrast, the judiciary is expected to act with neutrality and free itself from the biased protectionism, effective judicial remedies are thus proved to essential to safeguard rights and interests of individuals and enterprises under the WTO Agreement. The

¹⁴ WTO document, G/ADP/N/166/CHN (7 March 2008); see also other previous semi-annual reports of Anti-dumping committee.

¹⁵ *Ibid.*

¹⁶ International Trade Commission, Ministry of Economic Affairs of Taiwan, available at <<http://portal.moeaitc.gov.tw/icweb/default.aspx>> (last accessed 09/02/2007).

¹⁷ (WTO Document, G/ADP/N166/TPKM, 20 February 20068); see also other previous semi-annual reports of Anti-dumping committee.

necessity for judicial protection in the trade measures is evidence by these cases cited above. As is known, under the existing WTO legal system, two levels of judicial review exist: the intergovernmental WTO Dispute Settlement Mechanism and the domestic judicial review. This Chapter thus wishes to examine the existing provisions governing these two levels of judicial protection and to illustrate why a further strengthened judicial review is desirable. As China and Taiwan have limited experiences in this matter, it is feasible and necessary to examine practices of other members. Consequently, the following will discuss firstly the intergovernmental WTO Dispute Settlement Mechanism, and then goes to examine the often-neglected domestic judicial review. It will also examine the constraints of domestic judicial review in foreign trade measures. Existing practices in the United States and the European Community will also be discussed in order to clarify the need for a further strengthened judicial review. Three arguments are offered to justify this claim: legitimacy; consistency and coherence; and protection of rights and interests of individual economic actors. I will then argue that strengthened judicial protection is of even greater importance for trade dispute resolution among the Four WTO Members to achieve the following goals: rational decision-making; the safeguard of economic autonomy of Hong Kong, China and Macau, China; compliance to the WTO rules; the protection of right to trade. Lastly, this Chapter points to the role of the WTO Dispute Settlement Mechanism in resolving cross-strait trade disputes and enhancing economic integration.

II. EFFECTIVE JUDICIAL PROTECTION AND IMPLEMENTATION OF THE WTO AGREEMENT

A. INTERGOVERNMENTAL DISPUTE SETTLEMENT MECHANISM IN THE WTO

It is not possible and not the aim of this section, to discuss the WTO Dispute Settlement Mechanism in a comprehensive manner. However, it is feasible to provide an overview of this intergovernmental dispute settlement mechanism, as it will facilitate the following analysis of the two-level judicial review in relation to international trade decisions. Compared to its power-oriented predecessor GATT, the WTO Dispute Settlement Mechanism is characterized as a rule-based system where ‘security and predictability’ is to be safeguarded and ‘rights and obligations’ of

members are to be preserved. This dispute settlement mechanism can be separated into four stages: consultation; panel proceedings; Appellate Body proceedings; and recommendation, implementation, and surveillance. With regard to this dispute settlement mechanism, three quick points should be noted at this stage: compulsory jurisdiction, quasi-automatic adoption of the WTO Panel/Appellate Body reports, and the permanent Appellate Body.

As provided in Article 6.1 of the DSU, a panel shall be established no later than the second meeting of the DSB after the request firstly appears on the agenda of the DSB, unless the DSB decides not to establish the panel by consensus. This is generally referred to as ‘negative consensus’ or ‘reverse consensus’. In practice, the requesting member is unlikely to join the consensus against the establishment of panel. If it is preferable not to establish the panel, the request may be withdrawn. Besides, as the provision reads that a panel shall be established no later than the second meeting of DSB, it suggests that the respondent member may ‘block’ the establishment of a panel once. Consequently, a panel is usually established at the second meeting of the DSB after the request is scheduled on the agenda of the DSB. This differs from some other international dispute resolution practices where agreements of the acceptance of jurisdiction are indispensable.

‘Negative consensus’ is also applied to the adoption of the WTO Panel/Appellate Body reports. These reports should be unconditionally adopted unless the DSB by consensus decides not to adopt them.¹⁸ This practice differs from the GATT practices, where the party complained against could block the adoption of panel reports. The ‘negative consensus’ makes the WTO Panel/Appellate Body reports (quasi-)automatically adopted, which highly strengthens the efficacy of the WTO Dispute Settlement Mechanism.

Compared to its processor, another novel practice is the establishment of a permanent Appellate Body. This standing Appellate Body serves as a safeguard against legally wrong Panel reports; it also contributes to the consistence and

¹⁸ DSU, Art. 16.4, 17.14.

coherence of the WTO jurisprudence. Compared to *ad hoc* panellists, this permanent Appellate Body is equipped with greater experiences and expertise in WTO law and jurisprudence. The establishment of a standing Appellate Body to hear appeals from panels further strengthens its legalized and judicialized character of this dispute settlement mechanism. As observed, the adoption of Panel reports by the political consensus of the GATT Council had been much abused in the final period of the Uruguay Round negotiation. The afore-mentioned (quasi-)automatic adoption of Panel reports is aimed to correct this defect. Nevertheless, this (quasi-)automatic adoption necessitates a mechanism to ensure the accuracy of these Panel reports, which a standing Appellate Body is expected to meet this need.¹⁹

Before engaging the analysis of domestic judicial remedies, it is also desirable to note that, as the WTO Dispute Settlement Mechanism remains intergovernmental in nature, members may enact domestic legislation to offer opportunities for individual economic actors to petition for referring to this dispute settlement mechanism. The *Section 301 of the Trade Act of 1974* is obviously the best example. However, the *Trade Barrier Regulation* of the European Community also follows the same approach. These instruments can be thus regarded as an indirect link between the WTO Dispute Settlement Mechanism and domestic judicial remedies. As observed, a 'public-private partnership,' where private individuals and enterprises work side by side with United States Trade Representative (the U.S.T.R.) as a partner, is visible in the proceedings of WTO Dispute Settlement Mechanism.²⁰

¹⁹ EU Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (Kluwer Law International London, The Hague, Boston 1997) 186.

²⁰ G Shaffer, "Public-Private Partnership" in WTO Dispute Settlement: the US and EU Experience' in Y Taniguchi, *et al.* (eds) *The WTO in the Twenty-first Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (Cambridge University Press, Cambridge 2007) 153. See also, G Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press, Washington, D.C. 2003).

B. THE ROLE OF DOMESTIC COURTS IN THE WTO AGREEMENT

1. THE TREND TO STRENGTHEN DOMESTIC JUDICIAL REVIEW

Prior to the establishment of the World Trade Organization, it had already been proposed to strengthen the domestic enforcements of the GATT rules.²¹ During the negotiation process of the Uruguay Round, Switzerland submitted a communication to the Negotiation Group on Dispute Settlement addressing domestic implementation.²² While it presented three models of introducing international trade laws into domestic legal order, namely, to give full effects of the international trade law in the domestic legal order, selectively to have qualified self-executing provisions directly implemented, and to leave it to the member states to decide the way in which international trade laws are enforced. In light of the infeasibility of an over-reaching ambition, the third approach was preferable. However, Switzerland proposed that the following elements concerning domestic procedures should be included:

Provisions for fair hearing for all parties substantially affected by administrative or judicial action related to international trade. In case of urgent determination, the right to a hearing may be granted upon complaint only.

Obligation to provide, at least upon complaint, a reasoned decision without undue delay.

Prompt and effective provisional measures in case of pending irreversible damage.

Prompt and effective administrative or judicial review of administrative action related to international trade. The scope of judicial review may be limited to issues of law, excluding questions of fact and discretionary exercise of authority within the law.²³

This proposal intended to widen the scope of the subject matter that was entitled to the procedural protection. It replaced with the original wording of ‘administrative action relating to customs matters’ as used in the GATT with more precise and clearer terminology and in a more comprehensive manner, and thus extended the scope of domestic judicial review. In this proposal, Switzerland argued that Article X: 3(b) of

²¹ See, e.g., EU Petersmann, 'Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal System' in EU Petersmann and M Hilf (eds) *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (Kluwer Law and Taxation Publishers, Deventer 1991).

²² GATT Document, MTN.GNG/NG13/W/36 (18 January 1990) 4.

²³ *Ibid.*

the GATT could not be effective if non-tariff measures were not covered. Based on this reasoning, Switzerland proposed that Article X: 3(b) should be expressly applied to all areas covered in the Agreement, including non-tariff barriers.²⁴

It is submitted that Switzerland's proposal, with the aim of strengthening domestic implementation of international trade rules and to providing effective judicial protection of individuals and enterprises, had been largely adopted in the following negotiation process and had been included into the Uruguay Round Multilateral Trade Agreements.²⁵ Such examples can be found in Article X:3(b) of the GATT 1994, Article 13 of the Anti-Dumping Agreement, Article 11 of the Agreement on Customs Valuation, Article 4 of the Agreement on Pre-shipment Inspection, Article 23 of the Agreement on Subsidies and Countervailing Measures, Article VI of the GATS, Article 41 to Article 50 and Article 59 of the TRIPS Agreement, and Article XX:2 of the Government Procurement Agreement.²⁶

The trend to strengthen the effectiveness of domestic judicial review is also evidenced by China's Accession Protocol to the WTO, which, in Article 2 (D), explicitly prescribes the obligation to provide an independent and impartial judicial review. As argued, while the obligation to maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to matters referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement covers similar subject matters in the existent WTO rules, an 'opportunity for appeal' reviewed by 'judicial body' laid down in the accession protocol has put forward more stringent requirements.²⁷ Besides, members are not required to eliminate the existing procedures and to substitute them with those procedures, fully and formally, independently of the administrative agencies if the existing ones provide objective and impartial reviews of administrative actions. Nor are they required to institute a new review mechanism would be inconsistent with

²⁴ *Ibid.*

²⁵ Petersmann, above n. 19, at 244.

²⁶ *Ibid.*, at 194.

²⁷ JY Qin, "'WTO-plus' Obligations and Their Implications for the World Trade Organization Legal System - An Appraisal of the China Accession Protocol ' (2003) 37 Journal of World Trade 483, 496.

their constitutional structure or the nature of their legal systems²⁸ Nevertheless, such leeway is not available for China since the accession protocol expressly prescribes that those tribunals should be independent of the agency entrusted with administrative enforcement.²⁹

China's Accession Protocol also lays down several institutional requirements governing the designation of this prompt review. For example, the tribunal shall have no substantial interests of the outcome of the decision;³⁰ the right to appeal shall be without penalty;³¹ the decision of the appeal should be given to the appellant with reasons provided in writing;³² and be notified of the right for further appeals.³³ In so doing, the domestic judicial protection in Chinese courts is expected to be further strengthened in light of the right to appeal to be reviewed by judicial organs whose impartiality is enhanced by dictating the tribunals to be independent of administrative agencies.

2. THE CONSTRAINTS OF DOMESTIC JUDICIAL REVIEW

a. National Implementation Act of the Uruguay Round Agreements

Even with a clear and specific aim to strengthening domestic judicial review during the course of the negotiation in the Uruguay Round, domestic courts, in enforcing the WTO rules, are still subject to various constraints. Part of these constraints derive from the nature of the WTO Agreement, which leaves much room for the members to decide the way in which it is implemented. More importantly, political branches deliberately impose stringent constraints upon domestic courts to limit their competence to enforcing the WTO rules. In respect of domestic judicial review, while various provisions governing domestic judicial review are included in the WTO Agreement, how domestic courts apply and enforce the WTO rules is still conditional on their national legal systems and their judicial policies with limited exceptions. According to the Agreement on Pre-shipment Inspection, private

²⁸ GATS, Art. VI: 2(b).

²⁹ Qin, above n. 27, at 495-496.

³⁰ China's Accession Protocol, Art. 2 (D), para. 1.

³¹ China's Accession Protocol, Art. 2 (D), para. 2.

³² *Ibid.*

³³ *Ibid.*

exporters are allowed to raise a dispute in the 'Independent Entity';³⁴ the Agreement on Government Procurement enables suppliers to challenge alleged breaches of this agreement through the 'challenge procedures.'³⁵ In general, the domestic implementation of the WTO Agreement or even of the ruling of the WTO Panel/Appellate Body reports still depends much upon the discretion of national governments. Implementation acts of the Uruguay Round Agreements and relevant legislative intention of two major players of the WTO, the United States and the European Communities, provide good examples of political branches' efforts in preventing or limiting the application of the WTO rules in domestic courts.

As in the case of the United States, one can easily find the intent to limit the application of the WTO Agreement in the courts of the United States from some explicit prescriptions of the *Uruguay Round Agreement Act* (the URAA). For example, it provides that no person other than the United States shall 'have any cause of action or defence under any of the Uruguay Round Agreements'³⁶ or challenge 'any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement',³⁷ and that 'no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect'.³⁸ These provisions cited above do not only prevent those provisions in the Uruguay Round Agreements, which are inconsistent with the U.S law, from being applied, but they also prevent the Uruguay Round Agreements from being directly

³⁴ The Independent Entity was established in the WTO in 1995, in cooperation with the International Federation of Inspection Agencies and the International Chamber of Commerce. Once a case is referred to the Independent Entity, an arbitral panel will be established to decide whether members or exporters have complied with Pre-shipment Agreement. This procedure gives the exporters a right of action to bring a case into the WTO. S Charnovitz, 'The WTO and the Rights of the Individual' in S Charnovitz (ed) *Trade Law and Global Governance* (Cameron May, London 2002) 386. 'Independent Entity' and 'challenge procedures' will be further discussed in Chapter IV. *See, infra*, Chapter IV, n. 55 and text.

³⁵ Even under Article XX:2 of GPA where suppliers are allowed to challenge alleged breaches of this agreement, whether the four principles governing this challenge procedures, i.e., non-discriminatory, timely, transparent and effective, are legally enforcement is subject to dispute. *See*, S Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International, Dordrecht, The Netherlands 2003)389-91.

³⁶ The URAA, Sec. 102(c)(1)

³⁷ The URAA, Sec. 102 (c)(2)

³⁸ The URAA, Sec. 102 (a)(1)

relied upon by individuals. Consequently, the scope of the implementation of the Uruguay Round agreements and how these agreements are implemented still remain in the hands of the Congress and the administration of the United States.

As is observed, two dominating factors contributed to the shaping of the Uruguay Round Agreement Act: sovereignty and federalism. The Agreement on Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade attract the most concerns as they increase the degree of obligations of states and local governments in order to ensure that product standards do not constitute disguised trade barriers. The concerns were intensified by the quasi-automatic adoption of the WTO Panel/Appellate Body reports, which prevents the United States from 'vetoing' the unfavourable reports. The opponents of the Uruguay Round Agreements argue that these changes would undermine the sovereignty of the United States in the sense that its regulatory autonomy was to be limited. As a result, with their great impact on political debates, the role of the Uruguay Round Agreements in the legal system of United States was extremely circumscribed. The URAA carefully delimits potential impacts for environmental protection and consumer safety. Besides, the decisions of the WTO Panel/Appellate Body, without further implementations, are designed to non-binding in its domestic legal system.³⁹

With regard to the federalism concerns, as was testified by Professor Lawrence Tribe before the Congress, some potential adverse effects on the states might arise. Firstly, particular states might be subject to sanctions if the federal government failed to implement adverse Panel decisions. Besides, states would have to rely upon federal government to defend their interests in the WTO Panel/Appellate Body proceedings while the latter might have no interests in this subject matter. The Federal government might be in a conflicting position while it would have to defend for the states in the WTO Dispute Settlement Mechanism and challenge state laws or regulations domestically. Furthermore, federal government would be likely to offer to changes of state laws other than of federal laws. Moreover, the obligations for the federal

³⁹ DW Leebron, 'Implementation of the Uruguay Round Results in the United States' in JH Jackson and AO Sykes (eds) *Implementing the Uruguay Round* (Oxford University Press, Oxford 1997) 209-211.

government to ensure states to act in accordance with the Uruguay Round Agreements would reduce regulatory autonomy of states.⁴⁰ With to the aim of easing these concerns, it was thus proposed that states should be provided opportunities to participate in dispute settlement proceedings, and that only federal government should be given the standing to challenge the validity of state laws. Besides, actions brought against states should be carried out for this specific purpose, namely, invalidating state laws. Above all, an unfavourable ruling in the WTO Panel/Appellate Body proceedings should not relieve the federal government's burden to prove in the courts of United States that state laws are inconsistent with Uruguay Round Agreements.⁴¹ Such compromise, with the price of the efficacy of Uruguay Round Agreements, between federal government and states were eventually incorporated into the Section 102 (b) of Uruguay Round Agreements Act. In this provision, consultation between federal and states, co-operation of federal and states in the WTO Dispute Settlements Mechanism and legal challenges against state laws in national courts are detailed prescribed.

Apart from the sovereignty and federalism considerations in political debates, efforts aiming to limit the URAA from altering laws of the United States were extended to methods of interpretation to be employed in courts of the United States. Section 102(a)(2) of the URAA lays down the methods for the construction of this Act. It dictates that, unless otherwise specifically provided for, the courts shall not construe the Act

(A) to amend or modify any law of the United States, including any law relating to (i) the protection of human, animal, or plant life or health, (ii) the protection of the environment, or (iii) worker safety, or

(B) to limit any authority conferred under any law of the United States, including section 301 of the Trade Act of 1974.⁴²

⁴⁰ United States Congress Senate, *GATT Implementing Legislation, Hearings before the Senate Committee on Commerce, Science and Transportation, One Hundred Third Congress, Second Session, 18 October 1994* (US GPO, Washington DC 1994) 290-339.

⁴¹ Leebron, in J. H. Jackson and Alan O. Sykes (eds.), above n. 39, at 228-231.

⁴² The URAA, Sec. 102(a)(2)

This provision aims to avoid conflicts between the URAAU and existing laws, and to prevent traditionally taken *les posteriori* from being applied.⁴³ It should be nevertheless pointed out that courts should, under ‘Charming Betsy’ doctrine, make every possible effort to interpret laws of United States in accordance with its international obligations (i.e., Uruguay Round Agreements) if such results of interpretations are not contrary to expressed intents of the Congress. The critical issue then is how broadly or narrowly a statute could be interpreted to be in conformity with its international obligations. The case of the Uruguay Round Agreements appears even more difficult, given the expressed preference to existent laws. The URAA explicitly provides that the Act should not be interpreted to amend or modify the laws of United States and that the Agreement or the implementation acts that are inconsistent with the existing laws shall not have effect

The implementation of the Uruguay Round Agreements in the European Community was mainly related to the competence issue. Except the GATT 1994, whether the GATS and TRIPS Agreement fall into the exclusive competence of the community had been hotly debated between the Commission, on the one side, and the Council and member states on the other. This dispute was finally settled by Opinion 1/94,⁴⁴ where the European Court of Justice (the ECJ) held that, the Community has sole competence, pursuant to Article 113 of the EC Treaty, while Community and its Member States are jointly competent to conclude the GATS and TRIPS Agreement. The Court reasons that cross-frontier suppliers, unlike other modes of supply of service, do not relate to any movement of persons, and should therefore, not be distinguished from trade in goods. This mode of supply of service falls into the scope of common commercial policy, while other modes of supply of service do not.⁴⁵ With regard to the TRIPS Agreement, the Court held that, the Community has exclusive competence in respect of the prohibition of the release into free circulation of

⁴³ Leebron, in J. H. Jackson and Alan O. Sykes (eds.), above n. 39, at 212-214.

⁴⁴ Advisory Opinion 1/94, Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property [1994] ECR I-05267. A vast of literature is devoted to this case, see, e.g., M Hilf, 'The ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise?' (1995) 6 European Journal of International Law 245; A Appella, 'Constitutional Aspects of Opinion 1/94 of the ECJ concerning the WTO Agreement' (1996) 45 The International and Comparative Law Quarterly 440.

⁴⁵ *Ibid.*, paras. 43-47.

counterfeit goods. The Court points out that the Community has autonomously laid down measures governing this free circulation of counterfeit goods inside community in Council Regulation No 3842/86. As the community can autonomously adopt measures in this field Article 113 of EC Treaty, international agreements on the same subjects fall within the Community's exclusive competence of common commercial policy.⁴⁶ Despite its internal competence to harmonize national laws pursuant to Articles 100 and 100a and, basing on Article 235, to create new rights, the Community does not have exclusive competence for the conclusion of international agreement in this subject. Otherwise, the rules of voting or procedures laid down by these articles are to be escaped if the Community could conclude international agreements with non-member countries with the aim to harmonizing intellectual property rights protection.⁴⁷ While is true that, when legal harmonization is carried out in one specific area based on Article 110a, member states are thus precluded from concluding international agreements with non-member countries, however, this does not equip the Community with exclusive competence in the field of intellectual rights protection. This is because the harmonization in the subject has not been fully completed.⁴⁸ Therefore, the GATS and TRIPS Agreement should be concluded with mixed agreement.

With regard to the domestic implementation measures, it was not surprising that the European Community had followed the same approach. The Commission argued, in its proposal submitted to the Council for the decision to conclude the Uruguay Round Agreements, that the Community would have stepped into an imbalanced position if Uruguay Round Agreements were to be granted direct effect since most trading partners were expected not to opt to this approach.⁴⁹ The European Council, when passing its decision of 22 December 1994 on the Conclusion on the agreements reached in the Uruguay Round, declared in the last preambular that 'by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto,

⁴⁶ *Ibid*, para. 55.

⁴⁷ *Ibid*, para. 60.

⁴⁸ *Ibid*, paras. 88, 103

⁴⁹ Commission (EC), 'Proposal for a Council Decision concerning the conclusion of the results of the Uruguay Round of Multilateral Trade Negotiations (1986-94)' COM (94) 143 final, 15 April 1994, para. 7a.

was not susceptible to being directly invoked in Community or Member State courts.⁵⁰ In light of this legislative intent, the WTO Agreement was not intended to have direct effect in Community or Member State courts. It should be, however noted, that it is the ECJ, not the Council nor the Commission, who decides whether these provisions in the Uruguay Round Agreements have direct effect or not.⁵¹ As will be seen below, the ECJ tends not to be generous on this issue.

In sum, members of the WTO, especially the executive branch of national governments, still enjoy great freedom as to whether and how to implement the WTO Agreement, in spite of potential challenges and trade retaliations from other members, if authorized by the DSB. It should be therefore, borne in mind that, even though the aim to strengthening domestic judicial review had been shared by most negotiators and had been materialized by the Final Act, these Uruguay Round Agreements had to be ratified by legislature and subsequently they would be implemented in domestic legal systems through different implementation acts according to various different constitutional traditions of the members. The inclusion of strengthened judicial review provisions in the Uruguay Round Agreements does not necessarily guarantee an effective judicial protection in domestic courts. In other words, although efforts to enhance the effectiveness of the Uruguay Round Agreements and to provide fuller protection to individuals had been successfully carried out during the course of negotiations, the way in which these agreements are to be applied in domestic courts are still subject to constitutional constraints. National legislature may also deliberately limit or exclude their application.

However, it does not suggest that domestic courts should ‘hand off’ in relation to measures concerning the implementation of Uruguay Round Agreements. On the contrary, domestic courts are under their constitutional obligation to interpret domestic laws and regulations in a manner that is in conformity with Uruguay Round

⁵⁰ Council Decision (EC) 94/800 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), 22 December 1994 [1994] OJ, L336/2.

⁵¹ PLH Van den Bossche, 'The European Community and the Uruguay Round Agreements' in JH Jackson, Alan O. Sykes (ed) *Implementing the Uruguay Round* (Oxford University Press, Oxford 1997) 93.

Agreements, particularly in light of these agreements being ratified in their parliaments. The crucial issue here is how to deal with 'hard cases' where conflicts between Uruguay Round Agreements and national laws and regulations exist to which consistent interpretation offer little help. Consequently, it is feasible and necessary to examine the existent practice in domestic courts as to how they resolve these conflicts and as to efforts, if any, they have made. The following section will thus examine some case-law of the United States and the European Community. Emphasis will be placed upon direct effects of Uruguay Round Agreements and the binding effect of the WTO Panel/Appellate Body reports. The examination will once again expose the ineffectiveness of judicial enforcement of these agreements and insufficiency of judicial protection of individual rights in relation to external trade.

b. Judicial Review of External Trade Measures in Domestic Courts

As is observed, judicial review at the domestic level often acts in a more restrained manner than at the intergovernmental level in the WTO. Given the vast diversity of constitutional models and traditions in which domestic courts are situated, there are different perceptions of judicial functions. It is thus not surprising that various approaches and diverse attitudes exist in domestic courts in relation to trade-related measures that fall into the ambit of the WTO. As the WTO Agreement loosely regulates the form and shape of domestic judicial review, therefore, domestic courts decide by themselves whether they opt for judicial restraint or judicial activism according to their own perceptions of the separation of powers and checks and balances. Nevertheless, notwithstanding such diversity mentioned above, domestic courts seem to act with more restraint when dealing with external trade measures, compared to domestic affairs. External relations, including external trade relations, have been conventionally considered the province of legislative and executive branches. The court is not in a good position to intervene.⁵² So far, this judicial self-restraint has not been fundamentally changed even after the WTO Agreement, aiming at strengthening domestic judicial review, entered into force. As is argued,

⁵² T Cottier and M Oesch, 'The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework' in T Cottier and PC Mavroidis (eds) *The Role of the Judge in International Trade Regulation* (The University of Michigan Press, Ann Arbor, Mich. 2003) 288-289.

judicial review, on the one hand, is an essential mechanism for the control of administrative actions. Since agencies are required to provide reasoned decisions based on adequate supporting facts, and the legitimacy of the bureaucratic decision-making can be enhanced by judicial review. On the other hand, international trade decisions, unlike other administrative actions, involve political, social and economic policies. Strong judicial oversight would undermine the flexibility and even disrupt the democratic process when the courts substitute their own decisions for those of elected officials. Judicial review in international trade relations is thus said to be faced with a dilemma.⁵³ It is even questioned whether international decision-making is really law or whether it is politics pure and simple.⁵⁴

These are typical arguments based on the division between foreign relations, including foreign trade relations, and other governmental actions. It is nevertheless also argued that, while proposing for protection of equal right of citizens for domestic decision-making procedures within constitutional democracies, but at the same time admitting foreign policies to rely upon the prudence and wisdoms of politicians with no effective legal constraints imposed, John Locke presented a constitutional theory with 'Lockean Dilemma.' In this constitutional theory, constitutional restraints are ineffective and incomplete as foreign policies powers, often operating by taxing and restricting domestic citizens, cannot be separated from domestic policies powers.⁵⁵ As is argued, another conceptual basis for the government can nevertheless come from Immanuel Kant, who explains why constitutional control of domestic policy powers cannot remain effective if the same control is not imposed upon foreign policy powers. All rule of law principles should be therefore, extended to intergovernmental relations among states and transnational relations with foreign citizens.⁵⁶

Building on the Kantian premise, Petersmann further argues that, in a globally integrated world, the line between domestic policy powers and foreign policy powers

⁵³ TJ Schoenbaum and DS Arnold, 'Judicial Review of International Trade Law Decisions: A Comparative Analysis' in M Hilf and EU Petersmann (eds) *National Constitutions and International Economic Law* (Kluwer Law and Taxation Publishers, Deventer, Boston 1993) 475-476.

⁵⁴ *Ibid.*, at 476.

⁵⁵ Petersmann, above n. 19, at 18.

⁵⁶ *Ibid.*, at 23.

has been diffused. This division is never clear-cut. He then provides examples that foreign policies are in fact shaped by and responded to local interests, and argues that the need to constitutionalize foreign policies and to maintain the constitutional control is no less compelling.⁵⁷ Using the law of the Council of Europe and the EC law, especially jurisprudential developments in the European Court of Human Rights (the ECtHR) and the ECJ, he further illustrates that constitutional guarantee of rule of law, human rights and democracy has been effectively maintained and strengthened by allowing individuals to invoke their fundamental rights before the ECJ, the ECtHR, and national courts.⁵⁸ Effective judicial protection is thus conceived as an indispensable element for the constitutionalization of the foreign policy powers.⁵⁹

However, such enthusiasm with effective control and strict oversight against international trade decisions is not embraced by most judicial practices. As will be seen below, courts in the United States and the ECJ appear lukewarm in engaging into strict scrutinizes of external trade measures. As is pointed out, some constitutional barriers to judicial remedies exist when challenges against international trade decisions are brought into courts of the United States. Procedurally, these challenges can be effectively precluded by the ‘standing’ requirement. For example, the constraint of class action brought by consumer unions substantially limits access to courts in the United States. Moreover, as courts have only jurisdiction over ‘cases and controversies,’ neither a case not ‘ripen’ enough that is not fully developed nor a case ‘moot’ where effective legal protection cannot be provided, should be admitted. Such requirement aims to prevent courts from providing advisory opinions. However, once the legislation is enacted, it is possible to subrogate their international obligations

⁵⁷ The examples cited include: powers to tax and restrict domestic citizens (e.g., through import tariffs, import restrictions, or currency devaluations), to redistribute income among domestic groups (e.g., through export subsidy) and even to expose domestic citizen to health risks and deaths (e.g. in the cases of war, peace-making and peace-keeping missions or transnational environmental pollutions). EU Petersmann, ‘How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?’ (1998) 20 (3) Michigan Journal of International Law 1, 23. See also, M Krajewski, ‘The Emerging Constitutional Law of European Foreign Policy’ in A Bodnar, *et al.* (eds) *The Emerging Constitutional Law of the European Union* (Springer, Berlin, Heidelberg, New York 2003) 441-68, esp. at 452-455 for the discussion of judicial control of European Foreign Policy.

⁵⁸ Petersmann, above n. 19, at 17-18, 28.

⁵⁹ This constitutional approach has been long advocated by Petersmann. For a representative literature of his argument, see EU Petersmann, *Constitutional Functions and constitutional Problems of International Economic Law* (University Press, Fribourg, Switzerland 1991).

with express legislative intention. Otherwise, contending this legislation being inconsistent with international agreements before its enactment constitutes seeking advisory opinions. Consequently, only when actual adverse effects arise can individuals bring complaints into courts. This limitation points to the ineffectiveness of judicial protection.⁶⁰

In respect of the substantial aspect, the possibility of seeking judicial remedies in courts of United States against international trade decisions may be either denied or limited by the 'political question' doctrine. This doctrine is originally intended to exclude judicial review of decisions concerning foreign relations. It then develops into a deferential standard of review where judicial review is not automatically excluded. As the courts have reasoned, they are not equipped with expertise or judicially manageable standards to review decisions relating to foreign relation decisions.⁶¹ It is thus inappropriate for courts to replace administrative decisions with their own.

With regard to judicial review of international trade decisions, two interrelated categories should be distinguished. One is the review of decisions based on domestic laws; the other is those cases when courts are called upon to determine whether conflicts between domestic laws and international agreements exist, and to find out a consistent interpretation. As observed, while standards of review of international trade decisions based on domestic laws vary from area to area, the U.S courts, when faced with conflicts between domestic legislation and international trade agreements appear timid and tend to defer to the political branches.⁶² Moreover, the political branches control the scope and standard of judicial review to ensure their preferred trade policies to be implemented. As argued, the key to perceiving correctly why statutory judicial review exists in some areas but in most others not, is through the examination of the role of Congress in shaping the international trade policies. When Congress has

⁶⁰ FL Morrison and RE Hudec, 'Judicial Review of Individual Rights under the Foreign Trade Law of the United States' in M Hilf and EU Petersmann (eds) *National Constitutions and International Economic Law* (Kluwer Law and Taxation Publishers, Deventer, Boston 1993) 110-112.

⁶¹ *Ibid.*, at 112-113.

⁶² With regard to the standard of review, based on domestic laws, in different areas, see Schoenbaum and Arnold, in M Hilf and EU Petersmann (eds.), above n. 53, at 476-494. See also Morrison and Hudec, in M Hilf and EU Petersmann (eds.), above n. 60, at 115-128, for the explanation why some statutes are placed under strict scrutiny while most other not.

no clear picture about what results it wishes to pursue, much discretion may be left to executive powers. No justifiable standards will be given and strict judicial scrutiny will thus be not possible. A good example is the case of anti-dumping and countervailing duty measures where stricter judicial review is imposed with the aim of protecting the interests of domestic producers.⁶³ While it is ironic to see that a stricter judicial scrutiny is aimed at protecting domestic interests instead of preserving liberal trade policies, it is clear that the Congress dictates the courts, through detailed provisions relating to anti-dumping and countervailing measures, to ensure preferable results to domestic producers. In light of this, regardless of stricter standard of review in U.S courts, the result may be protectionist and inconsistent with non-discriminatory trade rules.

This thus links to the second category, where courts have to resolve potential conflicts between international agreements and national laws and regulations.⁶⁴ Firstly, courts are expected to make best efforts to reach an interpretation consistent with international law. However, this does not seem to be borne out by studies of judicial decisions.⁶⁵ It might be partly because of the extremely unusual legal status of the GATT in the U.S legal system, but it can also be attributed to courts' continued indifference to the international obligations of the United States. This indifference is strengthened by the '*Chevron doctrine*', which instructs the courts to defer to the agencies' interpretation of international agreements. As a result, judicial protection in foreign trade relations in further weakened.

The '*Chevron doctrine*' originated from environmental regulatory areas based on the rationale that courts, being lacking in expertise and accountability, were not in a better position to reconcile competing interests, and deference to the administration's view of wise policies would be preferable.⁶⁶ In other words, if legislative intention is

⁶³ Morrison and Hudec, *ibid*, at. 115-128

⁶⁴ An illustrative example here is anti-dumping measures as the 'zeroing' practice employed by the U.S executive agencies has been found to be inconsistent with WTO law. How the courts respond to this inconsistency is thus of great importance.

⁶⁵ See RE Hudec, 'The Legal Status of GATT in the Domestic Law of United States' in M Hilf, *et al.* (eds) *The European Community and GATT* (Kluwer Law and Taxation Publishers, Deventer 1986) 187-249.

⁶⁶ For the discussion of the interrelationship between the Charming Betsy doctrine, Chevron doctrine and judicial review of international trade decision, see, JA Restani and I Bloom, 'Interpreting

clear, courts are required to rely upon it; otherwise, when clear legislative intention is not existent, courts are also required to defer to interpretations of agencies if these interpretations are not reasonable. Largely, courts rely upon and defer to the agencies' interpretations related to international trade agreements even in the case where agencies' interpretations are likely to violate international obligations. Such deference considerably undermines the effectiveness of judicial remedies in relation to international trade decisions.⁶⁷ The case of the WTO Agreement would be even worse as the implementation act explicitly excludes their application of conflicting provision in the courts of the United States. Courts are tempted to find an easier way out, namely by refusing their application instead of finding a consistent interpretation.

A good example illustrating attitudes taken by the U.S courts is the *Timken Company v. United States*,⁶⁸ where the court of appeals of the Federal Circuit had to deal with three issues: deference to interpretations of agencies under the '*Chevron doctrine*,' the obligation of consistent interpretations under the '*Charming Betsy doctrine*,' and the binding effect of the WTO Panel/Appellate Body reports. Faced with a challenge to the Department of Commerce's practices of 'zeroing' in the anti-dumping procedures, the Court held that, in examining whether to sustain an agency's statutory interpretation, a two-part inquiry should be followed. The court has firstly to determine whether the Congress has directly spelled out the precise meaning. If a clear legislative intent is existent, it has to be followed. This unambiguously expressed intent should be given effect. Wherever this intent is not available, the court then has to decide whether the agency's statutory interpretation is a permissible one.⁶⁹ To survive judicial scrutiny, such an interpretation does not have to be the only reasonable one or even the most reasonable one. The court should defer to the agency's interpretation even if the court believes other interpretations to be more reasonable.⁷⁰

International Trade Statutes: Is Charming Betsy Sinking?' (2001) 24 Fordham International Law Journal 1533.

⁶⁷ Leebron, in J. H. Jackson and Alan O. Sykes (eds.), above n. 39, at 216-217.

⁶⁸ *Timken Company v. United States*, 354 F. 3d 1334 (Fed. Cir. 2004).

⁶⁹ *Ibid.*, at 1341.

⁷⁰ *Ibid.*, at 1342.

While the appellant contends that, in light of *the Charming Betsy* doctrine, an interpretation running counter to decisions of the Panel or Appellate Body is a unreasonable one, the Court held that, ‘longstanding and consistent administrative interpretations is entitled to considerable weight, and that the appellant’s argument, employing decisions of Panel and Appellate Body reports to establish the unreasonableness of the Agency’s interpretation, is thus unpersuasive.’⁷¹ According to *the Charming Betsy* doctrine, the courts of United States should, whenever possible, interpret the laws in a manner consistent with the international obligations of United States. The court obviously did not place much weight on this doctrine. With regard to the binding effect of the Appellate Body report, the court merely notes that, ‘as Koyo [the Appellant] acknowledges, the decision is not binding on United States, much less this court’⁷² in light of the fact that the United States is not a party to the *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (the *EC – Bed Linen*),⁷³ and that *EC – Bed Linen* deals with anti-dumping investigation instead of an administrative review of decisions on anti-dumping duties.⁷⁴ The court did not bother to discuss the legal effects of this report and its potential impacts on the interpretation of national laws. As previously said, the court found an easy way out.

In a subsequent case,⁷⁵ where the appellant relies upon, *inter alia*, a finding in the Appellate Body report on *United States—Final Dumping Determination on Softwood Lumber from Canada* (the *US – Softwood Lumber IV*)⁷⁶ against the zeroing method of United States, the court further widens the scope of its previous ruling. It re-affirms that WTO decisions are ‘not binding on the United States, much less this court,’⁷⁷ given that the URAA explicitly prevents the application of conflicting provisions of the WTO Agreement in the domestic legal order of the United States.

⁷¹ *Ibid.*, at 1344.

⁷² *Ibid.*

⁷³ Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049.

⁷⁴ *Ibid.*

⁷⁵ *Corus Staal BV. V. Department of Commerce*, 395 F. 3d 1343 (Fed. Cir. 2005).

⁷⁶ Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571.

⁷⁷ *Corus Staal BV. V. Department of Commerce*, above n. 75, at 1348.

Besides, according to the Court, in order to deal with these conflicts, the Congress has enacted legislation that authorizes the U.S.T.R., an arm of the Executive branch, in consultation with various Congressional and Executive bodies and agencies, to 'determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation.' The Court then concludes that the GATT/WTO agreements do not trump domestic legislation, and that if US statutory provisions are inconsistent with these GATT/WTO agreements, it is strictly 'a matter for Congress.'⁷⁸

In respect of the EC's implementation of the GATT/WTO rules, two issues are of vital importance. One is the hotly debated direct effect issue; the other is the standard of review in relation to external trade measures. The ECJ has long been reluctant to admit the direct effect of the GATT/WTO rules. While its case-law has been severely criticized, some scholars also defend the court's position.

It was originally expected that the ECJ would take a different position toward the WTO Agreement with regard to its legal effect in the Community law. Firstly, compulsory jurisdiction was included in the Dispute Settlement Understanding and the efficiency and efficacy of the WTO Dispute Settlement Mechanism had been remarkably strengthened. Moreover, the Agreement on Safeguard Measures (the ASG) was far more specific and reduced the 'flexibility' as perceived by the ECJ.⁷⁹ It was therefore, argued that, given these significant changes, the ECJ should come to a different decision from its previous case-law. However, these arguments did not succeed in persuading the ECJ to revisit its existing jurisprudence. In *Portugal v. Council*,⁸⁰ the ECJ again refused to recognize the direct effect of the WTO Agreement in the community legal order.

The Court held that, when concluding an international agreement falling into community competence, the community institutions are free to agree with a

⁷⁸ *Ibid.*

⁷⁹ Apart from those who zealously argue for direct effect of the WTO/GATT law in Community legal order, some commentators argue for a moderate approach, namely, limited direct effect of the WTO agreements, see e.g., P Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems' (1997) 34 Common Market Law Review 11.

⁸⁰ Case C-149/96 *Portugal v. Council* [1999] ECR I-08395.

non-member country the legal effect of provisions in this international agreement in their domestic legal order, the community legal order in this present case. When such provisions governing legal effect in the community legal order are not available, the ECJ has the mandate to determine the question at issue. As the WTO Agreement does not provide any guidance on what legal effects it would have in domestic legal systems of members, it is thus for the Court to decide whether it should have direct effect in community legal order.⁸¹

While the Court recognizes the significant changes in the WTO Agreement, especially in the cases of the ASG and the DSU, the court however turns to another direction. The Court reasons that it is preferred for a Member to bring a measure into conformity with the WTO Agreement when it is found to be WTO-inconsistent. However, when the immediate withdrawal or correction of this measure is impracticable, compensation on an interim basis can be granted.⁸² The Court then comes to the cornerstone of its argument: the respondent member, under Article 22(2) of the DSU is nevertheless allowed to enter into a mutually accepted arrangement with the complaining member. If the court accepted the direct effect of the WTO Agreement in community legal order, it would 'deprive the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis.'⁸³ In other words, if the Court accepts direct effect of the WTO Agreement, the legislative and executive organs are forced to implement their obligations under this Agreement. There is no longer a possibility of for them to enter into a mutually accepted arrangement with other members.

The Court relies again on its conventional argument of the lack of reciprocity concerning the direct application of the WTO Agreement. The court firstly defines the WTO Agreement as reciprocal and mutually advantageous arrangements, and then distinguishes it with from other agreements containing asymmetry obligations or

⁸¹ *Ibid.*, para. 34.

⁸² *Ibid.*, paras. 37-39.

⁸³ *Ibid.*, para. 40.

designated for integration objectives that the community enters into.⁸⁴ Although the Court tends to recognize the direct effect of the international agreement to which the Community is a party, these agreements are mainly those containing asymmetry obligations or designated for integration objectives. By contrast, the WTO Agreement is reciprocal and mutually advantageous arrangements by nature, and should thus not have direct effect in the community legal order. The Court further argues that, in light of the lack of the reciprocity concerning direct application of WTO major players, it would 'deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts,'⁸⁵ if the court were called upon to ensure that community law complies with the WTO Agreement.

The Court's judgment was again, unsurprisingly severely criticized by some commentators. It is argued that the Court misinterprets the DSU, particularly in relation to the obligation to comply with the WTO Panel/Appellate Body reports. As Griller points out, the obligation to comply with the Panel or Appellate body reports is unconditional, and compensation is 'no alternative to compliance, but a temporary measure available'⁸⁶ when recommendations and rulings are not duly enforced. Using systematic interpretation together with a comparison of the relevant provisions of the DSU, namely, condition of compensation, prompt compliance being essential, preference to full implementations, surveillance of the implementations of recommendations and rulings, Griller argues that 'the binding force of the Panel and Appellate Body reports is unconditional, and there is no authorization to depart from such findings, even on a temporary basis.'⁸⁷ This view can also find its support from Arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)*, where the Arbitrators, after recalling Article 22.1 of DSU decide that 'the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned,' and that 'this *temporary* nature indicates that it is the purpose of

⁸⁴ *Ibid.*, para. 42.

⁸⁵ *Ibid.*, para. 46.

⁸⁶ S Griller, 'Judicial Enforceability of WTO Agreement in European Union: Annotation to Case C-149/96 *Portugal v. Council*' (2000) 3 *Journal of International Economic Law* 441, 451.

⁸⁷ *Ibid.*

countermeasures to *induce compliance*.’⁸⁸ The significance of preference to compliance should never be neglected.

Moreover, he also argues that putting ‘suspension of concessions’ and ‘compensations’ into the same paragraph indicates that the latter is aimed to prevent the retaliatory measures. This arrangement also reveals the coercive character of the recommendations and rulings. Retaliations and compensation should be understood as not as alternatives to compliance, but as mechanisms to ensure full compliance. According to him, such view is coined with general international law insofar as the obligation to repair the damage does not constitute an alternative to compliance with the primary obligation of not infringing an international obligation. While compensation might be viewed as an alternative to the suspension of concessions, but not to compliance,⁸⁹ it is thus clear that, even in the case where compensation is mutually agreed with upon, the mandatory nature of the WTO Panel/ Appellate Body reports remains unaffected.

The Court’s reasoning based upon ‘reciprocity’ is also questionable. According to settled jurisprudence, reciprocity is not a prerequisite for judicial enforcement, particularly in contrast to the Court’s position taken in *Kupferberg*. The differentiation between the WTO Agreement and other numerous international agreements which the court recognizes as directly applicable is unjustified. Misperceiving the WTO Agreement and denouncing it as ‘reciprocal and mutually advantageous arrangements,’ the court is thus unable to appreciate the mandatory nature of the various obligations covered therein. Above all, the denial of judicial enforceability of the WTO agreement in the Community legal order conflicts with the rule of law, as enshrined in the general principle of Community law. The Court has repeatedly ruled that the European Community is a community ruled of law, where the conformity with the constitutional charter of measures taken by its member states and its institutions should be subjective to judicial review, and the requirement of judicial

⁸⁸ Decision by the Arbitrators on *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU – (EC – Bananas III (US) (Article 22.6 – (EC))*, WT/DS27/ARB (9 April 1999), para. 6.3 (emphasis original).

⁸⁹ Griller, above n. 86, at 452-453.

control is a general principle of law underlying the constitutional traditions common to the member states.⁹⁰ Rejecting the WTO Agreement to be directly applicable and preventing from individuals to rely upon the GATT/WTO rules in Community courts has produced an inconsistency and incoherence in Community legal order.

However, taking a different approach, Eeckhout argues in favour of the Court. According to Eeckhout, what is at stake is not the issue of direct effect, but the impact on the political institutions of the Community if direct effect is to be recognized in community legal order. In respect of the court's reasoning, 'there was large judicial discretion which could only be filled through judicial policy-making. A formal reasoning can only serve to dress (and disguise?) the judicial decision.'⁹¹ In Eeckhout's view, Griller's critique of the Court is based on too formal an approach and puts too much faith in judicial enforcement. Leaving political institutions to solve this issue might be the best way as the WTO is such a young and contested legal system, and the precise scope and meaning of these obligations are to be further defined.⁹²

The above debate illustrates two fundamental issues when looking at the legal effect of the WTO Agreement in the domestic courts: the nature of WTO Agreement and the legitimate role of the courts.⁹³ Griller defines the WTO Agreement as covering at least part of the mandatory provisions and thus argues that these provisions should be directly applicable in Community courts. By contrast, Eeckhout sees the WTO as a legal system too young and too contested. Based on this reason, political institutions should be the legitimate actors defining the precise scope and meaning of the legal obligations. The first author holds that judicial review of measures of community institutions and member states is a fundamental feature of community rule of law, and therefore, suggests greater reliance on the courts with regard to compliance of WTO Agreement in the belief of the contribution to the

⁹⁰ *Ibid*, at 455-462.

⁹¹ P Eeckhout, 'The Judicial Enforcement of WTO Law in European Union: Some Further Reflections' (2002) 5 *Journal of International Economic Law* 91, 96.

⁹² *Ibid*, at 97.

⁹³ For a comprehensive review of literature on the relationship between WTO law and national law, See T Cottier and KN Schefer, 'The Relationship Between World Trade Organization Law, National and Regional Law' 1 *Journal of International Economic Law* (JIEL) 83.

community rule of law by stricter compliance to the WTO rules. However, the second author appears more suspicious and agrees with the court that scope for manoeuvre should be allowed and decision-making in external trade relations should be left to the political institutions.⁹⁴ Given their different perception on these two issues, they provide different answers for the court to rule this case. When commenting on the decision of the ECJ, Griller places much emphasis on systematic interpretation, comparing one provision to another. He also contrasts this *Portugal* decision to existing jurisprudence with regard to ‘reciprocity.’ On the other hand, Eeckhout opts for policy arguments. His major argument may be equal to ‘the political doctrine.’ It is telling when he says, ‘but let us not fool ourselves. Whatever the ECJ decided in the *Portugal*, and whichever way it chose to present the arguments in support of its ruling, there was in any event large judicial discretion which could only be filled through judicial policy-making.’⁹⁵

Apart from the ECJ’s reluctance in recognizing the direct effect of GATT/WTO rules, similar self-restraint can be found in its jurisprudence concerning external trade measures. An illustrative example is its case-law concerning the non-market economy status of China and the accompanying discussion on Market Economy Treatment and Individual Treatment. Although the major arguments were developed before China acceded to the WTO, nevertheless, it is relevant and binding in later cases as China’s joined the WTO as a non-market economy, and the EC has not yet recognized China as market economy. Besides, apart from the ECJ, as will be seen below, the same approach is still shared by Court of First Instance (the CFI).

In *Shanghai Teraoka Ltd. v. Council*,⁹⁶ the CFI, by re-affirming the settled case-law, held: ‘in the sphere of measures to protect trade, the Community institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine.’⁹⁷ Following this reasoning, the CFI further argues that the Community judicature should limit its review of the

⁹⁴ These two issues will be further elaborated in Chapter III. However, as they are among the themes of this thesis, they will be continuously revisited in the following Chapters.

⁹⁵ Eeckhout, above n. 91, at 96.

⁹⁶ *Shanghai Teraoka Ltd. v. Council*, Case T-35/01 [2004] ECR II-3663.

⁹⁷ *Ibid.*, para. 48.

assessments made by the Community institutions to ascertaining ‘whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of the facts or a misuse of power.’⁹⁸ The CFI then applied this standard of review to this present case in which it was called upon to determine the appropriateness of the denial of the market economy treatment to an enterprise. The CFI further argued that, the same standard of review ‘applies to factual situations of a legal and political nature in the country concerned which the Community institutions must assess in order to determine whether an exporter operates in market conditions without significant State interference and can, accordingly, be granted market economy status.’⁹⁹

In essence, the Court argues that the complexity of economic, political and legal situations necessitate the Community institutions to be conferred a wider discretion in the field of trade protection measures. Community courts should therefore, limit its review to (1) whether relevant procedural rules have been complied with; (2) whether the facts on which the contested choice is based have been accurately stated; and (3) whether there has been a manifest error of assessment of the facts or a misuse of power. Since the determination of whether an exporter operates in market conditions free from State interference relates to similar legal and political concerns, the Court should defer to political institutions and refrain itself from interfering into the substantial part of this issue. It can be seen clearly, from its holding that the Court takes a very restrained, if not ‘hands-off,’ approach. This is also a proof of the weak judicial protection in the field of external trade measures.

C. THE NEED TO FURTHER STRENGTHEN DOMESTIC JUDICIAL PROTECTION

After examining domestic implementation acts and jurisprudence, one can find that efforts made in the Uruguay Round Negotiation to strengthen domestic judicial review prove to be not as successful as expected. Political branches, both the United States and the European Community, have set up some barriers to prevent the

⁹⁸ *Ibid.*, para. 49

⁹⁹ *Ibid.*

Uruguay Round Agreements from being directly relied upon by private individuals and enterprises. Domestic courts are reluctant to step into the field of external trade; and a high degree of judicial self-restraint persists. Consequently, one is tempted to propose for a further strengthened judicial protection. However, this proposal should firstly address the court's legitimacy in reviewing external trade measures, and then justify itself both by its enhancement to consistency and coherence between international trade obligations and national legal order and its contribution to protection of rights and interests of individual economic actors under the WTO Agreement. Otherwise, it will not overcome those weaknesses and ineffectiveness as noted above. Therefore, the following will firstly examine these three issues, and explores the contribution of strengthened judicial review to the Four WTO Members.

1. LEGITIMACY OF JUDICIAL REVIEW OF EXTERNAL TRADE MEASURES.

As illustrated by the afore-mentioned arguments, domestic courts, both in the United States and the European Community rely heavily on 'political question doctrine' when they are called upon to review international trade decisions. As previously noted, this doctrine was originally employed by the courts for the refusal of judicial review, and subsequently it was transformed into a doctrine instructing the courts to defer to the decisions of political branches. Domestic courts tend to argue that they are not equipped with expertise in the field of international trade. International trade decisions, with the complexity of legal, political, and economic dimensions involved, are, they claim, not justiciable in nature and should be thus deferred to political branches. Even if the courts do engage into the review process, they adopt deferential standards of review.

It should be, however emphasized again that this approach is not flawless. As mentioned above, the distinction between domestic affairs and external relations has become highly unjustified as decisions of external relations are inevitably implemented, side by side, with domestic measures. Foreign relations and domestic affairs are interrelated, and thus a clear-cut division is not possible. Just as judicial protection, an indispensable element of rule of law, should be provided in the field of domestic affairs, it should also be extended to foreign areas. Individual rights in the

field of external trade are no less prone to arbitrary administrative interference than those in the field of domestic affairs.

It is argued that the judiciary is not the legitimate actor to deal with cases concerning foreign relations, including foreign trade relations, as it is not sensitive and responsive to political needs. However, it is exactly this lack of sensitivity that makes it the best guardian to ensure decisions to be rationally made. A review by a neutral judiciary, which is not involved in the political and economic interests of international relations, and which is thus able to prevent itself from being captured by interest groups, and to depoliticize the external trade decisions, helps to ensure rational decision-making. As has been seen in the economic development of the United States, exporting groups and importing groups compete to shape a country's trade policies. High tariffs arise when protectionism prevails. The high tariffs authorized by Smoot-Hawley Act had caused other countries to retaliate by raising their tariffs against US exports, and turned out to be a cause of the Great Depression.¹⁰⁰ As political branches are not always rational decision-makers, arguments based on 'political question doctrine' that calls for respect for the wisdom of politicians and deference to political branches are thus unfounded. Judicial review should therefore, act as a vehicle for 'checks and balances' to prevent the powers of political branches from being abused. The role of the judiciary is of even greater importance in the field of external trade decisions as a wide discretion is conferred to administrative agencies. Judicial review thus appears essential to ensure this discretionary power to be carefully exercised.

In other words, judicial review, by means of substantive and procedural functions can help to preserve liberal trade policies. Being neutral, in the sense of the absence of political influences, interest group pressures, electoral politics and foreign policy concerns, courts are able to interpret and apply laws in a principled manner and thus contribute to the coherence of foreign trade law and policy. With regard to the procedural function, courts, by imposing more stringent procedural requirements upon

¹⁰⁰ KW Dam, 'Cordell Hull, the Reciprocal Trade Agreement Act, and the WTO' in EU Petersmann (ed) *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press, Oxford 2005) 85.

administration, help to unveil and rationalize the executive decision-making in the field of foreign trade, where there is no transparency and meaningful procedural requirements; it is thus possible to make the opaque foreign trade policy subject to the deliberation by civil society.¹⁰¹ It should also be noted that, while the Federal Supreme Court of the United States has ceased to apply the substantial due process test in the field of economic regulation (foreign trade decisions included), review standards of trade restrictions taken in the ECJ, based on principle of proportionality and general principles of community law, toward trade restrictions seem to be comparatively stringent. These stricter standards enhance the effectiveness of judicial review of 'external trade measures' and subsequently help to maintain the open market.¹⁰²

One might argue against judicial review of international trade decisions based on accountability. Such argument is related to the argument of lack of democratic legitimacy of judiciary. As judiciary is not elected, and not accountable to the people, courts are not in a position to deal with international trade decisions. As international trade relation has high degree of foreign policy implication, it should be left to political branches, whose decisions are to be examined by regular elections. This argument should also be rejected. Accountability should not rely solely upon electoral systems. With its decisions open to the civil society and subject to public comments and deliberation, judiciary is no less accountable to the people.

In sum, courts are legitimate, and are under their constitutional obligation to engage in judicial review in the field of foreign trade decisions, as they are responsible for ensuring the rational decision-making of political branches. With effective judicial review, coherent interpretations and applications of foreign trade laws can be carried out and procedural requirements can be faithfully observed. In this

¹⁰¹ RE Hudec, 'The Role of Judicial Review in Preserving Liberal Trade Policies' in M Hilf and EU Petersmann (eds) *National Constitutions and International Economic Law* (Kluwer Law and Taxation Publishers, Deventer, Boston 1993) 549-551.

¹⁰² *Ibid.*, at 561. Nevertheless, 'external trade measures' referred to here normally do not include trade measures related to non-member countries. The term 'external trade measures' signifies trade measures related to the establishment of common market. It is external trade measures of member states instead of external trade measures of the Community. The ECJ rarely engages in strict scrutiny with proportionality test in respect of external trade measures of the Community.

way, rationality and reasonableness in the decision-making is enhanced. Judicial review is thus an indispensable instrument for the protection of individual rights as well as ‘checks and balances’ of state powers, which applies equally to the field of foreign trade decisions.

2. CONSISTENCY AND COHERENCE

As has been pointed out, standards of review in the international trade decisions present a paradoxical imbalance. Judicial review in the domestic context, with a stronger constitutional setting, seems to act in a more restrained manner than at the international level of the WTO, where the constitutional framework dictating ‘checks and balances’ of powers is much weaker. This paradoxical imbalance results in incoherence and inconsistency which runs counter to the essential goals of legislation, jurisprudence and doctrines in an increasingly globally integrated trading system.¹⁰³ In other words, domestic courts that are situated in established constitutional structures and equipped with strong law enforcing powers, should be able to deal with protectionism more rigorously. With this paradoxical imbalance, a constitutional approach is proposed in pursuit of the consistency and coherence in the world trading system. It is argued that consistent and coherent standards of review both on the domestic and global level necessitate an expansion of constitutional thinking to ‘bring about reasonable inter-linkages of different layers of governance.’¹⁰⁴ With this constitutional thinking, it helps to ‘shape attitudes toward the role of courts in international economic relations and thus of judicial review both at home and regional and global level, reflecting a mutual relationship of domestic and international fora.’¹⁰⁵ It is believed that, in the end, this constitutional thinking will contribute to the consistency and coherence of standards of judicial review at every level, and will address democratic legitimacy of international trade rules in a broader context.¹⁰⁶

In this vein, judicial review plays a pivotal role in these inter-linkages when consistency and coherence is at stake. At the domestic level, national courts are

¹⁰³ T. Cottier and M. Oesch, in T. Cottier, *et al.* (eds.), above n. 52, at 287-306.

¹⁰⁴ *Ibid.*, at 301.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

responsible for ironing out conflicting interpretations and applications between international trade obligations and national laws and regulations. Domestic courts are, from time to time called upon to deal the international trade decisions. Domestic judicial review may base on the national or regional law; it may also base on international law. In any event, what remains undisputed is that the enhancement of consistency and coherence of this world trading system relies much upon the domestic courts. It should also be noted that domestic courts are also bound by their international obligations as the international obligations bind all governmental bodies. Domestic courts are thus obliged to ensure the consistency and coherence of the international trading system being maintained. It is also without doubt that defects of the existing multilevel judicial remedies in this world trading systems lie mainly in domestic courts as they tend to defer to political branches and allow conflicting interpretations and application of international obligations being maintained. Such fragmentation does not only undermine the effectiveness of international trade rules, but it also menaces the legitimacy of domestic courts.

3. INDIVIDUAL RIGHTS/THE ROLE OF INDIVIDUAL ECONOMIC ACTOR

Although the world trading system was established in the form of international agreement, governments being the subjects of the Marrakesh Agreement, it does not necessarily mean that individuals have no space in the scene of this world trading system. As the Panel correctly defines the role of the WTO in *United States – Sections 301-310 of the Trade Act of 1974*, holding that:

The GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals. However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow because of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.¹⁰⁷

¹⁰⁷ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974 (US – Section 301 Trade Act)*, WT/DS152/R, adopted 27 January 2000, paras. 7.71-7.72.

The aim to provide security and predictability in multilateral trade system is to protect the individual operators as ‘the lack of security and predictability affects mostly these individual operators,’¹⁰⁸ since the ‘multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators.’¹⁰⁹ In other words, whereas the WTO agreements address rights and obligations of members, the rights of individuals are thus to be indirectly secured in this ‘integrated, more viable and durable multilateral trading system.’¹¹⁰ As international trade activities are eventually carried out by individual economic actors, including exporters, importers, service suppliers, and intellectual property rights holders, it is the rights and obligations of these individual economic actors in need of protection by a secure and predictable multilateral trading system. As is correctly pointed out, the WTO agreements give individual economic actors an entitlement to various substantive and procedural rights, ranging from intellectual property rights to ‘due process’ requirements in national legal systems.¹¹¹ In addition, in China’s Accession Protocol, the right to trade is clearly defined in Article 5, which provides that ‘such right to trade shall be the right to import and export goods.’¹¹² The availability and scope of the right to trade shall be progressively liberalized, and foreign individuals and enterprises should be treated no less favourably than enterprises and individuals in China. China’s Accession Protocol has further evidenced that rights of individuals are not of no relevance to this multilateral trading system.

It is thus made clear that the individual rights of these individual economic actors are at the heart of this world trading system, and the domestic courts are in a better position to ensure these rights to be fully protected. China’s WTO obligation to establish, or designate, and maintain an independent and impartial judicial review also evidences this need. As is correctly pointed out by Petersmann, domestic courts are a better forum to deal with private trade disputes in light of efficiency, transaction cost,

¹⁰⁸ *Ibid.*, para. 7.76.

¹⁰⁹ *Ibid.*

¹¹⁰ Preamble of Marrakesh Agreement Establishing the World Trade Organization.

¹¹¹ S Charnovitz, in S Charnovitz (ed.), above n. 31, at 377-96.

¹¹² China’s Accession Protocol, Art. 5(1).

or even the promotion of rule of law. Resorting to the intergovernmental WTO Dispute Settlement Mechanism should remain subsidiary. Only when WTO members fail to provide effective judicial review, or when domestic courts ignore their international obligations or misinterpret WTO rules should members refer to the dispute settlement mechanism.¹¹³ As far as private trade disputes are concerned, domestic courts are by no means the best guardian for the rights and interests of these individual economic actors. With a better protection of rights and interests of individual economic actors in domestic courts, the entire world trading system can be made more effective.¹¹⁴ As the experiences of the European Community suggest, free market rules are made much more effective when private actors are allowed to rely upon community rules and to challenge the protectionist national legislation in Community and national courts. The grass-roots enforcement of the GATT/WTO rules in domestic courts will in the same way enhance the effectiveness of the WTO legal system.

D. TWO LEVELS OF JUDICIAL REVIEW IN WTO LAW

Compared to the considerable amount of literature focusing on the WTO Panel/Appellate Body proceedings, discussions concerning judicial remedies in domestic courts appear to be relatively rare. While the negotiation of improvements and clarifications of the DSU is among the issues of the Doha Agenda,¹¹⁵ various proposals attracting a wide academic attention have been submitted in this regard.¹¹⁶ By contrast, judicial review in the domestic level has been continuously put aside. It is understandable why the WTO Panel/Appellate Body proceedings receive more attention as Geneva has become highly politicized, especially since the Seattle

¹¹³ EU Petersmann, 'Multi-level Judicial Trade Governance without Justice? On the Role of Domestic Courts in the WTO Legal and Dispute Settlement System' (2006) EUI Working Paper 2006/44, 19-21. available at <<http://cadmus.iue.it/dspace/bitstream/1814/6432/1/LAW-2006-44.pdf>> (last accessed 23 March 2007).

¹¹⁴ M Hilf, 'The Role of National Courts in International Trade Relations' in EU Petersmann (ed) *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Law International London, The Hague, Boston 1997) 579.

¹¹⁵ Doha Ministerial Declaration, para. 30 (WT/MIN(01)/DEC/1, 20 December 2001).

¹¹⁶ See e.g. contributions to F Ortino and EU Petersmann (eds), *The WTO Dispute Settlement System 1995-2003* (Kluwer Law International London, The Hague, Boston 2004).

Ministerial Meeting. On the other hand, the issue of domestic judicial review remains continuously neglected due to the constraint of sovereignty concerns.

Although domestic judicial review was envisaged by the negotiators of the Uruguay Round, a well-functioning two-level judicial review in the WTO system has yet to be realized. As pointed out by Hilf, there is no institutional linkage between these two levels of judicial protection in the WTO legal system. There is no exhaustion of local remedies rule, national courts are not able to refer cases to the Dispute Settlement Body for preliminary ruling or interpretation, and individuals have no access to this dispute settlement mechanism. Consequently, there is a danger of divergent or conflicting interpretations of the WTO rules.¹¹⁷ It seems that such institutional linkage will not be established in the near future, and such linkage appears undesirable to most WTO members. However, conflicting interpretations and applications of the WTO rules in domestic legal systems should be redressed in order to prevent this world trading system from fragmenting. It is even so when one takes into account the afore-mentioned holding of the Court of Appeal of the United States. There the court arrogantly decides the WTO decisions are not binding on the United States, much less on that court. It is thus proposed that Members should enter into additional commitments:

requiring domestic courts to interpret domestic trade rules (e.g. on customs valuation, antidumping, intellectual property rights) in conformity with the WTO obligations of the country concerned; and

empowering domestic courts to apply specifically agreed, precise and unconditional WTO rules (as provided for in Article XX of the WTO Agreement on Government Procurement) at the request of private plaintiffs vis-à-vis administrative trade restrictions inconsistent with WTO law.¹¹⁸

Hard cases however remain hard, when legislature explicitly derogates the WTO obligations by enacting WTO-inconsistent legislation with clear legislative intention. One should not ignore the constitutional constraint of the domestic courts, which means that such cases will inevitably be referred to the WTO Dispute Settlement

¹¹⁷ M Hilf, in EU Petersmann (ed.), above n. 114, at 571.

¹¹⁸ EU Petersmann, above n. 113, at 21.

Mechanism. It should be therefore, reiterated that domestic courts should provide a primary forum for the settlement of trade disputes, particularly with private trade disputes; only when disputes are beyond the capacity of domestic courts to ‘absorb’ or to ‘resolve’ should they be referred to the WTO Dispute Settlement Mechanism.

III. MORE EFFECTIVE JUDICIAL PROTECTION NEEDED AMONG THE FOUR WTO MEMBERS: AN EVER CLOSER ECONOMIC INTERDEPENDENCE BRINGS ABOUT EVER GROWING TRADE DISPUTES

The above two sections illustrate the importance of the judiciary in the field of external trade relations. This section will further elaborate the particular importance of judicial remedies, both on the domestic and intergovernmental WTO level, in relation to trade disputes among the Four WTO Members. It will be based on the above-established rationale of why courts should engage in judicial review in foreign trade areas more rigorously. However, some special factors related to these four members should be dealt with separately. Apart from rational decision-making, three arguments are offered: to ensure WTO compliance, in particular in China and in Taiwan; to ensure economic autonomy of Hong Kong, China and Macau, China; to fully protection the right to trade in China. Finally, this section will point out the significance of the WTO Dispute Settlement Mechanism in relation to the Four WTO Members, especially China and Taiwan.

A. JUDICIAL REVIEW IN ENSURING RATIONAL DECISION-MAKING

Cross-strait trade between China and Taiwan has long been highly politicized on both the WTO level and the domestic level. The best illustration of this ‘political sensitivity’ in Taiwan’s mindset is the comments made by Taiwan during its first trade policy review in response to China’s questions. Cross-strait relations were referred to as ‘special and complex’, ‘unique and complicated’, and ‘not a simple trade issue’. Therefore, Taiwan ‘had not immediately been able to carry out a comprehensive overhaul of the cross-strait trade and economic regulations.’¹¹⁹ Another good example is the nomenclature of Taiwan in the WTO. During the course

¹¹⁹ WTO, Trade Policy Review of Separate Customs Territories of Taiwan, Penghu, Kinmen, Matsu (WT/TPR/M165 22 September 2006) para. 138.

of this review, the representative of El Salvador referred to Taiwan as ‘Republic of China’. China immediately requested the floor to make a point of order, stating that there was an understanding in the WTO with regard to the nomenclature and titles of officials of Taiwan. That is, Taiwan entered into the WTO as a separate customs territory, not as a State.¹²⁰ The ideology preoccupying the mindset of China is that Taiwan, being a separate customs territory member, should be treated the same as other two separate customs territories, namely, Hong Kong, China and Macau, China. This was reflected in of China’s early communications to Taiwan, which referred Taiwan’s mission as ‘Economic and Trade Office,’ borrowing similar terminology used by missions of Hong Kong, China and Macau, China.

It would be too naïve to believe that such political obsessions do not exist in the mindset of national judges. It should nevertheless be pointed out that, when seeking to make reasoned decision, courts are obliged to justify themselves with appropriate legal basis. This prevents the courts from being unduly influenced by mere irrational political preferences. The neutrality of courts also enables judges to reach decisions in a principled manner, with various, and sometimes conflicting, constitutional rules and principles, laws and regulations being taken into due account. Courts are thus able to balance competing interests and values in an unbiased way.¹²¹ Depoliticization through ‘judicial governance’ contributes to disentangle the complexity of cross-strait trade issue. It should also be stressed that, by providing a good basis for further debates with reasoned decisions, courts are able to enhance the public deliberations in this highly contested issue.

¹²⁰ *Ibid*, para. 94.

¹²¹ It should be carefully noted that competing interests and values here referred to are not limited to trade interests, less to exporter’s trade interests. A recently petition to initiate anti-dumping investigation against print paper from China helps to present these conflicting interests. While the major domestic paper industry favors anti-dumping duty to protect the ‘injured industry,’ another major publisher argues against this initiate, indicating the economic difficulties which small-size publishers are faced with as well as the potential cultural impacts when the publishing industries become even more withered once the production costs surges as a result of the anti-dumping duties. The issue of ‘competing interests and values’ will be further elaborated in Chapter III.

B. JUDICIAL GOVERNANCE IN HONG, CHINA AND MACAO, CHINA TO ENSURE HIGH DEGREE OF AUTONOMY IN ECONOMIC AFFAIRS

Since Hong Kong and Macau were returned to China, these two members have participated in the WTO under the official name of Hong Kong, China and Macau, China. Their status as separate customs territories and their competence to participate in the WTO are explicitly prescribed in the Hong Kong Basic Law (the HKBL) and Macau Basic Law (the MABL).¹²² While it is maintained that Hong Kong, China and Macau, China should enjoy a high degree of autonomy in economic areas, it should be, however, pointed out that these two Basic Laws do not provide exclusive competence for these two Special Administrative Regions (the SARs). Neither is residual competence explicitly attributed to these two SARs, whereas national defence and foreign affairs, as prescribed by these two Basic Laws, fall into the exclusive competence of Central Authority.¹²³ Moreover, the National People's Congress and its Standing Committee shall interpret the Basic Laws when necessary. The interpretations are binding and should be followed by courts in the SARs.

This poses a great threat to economic autonomy in Hong Kong, China and Macau, China as the jurisprudential consistency and coherence in these two SARs might be undermined. So far, three interpretations have been made by the Standing Committee of the National People's Congress; none is directly related to economic or external trade relations. Nonetheless, the practices of interpreting the HKBL have undermined the 'security and predictability' of trade environment when established jurisprudence by the Court of Final Appeal (the CFA) in Hong Kong, China might be altered. These practices may also lead to the limitation of competence of these two SARs in participating in the world trading system. Within this context, courts in these two SARs are of crucial importance in preserving their autonomy in economic affairs even though their situation seems difficult. Put simply, courts are responsible for ensuring that WTO rules are fully respected and implemented in these two SARs, and that the competence of these two SARs in participating in the WTO will not be weakened. As Hong Kong, China and Macau, China, being a free port and

¹²² HKBL, Art. 116; MABL, Art. 112.

¹²³ HKBL, Art. 11, 12; MABL, Art. 13, 14.

maintaining zero-tariff policy, present themselves as highly free economies, it is thus clear that the task of preserving autonomy of these two SARs in economic areas is compelling.¹²⁴

C. JUDICIAL REVIEW TO ENSURE WTO COMPLIANCE

China's capacity and willingness to carry out its WTO obligation was repeatedly questioned long before it entered into the WTO. Consequently, a transitional review mechanism with the mandate to monitor China's implementation efforts was established in the WTO. Apart from this transitional review mechanism, some members also enact national legal instruments to oversee China's implementing efforts and to ensure the conformity with WTO rules. For example, the Congress of the US enacted the US-China Relations Act of 2000, which requires the United States Trade Representative (the USTR), under section 421, to report annually to the Congress on the compliance to China's commitments relating to its accession to the WTO. Both multilateral commitments and any bilateral commitments made to the United States are included. The USTR has subsequently prepared an annual report on China's WTO compliance to Congress since 2002. Apart from this, the US-China Economic and Security Review Commission, created in 2000 under the National Defence Authorization Act of 2001, also reports to the Congress annually. WTO compliance is also one of the highlights of these annual reports.

Among various areas, China's implementation of the TRIPS Agreement is a good illustration of why domestic judicial review is so important to ensure WTO compliance and how effective it can be. Since its accession, China has been forced to strengthen its intellectual property rights protection as this issue is on the spotlight of US-China and EU-China Trade. In response to an agreement between Deputy Premier Wu Yi and the US government at the 15th annual meeting of the US-China Joint Commission on Commerce and Trade, the Supreme People's Court and the People's Supreme Procuratorate jointly issued *An Interpretation on Several Issues of Concrete Application of Laws in Handling Criminal Cases of infringing Intellectual Property*

¹²⁴ This competence issue will be further elaborated in Chapter VIII.

on 22 December 2004.¹²⁵ Besides this, a specialized Chamber focusing intellectual property rights was established within the Supreme People's Court in 1996. Private intellectual property rights holders have long been allowed to seek judicial remedies in the cases of infringements. The intellectual property rights litigations have become the most active area since most intellectual property rights holders are foreign enterprises or individuals. Compared to Chinese individuals and enterprises, they are more willing to refer cases to courts and more experienced in litigations. According to some observers, the *Interpretation* touches upon five main elements:

- (1) lower the numerical thresholds determining the criminal status of infringing acts;
- (2) allow for accomplice liability for importers, exporters, landlords, and others who assist infringers;
- (3) permit goods produced in factories and/or kept in warehouses to be included in sales calculations;
- (4) authorize using the number of illegally duplicated disks or internet advertising revenue to satisfy the for-profit requirement; and
- (5) expand the definition of an infringing trademark.¹²⁶

Another *Interpretation* in relation to criminal cases of infringing intellectual property rights was newly issued on 5 April 2007. This *Interpretation* widens the scope of 'reproduction and distribution' governed in Article 217 of criminal law to include advertising for the sale of copyright-infringing product. It also lowers the thresholds, in terms of illegal copies, redefining 'serious' or 'especially serious' as referred to in article 217 of criminal law. The second *Interpretation* was an effort to prevent the U. S from referring the dispute of enforcement and protection intellectual property to the WTO. These efforts made by Supreme People's Court illustrate their importance in implementing the TRIPS Agreement and protecting intellectual property rights, especially in light of its competence to issue binding and generally applicable interpretations. These efforts so far (forced to) made also reflects the role that other members expect Chinese courts to play: it is through Chinese courts where minimum standards of protection can be ensured.¹²⁷

¹²⁵ An official English version of this interpretation can be downloaded at <<http://www.chinaiprlaw.cn/file/200501234109.html>> (last accessed 14/03/2007).

¹²⁶ B Qiang *et al.*, 'China' (2006) 40 International Lawyer 547, 556.

¹²⁷ The author has argued elsewhere that, the TRIPS Agreement, given its detailed procedural and substantial prescriptions, has transformed Chinese administrative law. During this process of transformation, Chinese courts play a pivotal role. C-H Wu, 'How Does TRIPS Transform Chinese Administrative Law?' (2008) 8 Global Jurist, available at: <http://www.bepress.com/gj/vol8/iss1/art6>

It is of equal importance that Taiwan's WTO compliance be ensured through effective judicial review in the foreign trade measures. As indicated in the Secretariat Report during its Trade Policy Review, Taiwan 'prohibits inbound cross-strait trade involving some 2,200 tariff lines,¹²⁸ and cross-strait trade can only be made by indirect shipment through a third port, usually Hong Kong, China.'¹²⁹ With regard to cross-strait direct investment, 'little inbound investment has been allowed, and outbound investment, if not prohibited, requires the approval of the relevant Chinese Taipei authorities.'¹³⁰ These measures apparently contradict the principle of Most-Favoured-Nation Treatment, one of the fundamental non-discriminatory rules of the WTO. Cross-strait trade is one of the most contested issues in Taiwan's politics, and it is believed that views will remain divided. The contested nature of this issue would remain unchanged even when the President Chen Shuai-ben, who has long seen China's emergence as a great trading power as a threat, and thus advocated the imposition of restrictive measures toward cross-strait trade to be imposed, finishes his term in 2008.

Against this background, courts play a pivotal role in enforcing Taiwan's WTO obligations and ensuring WTO compliance in Taiwan's legal system. Faced with these restrictions of cross-strait trade, it is of crucial importance for domestic courts to allow individual economic actors to challenge these WTO inconsistent laws and regulations, and to bring about a substantial progress of liberalization in cross-strait trade. Nevertheless, WTO compliance is not identical to trade liberalization, as conflicting values, such as public morals, human, animal, or plant life or health and the conservation of exhaustible natural resources, are explicitly referred to in the general exceptions, while security exception is also another example. The hard case presented to Taiwanese courts here is to balance competing interests and values even when national security is at stake.

¹²⁸ WTO, Trade Policy Review Secretariat Report, WT/TPR/S/165 (16 May 2006) at 14.

¹²⁹ *Ibid*, at 40.

¹³⁰ *Ibid*, at 17.

D. INDEPENDENT AND IMPARTIAL JUDICIAL REVIEW TO ENSURE FULL PROTECTION OF RIGHT TO TRADE IN CHINA

As previously noted, the obligations to provide an independent and impartial judicial review and to protect right to trade as embodied in China's Accession Protocol are atypical. These two obligations indicate that members are attached to the idea that, with an independent and impartial judicial review in place where individual economic actors can claim the right to trade, as explicitly conferred to them by the accession protocol, China's WTO obligations can be more effectively implemented. Members realize that effective enforcement of China's WTO obligations should not rely solely upon the faithful implementations of Chinese governments. It is essential to allow individuals to challenge WTO inconsistent measures in domestic courts.¹³¹

These two obligations appear even more critical in light of the fact that the judiciary in China is often identified with corruption, lack of independence, and as subject to interference, and that human rights are rarely respected. For example, some literature has argued that the judicial independence and the protection offered by the judiciary are still very limited due to the interference, caseloads, and high withdrawal rates.¹³² China's records in human rights protection are continuously notorious, even though it ratified the Economic, Social and Cultural Rights Covenant in 2001 and explicitly, in its 2004 constitutional amendment recognizes the inviolability of private property rights are inviolable and should be protected.¹³³ In economic activities, various restrictions persist. It cannot really be said that economic freedom and trading rights are effectively protected. Therefore, it should also be made clear that these two prerequisite elements, an independent and impartial judicial review and right to trade, remain at the hands of national government. The establishment of an independent and impartial judicial review and the trade to trade of individual actors can only occur once China's implementation measures are in place. The crucial issue behind this is then how to ensure that these two obligations are fully implemented, and how to

¹³¹ This issue will be further dealt with in Chapter V.

¹³² VM Hung, 'China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform' (2004) 52 *American Journal of Comparative Law* 77, 82-89.

¹³³ China's Constitution, Art. 13.

evaluate whether judicial review in China is independent and impartial and whether right to trade in China is fully protected, or not.

E. THE IMPORTANCE OF WTO DISPUTE SETTLEMENT MECHANISM

With two levels of judicial remedies presented above, trade disputes would inevitably come to Geneva when they are beyond the capacity of domestic courts. Some examples help to illustrate the significance of the WTO Dispute Settlement Mechanism to the Four WTO Members, especially to China and Taiwan. It is clear that domestic courts are still governed by constitutional constraints. They are obliged to respect their international obligations; however, they are also obliged to observe their constitutional rules and principles. When one is in conflict with the other, it becomes unfeasible and impractical to refer these disputes to domestic courts. Further, to force China to implement its WTO obligation to provide an independent and impartial judicial review in a meaningful way depends much upon the pressure of other WTO members, as well as potential challenges in the dispute settlement mechanism.

With regard to cross-strait trade, how China and Taiwan would avail themselves of this WTO Dispute Settlement Mechanism when they acceded to the WTO was highly uncertain and much disputed. Nevertheless, five years after the accessions, it seems a bit clearer. Even if it is argued that Taiwan, being a member in the WTO, does not alter its status as separate custom territory, and not a State,¹³⁴ and China should feel secured in terms of 'sovereignty concerns,' it is commonly believed that China is unlikely to lodge a complaint against Taiwan in the WTO. This seems a firm and settled position of China not to refer to the WTO Dispute Settlement Mechanism when Taiwan trade relations are at stake. It was expected that, particularly by Chinese trade officials and lawyers, Taiwan would jump into the WTO Dispute Settlement Mechanism in order to show that it has a different identity from China. However, Taiwan, on the contrary, has taken a cautious approach in dealing cross-strait issue in this dispute settlement mechanism. As will be seen in Chapter VII, Taiwan availed

¹³⁴ See *e.g.*, Q Kong, 'Can the WTO Dispute Settlement Mechanism Resolve the Trade Disputes Between China and Taiwan?' (2002) 5 *Journal of International Economic Law* 747, 756-757.

this mechanism by joint-consultation and intervention as a third party, which helps both Taiwan and China to get prepared to deal with cross-strait disputes in the WTO Dispute Settlement Mechanism.¹³⁵

IV. SHORT CONCLUSION

This Chapter has illustrated the ‘ever closer economic interdependence’ among these four members, and presented several trade measures taken in domestic law, and existent practices among the four WTO Members. Based on these factual studies, this Chapter argues that strengthened judicial review is desirable and necessary. To clarify this need, this Chapter firstly examines the implementation acts of Uruguay Round Agreements in the United States and the European Community, and examines the jurisprudence of courts in these two members. The ineffectiveness of domestic judicial protection in international trade relations is thus made clear. This Chapter then justifies its claim for a further strengthened judicial review on three grounds: judicial legitimacy in intervening in this field; consistency and coherence; and the protection of rights of individual economic actors. This Chapter then goes on to argue that a strengthened judicial review is of even greater importance for the Four WTO Members for the following reasons: to ensure rational decision-making; to ensure economic autonomy in Hong Kong, China and Macau, China; to ensure WTO compliance; and to maintain an independent and impartial judicial review to ensure fuller protection of right to trade in China. This Chapter then presents the significance of the WTO Dispute Settlement Mechanism in the WTO for the Four WTO Members, in particular for Taiwan and China. However, how to resolve hard cases remains unanswered. A good example of these hard cases would be the dilemma of courts in Taiwan when they are called upon to balance with Taiwan’s WTO obligations and its national security concerns. This answer depends how judges perceive their international obligations and how they perceive their constitutional obligations, and most importantly, how they perceive their role as ‘judges.’ This question will be further addressed in Chapter III, and the hard case of Taiwanese courts will be resolved in Chapter VI.

¹³⁵ The cross-strait issue in the WTO Dispute Settlement Mechanism will be dealt with in Chapter VII.

CHAPTER III JUDICIAL GOVERNANCE IN EXTERNAL TRADE AND ITS IMPLICATION TO THE FOUR WTO MEMBERS

I. INTRODUCTION

This Chapter aims to clarify the methodology employed in this dissertation. It will deal with three main issues: my perception of WTO law, the role of judges in international trade (including the WTO Appellate Body members and judges in domestic courts), and the role of individual economic actors in this world trading system. I will also illustrate why such approach is justified or even indispensable in dealing with trade disputes among the Four WTO Members. Before engaging analysis of the approach taken to deal with my research question, a framework outlining where my approach is located in current debates in relation to these afore-mentioned issues appears helpful. Thus, before developing my methodological approach, I will firstly point to major issues underlying in the debates on the WTO. To this author, three issues are most relevant: legitimacy, constitutionalism and human rights. Based on these three elements, I will illustrate the role of judicial governance and individual economic actors. It should be, nevertheless noted that it is not feasible, and not possible, to devote myself to these debates in a comprehensive and detailed manner. This framework serves as the main basis on which my methodology is built. The literature referred to here is thus selective; arguments are presented only to the extent necessary for the shaping and formulating of my own methodological approach. As previously noted, the debates relate mainly to legitimacy, constitutionalism and human rights. My methodology stems from the role of judicial governance in the field of external trade measures, in particular in relation to its significance to individual economic actors. I develop my methodology on judicial governance among the Four WTO Members based on the significance of right to trade, national constitutions and Basic Laws in the processes of constitutionalization of external trade relations therein. I also illustrate how the WTO Agreement or their WTO memberships can act as a pre-commitment to these four members. Finally, I argue that judicial governance in external trade relation among the Four WTO Members is an essential and indispensable element for legal and economic integration therein. As presented above, this Chapter will thus start with exploration of these controversial debates, and then

present my approach, and finally concludes with the justification for the approach taken.

II. THE CURRENT DEBATES: LEGITIMACY, CONSTITUTIONALISM, AND HUMAN RIGHTS

Three interrelated issues have dominated current debates in relation to the WTO: legitimacy, constitutionalism, and human rights. Constitutional approach toward WTO law can be read as an effort to resolve the ‘legitimacy deficit’ of the WTO, while, at the same time, it is also argued that there is no solid legitimacy foundation to build up with constitutionalism in the WTO.¹ Although some literature engages to bring human rights dimensions/non-trade concerns into the realm of the WTO with the aim to legitimizing the WTO as an ever-bourgeoning regulatory regime, it is also contended that, without enough ‘input legitimacy’ to feed this aggrandizing system, the WTO should refrain from encroaching into the fields of labour standards, environment, and human rights.² The WTO should substantially defer to other institutional regimes as well as domestic regulatory diversity. Observing that global and international norms, precisely WTO laws and rules in this dissertation, have penetrated into domestic legal systems, some argue that a form of global administrative law, emphasizing the procedural due process of law aspect, has been emerging.³ Meanwhile, it is also argued that a solely procedural understanding is insufficient. A holistic approach, including the economic rights and social rights, procedural and substantial, referred to as global integration law, would be feasible and necessary.⁴

¹ See, e.g., M Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' (2001) 35 *Journal of World Trade* 167.

² *Ibid*, at 168-169, 183, 186.

³ See e.g., N Krisch and B Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1; B Kingsbury, *et al.*, 'The Emergence of Global Administrative Law' (2004-2005) 68 *Law and Contemporary Problems* 15.

⁴ See, e.g., EU Petersmann, 'From Negative to Positive Integration in the WTO: The TRIPS Agreement and the WTO Constitution' in T Cottier and PC Mavroidis (eds) *Intellectual Property: Trade, Competition, and Sustainable Development* (The University of Michigan Press, Ann Arbor, Mich. 2003) 27. See also, EU Petersmann, 'Time for United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621.

This points to a fundamental issue: the definition of the WTO and the nature of WTO law. How to define the role of the WTO and the nature of WTO law has never been an easy task. It is not only disputed between developed and developing countries, but it is also debated among the academic field. What the WTO/WTO law is should nevertheless be distinguished from what the WTO/WTO law should be. These two questions should also not be confused with what the WTO/WTO law can be. While constitutionalization of the WTO has been widely used in order to describe some significant changes it has undergone, and has been constantly proposed to tackle the 'legitimacy deficit' of the WTO, some trade law scholars and most trade experts remain doubtful and argue that constitutionalizing the WTO is a step too far.⁵ In other words, the departing point of the perception of the WTO and the definition of WTO law has already differed. There is also a great difference on the direction toward which the WTO should move. Given the difference on the perception of the WTO and the definition of WTO law, views on the competence and capacity of the WTO thus diverge. In this Section, I will deal with the current debates that attract most of the attention of the members of the WTO and the academic fields. As noted above, three issues will be touched upon: legitimacy, constitutionalism and human rights. This Section finally explores the role of judicial governance and individual economic actors in this world trading system.

A. DEMOCRATIC LEGITIMACY AND BEYOND

Bacchus, the former chairperson of the Appellate Body, argues that the 'legitimacy deficit' of the WTO results from misunderstanding of the WTO. More precisely, he argues that the legitimacy of the WTO derives from members of the WTO and cannot be separated from the individual legitimacy of its members. The WTO is 'a mutual effort by individual states to assert and to sustain their sovereignty in an effective way in confronting the many challenges that face individual states in an increasingly globalized economy'.⁶ Democratic governance in the WTO relies

⁵ See, e.g., R Howse and K Nicolaidis, 'Legitimacy through "Higher Law"? Why Constitutionalizing the WTO Is a Step Too Far?' in T Cottier and PC Mavroidis (eds) *The Role of the Judge in International Trade Regulation* (The University of Michigan Press, Ann Arbor, Mich. 2003) 307-348.

⁶ J Bacchus, 'A Few Thoughts on Legitimacy, Democracy, and the WTO' in EU Petersmann (ed) *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press, Oxford 2005) 431.

upon the democratic governance of members of the WTO since the WTO is merely a place for delegates of members to make decisions in Geneva.⁷

At first glance, this argument looks sound and appealing. Nevertheless, one might hesitate when the controversies of sovereignty issues during the processes of treaty ratification, the wide-ranging WTO rules and their impact on domestic legal systems come into his/her mind. Bacchus' comment is mainly based on the experience of the United States where the Congress has strong oversight on the executive branch during the process of negotiation. The Congress also controlled the result of negotiations not only by means of treaty ratification or approval,⁸ but also through the passage of implementation acts. However, the US model is not typical, if not unique.⁹ Except the case of the United States, legislative oversight and participation during the course of negotiations in other members were actually rare, if not absent. The parliamentary approval after the deal was done might eventually turn out to be a rubber stamp. It is also difficult to imagine that, in particular for those small and weak members, the parliaments would risk of rejecting the whole deal. Consequently, the executive branches dominated and determined the result of the negotiations. In light of this, while one might be tempted to imagine a democratic legitimacy of the WTO stemming from individual members, this seems not to be the real world in which we are situated. If the argument of Bacchus is unfounded, then we will have to figure out an alternative.

Legitimacy in the WTO can be delicately separated into two dimensions. One is related to whether WTO law is sufficiently underpinned by (democratic) consent from

⁷ *Ibid.*

⁸ It should however be noted the WTO agreement was not ratified as treaty, congressional-executive agreement instead. For the constitutionality of congressional-executive agreement, see, e.g., JC Yoo, 'Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements' (2001) 99 *Michigan Law Review* 757. See, also B Ackerman and D Golove, 'Is NAFTA Constitutional?' (1995) 108 *Harvard Law Review* 799. For an overview of congressional-executive agreement, see J. J. Grimmett, 'Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than Treaties?' CRS Report for Congress 97-856 (updated 8 February 2005) 1-6, available at <http://openocrs.cdt.org/rpts/97-896_20050208.pdf> (last accessed 15 May 2007).

⁹ For national practices of parliamentary oversight of foreign trade negotiations, see the contributions of G. Shaffer, D. Skaggs, M. Hilf, and E. Mann to EU Petersmann (ed) *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press, Oxford 2005) 381-428.

its members;¹⁰ the other relates to the institutional legitimacy for the WTO to trespass trade issues, and thus to cover various non-economic concerns. Appealing the legitimacy of WTO law solely from the consent of its members, legislative consent in the case of western democracies, suffers from some weaknesses. One is that, in most cases, legislature is unable to control the executive due to the information asymmetries. Besides, the agent (negotiators) does not always represent interests of principal (legislature, and eventually the people) because of difference in interests.¹¹ The control is weak both in terms of ex ante and ex post control. Legislature is not able to lay down the mandate to negotiate in a detailed and comprehensive manner. It is also not feasible to do so since a detailed and comprehensive negotiation mandate prevents negotiators from flexibly engaging into the negotiation and makes it difficult for negotiators to reach a compromise. The ex post scrutiny is also weak as the cost to opt out from this world trading system is simply too high. States cannot afford to leave it.¹² The legislative approval, compared to this time-consuming negotiating process, is recklessly quick. It cannot provoke substantial and meaningful deliberation to legitimize the decision. This weak control gives rise to additional agency cost, as legislature, being ill informed of negotiation processes might act differently in making decisions than they were full aware of the whole circumstances. Agents without sufficient control in place might also be tempted to substitute their own perceptions and values for those of the principals.¹³

Another weakness is the capacity of least developed countries members (the LDC members) to sustain a substantial and meaningful consent. The LDC members, when faced with other economic giants, have weak bargain powers and are left with little or no margin of negotiations. A stricter scrutiny from domestic legislature appears even more difficult in terms of capacity and the price that they have to pay

¹⁰ R Howse, 'How to Begin to Think About the 'Democratic Deficit' at the WTO?' in S Griller (ed) *International Economic Governance and Non-Economic Concerns* (Springer-Verlag Wien, New York 2003) 81.

¹¹ *Ibid.*, at 82.

¹² JHH Weiler and I Motoc, 'Taking Democracy Seriously: The Normative Challenges to the International Legal System' in S Griller (ed) *International Economic Governance and Non-Economic Concerns* (Springer-Verlag, Wien, New York 2003) 66.

¹³ R. Howse, in S. Griller (ed.), above n. 10, at 83.

for.¹⁴ How to ensure the LDC members' substantial and meaningful participation is a key element when one addresses legitimacy issues of the WTO. As argued, this 'member-driven' approach has long disregarded the lack of democracy, rule of law, and unnecessary poverty in many LDC members. It has also substantially undermined legitimacy and effectiveness of the WTO,¹⁵ and therefore, needs to be redressed in shaping 'an integrated, more viable and durable multilateral trading system.'

The second issue of the 'legitimacy deficit' in the WTO, as previously noted, relates to its wide-ranging scope and its potential encroachment into non-economic areas, such as environmental protection and human rights. As WTO law penetrates deeply into those subject matters that were originally the exclusive province of the national or sub-national governments, critics surge with regard to the legitimacy of the WTO in dealing with these issues.¹⁶ This penetration can be registered especially in those areas of the GATS, TPT Agreement, SPS Agreement, and TRIPS Agreement. Doubts and fears are exacerbated with the compulsory jurisdiction of the WTO Dispute Settlement Mechanism in the WTO to which critics refer as a closed, no-democratic, bureaucratic and supra-national entity. Such criticism derives their suspicion and distrust of the capacity and credibility of the WTO in dealing with non-economic matters. To them, the WO is simply the wrong forum.¹⁷

Enhancing transparency in the decision-making of the WTO and making it more LDC-inclusive is certainly a quick response to these critics. Allowing *Amicus Curiae* submissions in the dispute settlement proceedings is regarded as an important step forward to increase transparency, and thus to enhance legitimacy of the WTO Dispute Settlement Mechanism. Allowing non-governmental organization to participate and to

¹⁴ J. H. H. Weiler and I. Motoc, in S. Griller (ed.), above n. 12, at 65.

¹⁵ EU Petersmann, 'Addressing the Institutional Challenges to the WTO in the New Millennium: A Long-term Perspective' (2005) 8 *Journal of International Economic Law* 647, 654. See also, EU Petersmann, 'Human Rights and International Trade Law: Defining and Connecting the Two Fields' in T Cottier, et al. (eds) *Human Rights and International Trade* (Oxford University Press, Oxford 2006) 80-82.

¹⁶ DP Steger, 'The Challenges to the Legitimacy of the WTO' in S Charnovitz, et al. (eds) *Law in the Service of Human Dignity* (Cambridge University Press, Cambridge 2005) 202.

¹⁷ It would be very interesting to note that, in a lecture delivered in the European University Institute, Dr. Elisabetta Righini, a legal advisor of European Union in the GMO case, mentioned that EC, during the panel procedure, had made the statement that the WTO was not the appropriate forum to deal with this issue, and it was regretful that the US had brought this case to it.

get more involved in shaping WTO law and policy is also a major effort to make WTO decision-making more transparent, better understood, and thus gain more support from the civil society.¹⁸ Inter-parliamentary meetings in Ministerial Conference is also another effort to enhance the democratic legitimacy in WTO decision-making. However, there exist diverse and conflicting attitudes toward this meeting. Compared to the enthusiasm of European Parliament, American Congressmen appear lukewarm. They would rather focus on domestic politics and harness the negotiation through oversight of executive agencies than participate in this inter-parliamentarian meeting. They perceive this meeting as weakening instead of strengthening their influences. This meeting may also burden developing members, in terms of both financial and human resources.¹⁹ In addition, views about whether or how to institutionalize this inter-parliamentarian meeting are far from settled. Even in the current form, some problems persist. As this inter-parliamentarian meeting is co-organized by International Parliamentary Union (IPU) and European Parliament, who is eligible to participate in this meeting may be subject to dispute due to the inconsistency of the memberships between the IPU and the WTO. For example, Iran is not a member of the WTO, but a member of the IPU. Taiwan is member of the WTO, but not a member of the IPU. While Iran occasionally participates in this meeting, Taiwan was not invited to the inter-parliamentarian meeting during Hong Kong Ministerial Conference.²⁰ Nevertheless, apart from these quick responses, some other normative premises need to be established.²¹ Different approaches are taken in

¹⁸ It should however be noted that a widespread view among developing countries is that, as most powerful and resource-rich NGOs are situated in developed countries, increasing the influence of NGOs in the WTO inevitably result in detrimental impacts to developing countries. It was also contended that the friend of the court is not the friend of developing countries. See, JA Lacarte, 'Transparency, Public Debate, and Participation by NGOs' in EU Petersmann (ed) *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press, Oxford 2005) 449.

¹⁹ G Shaffer, 'Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contexts' in EU Petersmann (ed) *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press, Oxford 2005) 391-401.

²⁰ E Mann, 'A Parliamentary Dimension to the WTO: More than Just a Vision' in EU Petersmann (ed) *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press, Oxford 2005) 426.

²¹ Parliamentarians and NGOs are perceived as important elements to enhance external transparency of the WTO by widening the scope of the participation, and thus to win better support of civil society. Based on this reasoning, the WTO cosmopolitics is proposed. See, e.g. S Charnovitz, 'The WTO and Cosmopolitics' in EU Petersmann (ed) *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press, Oxford 2005) 437-445; S Charnovitz, 'The WTO Cosmopolitics' (2002) 34 *New York University Journal of International Law and Politics* 299.

order to address this legitimacy issue. One of the most influencing and controversial approaches relates to the WTO constitutionalism.

B. IS CONSTITUTIONAL UNDERSTANDING OF WTO LAW INDISPENSABLE OR DOES IT HELP?

In contrast to this understanding of the WTO as a ‘mutual effort’, literature on the constitutionalization of the WTO, constitutionalism in the WTO or the constitutional function of the WTO also abounds. Various dimensions of constitutionalism in the WTO have been explored. The constitutional understanding of WTO law is seen as an effort to lessen the threat to national legitimacy that is traditionally generated from domestic legislative procedures. This threat stems from the great impact of WTO law and the WTO Panel/Appellate Body reports upon national legitimacy.²² An easy though confusing, at the same time, characterization this threat may be termed as ‘the erosion of national sovereignty’. Scholarship focusing on structural aspects of the WTO pays attention to allocation of powers vertically between members and the WTO and horizontally between various bodies of the WTO – the governing bodies, Councils, and the Dispute Settlement Mechanism. The term ‘WTO Constitution’ is employed in a sense that this constitution defines a particular system of governing rules with the aim to clarifying the institutional architecture of this organization. A clearly defined institutional architecture is of crucial importance as the WTO is shaping world economics and influencing non-economic goals, including vital issues of peacekeeping in the world.²³ Building on this allocation of powers analysis and being aware of great impacts of globalization and the inability of states to deal with it, Jackson argues that international economics in a globalized world needs an appropriate international institution. According to him, the market will not work unless there are effective

See also the speech to London School of Economic on 1 February 2001 by Pascal Lamy, the former EC trade commissioner, now the WTO Directorate General, 'Harnessing globalization. Do We Need Cosmopolitics?' available at <http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_119391.pdf> (last accessed 11/4/2007).

²² A von Bogdandy, 'Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization' in S Griller (ed) *International Economic Governance and Non-Economic Concerns* (Springer-Verlag, Wien, New York 2003) 105-120.

²³ JH Jackson, *The World Trading Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs, London 1998) 102-103.

human institutions to provide a sound framework underlying a well-functioning global economic market. The WTO is one of the appropriate places to deal with this framework. In order to succeed with this task, the WTO should fix several constitutional flaws, namely, its over-emphasis on reciprocity, sovereignty, and the interests of producers. Institutionally, the WTO relies too much on consensus-based decision-making and relatively lacks of openness.²⁴

Out of the same concern of allocation of powers, mainly the vertical one, Cottier proposes a theory of five-storey house that is specifically designated for, but not limited to, the Swiss constitution. In his five-storey house, regional level, notably the EU and its treaties,²⁵ and global level, particularly the WTO and the Bretton Woods institutions, should be added into the original Swiss constitutional framework of communes, the cantons or sub-federal entities, and the federal structure. He argues that, as regional and global regulatory powers have increasingly aggrandized, regional and global integration will significantly reshape the role and function of national constitution. Besides, these regulatory measures by regional or global integration laws need to be complemented or implemented by national measures. This process of reformulation might shift and upset the existent balance of traditional constitutional patterns, as the distinction of federal and sub-federal tasks is being eroded in terms of the fulfilment of regional and global obligations.²⁶ A broader constitutional concept, extending from national level to regional and global level, is thus proposed in order to fix this problem. For these five levels, powers and responsibilities should be allocated to the most appropriate level. A domain may be, at the same time, regulated by different levels.²⁷ A framework on the global level should be capable of taking into account and reasonably balancing a wide range of competing interests, including the vertical balance of powers in different levels. A constitutional understanding is

²⁴ JH Jackson, 'Sovereignty, Subsidiarity, and Separation of Powers' in DLM Kennedy and JD Southwick (eds) *The Political Economy of international Trade Law: Essays in Honor of Robert E Hudec* (Cambridge University Press, Cambridge 2002) 28-31.

²⁵ Although Switzerland is not a member of the European Union, the impact of EU law on Swiss legal system cannot be neglected.

²⁶ T Cottier, 'Reforming the Swiss Federal Constitution: An International Lawyer's Perspective' in M Butler, et al. (eds) *The Making of Modern Switzerland: 1848 - 1998* (St. Martin's Press, New York 2000) 80-87.

²⁷ *Ibid*, at 91.

essential for the establishment of this framework and subsequently for the balance of powers. In addition, only with such constitutional understanding can this framework also take into account and balance horizontal competing interests in different subject matters, notably non-economic concerns.²⁸

It is thus argued that the constitutionalism in the WTO is primarily a matter of attitudes and perceptions of existing instruments and their proper role and function. These attitudes and perceptions influence firstly interpretations and applications of existing instruments, and subsequently the shape of these instruments. This constitutionalism in the WTO enables existent instruments to include positive standards in various fields, such as environmental and labour standards. It will finally address the issue of legitimacy of policy goals in the WTO since rule-making and standard-setting in the global level has expanded exponentially and a higher degree of acceptance is needed. It is thus essential to strike a balance between governments at different levels and to bring producers, consumers, and public good interests into this policy-making process. A constitutional understanding is therefore, indispensable in addressing this constitutional problem of global governance.²⁹

Similar concerns are also indicated by Petersmann, albeit from a different perspective from Cottier's, and much different from that of Jackson. In respect of the institutional architecture, he emphasizes the importance of the WTO Dispute Settlement Mechanism. In response to the 'institutional imbalance' between the consensus-based decision-making body and the WTO Dispute Settlement Mechanism, Petersmann observes that, compared to the consensus 'member-driven' political governance, the dispute settlement function of this (quasi-)judicial branch inevitably acts more quickly and smoothly. However, the political and judicial governance in the WTO has offered a positive synergy, as the WTO Panel/Appellate Body reports have to be adopted by the political Dispute Settlement Body (the DSB). An 'institutional imbalance' in the WTO does not exist. Besides, the dispute settlement proceedings and their future legalization and judicialization remain 'member-driven'. Whether or

²⁸ T Cottier, 'Limits to the International Trade: the Constitutional Challenge'[2000] American Society of International Law Proceedings 220, 221.

²⁹ *Ibid.*, at 222.

not to initiate the WTO Panel/Appellate Body proceedings or other arbitration procedures still depends on member's choice. How to further legalize and judicialize these procedures are subject to future negotiations by members. In addition, the adoption of numerous Panel/Appellate Body reports and Arbitration reports by the DSB has placed a great pressure for the political branches to assume their political responsibilities to clarify existent WTO rules and to ensure the progressive development of the WTO.³⁰ With their gradually developed jurisprudence, the WTO Panel/Appellate Body have not only clarified 'due process of law' and balanced rights and obligations of WTO members, but they have also continuously showed due respect to rule of law and the basic principles and objectives underlying in this multilateral trading system.³¹ Owing to the synergy of the political and judicial branches, the legitimacy of the WTO in trade governance is highly enhanced. The ever-evolving WTO Dispute Settlement Mechanism has transformed the member-driven 'GATT 1947 bicycle' into a 'WTO tricycle.'³²

Petersmann's constitutional approach to the WTO comprises several features. To begin with, the WTO Agreement should be read as a constitutional instrument. Based on this understanding, WTO law should not be interpreted in purely economic terms since the legal and political objectives of the WTO are no less important than trade liberalizations. According to him, the WTO Agreement employs not only formal techniques ('constitutional methods'), but it also includes various substantive principles (constitutional principles). These constitutional methods and constitutional principles are characteristics of constitutionalism. WTO law can thus be conceived a part of multilevel constitutional framework in multilevel trade governance. In his view, WTO law uses three formal techniques of constitutional methods: (1) the distinction of long term constitutional rules and post-constitutional decision making;

³⁰ EU Petersmann, 'From 'Member-Driven Governance' to Constitutionally Limited 'Multi-Level Trade Governance' in the WTO' in G Sacerdoti, *et al.* (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, Cambridge 2006) 98.

³¹ What are these principles and objectives underlying in this multilateral trading system is controversial and contested. How one defines these principles and objectives determines how one perceives the WTO.

³² Petersmann, in G. Sacerdoti, *et al.* (eds.), above n. 30, at 109-110. Petersmann goes further to argue that a four-wheel vehicle should be built by empowering the Director-General to act as guardian of the collective interests and to ensure that this world trading system takes into account not only economic interests, less than producers' interests, but also consumers' interests as well as the social justice.

(2) the legal primacy of the WTO Agreement over conflicting provisions in the Multilateral Trade Agreements annexed the WTO Agreement; and (3) protection of freedom of trade, Most-Favoured-Nation Treatment, National Treatment, private property rights and rule of law subject to broad exceptions to protect public interests. He also argues that four substantive constitutional principles are included in WTO law: rule of international law, the respect of universal human rights obligations of WTO members, separation of powers and the concern of social justice.³³ As far as the multilevel governance is concerned, the 'WTO' Treaty Constitution' complements with national constitutions as national governments, in such a globally interdependent world, are not capable of allocating the international division of labour, providing basic needs, and protecting global public interests. Besides, This WTO Treaty Constitution can also help to set up multilevel restraints, preventing human rights of citizens from being abused by government powers.³⁴ With this multilevel constitutionalism in place, trade governance can be duly decentralized to appropriate corresponding levels where Most-Favoured-Nation Treatment, National Treatment, private property rights, protection of freedom of trade, and rule of law are constitutionally safeguarded. This multilevel constitutionalism will also require national legal order to show due respect to WTO law, particularly dictating stricter compliance to the WTO rules and more effective judicial protection in domestic courts.

These three constitutional approaches originate from the same observation of this ever globalizing/globalized world, where one single state is not able to handle with various complicated trade and trade-related issues. Besides, trade and trade related measures taken by one state may have great extraterritorial impact.³⁵ They may adversely affect foreign countries, foreign individuals and enterprises. Cooperation between states by contractual agreements appears inefficient and ineffective, and thus demands the establishment of an institutionalized organization to deal with these

³³ EU Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism' in C Joerges and EU Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, Oxford and Portland, Oregon 2006) 32-33.

³⁴ *Ibid.*, at 35.

³⁵ An illustrative example is the *US – Shrimps* case, see further subsection C.

issues. However, this institutionalized organization with great regulatory powers has been continuously questioned by its 'legitimacy deficit,' in terms of its competence covering wide-ranging areas and the penetrating effect of its regulatory decisions. An approach focusing on the institutional feature, notably, the horizontal allocation of powers is thus proposed by Jackson to deal with this 'legitimacy deficit.' His 'WTO Constitution' emphasizes on institutional aspects of this world trading system. Cottier also takes his departing point from the allocation of powers, but he concerns mainly the vertical one. He emphasizes how these global norms come into domestic constitutional legal order, and thus argues a constitutional understanding is necessary to ensure consistency and coherence between the international legal order and domestic constitutional legal order. Powers and responsibilities can also be allocated to the most appropriate level where competing values and interests can be taken into due account. Petersmann's effort aims to empower individuals to protect themselves against arbitrary protectionist interventions of domestic governments. WTO law can thus serve as weapons to wield against these interventions. According to Petersmann, to allow individuals to challenge WTO-inconsistent domestic measures is the best way to make these WTO rules effective. These WTO rules are not limited to trade concerns. Effective implementation of these WTO rules can also bring about rule of law, protection of human rights, and realization of social justice.³⁶

Nevertheless, such constitutional understanding of WTO law, both Cottier's five-storey house and Petersmann's multi-level constitutionalism, attracts severe critics mostly from (north) American and Australian academics. Howse and Nicolaidis refer to the constitutionalism in the WTO as a fallacy. They argue that, while constitutionalism normally means principles not policies, and rights not interests, libertarian version of constitutionalism in the WTO has reduced human rights to individual economic rights. According to Howse and Nicolaidis, the crucial question here is why states would protect individual economic rights internationally while those rights are not protected at the domestic level. In this vein, two relevant

³⁶ For further examination and critics of Jackson's and Petersmann's (as well as Weiler's) arguments in relation to the constitutionalization of the WTO, See, DZ Cass, *The Constitutionalization of the World Trade Organization* (International Economic Law Series, Oxford University Press, Oxford 2005).

dimensions should be made clear: the conditions of hand-tying/pre-commitment and the sources of individual economic rights. Petersmann argues that rational decision-makers that act in the public interests can enter into pre-commitments internationally for long-term interests. These pre-commitments help them to resist the temptation of short-term interests domestically, in particular against the protectionism rent-seeking. However, it is quite a different picture to Howse and Nicolaidis about what is in the mind of the decision-makers when they enter into these pre-commitments. They actually aim to tie the hand of their domestic political opponents when their opponents come to power. Such hand-tying appears problematic as WTO law do not have the same solid democratic foundations as domestic constitutional pre-commitments, such as referendum, super-majority, etc. Such concerns were exacerbated, as the WTO, compared to the GATT covers various new rules with social welfare effects, ranging from intellectual property rights to food safety. Besides, hand-tying should not be the sole solution to protect economic rights. According to Howse and Nicolaidis, domestic interventionism does not necessarily arise from rent-seeking of interests groups and does not always lead to protectionism. They also argue that Petersmann's constant emphasis on the individual economic rights is a misreading of the European experiences. The key to European success is the balance between two needs: the need of the stability in its constitutional rules and the need for flexible adjustment in its political system. Over-emphasis on the constitutionalization of the European experiences has prevented Petersmann from appreciating the major role of political compromise in shaping European integration.³⁷

Howse and Nicolaidis also reject Cottier's constitutional interpretation of WTO law as global law in a five-storey house. They argue that judicial transformation of the treaty law into constitutional law, through the doctrine of direct effect, has no comparable basis in WTO law. The cooperation of the European Court of Justice (the ECJ) and national courts in shaping this process of constitutionalization does not exist at WTO level. Furthermore, 'legitimacy deficit' will not be remedied, but worsened, if the constitutionalization in the WTO is to be driven by the WTO Appellate Body. The sources of legitimacy to underpin a constitutional status of the WTO Appellate Body

³⁷ R Howse and K Nicolaidis, in T Cottier and PC Mavroidis (eds.), above n. 5, at 320-325.

are still lacking. Although rule of law can serve as an important source for legitimizing this constitutionalization process, and the WTO Dispute Settlement Mechanism does display some features of rule of law, it is still not self-sufficient and self-sustaining. A framework of public institutions of governance that is able to reflect the direct expression of democratic self-determination remains indispensable.³⁸

Rejecting constitutionalism in the WTO, they argue that the key to resolve ‘legitimacy deficit’ in the WTO is to bring the politics in, but not to transcend it. A model of global subsidiarity is thus proposed. The WTO judges should show political sensitivity and deference to views defended outside the WTO. The importance of non-WTO institutions and norms representing values other than free or freer trade should be emphasized in treaty interpretation. The WTO judges should show due respect and substantially defer to domestic regulatory choices and to other international regimes, in respect of health, labour standards, environmental protection or human rights, etc.. Besides, the WTO should also promote the principle of political inclusiveness, with particular emphasis on the procedural aspect, to support the participation of actors inside and outside the members’ jurisdiction. Political inclusiveness suggests a stronger connection between WTO decision-making and domestic processes of accountability. A renewed spirit of embedded liberalism is thus desirable. Members should be empowered and encouraged to protect business in a manner compatible with WTO law.³⁹

C. WTO LAW AS GLOBAL ADMINISTRATIVE LAW OR GLOBAL INTEGRATION LAW? IS THERE ROOM FOR HUMAN RIGHTS IN THE WTO?

Given the great influence of WTO law upon domestic legal systems, a Global Administrative Law approach has been proposed to interpret numerous regulatory functions in the WTO. According to this approach, these global regulatory functions can be clearly evidenced in the area where international rule-making is to be combined with actions of domestic regulations. The former supplements and often determines the later, and thus penetrates deeply into domestic regulatory programs

³⁸ *Ibid.*, at 325-331.

³⁹ *Ibid.*, at 331-341.

and decisions.⁴⁰ This growing global regulatory regime and its infusion into domestic counterparts, with substantial and procedural norms, lays down a constraint to which domestic regulators are subject.⁴¹ This constraint placed upon domestic regulators aims to ensure the fidelity of domestic regulators to global administrative norms and to transform domestic regulators into agents of this global regulatory regime. In this way, domestic regulators participate in shaping this Global Administrative Law, and are thus obliged to act as agents of this global regulatory regime, instead of merely national actors. The *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimps)*⁴² case best illustrates the role of domestic regulators in this global regulatory regime. Domestic regulators acting within this global administrative space should take into due account of global administrative norms, such as procedural due process of law, right to participate, reasoned decision, and right to administrative review. They are required to ensure that rights and interests of other states, individuals and enterprises subject to this regulation as well as other broader economic and social interest fully considered.⁴³

With regard to the WTO, this Global Administrative Law approach argues that, legal rules derived from the WTO agreements and decisions from collegial bodies established by these agreements should be discriminated. States follow rules set out in international agreements to which they agree out of self-restraint whereas rules derived from collegial bodies, such as the Committee on Sanitary and Phytosanitary Measures, Committee on Technical Barriers to Trade, and Council in Trade in Services, represent external limitations regardless of the participation of national civil servants in these bodies.⁴⁴ These committees function as ‘clearinghouse for national interests, connecting bodies, and centres of secondary rule-making.’⁴⁵ It is thus made clear that even though the WTO Agreement can be arguably perceived as a ‘mutual

⁴⁰ B. Kingsbury, *et al.*, above n. 3, at 26.

⁴¹ *Ibid.*

⁴² Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US - Shrimps)*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821

⁴³ B. Kingsbury, *et al.*, above n. 3, at 36.

⁴⁴ S Cassese, 'Global Standards for National Administrative Procedures' (2004-2005) 68 *Law and Contemporary Problems* 109, 116-117.

⁴⁵ *Ibid.*, at 117.

effort' by WTO members, as Bacchus suggests, to shape the world trading order, secondary rules delivered by these collegial bodies, albeit mainly soft rules by nature go beyond original international agreements. These secondary rules are not what national parliaments directly control and agree upon.⁴⁶ Moreover, regardless of their status of being soft rules, one should not dismiss secondary rules of no legal significance, at least in light of members' obligation regarding consistent interpretation of international law.⁴⁷ It is therefore, problematic to conceive the WTO as a purely inter-state 'mutual effort' and appeal legitimacy issue solely to national governments. One should look into the essence of this ever-evolving world trading system. WTO law not only controls the domain of states, but controls, to great extent, the domain of administration. International law with regulatory dimensions or international law as governance that has been repeatedly labelled as governance without governments has become more and more common. International regulatory obligations that insist on procedural requirements and direct or indirect substantial obligations have reformulated domestic administrative law through the limitation of the discretion or policy space of domestic regulatory regime.⁴⁸ It changed the traditional understanding that administration is a realm occupied solely by nation states. WTO law is one of the best telling stories as it has deeply penetrated into national legal systems by dictating principles and criteria that national administrations must respect and private actors may rely upon for the protection of their rights and interests.⁴⁹ Apart from the GATS, TBT Agreement and SPS Agreement as previously noted, such intrusion can also be clearly evidenced in TRIPS Agreement where various procedural and substantive rules are laid down.

Some potential weakness of this Global Administrative Law approach may be noted. Such idea is mainly based on the model of American administration⁵⁰ where Administrative Procedural Act plays a pivotal role, regulatory state dominates public

⁴⁶ This again points to the importance of the legitimacy issue in WTO law.

⁴⁷ For the effect of soft law, see G Hafner, 'The Effect of Soft Law on International Economic Relations' in S Griller (ed) *International Economic Governance and Non-Economic Concerns* (Springer-Verlag Wien, New York 2003) 149-168.

⁴⁸ Weiler and Motoc, in S. Griller (ed.), above n. 12, 68-69.

⁴⁹ Cassese, above n. 44, at 110.

⁵⁰ See, e.g., RB Stewart, 'US Administrative Law: A Model for Global Administrative Law?' (2004-2005) 68 *Law and Contemporary Problems* 63.

discourse in the field of administrative law, and regulation is deemed as a synonym to administration. While this approach aims to enhance the institutional accountability, to protect human rights, and to promote democracy, it appears to be over-procedure-oriented. While a procedure-based approach has been a great success in American administrative law, it is questionable whether it can be as effective in the global level. Global administrative norms, compared to the American Administrative Procedure Act, are far less stringent and would not be able to ensure a transparent and level play-field for conflicting values and interests to be fully represented and balanced. A value-neutral and procedure-oriented approach turns out to be a vacuum if it is not embedded with substantial values, even though this approach, on a normative premise also aims to protect human rights and to promote democracy.

A different approach, aiming at integrating human rights into WTO law, is proposed by Petersmann. This integrating approach, referred to as global integration law, argues that human rights and economic integration law offer a mutually-beneficial synergy. This integrating approach actually stems from his constitutional understanding of the WTO through which he aims to balance economic development and other non-economic concerns, such as human rights and social justice. The protection and enjoyment of human rights depends upon the availability of economic resources to which economic integration law will contribute with the mechanism of exchange, transaction, and allocation of labour. On the other hand, human rights, by constitutionally empowering citizens and limiting national and international regulatory powers enhance both the legitimacy of economic integration law and its effectiveness. As experiences of European integration law suggest, the linkage between economic integration law and human rights has contributed to not only economic and social welfare, but also to the rule of law, the protection of human rights, and democratic legitimacy of governance at both the European level and national level.⁵¹ According to him, economic integration law, as shown in the

⁵¹ Petersmann, 'Time for United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', above n. 4, at 621-625.

European experiences, has been proved able to promote human rights, legal and political integration, and the emergence of international constitutionalism.⁵²

This integrating approach is however, rejected by some other trade lawyers and most human rights lawyers. As argued, even though Petersmann claims to balance social rights and economic rights, what he aims to link with economic integration law is mainly economic rights, particularly property and contractual rights. Contrary to Petersmann's proposition that trade restrictions by domestic governments should be limited only to the extent necessary for the social and other positive human rights,⁵³ Howse questions why the reverse should not be the case. That is, 'why not subject *free trade rules* to strict scrutiny under a necessity test, where these rules make it more difficult for governments to engage in interventionist policies to protect *social rights*?'⁵⁴ Here, conflicting views in relation to the hierarchy and possible reconcilability between economic rights and social rights persist. Being aware of the scepticism about human rights in the WTO, Howse is suspicious about the possibility of linkage or reconcilability between these two fields. It is also questionable whether the WTO judges are competent to appreciate the relevance of human rights law to the WTO.

Even more severe critics come from Alston, who argues that this proposed approach would fundamentally redefine international human rights law and 'make it subject to the libertarian principles expounded by writers such as Friedrich Hayek, Richard Pipes and Randy Barnett.'⁵⁵ Human rights would be thus detached from their foundations in human dignity and would be viewed as an instrument for the pursuit of economic developments.⁵⁶ The fundamental difference underlying the debate between Petersmann and Alston is their perception of human rights. While

⁵² *Ibid.*, at 643-647.

⁵³ Petersmann argues that the universal recognition of human rights requires us to construe the numerous public interest clauses in WTO law in conformity with the human rights requirement that individual freedom and non-discrimination may be restricted only to the extent necessary for protecting other human rights' *Ibid.*, at 645

⁵⁴ R Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) 13 *European Journal of International Law* 651, 655.

⁵⁵ P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal of International Law* 815, 816.

⁵⁶ *Ibid.*, at 826 (emphasis original).

Petersmann argues that the WTO does guarantee human rights, such as freedom of trade, non-discrimination principles, and property rights, this argument is rejected by Alston. According to him, these ‘rights’ are not rights conferred to individuals in the sense of human rights; economic liberties are not equal to human rights as understood in international human rights law. While Alston notes the exception of intellectual property rights as rights of authors and inventors to protect their interests are explicitly referred to in Article 15 of International Covenant of Economic, Social and Cultural Rights, he soon denounces intellectual property rights to be ‘rights’ granted to individuals for instrumentalist reasons. The purposes of human rights and trade-related intellectual property rights are inherently different: as human rights based on the inherent human dignity of all persons are recognized for all while trade-related intellectual property rights are instrumental in nature.⁵⁷

It should nevertheless be noted that Alston’s comments are founded upon two premises: his narrow perception of the WTO and scepticism about experiences of European integration. He sees the WTO as ‘an institution which is dominated by producers, and in which the economic, social, cultural, political and various other interests of a great many people are not, in practice, represented.’⁵⁸ Besides, he reads European experiences as being ‘driven by narrow self-interest rather than by any abstract commitment to the promotion of economic liberties.’⁵⁹ These interpretations of the WTO and European experiences help to explain why Alston fails to appreciate various objectives explicitly referred to in the WTO Agreement, such as ‘raising standards of living’, ‘ensuring full employment,’ and ‘sustainable development,’ and the relevance these objectives to shaping this world trading system. In addition, while an outsider’s perspective does prevent Alston being captured by Eurocentric ideology, his denunciation of European experiences as self-interest pursuing process, as Petersmann suggests, nevertheless indicates his deliberate ignorance of the vast European literature and legal practices on the EU constitutionalism and the importance of human rights in European integration.⁶⁰ The debate between

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, at 836.

⁵⁹ *Ibid.*, at 833.

⁶⁰ EU Petersmann, "Taking Human Dignity, Poverty, and Empowerment of Individuals More Seriously:

Petersmann and Alston nevertheless brings us back to the questions I pose in the beginning of this section: the definition of the WTO and the nature of WTO law. The fundamental difference in their perception of the WTO and their characterization of WTO law conditions the approaches taken in this debate, and thus lead to different answers about what the WTO is, what the WTO can be, and what the WTO should be.

D. JUDICIAL GOVERNANCE AND THE ROLE OF INDIVIDUAL ECONOMIC ACTORS

With a different approach taken to solve the legitimacy issue,⁶¹ Howse and Nicolaidis severely criticizes the constitutional understanding of WTO law. They characterize the advocated constitutionalism in the WTO as constitutionalization of market access rights or as redefining the regulatory function and organizational structures of the WTO in order to shape it in a global quasi-federal fashion. While such criticism appears too cynical, they nevertheless rightly point out that such belief in the constitutionalism in the WTO should be understood in a broader context. Namely, one has to clarify his/her conception of the role of the judge and the adjudicating process in the WTO. Further, one has to redefine the relationship between law and politics in this world trading system.⁶² The WTO Dispute Settlement Mechanism has been widely regarded as the most important achievement during the Uruguay Round. The strengthened domestic judicial review is also perceived as a major success. The WTO judges, both the Appellate Body members and judges in domestic courts are expected to assume substantial responsibility of judicial trade governance in this world trading system.

‘Courts and regional integration’ has been extensively explored in literature in relation to European integration.⁶³ Although this European experiences are unique, it does not necessarily prevent one from appreciating the importance of courts in the

Rejoinder to Alston' (2002) 13 *European Journal of International Law* 845, 845-851.

⁶¹ von Bogandy, in S. Griller (ed.), above 22, at 120-121.

⁶² Howse & Nicolaidis, in T Cottier and P C Mavroidis (eds.), above n. 5, at 320.

⁶³ See, e.g., AM Slaughter, *et al.*, *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart Publishing, Oxford 1998); MP Maduro, *We the Court. The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of EC Treaty* (Hart Publishing, Oxford; Portland, Oregon 1998). See also, ML Volcansek, 'Courts and Regionalism' in F Snyder (ed) *Regional and Global Regulation of International Trade* (Hart Publishing, Oxford and Portland, Oregon 2002) 165-180.

course of global economic integration. Meanwhile, the role of judges in international economic adjudication has been attracting more and more attention, and numerous publications are devoted to exploration of the WTO Dispute Settlement Mechanism.⁶⁴ As experiences of European integration suggest, with the proliferation of trade and rules, it requires someone to monitor, apply and enforce these rules. Courts have been proved the best guardian of private interests and individual rights. Judicial review, in particular constitutional review, is claimed to perform four regulatory functions: it operates as a counterweight to majority rule, pacifies the politics, legitimizes public policy and protects human rights. These functions are most apparent when courts act as ‘positive’ legislators. When the effectiveness of resolving constitutional disputes is sustained, it attracts more non-judicial actors to pursue their interests through constitutional review. Judges are thus made responsible to exercising more powers of decision-making. Techniques of constitutional adjudication will become an important mode of argumentation and decision-making in judicial systems, which is partly a logical and normative consequence of direct effect of rights provisions and partly a result of complex dialogues between constitutional judges and the judiciary.⁶⁵ With the expansion of judicial powers and gradual but inevitable infusion into other judicial actors, a form of decentralized judicial governance is thus made possible and available.⁶⁶

In respect of the (quasi-)judicial governance in the WTO, the WTO judges sit in the centre of these debates presented above and are also the key to resolve them. The attempt to include human rights dimension in the WTO relies upon effective judicial protection. A rights-based approach toward WTO law cannot be sustained if ‘rights’ are not guaranteed by and resort cannot be had to courts. It is clear that ‘rights’ referred to in the DSU means the rights of the WTO members, not rights as understood by human rights law. However, it does not imply that individual rights are

⁶⁴ A good example is the newly published *The WTO at Ten: The Contribution of the Dispute Settlement System*, which is dedicated, as its subtitle suggests, to this WTO Dispute Settlement Mechanism.

⁶⁵ A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, Oxford 2000) 114.

⁶⁶ *Ibid.*, at 136-139. Stone Sweet argues that such diffusion is not limited to judicial actors, but also to legislative actors. He concludes, in the last sentence of his book, that ‘[I]n the end, governing with judges also means governing like judges.’

absent in WTO law. The world trading system is mainly composed of individual economic actors whose rights are to be ensured in this system. Although these rights, to great extent, are indirectly defined and protected and resort to the WTO Dispute Settlement Mechanism should be sought indirectly through its home countries, these rights nevertheless serve as a good basis for individual actors to claim in the domestic courts.

Truly, these rights are mainly economic rights, which human rights lawyers may once again denounce not to be human rights. It should be nevertheless stressed that a minimum notion focusing on non-discrimination, individual rights (though mainly economic rights) and dispute-settlement mechanisms (particularly courts) will gradually develop into a set of individual constitutional rights protected from any form of power. With the protection of economic rights under dispute-settlement mechanisms, international rule of law can be gradually developed, and sufficient inputs can be thus obtained to 'feed' this global constitutionalism.⁶⁷

On the other hand, the authority of constitutional principles embedded in the WTO agreements will not be fully respected, and the constitutional function of WTO law cannot be effective, if sanctions for the non-compliance are not in place. The Dispute Settlement Mechanism in the WTO is certainly an important device for these sanctions; less important is domestic judicial review. One might even be tempted to say that all the WTO judges are responsible for the effectiveness of WTO law. However, the crucial question is who the WTO judges are. Why should national judges honour WTO law at the expense of national constitution and legislation? This again is the 'hard case.' It traces back to one's perception of constitutionalism: namely, whether national constitutional order should allow these WTO constitutional principles to flow in to ensure individual rights are better protected both at WTO and national level. These constitutional principles in WTO law can actually complement national constitutionalism, and help to guarantee individual rights.⁶⁸

⁶⁷ MP Maduro, 'The Constitution of the Global Market' in F Snyder (ed) *Regional and Global Regulation of International Trade* (Hart Publishing, Oxford and Portland, Oregon 2002) 63.

⁶⁸ For a discussion on constitutional nationalism and multilevel constitutionalism, see EU Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism

III. THE APPROACH TAKEN AND ITS CHALLENGES AND JUSTIFICATION

As illustrated in the previous section, it has been repeatedly questioned what individual rights, even in the 'reduced' form of economic rights, WTO law has included. It is also argued that there are neither individual rights nor effective judicial review to underpin constitutionalism in the WTO. This criticism suggests a constitutional approach toward the WTO is ungrounded and infeasible. The above Section presents some of the most controversial debates in relation to the WTO/WTO law without providing my own answer and conclusion. It is deliberately so this Section will illustrate my methodological approach in this dissertation which will indirectly makes clear my stance toward these debates. In this Section, I will argue that a constitutional approach is essential and beneficial for trade dispute resolution among the Four WTO Members. I will firstly illustrate the importance of the WTO membership as pre-commitments for these four members. I then explore the constitutional significance of right to trade as provided in China's Accession Protocol and the importance of national constitutions and the Basic Laws of Hong Kong, China and Macau, China. Finally, I illustrate the way to bring about judicial governance and the shape and formulation of this judicial governance for the objective the peaceful resolution of trade disputes among the Four WTO Members.

A. PRE-COMMITMENT TO CHINA, HONG KONG, CHINA, MACAU, CHINA AND TO TAIWAN

As Petersmann argues, one major constitutional function of WTO law is to ensure domestic constitutional guarantee of these fundamental market freedoms, non-discrimination rights, and the judicial protection. It is regarded as pre-commitments through hand-tying for the long-term benefits at the expense of short-term benefits. Such pre-commitments are indispensable for a country to lock in the progress of its economic reform and to make it irreversible. It is also an essential vehicle for Chinese reformists to counter against domestic political opposition and to resist the protectionism. Such pre-commitments might be read as 'undemocratic.' However, these undemocratic pre-commitments substantially contribute to the

to Multilevel Constitutionalism in International Economic Law?' in W Shan, *et al.* (eds) *Redefining Sovereignty in International Economic Law* (Hart Publishing, Oxford and Portland, Oregon 2006) 27-60.

sustainability of Chinese economic reforms and make the gradual legal and political reforms possible. China's pre-commitments to the right to trade and to the continuous economic liberalization are justified by their out-put legitimacy in terms of the following aspects: greater opportunities of self-development; better protection of properties rights and the gradual-evolving civil and political rights. A free economic market will eventually sustain enough foundation for the development of a stronger civil society.

In respect of Taiwan, cross-strait trade policies have been long captured by protectionism and political interests. This over-politicization prevents cross-strait trade policies from being reasonably and deliberately debated. Pre-commitments are of great significance here in that they help to maintain consistency and coherence between the Taiwan's international obligations and its national regulatory measures. While it is argued that pre-commitments are employed mainly for binding political opponents, this argument does not sustain in the case of Taiwan. Taiwan's approval for the accession protocol to the WTO and resistance of the liberalization of cross-strait trade actually come from the same decision-makers, namely, the same ruling party. This exposes a great inconsistency and incoherence between its international commitments and national decision-making. Therefore, the domestic constitutional function of the WTO in controlling domestic decision-making is thus necessary and indispensable. Therefore, it is important for national decision-makers to take their international commitments seriously. A constitutional understanding of WTO law focusing on its domestic constitutional function, will help national decision-makers to resist influence of protectionism and specific political interests, and thus minimize the discrepancy between international commitments and national decision-making.

The understanding of pre-commitments is also of great significance to Hong Kong, China and Macau, China. Their status as Contracting Parties to the GATT and subsequently members in the WTO, as a separate customs territory, should be perceived as a product of contractual understanding between China and United Kingdom, as well as between China and Portugal. It is also a mechanism to ensure

their economic autonomy through the presence in the international scene. Although the HKBL and the MABL are national legislation passed by the National People's Congress, their constitutional contractual character should not be neglected. They are not only a contract between China and its two SARs to ensure that the market economic autonomy remains unchanged for fifty years, but they are also a fruit from the contractual agreements of Sino-British Joint Declaration and Sino-Portuguese Joint Declaration. The authority of these two basic laws derives not only from Chinese constitution, through its National People's Congress, but also from these two international agreements. Regarding the economic autonomy of Hong Kong, China and Macau, China, two instruments are of constitutional importance apart from the two Declarations mentioned above. One is China's communications to the GATT concerning the separate customs territory status of Hong Kong, China and Macau, China, which possess full autonomy in the conduct of their external commercial relations and of other matters provided for in the Agreement. The other is the recognition, in the two Basic Laws, of the competence of these two SARs to participate, as separate customs territories, in the international organizations as well as international agreements. These pre-commitments do not only constitutionally control the domestic trade policy-making in Hong Kong, China and Macau, China, but they also place a constitutional constraint upon China in relation to the economic autonomy of these two SARs.

B. RIGHT TO TRADE, NATIONAL CONSTITUTIONS, AND BASIC LAW

China's accession to the WTO has tremendous importance not only because of economic impact, but also because of its constitutional and legal significance. As noted above, a minimum notion of constitutionalism may be established on the foundation of non-discrimination, individual rights (albeit economic rights), and dispute settlement mechanisms. These elements are actually explicitly provided in China's Accession Protocol to the WTO. Apart from fundamental non-discrimination principles, including Most-Favoured-Nation Treatment and National Treatment, China's Accession Protocol includes also the obligation to provide the right to trade, defined as the right to import and to export, and an independent and impartial judicial

review. These elements will gradually sustain a constitutional approach to WTO law, which ensures not only the commercial interests of the state but also the trading rights of individuals.

Section 5 of the Accession Protocol begins with the recognition of China's right to regulate trade, but prescribes that such regulation should be in accordance with the WTO Agreement. It then dictates that the scope and availability of this right to trade should be progressively liberalized. Three years after China's accession, except for those goods still reserved for state trading listed in Annex 2A, all individuals and enterprises shall have the right to trade in all goods throughout Chinese customs territory. The right to trade is defined as the right to import and export. Goods imported into China should be accorded with National Treatment. Foreign individuals and enterprises, in respect of the right to trade should also be accorded with treatment no less favourable than Chinese individuals and enterprises. Those goods reserved for state trading should also be phased out according to the schedule in the Annex. The specific schedule was set as follows. Beginning one year after accession, joint-venture enterprises with minority share of foreign-investment would be granted full rights to trade; beginning two years after accession majority share foreign-invested joint ventures would be granted full rights to trade; within three years after accession, all enterprises in China would be granted the right to trade. Foreign-invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting activities.⁶⁹ Therefore, three years after China's accession, all enterprises in China should be granted to the right to trade, except for those reserved to state trading,

Distribution service is not covered by the right to trade, even though these two elements are of the same importance for foreign individuals and enterprises to engage in economic activities in China. As generally understood, international trade in goods depends much on the domestic trade and distribution sectors. The degree of competition in these domestic distribution sectors has major influence on trade in

⁶⁹ WTO, Working Party Report on the Accession of China (hereinafter the Working Party Report), WT/ACC/CHN/49 (1 October 2001), para. 83.

goods, as distribution service can greatly facilitate trade in goods. The distribution service can be thus regarded as a linkage between trade in goods and trade in service.⁷⁰ Detailed commitments in distribution service are actually, though not included in the accession protocol, also identified in the Working Party Report. Before acceding to the WTO, China generally did not permit foreign companies to distribute products in China, namely, to provide wholesaling, retailing, franchising or commission agent services or to provide related services, such as repair and maintenance services. In its accession package, China agreed to phase out these prohibitions over three years, subject to limited exceptions.⁷¹ As previously noted, these restrictions should have been lifted owing to the passage of the phase-out period.

It is true that the right to trade recognized in China's Accession Protocol is comparatively limited in scope, and that this right to trade has to be further supplemented and materialized by domestic implementations. However, a WTO-consistent interpretation of this right in Chinese domestic legal system can provoke a better domestic constitutional guarantee in conformity with its international liberalization commitments. Such interpretation is of particular importance in Chinese context as most economic activities, prior to its open-up policy, were dominated by state powers. It is thus important to make market freedoms available and fair competition possible so that individuals are able to pursue their own self-developments through their human capacities by exercising positive freedoms (e.g. freedom of profession, property, and trade).⁷² Liberal economic rights are no less important than civil and political rights concerns, at least in the case of China. It would be too naïve to argue for political and civil rights when one's property and possession cannot be guaranteed. In this vein, the 2004 constitutional amendment that explicitly recognizes private properties rights, and lays down the obligation for the

⁷⁰ J. Francois and I. Wooton, Market Structure in Services and Market Access in Goods, CEPR Discussion Paper No. 5135, 1, available at SSRN: <<http://ssrn.com/abstract=784687>> (last accessed 13/4/2007).

⁷¹ The U.S initiated two requests for consultations under the Dispute Settlement Understanding on 10 April 2007, one of which the right to trade and distribution service are the subject matter. WTO document, WT/DS363/1 (16 April 2007).

⁷² Petersmann, in T. Cottier, *et al.* (eds.), above n. 15, at 56

state to protect these rights can be seen as a response to China's WTO obligation of the right to trade.

A constitutional understanding of the WTO is of the same importance to Taiwan. As I keep repeating in this dissertation, the closer economic interdependence between Taiwan and China has already been a given fact which will be further strengthened and accelerated. Situated within this context, one will have to figure out how to deal with potential trade disputes coming along with this economic interdependence in light of the political antagonism. Private individuals and enterprises are the way out. Namely, private individuals and enterprises should be empowered to engage in their economic activities and where necessary and appropriate, access to judicial remedies should be made available. Judicial enforcement of WTO law is an essential element here. It was expected that Taiwan would normalize its trade relations with China since its Taiwan accession to the WTO, as Taiwan and China did not opt for non-application. However, various restrictions on out-bound investments and market access for Chinese products remain unchanged even though five years has passed since Taiwan's accession. The paradoxical dilemma presented above must be broken through. Judicial enforcement of WTO rules in Taiwanese court through the challenges of private individuals and enterprises appear to be the best way out. As a matter of fact, rights and interests of these private economic actors are also in need of judicial protection in Taiwan, albeit maybe more importantly in China. This need calls for the normalization and constitutionalization of cross-strait trade relations. But the process of normalization and constitutionalization can only be achieved when equal efforts are made both by China and Taiwan. Therefore, after analyzing the right to trade in China's Accession Protocol and its importance to the constitutionalization of China's foreign trade relation, I will argue, in the following, for the normalization and constitutionalization of Taiwan's trade relations with China.

The normalization and constitutionalization of Taiwan's trade relations with China closely link to the domestic constitutional function of WTO law, in terms of its constitutional control of domestic regulatory measures. Although the extremely unusual reference of right to trade is not existent in Taiwan's accession protocol.

Freedom of trade is also not referred to in Taiwan's constitution either. The absence of both the right to trade in Taiwan's accession protocol and the freedom of trade in Taiwan's constitution does not prevent me from arguing for a constitutional approach toward the resolution of cross-strait trade disputes for the following two reasons. At the international level, those WTO fundamental principles, in particular non-discrimination principles, and various clear and unconditional market access commitments, lend good arguments against these arbitrary and unreasonable trade restrictions. At the domestic level, freedom of profession can serve as a good foundation for the argument of the right to cross-strait trade. I refrain from wishful thinking. Nonetheless, the paradoxical imbalance between economic relations and political relations should be resolved. To the author, with the normalization and constitutionalization of cross-strait trade and the ever-closer economic interdependence will bring about 'perpetual cross-strait peace.' Certainly, this 'perpetual cross-strait peace' cannot be realized solely on the normalization and constitutionalization of Taiwan's foreign trade relations with China. It is of equal (if not more) importance to constitutionalize China's foreign trade policy (subsequently foreign policy as a whole) to make this 'perpetual cross-strait peace' ensured.

External trade competence of Hong Kong, China and Macau, China and their free trade policies have special status in these two SARs. They are both entitled to participate in, as separate customs territories, international organizations and international trade agreements, as guaranteed by their constitutional instruments, the HKBL and MABL.⁷³ Both Hong Kong, China and Macau, China should maintain the status of free port,⁷⁴ pursue the policy of free trade, and safeguard the free movements of goods, intangible assets, and capitals.⁷⁵ External trade competence and free trade policy are not only important for the economic development of these two SARs, but also indispensable for their exercises of legal autonomy. With free trade and close into the world economy, fully guaranteed economic rights can thus help to

⁷³ HKBL, Art. 116; MABL, Art. 112.

⁷⁴ HKBL, Art. 114; MABL, Art. 110.

⁷⁵ HKBL, Art. 114; MABL, Art. 111.

ensure that civil and political rights are to be sustained in Hong Kong, China and Macau, China.⁷⁶

C. JUDICIAL GOVERNANCE IN EXTERNAL TRADE RELATIONS

Another important element for the author to argue for a constitutional understanding of WTO law for the Four WTO Members is feasible is judicial governance in external trade relations. China's WTO obligation to provide an independent and impartial judicial review would gradually make an effective domestic judicial protection possible. Although judicial practices in Chinese courts are still far from the ideal type of western models, such element is making significant changes to Chinese legal system. Again, the author is not engaging in wishful thinking. As will be further elaborated in Chapter V, China's WTO obligation to provide an independent and impartial judicial review has brought about some significant changes to Chinese legal system, in particular in respect of the administrative litigations concerning intellectual property rights. It is partly because the TRIPS Agreement provides detailed procedural requirements and substantial elements of intellectual property right that lay down a minimum standard by which China has to abide. It is also partly because intellectual property rights are individual rights in nature that lend a good weapon for rights holders to wield their rights and interests. As a great number of intellectual property rights are possessed by foreign individuals and enterprises, their resort to Chinese domestic courts for judicial remedies are actually backed with the support of their own national governments. These challenges in Chinese domestic courts, supported by governments of home countries, force China to implement its obligation to provide an independent and impartial judicial review in a faithful and meaningful manner. Chinese courts are thus required to rule controversies referred to them in an independent and impartial way.

It may also be challenged that a constitutional function of the WTO is not valid in Chinese courts on the ground that courts in China are not equipped with

⁷⁶ It is thus fair to say that those who denounces right to trade as non-human rights fail to appreciate the possibility for economic rights to give substantial feedback to political rights. While it is true that without further legal and political reform, Chinese economic reform will not sustain, it is also true that without an open economic market, Chinese legal and political reform finds no foundations.

constitutional review. This challenge is nevertheless unfounded in that the observation that Chinese courts are incapable of constitutional review does not quite catch the real picture of on-going developments of Chinese judicial reforms. I do not argue that courts equipped with a constitutional review, have already been visible. However, some significant changes have been brought about. At least, to employ rights guaranteed by constitution and to use constitution as a higher law to sustain their argument to disapply (though not to declare void) local legislation or regulations in Chinese courts has been reported.⁷⁷ Besides, the incapability to employ arguments derived from Chinese constitution does not necessarily suggest the incapability to employ arguments derived from international agreements. It is true that national constitutions can serve as an intermediate to channel international obligations into domestic constitutional and legal orders. Yet, it is not the only one. Here, the constitutional significance of the international obligation of the right to trade and to provide an independent and impartial judicial review becomes clearer. As will be shown in Chapter V, China's Accession Protocol prescribes in great detail the designation of this independent and impartial judicial review. The right to trade provided in China's Accession Protocol is even truer in light of its clear, specific and unconditional character. After the phase-out period of three years, all fields were expected to be liberalized except for those listed in the Annex 1A. It does not necessarily depend on national constitution for its 'channelling' in this right to trade into Chinese constitutional and legal system. It is true that a judicial review limited with trade issues and a right to trade, defined as the right to import and to export, can only be regarded as a constitutionalism in its thinnest form. Its potential influence should nevertheless not be overestimated. It is legitimately expected that Chinese courts, after experiencing in controlling administrative measures in trade areas, would gradually learn and start to control measures in other fields. With this gradual expansion of judicial powers, time for 'governing with judges' and for 'governing like judges' in China will inevitably come.

⁷⁷ For the interaction of judicial power and political powers in China, see, *e.g.*, S Balme, 'The Judicialisation of Politics and the Politicisation of Judiciary in China (1978-2005)' (2005) 5 *Global Jurist*, available at <http://www.bepress.com/gj/frontiers/vol5/iss1/art1> (last accessed 15 May 2007).

Compared to China, constitutional review in Taiwan is much more experienced and developed. However, their experience in dealing with highly political cross-strait trade relations is relatively limited, in contrast with other subject matters in which they are involved. Two major issues should be addressed at this point: the legitimacy and capacity. A quick challenge for the constitutional court to intervene in cross-strait trade relations is the legitimacy concern. The constitutional court may be argued to be in no legitimate position to 'encroach' into the domain of presidential power, especially when national security is at stake. This argument links cross-strait trade relations closely to national security, and subsequently excludes the possibility of judicial governance in cross-strait trade relations. Such argument should nevertheless be rejected. As previously argued, to politicize cross-strait trade is not the right answer to settle down cross-strait controversies, and thus to ensure national security. On the contrary, to pacify the political irrationality of cross-strait trade relations is the key to these cross-strait controversies. Cross-strait economic integration will gradually bring about mutual understanding and social cohesion and solidarity. The (constitutional) courts appear to be the best actor to de-politicize cross-strait trade and to ensure the rationality of their decision-making.

The capacity argument is not valid either. Cross-strait trade is argued to be, apart from being highly political, closely related to strategies of Taiwan's economic developments where various interests are at stake. The constitutional court is not equipped with expertise in this field and is not capable of making the correct decision. However, balancing various rights and interests is one of the major judicial functions that one should never fail to appreciate. What is exactly needed in developing strategies of Taiwan's economic policies is to ensure these competing interests being taken into due account and being rightly balanced. Besides, such issues as environmental protection, genetically modified organisms, euthanasia, and capital punishment pose controversies with no less social, economical, moral, and technological impact. If the capacity argument sustains, judicial powers are to be excluded from a wide range of subject matters. This is not what we perceive the image of judiciary. It also runs counter to the trend of world judicial expansion. As more and more rights and interests are involved, an independent and impartial

adjudicator becomes more and more important to ensure that these conflicting and competing values and interests are to be taken into due account.

In addition, judicial governance, compared to legislature and the Executive Chief, in Hong Kong, China and Macau, China has more solid legitimacy. As some members of the legislative council and the Executive Chief, if not nominated by Chinese central government, are not directly elected, their willingness and legitimacy to safeguard the economic autonomy in these two SAR are questionable. The Court of Final Appeal (the CFA) in these two SARs turns out to be the best guardian for their economic autonomy as they are distant from political intervention and interference. The Court of Final Appeal, in its famous *Ng Ka Ling*⁷⁸ case proved itself the best guardian of legal and economic autonomy in Hong Kong, China not to be encroached by Chinese Central Authority. By contrast, the Executive Chief subsequently chose to refer the case to the Standing Committee of National People's Congress for the interpretation of the HKBL. This reference undermined not only the judicial independence in Hong Kong, China, but also its economic autonomy. Although Hong Kong, China and Macau, China are free ports and adopt zero-tariff policies, it does not mean their economic autonomy are fully secured. Potential threat does exist in terms of other non-tariff regulatory interventions. Besides, the free-port status and zero-tariff policies do not also suggest that there will be no trade disputes in relation to these two separate customs territories. As technical barriers and sanitary and phytosanitary measures and other positive integration obligations become more and more important in international trade, the free-port status does not reduce the importance and influence of judicial governance in their external trade measures.

IV. SHORT CONCLUSION.

This Chapter examines existing major debates in relation to the WTO, namely, legitimacy, constitutionalism, human rights. It also explores the role of judicial governance and individual economic actors. It presents three different approaches to constitutionalize the WTO in order to resolve 'legitimacy deficit' in this world trading

⁷⁸ *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 (CFA).

system. It also presents critics to these approaches. While some has argued to integrate human rights into WTO law, most human rights lawyers and some trade lawyers and trade experts are suspicious of this approach. Views about the legitimacy and capacity for courts, notably domestic courts, to participate in external trade regulations are divergent. The author constructs its own methodological approach employed in this dissertation based upon those major debates. I argue that a constitutional approach is desirable and necessary to resolve trade disputes among the Four WTO Members. Three arguments are offered. Firstly, I points to the constitutional significance of the WTO membership as a pre-commitment to these Four WTO Members.

The WTO accession is a pre-commitment to China for widening and deepening economic and legal reforms, and thus for promotion of rule of law in China. The WTO accession is a pre-commitment to Taiwan for the progressive liberalization of cross-strait trade in order to enhance economic and legal integration, to contribute to mutual understanding, and therefore, to ensure ‘perpetual cross-strait peace.’ The WTO memberships of Hong Kong, China and Macau, China are also pre-commitments of these two separate-customs-territory members for them to observe free trade rules/policies and thus to maintain their economic autonomy. Their memberships are also China’s pre-commitments to these two SARs in relation to their legal and economic autonomy to participate in the international trading system. Secondly, I argue that the right to trade prescribed in China’s accession protocol, free-port status and free trade policies dictated by the HKBL and the MABL justify my attachment to trading rights. Finally, this approach helps to depoliticize cross-strait trade and thus to ensure rational decision-making, especially through judicial governance among the Four WTO Members. To constitutionalize China’s foreign trade policy and subsequently, to constitutionalize its foreign policy through ‘governing with judges’ as well as ‘governing like judges’ will then make ‘perpetual cross-strait peace’ possible. Judiciary in Hong Kong, China and Macau, China is also the best guardian to safeguard economic autonomy in these two SARs, as courts are distant from political interference. As some members of the Legislative Council and the Executive Chief are not directly elected and subject to intervention of Chinese

Central Authority, the judiciary has apparently more legitimacy to act as a guardian for their legal and economic autonomy. In a word, this Chapter stresses the constitutional significance of the WTO memberships as pre-commitments to the Four WTO Members. I argue that a constitutional understanding of WTO law is essential and indispensable for their trade dispute resolution. Judicial governance in the external trade relations is feasible and desirable. By peaceful resolution of trade disputes, the imbalance between economic interdependence and political antagonism can be ironed out and economic integration may contribute to mutual understanding and mutual trust among these Four WTO Members.

CHAPTER IV DOMESTIC JUDICIAL REVIEW IN URUGUAY ROUND AGREEMENTS

I. INTRODUCTION

As noted in Chapter II, the effort to strengthen domestic review has been reflected in the Final Act of Uruguay Round Agreements. Various provisions governing domestic judicial review can be found in various agreements annexed to the WTO Agreement. These provisions include Article X:3(b) of the GATT 1994, Article 13 of the Anti-Dumping Agreement, Article 11 of the Agreement on Customs Valuation, Article 4 of the Agreement on Pre-shipment Inspection, Article 23 of the Agreement on Subsidies and Countervailing Measures, Article VI of the GATS, Article 41 to Article 50 and Article 59 of the TRIPS Agreement, and Article XX:2 of the Government Procurement Agreement. This Chapter will then examine these provisions in detail.

Before examining these provisions each by each, it will be a good starting point to cite the authority governing the rule of interpretation and what the WTO Panel/Appellate Body has said on this point. As directed by Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), the WTO provisions should be interpreted ‘in accordance with customary rules of interpretation of public international law.’ The jurisprudence of the WTO Panel/Appellate Body has continuously stressed the importance of the fundamental rule of treaty interpretation set out in Article 31(1) of the Vienna Convention on the Law of Treaties (the VCLT). In the very first case of *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*¹, the Appellate Body held that, this general rule of interpretation ‘has attained the status of a rule of customary or general international law. As such, it forms part of the ‘customary rules of interpretation of public international law’² which should guide the interpretations of the *General Agreement* and the other ‘covered agreements’ of the WTO Agreement. The Appellate Body then further adds, in *Japan – Taxes on Alcoholic Beverages*

¹ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.

² Appellate Body report, *US – Gasoline*, at 17.

(*Japan – Alcoholic Beverages II*)³ that ‘Article 32 of the VCLT, dealing with the role of supplementary means of interpretation, has also attained the same status.’⁴ Article 31(1) of the VCLT provides as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

As pointed out by the Panel in *United States – Sections 301-310 of the Trade Act of 1974 (US – Section 301 Trade Act)*,⁵ elements referred to in this provision, namely, text, context and object-and-purpose correspond to well-established textual, systemic and teleological methodologies of treaty interpretation. These four elements as well should be read in a holistic manner.⁶ It is a general *rule* of interpretation rather than general *rules* in the plural by which a sequence of separate tests are to be applied in a hierarchical order.⁷ In this vein, interpretation must be based above all upon the text of the treaty. That is, the text is the departure point of this interpretative process. However, ‘the provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions’.⁸ Therefore, this Chapter will follow this approach: starting from the ordinary meaning of the ‘raw’ text of provisions governing domestic (judicial) review, and then construing it in its context and in the light of the object and purpose of the treaty. However, it does not mean that all of these four elements as well as good faith are to be employed in interpreting every single provision.

On the other hand, before examining these provisions, it is also worth citing what the Panel holds in *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea (US – Stainless Steel)*.⁹ The Panel

³ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97.

⁴ Appellate Body report, *Japan – Alcoholic Beverages II*, at 12.

⁵ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974 (US – Section 301 Trade Act)*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815.

⁶ Panel Report, *US – Section 301 Trade Act*, para. 7.22.

⁷ *Ibid.*

⁸ Appellate Body report, *Japan – Alcoholic Beverages II*, at 12.

⁹ Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea (US – Stainless Steel)*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295

says, the dispute settlement mechanism is not intended to serve as a mechanism to examine the consistency of a Member's particular decisions or rulings with its own domestic law and practice. This task should be reserved mainly for each Member's judicial system. WTO Panels are not in a good position to perform the same function of domestic courts scrutinizing the conformity of these decisions or ruling with relevant domestic law and practice. One should caution not to 'effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the WTO Agreement'¹⁰ based on Article X:3(b) of the GATT 1994.

The Panel further adds in the 64th footnote that, 'it is for this reason that both Article X:3(b) of GATT 1994 and Article 13 of the Anti-Dumping Agreement require Members to maintain appropriate judicial, arbitral or administrative tribunals or procedures.' The panel tries to allocate jurisdiction between the two levels of judicial review: the WTO Dispute Settlement Mechanism and the domestic judicial review. Although the Panel attributes the task to 'test the consistency of Member's decisions or rulings with the member's domestic law and practice' to domestic judicial review, however, it does not further elaborate what domestic judicial review should be like. In fact, the WTO Panel/Appellate Body has not ever addressed this issue. Nevertheless, as China's Accession Protocol includes more stringent obligation in respect of domestic judicial review, it will be indispensable to examine together with these existent provisions when a complaint in relation to China's obligation to provide an independent and impartial judicial review is brought about into the WTO.

Bearing this in mind, this Chapter will thus examine numerous provisions in Uruguay Round Agreements in relation to domestic judicial review. This Chapter will arrange as follows: it will start with the GATT 1994 and other agreements annexed to the GATT 1994, except the Agreement on Pre-shipment Inspection, followed by the GATS. It will examine numerous provisions related to domestic judicial authority provided in the TRIPS Agreement and finally those provisions provided in the Agreement on Pre-shipment Inspection and the Agreement on Government Procurement. A short conclusion will then be offered in the end of this Chapter.

¹⁰ *Ibid.*

II. ARTICLE X: 3 OF GATT 1994

The legal text of this provision reads:

(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

This provision in the GATT 1994 in relation to domestic (judicial) review is identical to that provided in the GATT 1947. As previously noted, the scope of this (judicial) review provided in Article X:3(b) is limited to customs matters. The following will examine those elements included in this provision.

A. MAINTAIN, OR INSTITUTE AS SOON AS PRACTICABLE

Firstly, with regard to implementation measures to be taken by members for the fulfilment of their WTO obligation under this provision, members are required to ‘maintain’ or ‘institute as soon as practicable’ judicial, arbitral or administrative tribunals or procedures. The ordinary meaning of ‘maintain’ is to ‘cause or to enable a condition or state of affairs to continue.’¹¹ In other words, to ‘maintain’ means to keep this condition or state of affairs at the same level or rate; to ‘institute’ means to set in motion or to establish. However, this provision has to be read together with the subsequent paragraph, which prescribes that procedures in force on the date of this agreement do not have to be substituted or eliminated provided they are objective and impartial. Therefore, to ‘maintain’ tribunals or procedures means that the level of protection provided by these tribunals or procedures should be kept at the same level and should not be weakened. Besides, the level of protection should be comparable to standards of ‘impartial and objective’. If a comparable level of protection was not available upon the signature of this agreement, members are required to establish

¹¹ J Pearsall, *et al.* (eds) Concise Oxford English Dictionary 2002, 858.

these tribunals or procedures as soon as practicable. However, whether it is practicable depends on the capacity of members, especially in relation to least developed countries. Thus, it will be then difficult to distinguish between lack of resources and intentional failure to carry out their obligations.

B. JUDICIAL, ARBITRAL OR ADMINISTRATIVE TRIBUNALS OR PROCEDURES

To begin with, as provided in the legal text, these review mechanisms can be judicial, arbitral or administrative. In other words, this ‘domestic (judicial) review’ has not to be a review by judicial organs provided it is ‘*independent of the agencies entrusted with administrative enforcement.*’ A review by administrative tribunals or procedures inside the executive branch, or even by arbitral tribunals might be permissible provided these reviewing mechanisms are ‘independent’ in terms of Article X:3(b). Further, as will be shown below, procedures satisfying the standards of ‘objective and impartial’ as laid down in the subparagraph (c) are not required to be substituted or eliminated even though they are fully or formally independent of the agencies entrusted with administrative enforcement. Three designations; judicial, arbitral or administrative review provided by tribunals or procedures are permissible under Article X:3(b) of the GATT 1994.

A ‘tribunal’ means a ‘*body established to settle certain types of dispute.*’¹² A ‘procedure’ means ‘an established or official way of doing something.’¹³ In other words, it requires a series of actions to be conducted in a certain order or manner. Therefore, tribunals, read in contrast to ‘procedures’, connote not only their function to settle disputes, but also their status of being an organic body. Although tribunals are usually connected with procedures, however, as this provision refers to tribunals ‘OR’ procedures, it appears that mere procedures which are able to provide a review mechanism comparable to prescribed standards should also be accepted as satisfying this obligation.

This interpretation seems to be justified by its context. The following sentence provides that ‘such tribunals or procedures’ should be independent of the agencies

¹² *Ibid.*, at 1530.

¹³ *Ibid.*, at 1139.

entrusted with administrative enforcement. In other words, this requirement of being independent of the agencies with administrative enforcement should be applied to either tribunals or procedures. Either of these two should be subject to this requirement. This interpretation can also be further supported by subparagraph (c), which provides the obligation imposed by subparagraph (b) does not require members to eliminate or substitute procedures in force provided they are objective and impartial. These two provisions read altogether, a Member can fulfil its obligation laid down in subparagraph (b) with objective and impartial procedures, even though these procedures are not 'independent' as defined by X:3(b). Subparagraph (c) aims to lessen the burden imposed on a Member for the institution or maintenance of its domestic judicial review. Therefore, although these procedures are not fully or formally independent of the agencies entrusted with administrative enforcement, these procedures are not required to be substituted or eliminated if they are objective and impartial. Besides, this subparagraph (c) does not require this 'objective and impartial' procedures to be linked with any institutional design. As subparagraph (c) refers solely to 'procedures', a review mechanism with only procedures but no institutional body may be permissible. However, stress should be made with regard to the objective and purpose of these procedures of these review mechanism. They are the official way to carry out these reviews, and are meant to guide importers. The security and predictability of the world trading system as referred to in the preamble of the WTO Agreement should be taken into due account. That is, these procedures should be clear and precise enough for the complainants to follow.

C. PROMPT REVIEW

The literal meaning of 'prompt' suggests readiness and quickness to act. The Oxford Concise English Dictionary defines it as 'done or acting without delay.'¹⁴ However, this definition offers little guidance since how ready or quick to act is a relative concept. It depends on the nature of the task and on with what it is compared, which should also be measured in the context of domestic legal system. However, when determining whether a review is prompt enough or not, the nature of 'customs

¹⁴ *Ibid.*, at 1114.

matters', in particular light of the increasing emphasis on trade facilitation in these matters should be taken into due account, as the dynamics of competitive market in international trade may significantly change. 'Prompt' should also be read together with the objective and purpose of this provision to provide effective domestic review. The promptness of this review is an important element to ensure its effectiveness. It would be difficult to imagine a delayed review decision could be an effective one.

D. COMPETENCE, JURISDICTION, AND AUTHORITY

This domestic review should be competent to review or to correct administrative actions. To 'review' means to examine the correctness of administrative actions. To 'correct' means to 'put right', to 'make straight' or to 'amend.' It also suggests the substitution of right for wrong. Therefore, a competence to review or to correct means to check the correctness of administrative actions. In case of incorrect decisions, this review mechanism should be competent to substitute the right for the wrong administrative decisions. In this sense, repeal should be include in this correction, as repeal and correction share the same conceptual features of removing the wrongfulness in these administrative actions. However, it is not as clear in relation to the authority to order the administration to make certain decisions. Nevertheless, without such authority, this review mechanism cannot be regarded as effective. The jurisdiction of this review mechanism should be limited to administrative actions relating to customs matters. Therefore, non-tariff measures are not included, and resort cannot be had to this review mechanism. Nevertheless, this limited jurisdiction undermines the effectiveness of this review mechanism. With the progressive liberalization of tariff areas, non-tariff barriers are of even greater importance.¹⁵ This domestic review should have the authority to have decisions to be implemented by agencies responsible for administrative enforcement. It should also have the authority with regard to how these decisions are implemented.

¹⁵ Efforts to redress this ineffectiveness during negotiation processes of the Uruguay Round were made. The extended scope and its effectiveness will be examined in subsequent sections of this Chapter.

E. INDEPENDENCE OF ENFORCING AGENCIES

An institutional/organic requirement of this review provided is that it should be 'independent 'of the agencies which are in charge of administrative enforcement. Being 'independent' means being 'free from outside control' ¹⁶ and 'not subject to another's authority.'¹⁷ It also suggests 'separate'. In this vein, this review mechanism should be free from the control, and should not be subject to the authority, of administrative enforcement agencies. In this sense, the term 'formally' in subparagraph (c) is relevant in determining independence of this review mechanism. It has to be at least formally separate from agencies entrusted with administrative enforcement. The 'impartial and objective' standard in terms of subparagraph (c) should also be taken into account, as the objective and purpose of this independence requirement is to avoid conflicts of interests and thus ensure the impartiality and objectiveness of this review mechanism. In the end, effective domestic (judicial) review will be materialized. Therefore, whether these tribunals and procedures are independent of agencies entrusted administrative enforcement should also be determined by examining whether there could be potential conflicts of interests between these tribunals or procedures and the administrative enforcement agencies.

F. RIGHT TO APPEAL AND REVIEW BY CENTRAL ADMINISTRATION.

This provision provides that decisions delivered by this review mechanism should be carried out unless they are appealed within the prescribed time constraint. However, to include a right to appeal against these decisions is not compulsory. In other words, a Member is not obliged to make available a right to appeal in these tribunals or procedures.¹⁸ Although these decisions should be implemented by enforcement agencies, another proceedings initiated by central administration against decisions made by the review mechanism may be nevertheless permissible on the ground that there is good cause for this central administration to believe that these decisions delivered by the review mechanism is against the principle of laws or actual facts. That is, central administration may be allowed to re-initiate proceedings against

¹⁶ Concise Oxford English Dictionary 2002, at 720.

¹⁷ *Ibid.*

¹⁸ With regard to 'right of appeal', the TRIPS Agreement has strengthened this aspect.

these decisions only when these decisions are believed to be against the principles of law and thus being illegal, or the facts on which the contested decision is based have not been accurately established.

G. OBJECTIVE AND IMPARTIAL PROCEDURES IN FORCE

In subparagraph (c) of Article X:3, it is nevertheless prescribed that existent procedures in force on the date of this Agreement, which provide objective and impartial review of administrative action, do not have to be substituted or eliminated, even though they are not ‘fully or formally independent of the agencies entrusted with administrative enforcement’. Therefore, if a Member believes that procedures in force on the date of this Agreement are objective and impartial, it is not required to substitute or eliminate these existing procedures. The criteria of ‘impartial’ and ‘objective’ are of crucial importance.

‘Impartial’ means ‘treating all rivals and disputants equally.’¹⁹ That is, these tribunals or procedures should not privilege any parties to these disputes. Equal opportunities to be heard and to defend are thus important in this sense. The ‘principle of equality of arms’ is also relevant in terms of information and evidence available to these complainants. As the object and purpose of these tribunals and procedures are to strengthen domestic (judicial) review, access to information and evidence is essential for importers effectively to defend their rights and interests through this review mechanism.

The Panel addresses the term ‘impartial’ in *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather (Argentina – Hides and Leather)*.²⁰ Although it relates to ‘impartial administration laws, regulations, judicial decisions and administrative rulings of general application,’ how the Panel sees impartiality can nevertheless shed some light here. As this dispute is related to the presence of ‘partial and interested representatives of certain industrial associations’ in the process of customs administration, it can arguably be transformed into one

¹⁹ Concise Oxford English Dictionary 2002, at 711.

²⁰ Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather (Argentina – Hides and Leather)*, WT/DS155/R and Corr.1, adopted 16 February 2001.

addressing review procedures in light of ‘principle of equality of arms’ and ‘*ex parte* contact.’ The Panel emphasizes ‘the presence of private parties with conflicting commercial interests in the Customs process’,²¹ and the advantage that any interested party may take in this process to ‘obtain confidential information to which they have no right’.²²

Impartial procedures should also enable two parties equally to participate and to be heard. It thus links to the right of information in these review procedures. Parties to these procedures should not be privileged or prejudiced in terms of their access to information and their rights in relation to the protection of confidential information. This is of particular importance in these review procedures as the decisions subject to review are delivered by custom authorities. They may take advantage in their access to information whereas complaining importers may rely upon customs authorities for such information.

The requirements of ‘objective’ and ‘impartial’ are closely related. Being ‘objective’ means not being ‘influenced by personal feelings or opinions in considering facts and making decisions.’²³ That is, such tribunals or procedures should not be biased, especially customs-authority biased. In this vein, prohibition of *ex parte* contact is important to avoid undue influence to decision-makers in these tribunals or procedures. In this line, the impartiality contributes to the objectiveness, as the former will prevent decision-makers in this review mechanism from being biased.

Whether these procedures are ‘impartial and objective’ enough to conform to this subparagraph should be determined by members. That is, in case of doubts, a Member employing these procedures should, upon request provide full information in relation to these procedures so that all members can decide the conformity with this subparagraph in terms of the impartiality and objectiveness of these procedures. So far, no decision in relation to these procedures has been made. In case of a complaint

²¹ Panel Report, *Argentina – Hides and Leather*, para. 11.99.

²² *Ibid.*, para. 11.100.

²³ Concise Oxford English Dictionary 2002, at 981.

with regard to subparagraph (b) where the respondent member affirmatively defends by referring to subparagraph (c), the WTO Panel/Appellate Body will face with a dilemma similar to that in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India – Quantitative Restrictions)*²⁴ and *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey - Textile)*.²⁵ Should the WTP Panel/Appellate Body decide this issue on its own as members have not decided on this point? Should the panel refrain itself from stepping into this issue?

III. ARTICLE 13 OF ANTI-DUMPING AGREEMENT

The legal text of this provision reads:

Article 23: Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

A. EACH MEMBER WHOSE NATIONAL LEGISLATION

As this provision limits its application to a member ‘whose national legislation contains provisions on anti-dumping measures’, it is clear that those members, as in the case of Hong Kong, China and Macau, China in this dissertation, which do not have anti-dumping legislation are under no obligation in terms of this provision.

B. MAINTAIN JUDICIAL, ARBITRAL, ADMINISTRATIVE TRIBUNALS OR PROCEDURES

Members employing anti-dumping measures in their legislation are obliged to ‘maintain’ judicial, arbitral and administrative tribunals or procedures. The implementing measures under this obligation are almost identical to Article X:3(b) of the GATT 1994. However, ‘institute’ is not referred in this provision. It is because whenever a domestic anti-dumping legislation is enacted, these legislation should be

²⁴ Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India – Quantitative Restrictions)*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763.

²⁵ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textile)*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345.

immediately equipped with review mechanisms. To ‘institute as soon as practicable’ is not permissible. Besides, this ‘judicial review’ is not limited to judicial organs. Administrative or arbitral tribunals or procedures may be permissible provided the independence requirement laid down in this provision has been met. As noted by Vermulst, the Anti-Dumping Agreement (the ADA) does not either impose an obligation upon members to establish specialized courts to hear anti-dumping and other similar trade remedy disputes.²⁶ This is not difficult to understand. Since members are not required to maintain a prompt review by judiciary, it appears more difficult to impose more stringent obligation to provide review by specialized courts in judiciary.

C. PROMPT REVIEW

As observed, court proceedings in relation to anti-dumping measures in some WTO members are notoriously time-consuming. However, thus far they have not been challenged under this provision.²⁷ Sometimes recourse to the WTO dispute settlement mechanism may be more prompt than domestic review. The case of anti-dumping duties against anti-dumping duties on Korean dynamic random memory semiconductors is a good example. While the panel report on *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea (US – DRAMS)*²⁸ had been adopted on 19 March 1999, proceedings in the court of international trade was still pending. When the court finally laid down its decision on 19 May 1999, the decision of the WTO Panel was, however not relied upon.²⁹ Nevertheless, as noted above, the challenge against the ‘promptness’ of domestic review has not been reported.

²⁶ E Vermulst, *The WTO Anti-Dumping Agreement: A Commentary* (Oxford University Press, Oxford 2005) 214.

²⁷ *Ibid.*

²⁸ Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea (US – DRAMS)*, WT/DS99/R, adopted 19 March 1999.

²⁹ *Hyundai Electronics Co. v. United States*, 53 F. Supp. 2d 1334 (Ct. Int'l Trade 1999).

D. JURISDICTION

The ‘prompt review’ of such tribunals or procedures should have jurisdiction on ‘administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11’. The ‘final determinations’, as the raw text suggests, do not include provisional measures. Besides, ‘reviews of determinations’ should be read in the context of Article 11, as also explicitly provided in the legal text, where ‘reviews of determinations’ refer to reviews of the necessity for continued imposition of anti-dumping duties as well as price undertakings. In addition, these ‘reviews of determinations’ provided in Article 11.3 of the ADA, also cover the review as to whether the expiry of the duty or price undertakings would be likely to lead to continuation or recurrence of dumping and injury. Therefore, reviews of determinations cover two categories: to review the necessity to for continued imposition of anti-dumping duties or undertakings, and before the expiry of these anti-dumping duties or undertakings, the review of the likeliness of the continuation or recurrence of dumping and injury. In fact, the likeness of the continuation or recurrence of dumping and injury is a factor to determine the necessity for continued imposition of anti-dumping duties or undertakings, as any anti-dumping duty or undertaking shall remain in force as long as and to the extent necessary to counteract dumping that is causing injury.³⁰ If there is no likeness for the continuation or recurrence of dumping and injuries, the continued imposition of anti-dumping duties and undertakings is thus unnecessary. Lastly, this ‘prompt review’ should be applicable to ‘review of determinations’ both on the initiative of administrative authorities or upon request are included.

E. INDEPENDENT OF THE AUTHORITIES RESPONSIBLE FOR THE DETERMINATION OR REVIEW IN QUESTION

The same ‘independent’ requirement is imposed on this prompt review. Although the review body does not have to be a judicial organ, it should be nevertheless independent of the authorities responsible for the determination or

³⁰ ADA, Art. 11.1

review in question. This requirement is also aimed to ensure the effectiveness of this review mechanism.

IV. ARTICLE 23 OF AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES.

The legal text of this provision reads as follows:

Article 23: Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

A. EACH MEMBER WHOSE NATIONAL LEGISLATION

This provision in relation to ‘judicial review’ is parallel to that of the ADA. Its application is also limited to those members whose national legislation contain provisions on countervailing duty measures

B. MAINTAIN JUDICIAL, ARBITRAL, ADMINISTRATIVE TRIBUNALS OR PROCEDURES

The implementing measures under this provision are identical to those under the ADA, i.e. to ‘maintain judicial, arbitral, administrative tribunals or procedures’. The review mechanism should be included in the legislation governing countervailing duties measures. These review mechanisms can be judicial, arbitral, administrative tribunals or procedure provided they are ‘independent’ in terms of article 23 of the Agreement on Subsidies and Countervailing Measures (the ASCM).

C. JURISDICTION.

This provision has also almost identical content to that of the ADA in relation to the jurisdiction of this review mechanism. The ‘prompt review’ of such tribunals and procedures should have jurisdiction on ‘administrative actions relating to final determinations or reviews of determinations within the meaning of Article 21’. The ‘final determinations’, as the raw text suggests, provisional measures may not be

included in this 'prompt review'. Besides, the 'reviews of determinations' should be read in the context of Article 21, where the 'reviews of determinations' include the review of the necessity for continued imposition of countervailing duties as well as undertakings. In addition, similar to anti-dumping measures, the reviews of determinations also cover the review as to whether the expiry of the countervailing duties or undertakings would be likely to lead to continuation or recurrence of subsidization and injury. Consequently, there are also two categories of reviews of determinations identified in the ASCM: the review of the necessity for continued imposition of countervailing duties and undertakings, and the review, before the expiry of countervailing duties and undertakings, the likeness of continuation or recurrence of subsidization and injury. Following the same logic of the ADA, the 'reviews of determinations' both on the initiative of administrative authorities and upon request should be subject to this review mechanism.

D. INDEPENDENT OF THE AUTHORITIES RESPONSIBLE FOR THE DETERMINATION OR REVIEW

The same requirement of independence as Article 11 of the ADA also applies. Such tribunals or procedures should also be independent of the authorities responsible for the determination or review in question.

E. STANDING

As provided in this provision, such tribunals or procedures 'shall provide all interested parties who participated in the administrative proceedings and are directly and individually affected by the administrative actions with access to review.' Although the ASCM is mainly analogous to that in the ADA, 'judicial review' provided in the Agreement on SCM goes beyond what is contained in Anti-Dumping Agreement.³¹ All interested parties who participated in the administrative proceedings and are directly and individually affected by the administrative actions should be provided with access to review. Two requirements are prescribed in relation to the standing of these interested parties in such tribunals or procedures. One is that

³¹ S Charnovitz, 'The WTO and the Rights of the Individual' in S Charnovitz (ed) *Trade Law and Global Governance* (Cameron May, London 2002) 383.

these interested parties should have participated in the administrative proceedings. The other is that they have to be directly and individually affected by the administrative actions.

As the countervailing measures involve a wide variety of competing interests, including importers, exporters and consumers, it is important for these interested parties to be properly heard and participate both in the administrative proceedings as well as in the review mechanism. This interpretation can also be supported by reading together with Article 19.2, which provides that ‘procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties whose interests might be adversely affected by the imposition of a countervailing duty.’ In the accompanying footnote, it also explicitly provides that consumers and industrial users of the imported product subject to investigation are covered by the term ‘domestic interested parties’ as defined. Although the note reads ‘for the purpose of this paragraph,’ the legal text of Article 23 makes it clear that these consumers and industrial users of the imported product, if having participated in the administrative proceedings, can also refer to the review mechanism. Different reading would lead to inconsistency and incoherence. It will be also against the object and purpose of Article 19.2 of the ASCM to define ‘domestic interested parties’ as including consumers and industrial users of the imported product subject to investigation. Further, the aim of Article 23 of the ASCM is to provide *all* interested parties to have access to the review mechanism. To exclude consumers and industrial users of the import product runs counter to the object and purpose of this review mechanism and undermines its effectiveness.

As far as ‘all interested parties’ is concerned, *Argentina – Hides and Leather* is also relevant here. The Panel firstly notes that an inherent danger of partiality arises whenever a party with a contrary commercial interest but no relevant legal interest, is allowed to participate in an administrative action. The panel then points out that this danger ‘could be remedied by adequate safeguards’.³² The word ‘safeguard’ is telling here. Countervailing measures may concern various legal and/or commercial interests.

³² Panel Report, *Argentina – Hides and Leather*, para. 11.101.

What is important here is to make these interests safeguarded by equal opportunities to participate in administrative proceedings and the review mechanism. Therefore, both legally and commercial affected parties may fall within the scope of ‘all interested parties’. However, it would be infeasible and against procedural economy if parties not participating in administrative proceedings could have the standing in the review mechanism. Therefore, it is reasonable to limit the access of this review mechanism to parties having participated in administrative proceedings.

With regard to ‘directly and individually affected’, the most important criterion in relation to the standing of this review mechanism, a good departure point would be the ordinary meaning of ‘directly’ and ‘individually’. ‘Direct’ suggests ‘without intervening factors or intermediaries.’³³ ‘Individual’ means the characteristic of a ‘single’, ‘separate’ and ‘particular person’, opposite to a general group.³⁴ However, these definitions seem to offer little aid in clarifying who is eligible to have resort to this review mechanism. The line cannot be drawn without referring to the objective and purpose of this provision. The aim of this provision is to offer an opportunity for interested parties to have an access to the review mechanism. However, given the limited resources of judicial, arbitral or administrative tribunals or procedures, this access should be made available to those who have sufficient interest in these countervailing measures. Therefore, directly and individually affected should be interpreted in this light. Nevertheless, as noted above, ‘domestic interested parties’ as defined in the accompanying note include consumers and industrial users of the imported product subject to investigation. It is still not a clear-cut to distinguish whether every single, particular consumer or industrial user is ‘directly or individually affected’ or not.

V. ARTICLE 11 OF AGREEMENT ON CUSTOMS VALUATION

The legal text of Article 11 reads as follows:

Article 11: Judicial Review

³³ Concise Oxford English Dictionary 2002, at 405.

³⁴ *Ibid.*, at 722.

1. The legislation of each Member shall provide in regard to a determination of customs value for the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty.
2. An initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority.
3. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any rights of further appeal.

A. REVIEW BODY.

Compared to Article X:3(b) of GATT 1994, the scope of this article is limited to the ‘determination of customs value,’ but more stringent requirements are imposed upon the review mechanism. This article should also be read together with its accompanying Interpretative Note.

As prescribed, members are obliged to provide the review of this determination of custom value by the judiciary. The initiate review may be carried out by an authority within the customs administration or by an independent body. However, as made clear in the Interpretative Note, ‘the importer shall have the right in the final instance to appeal to the judiciary.’ That is, even if the decision of customs value determination is initially reviewed by an authority within the customs administration or by an independent body, the imports should have the right to refer to the judiciary to make this initial decision reviewed.

B. WITHOUT PENALTY

‘Without penalty’ means, as the Interpretive Note indicates, that the importer shall not be subject to a fine or threat of a fine merely because the importer chooses to exercise the right of appeal. The phrase; ‘merely because’ is important as a causal link must be established between the fine or the threat of a fine and the exercise of the right of appeal. However, this ‘without penalty’ requirement does not prevent members from ‘requiring full payment of assessed customs duties prior to an appeal.’

A penalty means a ‘punishment imposed for breach of law, rule or contract.’³⁵ A fine is ‘a sum of money exacted as the penalty for an offense.’³⁶ ‘Punishment’ and ‘offense’ are telling here. Therefore, fees in order to cover the administrative costs should not be regarded as a fine, and thus do not fall into the scope of this penalty. This reading is supported by the Interpretive Note, which provides that the payment of normal court costs and lawyers’ fees shall not be considered a fine. However, these court costs and lawyers’ fees should be limited to the amount necessary to cover the administrative expenses. In terms of the objective and purpose of this provision, these costs and fees should not have the effects of preventing or prohibiting importers from referring to this review mechanism.

C. JURISDICTION: DETERMINATION OF CUSTOMS VALUE

This article is applicable only to the determination of customs value. As indicated in the Interpretative Note, this article is only dealt with the ‘valuation determination made by the customs administration for the goods being valued.’ The term ‘valuation’ here is decisive in contrast to ‘custom matters,’ as employed in Article X:3(b) of the GATT 1994. Valuation means ‘an estimation of something’s worth’³⁷ in a specific sum or amount. Therefore, the application of this provision is limited to the estimation and determination of the goods being valued. Other customs matters are not applicable. While this provision imposes more stringent requirement on the review body, as it has to be judicial authority at the final appeal. However, the scope of its application is more limited. It is understandable that more stringent requirement is imposed in relation to the review body since the value of the goods determines the tariff to be imposed. Tariff reduction can arguably be regarded as one of the most important issues in the old GATT system. In order to ensure the benefit of tariff reduction being effectively realized, it is indispensable to guarantee that the value of goods is not unreasonably raised.

³⁵ *Ibid.*, at 1054.

³⁶ *Ibid.*, at 531.

³⁷ *Ibid.*, at 1584.

D. DECISIONS WITH REASONS GIVEN IN WRITING, INSTRUCTIONS FOR FURTHER APPEAL

Decisions of appeal should be given to the appellant with reasons provided in writing. If there is possibility for further appeal, such possibility should be included in these decisions. The purpose of these requirements is to ensure that a substantive and meaningful review is being carried out. These instructions for possibility for further appeal also contribute to the effectiveness of this review.

VI. AGREEMENT ON IMPORT LICENSING PROCEDURES

The legal text of paragraph 5(e) of Article 3 reads as follows:

- (e) any person, firm or institution which fulfils the legal and administrative requirements of the importing Member shall be equally eligible to apply and to be considered for a license. If the license application is not approved, the applicant shall, on request, be given the reason therefore and shall have a right of appeal or review in accordance with the domestic legislation or procedures of the importing Member;

A. DECISIONS GIVEN ON REQUEST

According to this provision, whenever an application for the license is not successful, after the request of the applicant, the reason for this rejection should be given to the applicant. A reasoned decision in relation to licensing application is not obligatory. The licensing authorities are obligated to give the reason only upon request.

B. A RIGHT OF APPEAL OR REVIEW IN ACCORDANCE WITH DOMESTIC LEGISLATION OR PROCEDURES.

The unsuccessful applicant should be given a right of appeal or review in order to review this decision. However, this provision, compared to those previously mentioned, does not impose any specific requirement on the review mechanism. It only obliges members to provide the unsuccessful applicant a right to appeal or review 'in accordance with domestic legislation or procedures'. There is no further requirement for these domestic legislation or procedures.

VII. ARTICLE VI:2 OF THE GATS

The legal text of this provision reads:

(a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

A. MAINTAIN, OR INSTITUTE AS SOON AS PRACTICABLE JUDICIAL, ARBITRAL OR ADMINISTRATIVE TRIBUNALS OR PROCEDURES

Provisions governing domestic (judicial) review in the GATS are analogous to those in the GATT 1994. The implementing measures required are also to ‘maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures.’ Similar to the GATT 1994, the GATS does not oblige members to provide judicial review. Administrative or arbitral tribunals or procedures may also be permissible.

B. COMPETENCE, JURISDICTION, AND AUTHORITY

This domestic review should be competent to provide ‘prompt review’ and where justified, ‘appropriate remedies’ for the administrative actions affecting trade in services. Therefore, this domestic review should have jurisdiction only on administrative decisions in relation to services trade. However, the scope of services trade should be read together with the first paragraph, which limits the obligation of reasonable, objective and impartial administration of measures of general application to sectors where specific commitments are undertaken. Therefore, this obligation of domestic review in relation to administrative decisions is also limited to those sectors in which members have specifically made commitments. The same term ‘prompt’ is employed in the GATS. Similar difficulties exist when determining the promptness of this review. However, one has to bear in mind the differences between trade in goods

and services trade. Apart from this prompt review of administrative decisions, this review mechanism should have the authority to order appropriate remedies. Whether remedies should be limited to compensation is not clear. However, in light of the object and purpose of an effective domestic review, the local tribunal should have the authority to order administrative agencies to act or not to act in a certain manner.

C. INDEPENDENCE OF THE AGENCY ENTRUSTED WITH THE ADMINISTRATIVE DECISION CONCERNED

Compared to requirements imposed by the ADA, the ASCMA, and the Agreement on Customs Valuation, the ‘independence’ requirement imposed by the GATS on the review mechanism is lenient. The procedures for this review do not have to be ‘independent of the agency entrusted the administrative decision concerned’. However, members are obliged to ensure these procedures provide for an ‘objective’ and ‘impartial’ review. The same requirement of being ‘objective’ and ‘impartial’ as prescribed in Article X:3(c) of the GATT 1994, is also imposed upon these procedures. It is interesting to note that tribunals are not referred to in relation to this ‘objective and impartial’ requirement. It does not mean that tribunals are not required to be dependent of agencies entrusted of the administrative decision in question. On the contrary, it is because it would be difficult to imagine a tribunal that is dependent of the agency entrusted with this administrative decision. Otherwise, it would be against the object and purpose of this provision to make available domestic review to service suppliers. The effectiveness of this review mechanism would also be undermined. Besides, compared to Article X: 3(c) of the GATT 1994, such procedures governed by Article VI:2(a) of the GATS do not have to be the existent procedures ‘in force on the date of this Agreement’. That is, even in the case of subsequently instituted procedures that govern this domestic review mechanism, they are not required to be independent of the agency entrusted of the administrative decision at issue, provided these procedures are objective and impartial.

D. INCONSISTENT WITH ITS CONSTITUTIONAL STRUCTURE OR THE NATURE OF ITS LEGAL SYSTEM

Another major weakness of this domestic review obligation provided in the GATS is that the following subparagraph (b) explicitly admits the derogation to this obligation. Subparagraph (b) provides that subparagraph (a) shall not be ‘construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.’ Therefore, whether ‘it would be inconsistent with its constitutional structure or the nature of its legal system’ or not is extremely difficult, if not impossible, to determine. It may turn out to be the best ‘exit’ for members to escape from their domestic review obligation.

VIII. TRIPS AGREEMENT

The enforcement of intellectual property rights laid down in the TRIPS Agreement is generally regarded as one of its major achievements. It prescribes a variety of requirements in relation to domestic remedies. It is not limited to review of administrative actions regarding determination intellectual property rights. It also covers various procedural rules governing civil and criminal procedures. The review mechanism provided by the TRIPS Agreement has stepped forward gone from controlling governmental measures to private infringing actions against intellectual property rights by individuals and enterprises.

Article 41.1 of the TRIPS Agreement that dictates effective action against infringement of intellectual property rights should be made available in domestic legal systems lays down a general framework governing the enforcement procedures. The following paragraphs regulate fair and equitable procedures, reasoned decisions without undue delay; an opportunity for parties to be heard in the proceedings, and an opportunity for judicial review of these decisions. Apart from this general regulatory framework, rules governing civil and administrative procedures and remedies, provisional measures, and special requirements on boarder measures are laid down in the following three sections of this enforcement part. Four core elements are provided in these enforcement rules, namely, judicial review; fair and equitable procedures;

participation, evidence and right of information; and remedies and provisional measures.

A. JUDICIAL REVIEW

Judicial review may be perceived as interlinked with the other three elements. To be sure, fair and equitable procedures requirement is applicable to judicial proceedings. Right to be heard, evidence and right of information, remedies and provisional measures are also part of these judicial proceedings. However, it is justifiable to be dealt with for on its own merit, as it is the controlling element of these requirements. Such arrangement is also justified on the ground 'judicial review' of administrative decisions can be arguably distinguished from civil and criminal judicial procedures. The enforcement part of the TRIPS Agreement sets out rules in relation to civil, administrative and criminal procedures that evidence the attachment of members to judicial authorities in ensuring the domestic protection of intellectual property rights. Article 41.4 prescribes that an opportunity for review by judicial authority of final administrative decisions should be made available. Further, right of appeal of the initial judicial decisions, at least in legal aspects should be provided. It is because of the legal tradition of some members of which the appellate courts can consider only the legal aspects of a disputed case, but not the factual basis.³⁸ This right of appeal is also subject to the 'jurisdictional provisions concerning the importance of a case.' This is mainly out of concern that members are not required to allocate their judicial resources on case of mirror economic importance.³⁹ A number of subsequent articles impose upon members the obligation to institutionalize judicial authorities to have the power to order specified measures; a systematic refusal of judicial authorities to exercise this power might constitute nullification or impairment of rights and obligation under the WTO Agreement.⁴⁰

³⁸ CM Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary* (Oxford University Press, Oxford 2007) 416.

³⁹ *Ibid.*

⁴⁰ D Gervais, *The TRIPS Agreements: Drafting History and Analysis* (2nd edn, Sweet & Maxwell, London 2003) 289.

B. FAIR AND EQUITABLE PROCEDURES

Members are required to provide fair and equitable procedures in relation to the enforcement of intellectual property rights, which shall not ‘unnecessarily complicated or costly’ or entail ‘unreasonable time limits’ or ‘unwarranted delays.’ Article 42 provides requirements on civil and administrative procedures and remedies in more detail. Members are obliged to make available to the rights holders civil judicial procedures for the enforcement of intellectual property rights to right holders. ‘Make available’ is interpreted as rights holder’s entitlement to have access to civil judicial proceedings that are effective for the realization of their rights covered by the agreement.’ Rights holders, as defined in the accompanying note 11, include federations and associations having legal standing to assert such rights. In contrast to the term ‘owner of a registered trademark’ used in Article 16.1, rights holders are interpreted by the Appellate Body as persons who claim to have legal standing to assert rights.⁴¹

A right of defence, as formulated as a right to timely written notice with sufficient detail is explicitly referred to in this article. Moreover, the right to be represented by independent legal counsel should also be made available in these procedures. In addition, parties should have the opportunity to substantiate their claims and to present all relevant evidence. In addition, those rights covered in Article 42, as interpreted by the Appellate Body, are procedural in nature, aiming to guarantee ‘an international minimum standard for nationals of other members within the meaning of Article 1.3 of the TRIPS Agreement.’⁴²

C. RIGHT TO BE HEARD, EVIDENCE, AND RIGHT OF INFORMATION:

The right to be heard, evidence, and the right of information are also provided in the TRIPS Agreement. The right to be heard is to be read in the context of evidence examination. Under the general obligation concerning the enforcement procedures, only the evidence on which parties are offered an opportunity to comment can be

⁴¹ Appellate Body Report, *US – Section 211 of Omnibus Appropriation Act of 1998 (US – Section 211 Appropriations Act)*, WT/DS176/AB/R (2 January 2002), para. 217.

⁴² *Ibid.*, para. 221.

taken into account for decisions on the merits of a case.⁴³ Besides, in respect of provisional measures and the suspension of the release of goods taken as measures, defendants should be provided with possibility for the review of these boarder measures decisions; right to be heard should be included in this review procedure.⁴⁴

Another similar provision relates to the denial of the access of information; whenever a party to the proceedings voluntarily and without good reasons denies access to or does not provide necessary information, judicial authorities may make preliminary or definitive determinations based on information presented to them. However, opportunities to be heard on the allegations or evidence should also be made available.⁴⁵ This denial of access to information should be read together with the first paragraph, which requires that judicial authorities should have the authority to order the opposing party to provide the evidence when ‘a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party’.⁴⁶ Some points should be made clear. Firstly, starting from Article 43, several subsequent articles begin with ‘*the judicial authorities shall have the authority*’. As held by the Panel on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities (India – Patents (EC))*, the phrase ‘judicial authorities shall have the authority’ suggests a degree of judicial discretion. Regardless of this discretion, judicial authorities are required to act in a certain way when the prescribed conditions are satisfied, rather than merely having the authority to do so.⁴⁷

The Panel, *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – Intellectual Property Rights)*⁴⁸ also touches upon this issue. The Panel firstly turns to the dictionary definition of ‘authority’ and

⁴³ The TRIPS Agreement, Art. 41(3).

⁴⁴ The TRIPS Agreement, Art. 50(5), 55.

⁴⁵ The TRIPS Agreement, Art. 43.

⁴⁶ The TRIPS Agreement, Art. 43(1).

⁴⁷ Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities (India – Patents (EC))*, WT/DS79/R, adopted 22 September 1998, para. 7.66.

⁴⁸ *Panel Report, China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – Intellectual Property Rights)*, WT/DS362/R (26 January 2009).

then clarifies that the obligation imposed upon members is to empower their domestic authorities to ‘have authority, but not to ‘exercise’ authority. The Panel then contrasts the terminology used by other provisions in relation to minimum standards of protection, such as ‘Members shall provide’ protection or that certain protection ‘shall’ be provided. The Panel then reaches the conclusion that the term ‘shall have authority’ reflects the discretionary power of the judicial authorities in choosing the orders with respect to specific infringements.⁴⁹ The obligation, judicial authorities ‘shall have the authority’, does mean that judicial authorities are required to exercise that authority in a particular way, unless otherwise specified.⁵⁰ Moreover, that the judicial authorities ‘shall have the authority’ to order certain types of remedies does not suggest that the discretionary power of judicial authorities is confined to only these types of remedies. Domestic judicial authorities are free to order other types of remedies.⁵¹

Besides, with regard to the order for the evidence produced by the opposing party, the claiming party has to meet two requirements to persuade the court to make such order: to present reasonably sufficient evidence and to specify relevant evidence. That is, the claiming party firstly has to provide evidence that is reasonably available, and this evidence provided should be sufficient to support its claims. Secondly, the claiming party has to specify the evidence lying in the control of the opposing party.

The Right of information relates to the disclosure of the identity of third party involved in the production and distribution of the infringing goods or services, as well as of the channels of this distribution.⁵² This right of information is of crucial importance to fight against professional infringement. As judicial authorities have the authority to order the infringer to disclose the identity as well as the channels of distribution, sanctions with regard to non-cooperation, such as ‘contempt of court’ may be applicable to the refusal.⁵³

⁴⁹ Panel Report, *China – Intellectual Property Rights*, para. 7.236.

⁵⁰ Panel Report, *China – Intellectual Property Rights*, para. 7.238.

⁵¹ Panel Report, *China – Intellectual Property Rights*, para. 7.239.

⁵² The TRIPS Agreement, Art.47.

⁵³ D. Gervais, above n. 40, at 301.

D. REMEDIES AND PROVISIONAL MEASURES

Several remedies are included in the enforcement part of TRIPS Agreement, covering injunctions, damages, and provisional measures. The indemnity of the defendant is also included. With regard to injunction, judicial authorities are authorized to order the infringer to desist from an infringement. It is of particular importance for the prevention from the entry of infringing products into the channels of commerce when procedures of customs clearance are finished.

In case of infringing activities into which infringers engage, knowingly or with reasonable grounds to know, the judicial authorities should be competent to order infringers to pay damages. These damages should be adequate to compensate the damages of the intellectual property rights holders; other expenses, including attorney's fees may also be ordered to be paid. When appropriate, recovery of profits and/or payment of pre-established damages may be also ordered to be paid even if infringers do not engage into infringing activities, knowingly or with reasonable grounds to know. However, the members' obligation will be fulfilled when courts are conferred the authority to impose the payment of expense, which may cover attorney's fees. Nevertheless, it is not obligatory for the courts to order these expenses to be covered. There is some degree of judicial discretion. The same applies to recovery of profits and/or payment of pre-established damages by infringers who do not knowingly, or with reasonable grounds to know, engage into infringing activities. Furthermore, 'recovery of profits and/or payment of pre-established damages' may shed some light in interpreting the scope of damages in the first paragraph. In other words, damages referred to in the first paragraph may cover these two. However, it is up to national legislation to determine 'damages adequate to compensate the injury' provided they meet minimum standards of the TRIPS Agreement.

In order to create an effective deterrent to infringement, other remedies are provided in Article 46. Courts are authorized to order the infringing goods, as well as materials and implements predominantly used for the creation of these infringing goods to be disposed in a certain way or to be destroyed. With regard to the disposal of the infringing products, materials and implements, it is of crucial importance that

this disposal should have to effect to exclude them from the channels of commerce. Article 46 also explicitly provides that when dealing with this disposal, the court should take into account ‘the proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties’. The disposal of infringing products is among the subject matters of the request for consultation by the United States in *China – Intellectual Property Rights*. The US contends that the practices of Chinese Customs authorities with regard to the disposal of infringing goods, as required by relevant Chinese regulations, are inconsistent with Article 46. Infringing goods are allowed to enter into the channels of commerce after removing their infringing features; only when these infringing features of these goods cannot be removed will they be destroyed. In the view of the United States, these regulations and practices are WTO-inconsistent.⁵⁴ Such claim may be justifiable in light of the last sentence of this article that provides that the mere removal of the unlawfully affixed trademark does not sufficiently permit these infringing products to enter into channels of commerce. Even though this sentence addresses solely to counterfeit trademark goods, the same concerns in relation to entry into channels of commerce exist. The object and purpose of this article is to provide an effective deterrent to infringement and to prevent these infringing products from entering into the channels of commerce in order not to disrupt the market. The priority of permitting the entry into channels of commerce by removing the infringing features stipulated by the alleged Chinese regulation thus runs counter to this object and purpose.

On the other hand, it is also essential to balance the rights and interests of defendants, especially in case of the abuse of enforcement procedures. Consequently, Article 48 provides that a defending party should be adequately compensated for those measures taken upon the requests of the claiming party that has abused the enforcement procedures. Judicial authorities should also be authorized to order expenses, including attorney fees, to be paid by the applicant. However, liability of

⁵⁴ WTO Document, WT/DS362/1 (16 April 2007), at 3.

public authorities and officials may be exempted if these actions ‘are taken or intended in good faith in the course of the administration of that law.’⁵⁵

Lastly, provisional measures are also of great significance in domestic enforcement procedures. The terms ‘prompt’ and ‘effective’ are telling in interpreting these provisions in Article 50. These provisional measures aim to prevent the occurrence of infringement and preserving the evidence. These provisional measures are of particular importance for the prevention of the entry of infringing products into channels of commerce. The provisional measures can also be *inaudita altera parte* taken; however, more stringent requirements are imposed in this regard. Although it may not be limited to those cases where the delay is likely to cause irreparable harm or there is demonstrable risk of evidence being destroyed, however, the same characteristics of emergency should apply for those provisional measures *inaudita altera parte* imposed.

In other words, the interests of the defending parties should be counterbalanced. Claiming parties may be required to present reasonably available evidence to justify the necessity for the adoption of provisional measures. A sufficient degree of certainty that the right of applicant is being infringed or that the infringement is imminent should be demonstrated and substantiated. Besides, the judicial authorities should be authorized to order the applicant to provide ‘security or equivalent assurance sufficient to protect the defendant and to prevent abuse.’⁵⁶ When provisional measures are *inaudita altera parte* taken, a quick notice should be given to defending parties, and a review where a right to be heard is provided should be made available upon the request of defendant parties. In cases where provisional measures are revoked, where they lapse due to the act or omission of the applicant, or where there is no infringement, judicial authorities should be authorized to order compensation to be paid by the applicant.⁵⁷

⁵⁵ The TRIPS Agreement, Art.48(2).

⁵⁶ The TRIPS Agreement, Art. 50(3).

⁵⁷ The TRIPS Agreement, Art. 50(7)

IX. ARTICLE 4 OF PRE-SHIPMENT INSPECTION AGREEMENT

Apart from various provisions mentioned above, Agreement on Pre-shipment Inspection (the PSI Agreement) and the Agreement on Government Procurement (the GPA), as will be shown below, have special arrangements for their review mechanisms. An 'Independent Entity', as a subsidiary body of the Council for Trade in Goods is established within the WTO. As prescribed in the subparagraph (a) of Article 4, this 'Independent Entity' should be composed of an organization representing exporter and an organization representing inspection entities. In an agreement concluded with the WTO, The International Chamber of Commerce (representing exporters) and the International Federation of Inspections Agencies (representing pre-shipment inspection entities) agreed jointly to constitute this 'Independent Entity.'⁵⁸ Either exporters or inspection entities can refer a dispute to this 'Independent Entity.'⁵⁹ In case of such referral, an arbitral panel will be established to hear the dispute. In this case, exporters will be able to refer a dispute directly to the WTO. The Panel will have to rule whether parties to the dispute have complied with the PSI Agreement. Opportunities for both parties to present views in person or in writing should be provided in this review.⁶⁰ The Panel's decisions should thus be binding on both parties.⁶¹ As observed, this review procedure provides an opportunity which empowers exporters to enforce international trade law through the WTO's 'Independent Entity.' As of 31 January 2009, two cases are reported.⁶²

X. ARTICLE XX OF GOVERNMENT PROCUREMENT AGREEMENT

The challenge procedures provided in Article XX is also unique in terms of applicable laws and comprehensive requirements imposed by Government Procurement Agreement (the GPA). As noted above, domestic review allowing

⁵⁸ WTO, *Guide to WTO Law and Practice: Analytical Index* (1st edn, WTO, Geneva 2003) 839.

⁵⁹ The PSI Agreement, Art. 3 (c).

⁶⁰ The PSI Agreement, Art. 3 (f).

⁶¹ The PSI Agreement, Art. 3 (h).

⁶² The parties to these two disputes are the same: the company Alcatel CIT and Société Générale de Surveillance – SGS Holding France. During the proceeding of the first case, the parties reached a mutually satisfactory settlement of the dispute. Nevertheless, a dispute between parties arose in the following year and was again referred to the Independent Entity. The Panel thus ruled on the substantial part of this dispute. WTO Document, G/PSI/IE/R/1 (2 November 2005), G/PSI/IE/R/2 (14 November 2006).

private actors to challenge national measures are provided in some provisions. However, none of them goes as far as the GPA. As is pointed out, their procedural requirements and substantial obligation on remedies are not as detailed or stringent as those of the GPA. Greater deference is given to members' domestic legal traditions on review mechanisms in those areas in question.⁶³ By contrast, the GPA lays down not only general requirements for the challenge procedures that have to be 'non-discriminatory', 'timely', 'transparent' and 'effective'. As will be shown below, other specific requirements are also mentioned.

A. 'NON-DISCRIMINATORY', 'TIMELY', 'TRANSPARENT' AND 'EFFECTIVE'

The general requirements of these challenge procedures are 'non-discriminatory', 'timely', 'transparent' and 'effective'. No-discrimination has been dealt with in Article III of the GPA. As challenge procedures fall into the scope of 'all laws, regulations, procedures and practices regarding government procurement', requirements laid down Article III are applicable. No discrimination should be read both in the sense of Most-Favoured-Nation Treatment and National Treatment; products, services, and suppliers of other parties to the GPA should be accorded 'treatment no less favourable than that accorded to *domestic* products, services and suppliers, and that accorded to products, services and suppliers of *any other Party*'.⁶⁴

The 'timely' requirement is closely related to the 'effective' requirement. Paragraph 8 further elaborates this 'timely' requirement, stressing the importance of a timely decision for preserving commercial and other interests. If breaches of the agreement are to be corrected, not merely compensated, rapid resolution of complaints is essential. It should be made clear that suppliers refer to these challenge procedures mainly on the purpose of correcting these breaches of the agreement, and thus obtaining the commercial opportunities, instead of seeking for compensation. Therefore, effective challenge procedures should include timely resolution and thus make possible the profit-seeking of suppliers. Challenge procedures should not than serve merely as 'sorrow-comforter'. Transparency in these challenge procedures is

⁶³ S Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International, Dordrecht, The Netherlands 2003) 385.

⁶⁴ GPA, Art. III (emphasis added).

dealt with by various subsequent paragraphs. Written challenges procedures should be made generally available.⁶⁵ Drafters of the GPA prefer these challenges reviewed by a court. If the review is not carried out by the court, it is desired that the decision would be subject to judicial review. If it is not the case, various procedural and transparency requirements are imposed. It is assumed that judicial proceedings, by nature, are more transparent than any others.

Another issue related to these general requirements is their relationship with the follow paragraphs where detailed and specific requirements are provided. In other words, are these four general requirements serving as introductory interpretation guidance for later part of this article, or are they, independent of subsequently provisions, legally enforceable? A good example is whether the limitation of compensation to costs for tender preparation or protest can be accepted as ‘effective’, as prescribed by Article XX:2. For example, when a contract for procurement is not made public and when the review body refuses to suspend the procurement process or void the contract on the ground of public interests but merely provides compensation for tender preparation or protest, arguably no preparation cost as the challenging supplier might not be aware of this contract. In this case, are the challenge procedures ‘effective’ in terms of Article XX:2 of the GPA? Conflicting views exist.

Those arguing against the legal enforceability of Article XX:2 refer to *Japan – Tax on Alcoholic Beverage II*. There, the Appellate Body draws a distinction between provisions which ‘contains general principles’, and provisions which ‘provides for specific obligations regarding internal taxes and internal charges’. Basing on this distinction, the Appellate Body then held that, ‘the purpose of Article III:1 [of the GATT 1994] is to establish this general principle as a guide to understanding and interpreting the specific obligations’.⁶⁶ It is argued that, according to this holding, Article XX:2 of the GPA is mainly an introductory provision, violation claims solely based on this provision is not permissible. This argument also finds its support from

⁶⁵ GPA, Art. XX:3.

⁶⁶ Appellate Body report, *Japan – Alcoholic Beverages II*, at 18.

the legal certainty as the four requirements in Article XX:2 of the GPA are general and vague. Thus, they should not be solely relied upon.

On the other hand, a textual argument emphasizing the term ‘shall’ suggests that these requirements should be legally enforceable. The term ‘shall’ indicates the mandatory nature of this obligation. Besides, rendering these requirements legally enforceable would significantly contribute to the effectiveness of the GPA.⁶⁷ The ‘legal certainty’ argument should be rejected, as the nature of general principles does not prevent them from being legally enforceable. The judges can gradually figure out how to substantiate the contents of these requirements.

However, merely relying upon the term ‘shall’ fails to appreciate the whole picture of these challenge procedures and makes a holistic interpretation of the obligation to provide these procedures impossible. Principle of effectiveness in treaty interpretation does not necessarily render every single provision independently enforceable. As the Appellate Body points out in *Japan – Tax on Alcoholic Beverage II*, these general principles constitute a part of the context where the following paragraphs are situated. Therefore, these general requirements act as a basis to develop the challenge procedures prescribed by following paragraphs. Besides, they also constitute the core of these challenge procedures which should not be reduced to the extent that these challenge procedures are in fact ineffective.

B. STANDING

Article XX:2 of the GPA provides that these challenges should enable suppliers ‘to challenge alleged breaches of the agreement in the context of procurements in which they have, or have had, an interest.’ According to this provision, suppliers may refer to these challenge procedures with regard to these procurements in which they have, or have had, an interest. Two criteria should be addressed here: ‘suppliers’ and ‘have, or have had, an interest.’ There are conflicting views with regard to the scope of ‘suppliers’. It may be arguably confined to those who are seeking to be a party to a government’s contract. It may also be interpreted in a broader sense, covering

⁶⁷ Arrowsmith, above n. 63, at 389-391.

contactors, subcontractors or those operating further down the supply chain of works, supplies, and services. The difference here is whether these subcontractors, or other operators down in the supply chain, are eligible to refer to these challenge procedures. In light of the object and purpose of Article XX, namely, to provide effective protection to ensure the GPA to be faithfully observed, a broader interpretation is desirable. This can be further justified when conflicts of interests between contractors and subcontractors arise. In this case, it would be necessary for subcontractors to have resort to these challenges procedures.⁶⁸ Besides, standing to challenge is also limited to those suppliers who ‘have, or have had, an interest’. ‘Interest’ is not defined in the GPA. Interests may include legal interests or commercial interests. However, a reasonable limitation of the standing to interested supplier appears also justifiable in terms of the capacity and resources of these challenge procedures. It is nevertheless unacceptable to impose undue constraint upon the standing to make the access to these challenges procedures unreasonably difficult. As argued, it would be contrary to Article XX:2 of the GPA, if suppliers required to show that they would definitely or probably have won the contract.⁶⁹

C. A COURT OR BY AN IMPARTIAL AND INDEPENDENT REVIEW BODY

There are several requirements imposed upon the review body. According to Article XX:6, if this review body is not a court, it has to be ‘an impartial and independent review body’ with no interest in the outcome of the procurement. The members of this review body should be secure from external influence during their term of appointment. The decision of this ‘impartial and independent body’ should be subject to judicial review; otherwise, it has to meet various requirements laid down by the GPA. The provision reads as follows:

- (a) participants can be heard before an opinion is given or a decision is reached;
- (b) participants can be represented and accompanied;
- (c) participants shall have access to all proceedings;
- (d) proceedings can take place in public;

⁶⁸ *Ibid.*, 391-392.

⁶⁹ *Ibid.*, at 393.

- (e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
- (f) witnesses can be presented;
- (g) documents are disclosed to the review body.

In other words, the review body is preferably a court or ‘an impartial and independent body’ whose decisions are subject to judicial review. Otherwise, this ‘impartial and independent body’ should cover afore-mentioned procedures. Some elements need to be further elaborated. Firstly, similar impartial and independent criteria are imposed. Two specific requirements are imposed with regard to the impartiality and independence of this review body. It has to involve no interest of the outcome of the procurement. This requirement is mainly out of the concerns of conflicts of interests. Besides, the members of this review body should be secure from external influence during the term of appointment. This is also a vehicle to safeguard the independence and impartiality of members of this review body. Being secure from external influence is actually a major feature of judiciary. In case of the impartial and independent review body whose decisions are not subject to judicial review, as illustrated above, detailed procedural rules are prescribed. It includes right to be heard, represented and accompanied and right to present witnesses; full access to proceedings which should be held public; reasoned decisions in writing; access to information. These procedural rules actually model those governing judicial proceedings.

D. JURISDICTION, COMPETENCE AND AUTHORITY

These challenge procedures should have jurisdiction on ‘alleged breaches of the Agreement’. It is argued that the term ‘alleged breaches of the Agreement’ suggests direct applicability of the GPA.⁷⁰ However, it is also argued that suppliers can invoke and enforce substantial obligations of the GPA in the challenge procedures only when these substantial obligations have legal effects in domestic law.⁷¹ If in the domestic

⁷⁰ EU Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (Kluwer Law International London, The Hague, Boston 1997) 194.

⁷¹ Arrowsmith, above n. 63, at 386.

legal sphere, the transformation legislation deliberately omits or amends what is included in the GPA, suppliers may not be able, by referring to the GPA, to challenge measures based on this national legislation. In other words, legal basis for challenging the breaching measures is limited to national legislation. According to Arrowsmith, the reference to ‘this Agreement’ is a general practice of public international law. If stronger effects were intended, further elaboration should have been made.⁷² However, such interpretation seems to depart from the legal text as it reads, ‘each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.’ The alleged breaches of the Agreement does not limit to any specific scope. Besides, reading together with the term ‘effective’, it is obvious that the derogation of the GPA by national legislation to circumvent the obligations imposed is not intended and not desirable as it undermines the effectiveness of these challenge procedures.

Under the GPA, the competence of these challenge procedures should include at least three aspects: interim measures; an assessment and a possibility for a decision on the justification of the challenge; and the correction of the breach of the agreement or the compensation for the loss or damages suffered. The interim measures are meant to correct breaches of the agreement and to preserve commercial opportunities. To preserve commercial opportunities is of great importance as the compensation provided in Article XX:7(c) may be limited to ‘costs for tender preparation or protest.’ These interim measures also aim to ensure that complainant’s position in the procurement concerned will not be prejudiced during the processes of challenge procedures. Rapid interim measures are of particular significance in terms of government procurements as it will be sometimes very difficult or even impossible to correct the breaches once the contracts have been performed. In light of the afore-mentioned limited compensation, if breaches of the agreement cannot timely be corrected, the effectiveness of these challenge procedures can be seriously undermined. Moreover, the same provision also explicitly provides that, even in the case where these challenge procedures have the authority to order to suspend the

⁷² *Ibid.*

procurement process, they enjoy the discretionary power and can decide not to when adverse consequences override. Therefore, after balancing relevant interests concerned, including public interests, the challenge procedures may be tempted not to suspend the procurements process in question.

Secondly, Article XX:7(b) of the GPA provides an assessment and a possibility for a decision on the justification of the challenge. As is submitted, this provision means merely that the challenge procedures should have the authority to examine on the merits of the complaints and to determine the existence of the breaches of the GPA. However, what is missing here is the standard of review. How to assess the complaint is not made clear by this provision. Therefore, this will depend on domestic legal traditions in relation to this subject matter.

The third competence of these challenge procedures is its competence to correct of the breach of the Agreement 'OR' to compensate for the loss or damages suffered. The term 'or' here is ambiguous. It is not clear whether the challenge procedures are required to include both correction and compensation or either may suffice. A literal reading may leads that the challenge procedures may be conferred the competence to compensate only. However, this reads is obviously illogical. Firstly, challenge procedures with the sole competence to compensate can never be regarded as 'effective' in terms of Article XX:2 of the GPA. It is even so when one takes into account the limited amount of compensation. As dictated, the compensation should cover loss and damages suffered. While the compensation seems to be wide in scope at the first glance, and may arguably cover lost profits, Article XX:7(c) of the GPA explicitly reads that compensation 'may be limited to costs for tender preparation or protest.' Therefore, lost profits may be excluded for this compensation, which significantly reduce effectiveness of remedies. Bearing this in mind, if parties are allowed to provide either correction or compensation in these challenge procedures, remedies may be reduced to 'costs for tender preparation or protest.' The main object and purpose of these challenge procedures is to preserve commercial opportunities.

To correct the breaches of the agreement and to preserve commercial opportunities for challenging suppliers seems to be of greater importance both in

terms of the GPA-consistency and of commercial interests of suppliers. Correction may take in a wide variety of forms, depending on the stage of procurements processes. A timely correction is essential as it may be of no practical value in the case where the contract has been concluded and the performance has been commenced. Under this circumstance, it may be difficult for the review body to void a contract after balancing all interests affected. The remedies turn out to be the limited compensation.

XI. SHORT CONCLUSION: RELATIONSHIP WITH OTHER SUBSTANTIVE OBLIGATIONS

This Chapter examines various provisions of the WTO agreements governing domestic judicial review. It begins with Article X:3(b) of the GATT 1994 and those agreements annexed to this General Agreement. These provisions cover Article 13 of the ADA, Article 23 of the ASCM, and Article 11 of the Agreement on Customs Valuation. It then examines Article VI of the GATS and investigates Article 41 to Article 50 and Article 59 of the TRIPS Agreement. Finally, it deals with Article 4 of the PSI Agreement and Article XX:2 of the GPA

The interpretation is based upon the rule of interpretation dictated by Article 3.2 of the DSU. It also follows the practice of the WTO Panel/Appellate Body, namely, text, context, object and purpose.

Before concluding this Chapter, it is feasible to examine the relationship between these domestic review provisions and other substantive obligations. As noted in the introductory section, the Panel held that, it is inappropriate for the WTO Dispute Settlement Mechanism to ‘function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member’s domestic judicial system.’ The same concerns arise. Is the WTO Panel/Appellate Body suited to perform as the final appeal of domestic review?

The relationship between substantive obligation and Article X was firstly touched upon in *European Communities – Regime for the Importation, Sale and*

Distribution of Bananas III (EC – Bananas III).⁷³ When addressing Article X:3(a), the Appellate Body held, ‘Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.’⁷⁴ In *European Communities – Measures Affecting the Importation of Certain Poultry Products (EC – Poultry)*,⁷⁵ the Appellate Body refers to the afore-mentioned ruling and briefly discusses the application of Article X. According to the Appellate Body, ‘Article X relates to the *publication* and *administration* of laws, regulations, judicial decisions and administrative rulings of general application, rather than to the *substantive content* of such measures’.⁷⁶

These two cases are dealt with Article X:3(a) of the GATT 1994. However, as the obligation laid down in Article X:3(b) shares the same characteristics as X:3(a), it seems justifiable that the same distinction applies. Besides, the holding of the Appellate Body refers to Article X, instead of being limited Article X:3(a). Thus, the same distinction, by the same token, between impartiality and objectiveness of this ‘prompt review’ and the substantive content of decision this review can also be drawn. Borrowing the phrase used by the Panel in *Argentina – Hides and Leather*, Article X:3(b) aims to control the manner of review administrative actions, rather than the substantive decisions of the review mechanisms in question.⁷⁷ There are no persuasive reasons to prevent the WTO Panel/Appellate, either on the ground of legal argument or policy argument, from reviewing the substantive content of decisions delivered by these domestic review mechanisms. However, it is not intended to transform every claim relating to substantive obligation into one based upon Article X:3(b) of GATT 1994 or any other relevant provisions.

⁷³ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, WT/DS27/AB/R, adopted 25 September 1997.

⁷⁴ Appellate Body Report, *EC – Bananas III*, para. 200 (emphasis original).

⁷⁵ Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products (EC – Poultry)*, WT/DS69/AB/R, adopted 23 July 1998.

⁷⁶ Appellate Body Report, *EC – Poultry*, para. 115 (emphasis original).

⁷⁷ Panel Report, *Argentina – Hides and Leather*, para. 11.72.

CHAPTER V JUDGING JUDGES: CHINA'S WTO OBLIGATION TO PROVIDE AN INDEPENDENT AND IMPARTIAL JUDICIAL REVIEW, ITS IMPLEMENTATION AND POSSIBLE COMPLAINTS

I. INTRODUCTION

China's accession to the WTO has attracted much attention and a variety of scholarly work has been devoted to this issue.¹ A less explored subject is China's WTO obligation to provide an independent and impartial judicial review, as embodied in Protocol on the Accession of People's Republic of China to the WTO (hereinafter China's Accession Protocol). Although Chinese judicial reform has been, from time to time, related to its WTO accession, little literature examines whether the progress so far made suffices itself to pass the scrutiny from the WTO Dispute Settlement Mechanism. This obligation is of great significance both to WTO law and to Chinese legal system.

With regard WTO law, this 'independent and impartial judicial review' obligation prescribed in China's accession protocol is cited as an example to justify the argument that WTO law should not be interpreted in purely economic terms, and that its legal and political objectives are no less important than trade liberation. As the WTO Agreement does not only employ formal constitutional techniques, but it also embodies various substantive constitutional principles, WTO law shares major features of constitutionalism and can be thus conceived as a part of the multilevel constitutional framework in multilevel trade governance.² The WTO Agreement is

¹ According to Bhattasali's observation, three main approaches are employed to look upon China's WTO membership. One is from the perspective of the legal rights and obligations, examining challenges involved in meeting China's legal commitments and in ensuring that China's rights are maintained. Another approach places the emphasis on the trade and policy changes, and explores what efforts to be made with the aim to integrating China's open market into the global economy. The third one is to see how China's WTO membership serves as a key component in the restructuring of the Chinese economy as well as other policy goals, notably, its peaceful emergence as a great trading power. See, D Bhattasali, *et al.*, 'Impacts and Policy Implications of WTO Accession for China' in D Bhattasali, *et al.* (eds) *China and the WTO: Accession, Policy Reform, and Poverty Reduction Strategies* (World Bank, Washington, D.C. 2004) 1.

² EU Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism' in C Joerges and EU Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, Oxford and Portland, Oregon 2006) 32-33. Petersmann argues that WTO law uses the formal techniques of (1) the distinction of long term constitutional rules and post-constitutional decision making; (2) the legal primacy of the WTO agreement over conflicting provisions in the Multilateral Trade Agreements annexed the WTO agreement; and (3) protection of freedom of trade, most-favor-nation treatment, national treatment, private property rights and rule of

claimed to be 'one of the most revolutionary transformative agreements in the history of international law.'³

As for the impact of this obligation on Chinese legal system, the vice-president of the Supreme People's Court delivered a speech on 'China and the rule of law' shortly after China's entry into the WTO. He stated that the accession to the WTO would have a profound impact on both the rule of law and the judicial reform in China, even though he thought that the existing legal system on administrative procedure and judicial review had already met the requirements of the WTO.⁴ This statement seems not so convincing. On the contrary, Chinese judicial system should be reformulated in order to fulfil its WTO obligation. It As pointed out, China's accession to the WTO constituted an unprecedented opportunity to its judicial reform by reshaping the relationships among courts, local governments and the Chinese Communist Party, since China's accession has put its economic, legal and political system under strict scrutiny. The fact that the aggrieved foreign parties can always, through its own countries resort to the WTO Dispute Settlement Mechanism for legal redress, presents a great pressure for China and forces it to implement meaningful reform to establish an independent and impartial judicial review.⁵ In other words, the binding nature of this WTO obligation and the potential sanction for non-compliance compel China to take its legal obligation of the independent and impartial judicial review more seriously. Effective enforcement is also obligatory.

Such concerns could be also evidenced in China's first trade policy review conducted in 2006. During the Trade Policy Review, the United States voiced its concerns with respect to the role of the Chinese Communist Party in the proceedings

law subject to broad exceptions to protect public interests. He also argues that four substantive principles are included in WTO law: rule of international law, the respect of universal human rights obligations of WTO members, separation of powers and the concern of social justice.

³ EU Petersmann, *Dispute Prevention, Dispute Settlement and Justice in International Economic Law* (Forthcoming).

⁴ J Cao, 'China and the Rule of Law' (2002) 16 *Temple International and Comparative Law Journal* 379, 379. For updated review of the socialist rule of law with Chinese characteristics, see, J Lee, 'Socialist Rule of Law with Chinese Characteristics' (2007) 43 *Issues & Studies* 115.

⁵ VM Hung, 'China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform' (2004) 52 *American Journal of Contemporary Law* 77, 120-125.

and decisions of the Supreme People's Court as well as the lower courts. Chinese government replied with the following answer:

According to the Constitution, the Organic Law of the People's Courts of the People's Republic of China and the Judges Law of the People's Republic of China, the people's courts exercise judicial power independently and are not subject to interference by any administration, public organization or individual. When exercising this power, the people's courts shall strictly abide by the Constitution, the Organic Law of the People's Courts of the People's Republic of China and other substantial and procedural laws related to the specific cases.⁶

However, this reply did not fully answer the question. It was not clear whether the Chinese Communist Party fell into the categories of administration, public organizations or individuals, and thus courts should not be subject to its interference. In addition, what Chinese government failed to point out were those articles requiring the courts to be responsible to the People's Congress and those governing the relationship among courts, Chinese Communist Party and People's Congress. Against this background, this Chapter aims to examine efforts so far made in relation to China's 'independent and impartial judicial review' obligation and to ascertain the compatibility with the WTO requirements.

However, I do not engage into empirical studies in this Chapter. Progress in relation to 'an independent and impartial judicial review' will be presented to the extent necessary to illustrate its weakness and its incompatibility with standards laid down by global and regional instruments in relation to 'an independent and impartial tribunal.' Besides, this Chapter will not touch upon whether 'an independent and impartial tribunal' in accordance with the WTO requirements meets the needs of China's developments. Given the binding effect of China's WTO obligation, this Chapter chooses to focus on the conformity of Chinese judicial system with this obligation. Following this introductory Section, Section II will firstly examines China's 'independent and impartial judicial review' obligation based on what has been elaborated in Chapter II, namely, the role of domestic courts in the WTO Agreement.⁷ As the existent WTO jurisprudence does not offer a clear answer of

⁶ WTO Document, WT/TPR/M/161/Add.2 (11 September 2006), at 12.

⁷ See *supra*, Chapter II, Section II. B, text to n. 21, ff (the role of the domestic courts in the WTO Agreement).

what ‘an independent and impartial judicial review’ should be, Section III refers to global and regional standards of ‘judicial independence’⁸ in order clearly to define the nature and scope of this obligation. Section IV will firstly review some major efforts in relation to the fulfilment of this obligation, and then continue to explore the approach to interpret this ‘independent and impartial judicial review’ obligation, and end up with answering whether the existing judicial system can pass the scrutiny. This Chapter ends with a short concluding remark summarizing major arguments and main findings of this Chapter and points to the direction for future reform in Chinese judicial system.

II. CHINA’S OBLIGATION TO PROVIDE AN INDEPENDENT AND IMPARTIAL JUDICIAL REVIEW

A. CHINA’S ACCESSION PROTOCOL TO THE WTO

As noted in Chapter II, there was a trend to strengthen the effectiveness of domestic judicial review during the negotiation of the Uruguay Round. This trend is also evidenced by China’s Accession Protocol to the WTO where the obligation to provide an independent and impartial judicial review is explicitly prescribed in Article 2 (D). The legal text reads as follows:

1. China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.
2. Review procedures shall include the opportunity for appeal, without penalty, by individuals or enterprises affected by any administrative action subject to review. If the initial right of appeal is to an administrative body, there shall in all cases be the opportunity to choose to appeal the decision to a judicial body. Notice of the decision on appeal shall be given to the

⁸ Various approaches are offered to clarify the concept of ‘judicial independence’. For an empirical study of this topic, see *e.g.*, EG Jensen and TC Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press Stanford 2003). For an interdisciplinary study, see *e.g.*, SB Burbank and B Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications Thousand Oaks, California; London; New Delhi 2002). See also studies on judicial independence in the post-communist countries in A Sajo (ed), *Judicial Integrity* (Martinus Nijhoff Publishers Leiden 2004).

appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any right to further appeal.

Compared to existent provisions in the WTO agreements, China's 'independent and impartial judicial review' obligation deserves further exploration in several aspects: the scope of subject matters; the definition of 'general application'; institutional requirements; and independence and impartiality. However, before proceeding to examining these elements, it is worthwhile exploring the objective and purpose of this obligation. Why is an independent and impartial judicial review desirable for WTO members when negotiating for China's accession?⁹ The Working Party Report does not provide a clue as it, in section III.4 (titled 'Judicial Review') merely reiterates that some members of the Working Party wished independent tribunals to be established.¹⁰ The necessity and justification for such independent tribunals is not fully explained.¹¹ It is nevertheless clear that members of the Working Party attached great value and importance to independent tribunals, and were of the view that independent tribunals contribute to the smooth settlement of trade disputes and the protection of rights and interests of individual economic actors under the WTO agreements.

With regard to China's 'independent and impartial judicial review' obligation, a delicate but important difference is that China is obliged to 'establish, or designate, and maintain tribunals, contact points *and* procedures,' while GATT X:3(b) dictates members to 'maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals *or* procedures.' By comparing these two provisions, it is thus clear that all these three elements, i.e., tribunals, contacts points, and procedures,

⁹ It is interesting to note that, for those new member states of the European Union, the judicial independence was among the highlights of their accession process. However, China's WTO obligation and those new member states' judicial independence requirements apparently derive from difference logic, as the objective of the European Union and the WTO much differ. However, the scope of independent judicial review is much more wider; civil and political rights are of equal, if not more, importance in the accession process of the European Union, See *e.g.*, Open Society Institute, *Monitoring the EU Accession Process: Judicial Independence* (Open Society Institute, Budapest ; New York 2001).

¹⁰ Report of Working Party on the Accession of China (hereinafter 'China's Working Party Report'), WT/ACC/CHN/49 (1 October 2001), paras. 76-77.

¹¹ The Working Party Report on the Accession of Viet Nam, for example in paragraph 123, 124, 135, has also dealt with this independent and impartial judicial review of administrative actions. However, this obligation is not prescribed in Viet Nam's Accession Protocol. Besides, instead of reformulating an obligation of different duties, Viet Nam was requested to commit that its judicial review would be consistent with the requirements of the WTO agreements. The Working Party Report on the Accession of Viet Nam, WT/ACC/VNM/48 (27 October 2006), para. 135.

should be covered in China's implementing measures for this obligation. Although tribunals are usually connected with procedures, however, as GATT X:3(b) refers to tribunals 'or' procedures, it appears that mere procedures, which are able to provide a review mechanism comparable to prescribed standards should also be accepted as meeting this requirement. By contrast, a tribunal, which is a 'body' established to settle certain types of dispute, is indispensable to China's implementation measures.¹² Besides, in Article X:3(c) of the GATT 1994, it is nevertheless prescribed that existent procedures in force do not have to be substituted or eliminated, if these procedures provide objective and impartial review of administrative action provided, even though they are not 'fully or formally independent of the agencies entrusted with administrative enforcement'. Therefore, if a member believes that procedures in force are objective and impartial, it is not required to substitute or eliminate these existing procedures. Besides, members are not required to institute a new review mechanism which would be inconsistent with their constitutional structure or the nature of their legal systems (Article VI:2(b) of GATS). By contrast, as the second sentence of the Article 2(D)(1) of China's Accession Protocol clearly stipulates, tribunals in China should be 'independent of the agency entrusted with administrative enforcement.' Nevertheless, such leeway is not available for China.¹³

¹² With regard to the definition of 'tribunals', the European Court of Justice has laid down a variety of case-law to examine who is eligible and obliged to refer to it for preliminary ruling under Article 234 of EC Treaty (Article 177 of EEC Treaty). See, e.g., *Vassen v. Beambtenfonds Voor Het Mijnbedrijf*, Case C-61/65 [1966] E.C.R.261, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH*, Case C-54/96 [1997] E.C.R. I-04961. The author owes this point to Professor Petersmann.

¹³ JY Qin, 'WTO-plus' Obligations and Their Implications for the World Trade Organization Legal System - An Appraisal of the China Accession Protocol' (2003) 37 *Journal of World Trade* 483, 495-496. While it is true that judicial review to administrative measures in relation to trade matters could be regarded as a commonly-required obligation as previously established in the existent WTO agreements. This paper argues that the obligation to provide an independent and impartial judicial review as embodied in China's Accession Protocol is wider in scope and more stringent in its formulation. This obligation thus constitutes as a 'WTO-plus' obligation. Although Members' doubts about the independence and impartiality of China's courts are unquestionably justifiable, the arrangement to provide detailed obligations in one single country's accession protocol, normally a standardized document without dealing with substantial obligations, is unprecedented, and so far, the only case. By comparing to the accession protocol of Viet Nam, one can easily draw a sharp contrast. While Members might also have doubts about the independence and impartiality of Viet Nam's courts, given that Viet Nam is still a communist country. A similar arrangement does not exist. While in the Working Party Report on the Accession of Viet Nam to the WTO does refer to obligation relating to judicial review to trade measures, such as custom valuation, rule of origin and trade-related intellectual property rights, in particular compulsory licensing and the termination and invalidation of invention patents, the Accession Protocol does not include this obligation. See, Report of the Working Party on the Accession of Viet Nam, WT/ ACC/VNM/48 (27 October 2006), para. 235, 243, 409, 430 and 433. In addition, the Protocol of the Accession of the Socialist Republic of Viet Nam to the World Trade

In respect of the jurisdiction, some elements are worth noting. As provided in the legal text, these tribunals should have the jurisdiction on ‘administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement.’ The scope of the application has to some degree defined. Nevertheless, what these relevant provisions of the TRIPS Agreement are exactly referred to may be subject to dispute. It may be well interpreted as reference to Article 41 to 40 and 59 of the TRIPS Agreement. Yet, it is rather unclear in this regard. On the other hand, the Working Party Report may provide some guidance on defining the scope of administrative actions in terms of Article 2(D) of the Accession Protocol. It should cover those related to ‘the implementation of national treatment, conformity assessment, the regulation, control, supply or promotion of a service, including the grant or denial of a licence to provide a service and other matters.’¹⁴ These administrative actions should thus also be subject to the prompt review of independent and impartial tribunals. In a word, the subject matters which Article 2(D) covers are apparently wider than those in relevant provisions of the WTO Agreements.

Apart from the subject matters, the term ‘of general application’ is also of great importance. In *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (US – Underwear)*, the Panel held, ‘if, for instance, the restraint was addressed to a *specific company* or applied to a *specific shipment*, it would not have

Organization is actually a standardized document, just as other accession protocols do. WT/L/662 (15 November 2006). Further, according to paragraph 153 of Viet Nam’s Working Party Report, Viet Nam is obliged to ‘revise its relevant laws and regulations so that its relevant domestic laws and regulations would be consistent with the requirements of the WTO Agreement on procedures for judicial review of administrative actions, including but not limited to Article X:3(b) of the GATT 1994[.....]Such reviews would be impartial and independent of the agency entrusted with administrative enforcement, and would not have any substantial interest in the outcome of the matter.’ Viet Nam is only obliged to revise its laws and regulations to be consistent with the existent requirements covered in the WTO Agreement. The requirement of being ‘impartial and independent from the agency entrusted administrative enforcement is also the existent requirement as embodied in Article X:3(b) of the GATT 1994. The only variance from the existent requirements of the WTO Agreement is the requirement of having no substantial interest in the outcome of the matter, which in fact follows the practice of China’s Accession Protocol. Given the wider scope and more stringent requirement provided in China’s Accession Protocol, the author thus argues the obligation to provide an independent and impartial judicial review as included in China’s Accession Protocol constitutes a ‘WTO-plus’ obligation.

¹⁴ China’s Working Party Report, para. 79.

qualified as a measure of general application. However, to the extent that the restraint affects an *unidentified* number of economic operators, including domestic and foreign producers, we find it to be a measure of general application'.¹⁵ This view was upheld by the Appellate Body.¹⁶ According to this interpretation, whether laws, regulations, judicial decisions and administrative rulings are 'of general application' depends on whether they affect unidentified number of economic operators. Those addressed to individual persons or entities should not be regarded as of general application.

The Accession Protocol also lays down several institutional requirements governing the designation of this 'independent and impartial judicial review'. For example, the right to appeal shall be without penalty;¹⁷ the decision of the appeal should be given to the appellant with reasons provided in writing;¹⁸ the right for further appeals should also be informed;¹⁹ and the tribunal shall have no substantial interests of the outcome of the decision.²⁰ Besides, an 'opportunity for appeal' reviewed by 'judicial body' if the initial review is heard by an administrative body. This requirement of review by 'judicial' body does not exist in the WTO agreements. As is pointed out, China's Accession Protocol has put forward more stringent requirements with regard to domestic judicial review, and constitutes a 'WTO-plus' obligation.²¹

The requirement of 'without penalty' does also not exist in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement. It is nevertheless referred to in Custom Valuation Agreement. As the Interpretive Note in Custom Valuation Agreement informs, 'without penalty' means that appellant should not be subject to a fine or threat of fine merely because the importer chooses to exercise the right of appeal. A dictionary definition of 'penalty' is

¹⁵ Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (US – Underwear)*, WT/DS24/R, adopted 25 February 1997, modified by Appellate Body Report, WT/DS24/AB/R, para. 7.65 (emphasis added).

¹⁶ Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (US – Underwear)*, WT/DS24/AB/R, adopted 25 February 1997, at 21.

¹⁷ China's Accession Protocol, Art. 2 (D)(2).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ China's Accession Protocol, Art. 2 (D)(1).

²¹ For the 'WTO-plus' obligations in relation to China's accession to the WTO, *see*, Qin, above n. 13.

a punishment imposed for breach of law, rule or contract, while a ‘fine’ means a certain sum of money imposed as the penalty for an offence. ‘Punishment’ and ‘offence’ are telling here. Therefore, fees in order to cover the administrative costs should not be regarded as a fine, and thus do not fall into the scope of this penalty. This reading is supported by the Interpretive Note, which provides that payment of normal court costs and lawyers' fees shall not be considered a fine. However, these court costs and lawyers’ fees should be limited to the amount necessary to cover the administrative expenses. In terms of the objective and purpose of this provision, these costs and fees should not have the effects of preventing or prohibiting appellants from referring to this prompt review. Besides, the requirement of reasoned decisions given in writing forces review bodies to justify their decisions being rationally taken. This also provides a good safeguard to prevent the abuse of discretionary power. Instruction for further appeal helps the appellants to take better advantage of these review mechanisms in China as most foreign individuals and enterprises find them incoherent and confusing.

Above all, the most important element in the designation of Chinese judicial review relates to its impartiality and independence in terms of second sentence of Article 2(D)(1) of China’s Accession Protocol. As prescribed, the tribunals should be ‘impartial’, ‘independent of the agency entrusted with administrative enforcement’, and should not ‘have any substantial interest in the outcome of the matter’. These three criteria are actually interlinked. With regard to the ‘independence’, tribunals are required to be formally and structurally ‘independent of the agency entrusted with administrative enforcement’. The ordinary meaning of ‘impartial’ means treating all rivals and disputants equally. That is, these tribunals or procedures should not privilege any parties to these disputes. Equal opportunities to be heard and to defend are thus important in this sense. The ‘principle of equality of arms’ is also relevant in terms of information and evidence to be made available to these complainants. As the object and purpose of these tribunals are to strengthen domestic judicial review, access to information and evidence is essential for appellants effectively to defend their rights and interests through these review mechanisms. The criterion of impartiality is also closely related to the requirement of ‘no substantial interest in the

outcome of the matter.’ With no substantial interests in the outcome of the matter, tribunals are prevented from being biased due to the influences of personal feelings or opinions in considering facts and/or making decisions. Objective decision-making may be better achieved. In this line, no substantial interests involved contribute to the impartiality of these tribunals. This requirement of ‘no substantial interests’ involved also informs the requirement of being ‘independent of the agency entrusted with administrative enforcement’. Tribunals dependent upon agencies entrusted with administrative enforcement may be subject to influences of these agencies and have conflicting interests involved, which eventually undermines the impartiality of these tribunals.

With regard to the WTO jurisprudence, as previously noted, the Panel addresses the term ‘impartial’ in *Argentina – Hides and Leather*. Although it relates to ‘impartial administration of laws, regulations, judicial decisions and administrative rulings of general application,’ how the Panel sees impartiality can nevertheless shed some light here. As this dispute relates to the presence of ‘partial and interested representatives of certain industrial associations’ in the process of customs administration, it can arguably be transformed into one addressing review procedures in light of ‘principle of equality of arms’ and ‘*ex parte* contact.’ The Panel emphasizes ‘the presence of private parties with conflicting commercial interests in the customs process.’²² Furthermore, whether any interested party takes advantage in this process to ‘obtain confidential information to which they have no right’²³ should also be taken into due account.

However, the above somehow ‘textual’ analysis seems not to provide a clear picture and satisfactory answer of what the ‘independent and impartial judicial review’ prescribed in China’s Accession Protocol should be. Are these tribunals obliged to be independent only ‘of the agency entrusted with administrative enforcement,’ and not of other organs? Such interpretation is apparently unconvincing

²² Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather (Argentina – Hides and Leather)*, WT/DS155/R and Corr.1, adopted 16 February 2001, para. 11.99.

²³ *Ibid.*, para. 11.100.

and against the objective and purpose of this obligation: to strengthen domestic judicial protection of the rights and interests of individual economic actors. It is thus essential to refer to other legal systems correctly to interpret the nature and scope of this obligation. This approach is also justifiable as the Appellate Body, in the very first case of *United States – Standards for Reformulated and Conventional Gasoline*, clearly held, the WTO agreements should not ‘be read in clinical isolation from public international law.’²⁴

Then one may wonder how the WTO agreements should be to be read or how one should interpret the WTO agreements. This comes back to the ‘general rule of interpretation’, which the Appellate Body has recognizes its status of ‘a rule of customary or general international law’, which the Appellate Body should apply when clarifying existent provisions of the WTO agreements. Article 31(1) of the Vienna Convention on the Law of Treaties (the VCLT) provides, ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ The crucial point here is thus what constitutes the context of a treaty. While general principles of public international law may be this context, this again begs the question as to what constitutes ‘general principles of public international law.’²⁵

²⁴ Appellate Body report, *United States – Standards for Reformulated and Conventional Gasoline* (‘*US – Gasoline*’), WT/DS2/AB/R, adopted 29 April 1996, at 17. Besides, as the preamble of Vienna Convention on the Law of Treaties (the VCLT) explicitly prescribes that disputes concerning treaties should be settled by ‘peaceful means and in conformity with the principles of justice and international law’, and Article 31(1) of the Convention provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’, a question deserves further exploration here is the relevance of international human rights obligation in relation to access to justice to the interpretation of China’s WTO obligation to provide an independent and impartial judicial review. These international human rights obligations range from Article 8 of Universal Declaration of Human Rights to Article 9 of International Covenant on Civil and Political Rights, and Article 6 of The European Convention on Human Rights, to which China may (and may not) be a contracting party or not. Cf. *infra* n. 28.

²⁵ An illustrative example of this is the debate of ‘precautionary principle’ in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (EC – Approval and Marketing of Biotech Products), Panel Report, EC – Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006. While the EC argues that precautionary principle as embodied in Cartagena Protocol on Biodiversity is a general principle of international law, the United States takes the opposite position. (paras. 4.523-524; 4.539-544). The Panel finds in favor of the United States, holding that the precautionary principle does not constitute a general principle of international law.

Nevertheless, if one takes the wording of the Appellate Body carefully, it reads as follows: ‘that direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law.’ In rejecting the reading in clinical isolation from public international law, the Appellate Body presupposes a ‘correct’ reading of the General Agreement or other covered agreements, which is *not* ‘in clinical isolation from the public international law’. When directing the interpreters not to read the General Agreement and other covered agreement in clinical isolation from public international law, the Appellate Body actually, albeit implicitly, instructs the interpreters to read the General Agreement and other covered agreements in light of public international law.

This position finds its support from other relevant jurisprudence of the WTO Panel/Appellate Body. In *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimps)*,²⁶ the Appellate Body approaches this issue with a positive voice. It firstly recognizes the principle of good faith to be both a general principle of law and a general principle of international law, and then by citing Article 31(3)(c) of VLCT²⁷ opines that its task is to ‘is to interpret the language of the chapeau [of Article XX of GATT 1994], seeking additional interpretative guidance, as appropriate, from the general principles of international law’.²⁸

Further, the Panel in *EC – Approval and Marketing of Biotech Products* is called upon to deal with the relevance of the Cartagena Protocol on Biodiversity to the WTO agreements, in particular the Agreement on Sanitary and Phytosanitary Measures (the SPS agreement). The Panel again refers to Article 31(3)(c) of the VLCT. The Panel takes a cautious approach in exploring the relevance of this protocol. The Panel concludes that, as one of the party of this dispute, namely, the United States, is not a party to the Cartagena Protocol on Biodiversity, this protocol is not a ‘rule of international law applicable in the relations between the parties’. The Panel is thus not required to take into account of this protocol. Nevertheless, the Panel also notes:

²⁶ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimps)*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998: VII, 2755.

²⁷ Article 31(3)(c) of VLCT provides that ‘there shall be taken into account, together with the context: (c) any relevant rules of international law applicable in the relations between the parties.’

²⁸ *Ibid.*, para. 158.

Requiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules.²⁹

According to this holding, while the author is fully aware of the counterarguments against the introduction of the jurisprudence of the European Court of Human Rights (the ECtHR) in interpreting China's *WTO* obligation to provide an independent and impartial judicial review,³⁰ nonetheless, one should not fail to appreciate the importance of 'other rules of international law which bind the States parties.'

In addressing to the concept of 'denial of justice' on the treatment of aliens in customary international law, Francioni, using a different term, argues that the individual right of access to justice 'has emerged and is exercised independently or in cooperation with national state of the affected individual'³¹ based on a survey of universal and regional human rights instruments and national practices. According to him, the alien's right of access to justice should be met up with the requirements of fair and equitable treatment and of effective protection.³² As he writes, 'access to justice is not simply access to courts, but availability to a system of fair and impartial justice the effectiveness and legitimacy of which may be review under the international standard on the treatment of aliens.' The requirements of fair and equitable treatment and effective protection are reflected in the enforcement part of the TRIPS Agreement. Besides, the Panel on *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China-Intellectual Property Rights)*³³ is also called upon to examine whether the criminal penalty

²⁹ Panel report, *EC – Approval and Marketing of Biotech Products*, para. 7.70.

³⁰ Arguments against this approach may be: most of those international and regional instruments, in the form of soft laws, are not 'relevant rules of international law applicable in the relations between the parties,' since China do not participate in the drafting of those instruments; China is not a party to the European Convention on Human Rights and thus not bound by the jurisprudence of the ECtHR. Therefore, those global and regional instruments and the jurisprudence of the ECtHR is not relevant in interpreting China's *WTO* obligation to provide an independent and impartial judicial review. Nevertheless, it should be pointed out that even taking the cautious approach adopted by the Panel on *EC – Approval and Marketing of Biotech Products*, those universal/regional declarations, standards and instruments in which China participates should be of great relevance in interpreting its own obligation, even in the realm of *WTO* law.

³¹ F Francioni, 'The Rights of Access to Justice under Customary International Law' in F Francioni (ed) *Access to Justice as a Human Right* (Oxford University Press, Oxford ; New York 2007) 8.

³² *Ibid.*, at 11.

³³ Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – Intellectual Property Rights)*, WT/DS362/R (26 January 2009), para. 7.396, ff.

imposed by China's Criminal Law and the two *Judicial Interpretations* by the Supreme People's Court constitutes an effective deterrent for 'wilful trademark counterfeiting or copyright piracy on a commercial scale.' In addition, the object and purpose of China's obligation to provide an independent and impartial judicial review is mainly to ensure the WTO-consistency of Chinese laws and regulations and thus indirectly protect the rights and interests of foreign individuals and enterprises in China. It is thus clear that the right of access to justice derived from the treatment of aliens, namely the availability of an effective and legitimate system of fair and impartial justice in line with international standard, is of great relevance in interpreting China's WTO obligation to provide an independent and impartial judicial review.

Apart from the element of 'treatment of aliens' under customary international law, he also develops the human rights foundation for access to justice. According to him, human rights derived from various multilateral treaties of the United Nations, soft law and customary rules have created 'a system of international obligations binding upon states in their mutual relations, toward international community as a whole, and sometimes, directly upon individuals and private entities.'³⁴ Human rights obligations then entail a minimum standard of fair treatment and respect for human dignity.³⁵ Based on his observation on the expansion of the right of access to justice in domestic law and increasing direct access to international adjudicatory mechanisms, notably, the ECtHR, he proclaims an individual right to access to justice to which the minimum standard of human rights apply.³⁶ It is thus clear that the global and regional instruments on judicial independence and impartiality and the jurisprudence of the ECtHR are relevant in two senses. On the one hand, they explain and clarify the concept of the right of access to justice; on the other hand, they offer guidance in defining this scope and nature of this right.

As noted above, the two elements of the individual right of access to justice, namely, the 'treatment of aliens' and 'access to justice as a human right' impose

³⁴ *Ibid.*, at 29.

³⁵ Francioni, above n. 31, at 30.

³⁶ *Ibid.*, at 33-42.

international obligations that are binding on all States. The right of access to justice thus constitutes part of ‘other rules of international law which bind the States parties.’ In this line, the interpretation of China’s WTO obligation to provide an independent and impartial judicial review should be construed in the spirit of the individual right of access to justice and in conformity with global and regional instruments on judicial independence and impartiality and the jurisprudence of the ECtHR.³⁷

B. THE POSSIBILITY OF A COMPLAINT IN THE WTO ON CHINA’S OBLIGATION TO PROVIDE AN INDEPENDENT AND IMPARTIAL JUDICIAL REVIEW

Before proceeding to discuss what standard should the WTO Panel/Appellate Body should take in handling a complaint relating China’s ‘independent and impartial judicial review’ obligation, and its potential interpretative approach. Since a complaint in the WTO is not fictional, it evidences the necessity and feasibility of the examination of this obligation.

As noted above, Article X: 3(a) of the GATT 1994 has been referred to in some complaints. The Panel and Appellate Body have also laid down some criteria for the ‘impartiality’ and ‘objectivity’ of the administration of laws, regulations and judicial decisions and administrative rulings of general application. Since the complaint with regard to the impartiality and objectivity of the administration has been brought about in the WTO, and has been subject to the review of the Panel/Appellate Body, a complaint on the judicial impartiality and independence can easily formulated based on this pattern.

Besides, in the WTO jurisprudence, there are also complaints in relation to particular judgments of domestic courts.³⁸ Although complaints with regard to

³⁷ Here, it should be also reminded of the distinction between the interpretation of the obligation to provide an independent judicial review as included in China’s Accession Protocol and the legal basis for the Panel/Appellate Body to adjudicate the case. While the author argues that this obligation to provide an independent and impartial judicial review should be read in light of public international law, China is under its WTO obligation to provide this independent and impartial judicial review. It is this WTO obligation which forms the legal basis of the Panel/Appellate Body’s ruling and it is limited to this obligation too. Namely, if a complaint on this obligation is brought about in the WTO Dispute Settlement Mechanism, the terms of the reference of the WTO Panel/Appellate Body is to examine, in the light of the relevant provisions of the covered agreements (including China’s Accession Protocol, notably, the obligation to provide an independent and impartial review) cited by the complaining party.

³⁸ A closely-related example is the *United States – Section 211 Omnibus Appropriations Act of 1998* (*US – Section 211 Appropriations Act*), where the Appellate Body, in paragraph 202-232, examines

substantive obligations should be dealt with independently from the claim based upon the violation of ‘independence’ and ‘impartiality’ of judicial review,³⁹ a claim based upon the violation of the general obligation regarding the independence and impartiality of Chinese courts may come along with the claim upon the violation of a particular obligation or commitment.

Furthermore, in *China – Measures Affecting Imports of Automobile Parts (China – Auto Parts)*,⁴⁰ obligations and commitments provided in the China’s Accession Protocol are referred to by the complainants.⁴¹ Above all, two specific judicial interpretations by the Supreme People’s Court are identified in the submission of the request for the consultation, and subsequently in the submission of the request for the establishment of Panel in *China – Intellectual Property Rights*.⁴² These jurisprudential developments indicate that not only the result of a particular judgment of national courts is subject to the review of the WTO Panel/ Appellate Body, but the

precisely ‘a conclusion by a court based on Section 211’. In this complaint, the Appellate Body clarifies the comparable civil protection as required by Article 42 of the TRIPS Agreement has been provided by Section 211(a)(2) of the Omnibus Appropriations Act of 1998. WT/DS176/AB/R, adopted 1 February 2002, paras. 203-232.

³⁹ The relationship between substantive obligation and Article X was firstly touched upon in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*. The Appellate Body, when addressing Article X:3(a), the Appellate Body holds in *EC – Bananas III*: ‘Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994’ (emphasis original), WT/DS27/AB/R, adopted 25 September 1997, para. 200. In *European Communities – Measures Affecting the Importation of Certain Poultry Products (EC – Poultry)*, the Appellate Body refers to the aforementioned ruling, briefly discusses the application of Article X as follows: ‘Article X relates to the *publication* and *administration* of laws, regulations, judicial decisions and administrative rulings of general application, rather than to the *substantive content* of such measures’ (emphasis original), WT/DS69/AB/R, adopted 23 July 1998, para. 115.

⁴⁰ *China – Measures Affecting Imports of Automobile Parts (China – Auto Parts)*, WT/DS339/R, WT/DS340/R, WT/DS342/R (18 July 2008).

⁴¹ In EC’s submission for the request for the establishment of the Panel, it is submitted that ‘China has acted inconsistently with its obligations under the Marrakesh Agreement Establishing the World Trade Organization, as set out in the Protocol on the Accession of the People’s Republic of China to the WTO, in particular Part I paragraph 7.3 of the Protocol of Accession of China, and in paragraph 203 of the Working Party Report on the Accession of China in conjunction with Part I, paragraph 1.2 of the Protocol of Accession of China, and paragraph 342 of the Working Party Report on the Accession of China’. WT/DS339/8 (18/09/2006), p. 3. Obligations and commitments provided in accession protocol and working party report are also referred to in *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and other Payments (China – Taxes)*, See WTO document, WT/DS358/13 (13 July 2007), WT/DS359/13 (13 July 2007).

⁴² WTO document, WT/DS362/1 (16 April 2007), para. 1(2); WT/DS/362/7 (21 August 2007), para. 1(2), 1(3). The Panel on *China – Intellectual Property Rights*, after reviewing the threshold laid down by China’s criminal law and the disputed judicial interpretations, finds in favor of China. Panel Report on *China – Intellectual Property Rights*, WT/DS362/R (26 January 2009), para. 7.396, ff.

WTO Panel/Appellate Body can also scrutinize judicial interpretations by Chinese Supreme People's Court.⁴³ Given these developments in the WTO Dispute Settlement Mechanism, it is thus reasonable to expect that the complaint with regard to the independence and impartiality of Chinese courts is soon to come.

Above all, regarding the interpretative approach taken by the WTO Panel/Appellate Body on this obligation,⁴⁴ it should be firstly pointed to the importance of the Article 31 of VCLT, in particular 'good faith.' This approach is consistent with the established jurisprudence of the WTO Panel/Appellate Body. Further, the Panel on *China – Auto Parts* partly touches upon this issue. It relates to a commitment made by China in paragraph 93 of its Working Party Report. As this paragraph is referred to in paragraph 342 of its Working Party Report, and by virtue of Article 1.2 of China's Accession Protocol, this commitment is incorporated into China's Accession Protocol and constitutes an integral part of the WTO Agreement.⁴⁵ The Panel then notes that it would 'interpret China's commitment under paragraph 93 of the Working Party Report in accordance with the interpretative rules of the *Vienna Convention* to determine whether China has acted inconsistently with commitments under paragraph 93 of the Working Party Report'.⁴⁶

⁴³ Judicial interpretation is a peculiar designation in Chinese legal system. It is delivered by Supreme People's Court and enjoys the legal status of Chinese national law. It is aimed to serve as guidance to the lower court and is legal-binding in nature. See generally, N Liu, *Opinions of the Supreme People's Court: Judicial Interpretation in China* (Sweet & Maxwell Asia; Sweet & Maxwell, Hong Kong; London 1997). See also N Liu, 'An Ignored Source of Chinese Law: the Gazette of Supreme People's Court' (1989) 5 Connecticut Journal of International Law 271; N Liu, 'Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of Supreme People's Court' (1991) 5 Journal of Chinese Law 107. The issue of judicial interpretation will be further elaborated in Chapter VIII, see, see, *infra*, Chapter VIII, Section II A, text to n. 1, ff (diversity of legal cultures).

⁴⁴ For different approaches to interpret China's 'WTO-plus' obligation, see, e.g., D Huang, 'Legal Interpretation of Paragraph 242 of the Report of the Working Party on the Accession of China under the World Trade Organization Legal Framework' (2006) 40 Journal of World Trade 137; TW Huang, 'Taiwan's Protocol 16 Special Safeguard and Anti-dumping Enforcement on Imports from China' (2002) 41 Journal of World Trade 371. In interpreting the product-specific safeguard mechanism as embodied in China's Accession Protocol, Dongli Huang argues that this obligation should be read, to the most possible extent, in line with the existent WTO agreements in order to maintain the consistence and coherence of the WTO legal system; by contrast, Thomas Weishing Huang holds the contrary. He argues that, if one equals this product-specific safeguard mechanism to existent safeguard regime, the objective and purpose of this product-specific safeguard mechanism would be much undermined.

⁴⁵ Panel Report on *China – Auto Parts*, para. 7.740.

⁴⁶ Panel Report on *China – Auto Parts*, para. 7.741. During the Appellate Review, the parties do not dispute the interpretative approach taken by the Panel with respect of paragraph 93 of China's Working Party Report. While the Appellate Body reverses the Panel's finding that the nature of China's measures of imposing a 'charge' or 'duty' on importers of completely knock own and semi knock down

This interpretative approach is of great relevance in interpreting China's WTO obligation to provide an independent and impartial judicial review since this Panel relates to China, and even more, to China's 'WTO-plus' commitment. The interpretative approach of the Panel on *China – Auto Parts* basically follows the existent practice of the WTO Panel/Appellate Body. Besides, this approach also supports the author's argument paved above as well as the analysis to be conducted below: one should interpret China's WTO obligation to provide an independent and impartial judicial review in accordance with the interpretative rules laid down by the VCLT, in particular Article 31. This approach evinces the relevance of global and regional standards in interpreting this *WTO* obligation to provide an independent and impartial judicial review.

III. GLOBAL AND REGIONAL STANDARDS ON INDEPENDENCE AND IMPARTIALITY

A number of global and regional legal instruments have addressed to the issue of 'judicial independence'. Apart from the aspect of the administration of justice, including the financial autonomy; sufficient resources; appointment; tenure; and promotion, when adjudicating a case, two elements constitute the core of 'judicial independence': independence and impartiality. In addition to the jurisprudence of the WTO Panel/Appellate Body, it is indispensable further to explore these two concepts in the context of public international law. These international legal instruments, albeit mostly soft laws in nature, may contribute to a better understanding of judicial independence and impartiality and, consequently China's WTO obligation in relation to an 'independent and impartial judicial review'. As previously noted, these two concepts are interrelated, and some jurisprudence has the tendency to examine these two concepts together.⁴⁷ However, as most international instruments deal with these two concepts separately, it is thus feasible to follow this pattern. Besides, independence should be examined in two aspects: institutional independence and individual independence. Institutional independence means that judiciary, as a whole,

kits, as required by Decree 125, is an ordinary customs duty, the Appellate Body does not reject the Panel's interpretative approach. Appellate Body Report, *China – Measures Affecting the Imports of Automobile Parts (China – Auto Parts)*(WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, 15 December 2008), paras. 210-252.

⁴⁷ See e.g., *Findlay v. the United Kingdom* (app no 22107/93), 25 February 1997 ECtHR, Series 1997-I no 30, para. 73.

should be independent of other branches, such as legislatures and executives. Individual independence means that an individual judge, when adjudicating a case, should not be subject to influence and interference both outside the judiciary, namely other governmental branches and inside the judiciary.

A. INDEPENDENCE

1. INSTITUTIONAL INDEPENDENCE

The *Basic Principles on the Independence of Judiciary* (hereinafter the UN Principles)⁴⁸ of the United Nations offer some guidelines in relation to institutional independence. It is believed that judicial independence enshrined in the constitution or by the law helps to guarantee the prevention of judiciary from the interference of other governmental organs and institutions. Legislatures and executives are obliged to respect and observe this principle of judicial independence.⁴⁹ This approach is also endorsed by the Council of Europe in its *Recommendation No. R(94) 12 of the Committee of Ministers to Member States on the Independence, Efficacy and Role of Judges*⁵⁰ (hereinafter the Council of Europe Recommendation). It is recommended that the independence of judges should also be explicitly guaranteed in national constitutional principles, apart from the guarantee of Convention for the Protection of Human Rights and Fundamental Freedoms.⁵¹

Apart from this broad principle, some detailed requirements related to jurisdiction and finality of judicial decisions are laid down in the UN Principles. As prescribed, the judiciary should have jurisdiction over all judicial issues, and it is the judiciary which determines whether a case falls within its competence as defined by law.⁵² Besides, the finality of judicial decisions should be respected; they cannot be

⁴⁸ Basic Principles on the Independence of Judiciary, adopted by Seventh United Nation Congress on the Prevention and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁴⁹ The UN Principles, Principle 1.

⁵⁰ Recommendation No. R(94) 12 of the Committee of Ministers to Member States on the Independence, Efficacy and Role of Judges, adopted by the Committee of Ministers on 13 October 1994 at 518th of the Minister's Deputies.

⁵¹ The Council of Europe Recommendation, Paragraph 2(a).

⁵² The UN Principles, Principle 3.

revised by other branches.⁵³ The *Draft Universal Declaration on the Independence of Judiciary* (hereinafter ‘the Draft Declaration’)⁵⁴ has also further elaborated this institutional independence. It reiterates that the judiciary should have jurisdiction of all issues of a judicial nature. Besides, it explicitly provides that those issues of its jurisdiction and competence should be included to its jurisdiction.⁵⁵ Therefore, displacement of the jurisdiction, previously vested in the ordinary courts, by *ad hoc* tribunals are not permissible.⁵⁶ Specific standards in relation to the independence of judiciary are available in African Union. *The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*⁵⁷ (hereinafter ‘the African Union Principles and Guidelines’) also deals with the jurisdiction issue. It is provided, in Article 4(c) that ‘the judiciary shall have jurisdiction over all issues of a judicial nature.’ Besides, it emphatically stipulates that the judiciary shall have ‘exclusive’ authority to decide whether a case submitted to it falls into its competence as defined by the law. Similar provision is laid down in *Beijing Statement of Principles on the Independence of Judiciary in the LAWSAIA Region* (hereinafter Beijing Statement)⁵⁸, where it, in Paragraph 3(b) provides that ‘the judiciary has the jurisdiction, directly or by way of review, over all issues of a justiciable nature.’ In comparison, the Beijing Statement is weaker in respect of jurisdiction, as it does not clarify who decides the scope of judicial issues. As the terms ‘of a judicial nature’ and ‘of a justiciable nature’ need to be further clarified and defined, it is thus crucial for the judiciary to decide on its own which subject matter falls into its jurisdiction as defined by the law. Only by so doing can the judiciary be prevented from removing its jurisdiction by defining what issue is ‘of a judicial nature’ through legislative intervention. The institutional independence of the judiciary can thus be strengthened and safeguarded.

⁵³ The UN Principles, Principle 4.

⁵⁴ Draft Universal Declaration on the Independence of Judiciary, also known as Singhvi Declaration.

⁵⁵ The Draft Declaration, Paragraph 5(a). Similar provision is laid down in Beijing Statement of Principles on the Independence of Judiciary in the LAWSAIA Region, where it, in Paragraph 3(b), provides that ‘the judiciary has the jurisdiction, directly or by way of review, over all issues of a justiciable nature.’

⁵⁶ *Ibid.*

⁵⁷ The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, adopted as part of the African Commission’s activity report at 2nd Summit and meeting of heads of state of African Union held at Maputo from 4-12 July 2003.

⁵⁸ Beijing Statement of Principles on the Independence of Judiciary in the LAWSAIA Region, adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in Beijing 1995, and adopted by the LAWASIA Council in 2001.

The finality of judicial decisions should also be ensured to preserve the institutional independence of the judiciary. Judicial decisions should not be subject to revision of other non-judicial authorities. In other words, legislatures and executives are not allowed to reverse, *retrospectively*, the result of judicial decisions.⁵⁹ That is, the juridical validity of judicial decisions and their status as *res judicata* should not be subject to actions of other branches, no matter whether such actions change or confirm the judicial decisions concerned.⁶⁰ Legislative intervention with the aim to bring about a specific result of a case should also be prohibited. It should be nevertheless noted that this principle is without prejudice to amnesty, pardon, mitigation, or commutation by competence authorities.

The ECtHR has dealt with both the jurisdiction and finality issues. In *Papageorgiou v. Greece*,⁶¹ the Court was requested to declare that Greece infringed Article 6(1) of the European Convention on Human Rights on the ground of, *inter alia*, the removal of the court's jurisdiction of his case. The Court firstly recognized legislative powers to regulate individual rights through the passage of new provisions. However, the Court then turned to, referring to *Stran Greek Refineries and Stratis Andreadis v. Greece*,⁶² argue that 'the principle of the rule of law and the notion of fair trial enshrined in Article 6 [of the Convention] precluded the interference by the Greek legislature with the administration of justice designed to influence the judicial determination of the dispute.'⁶³ The Court in *Stran Greek Refineries and Stratis Andreadis v. Greece* held that the applicant's right of fair trial was violated due to the legislative intervention 'in a manner which was decisive to ensure that the imminent outcome of proceedings in which it [the State] was a party was favourable to it.'⁶⁴ The Court then examines the case at dispute, where it rules that with the passage of

⁵⁹ Principle 4 of UN Principles; Paragraph 6 of Draft Universal Declaration; Article 2(a)(iv) of Principle I of Council of Europe Recommendation; Article 4(f) of the African Union Principles and Guidelines.

⁶⁰ International Commission of Jurists (ed), *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioners' Guide* (International Commission of Jurists Geneva 2004)

⁶¹ *Papageorgiou v. Greece* (app no 24628/94), 22 October 1997 ECtHR, Series 1997-VI no. 54.

⁶² *Stran Greek Refineries and Stratis Andreadis v. Greece* (app no 13427/87), 9 December 1994 ECtHR, Series A no 335.

⁶³ *Papageorgiou v. Greece*, para. 37.

⁶⁴ *Ibid.*, para. 37.

new provisions with the aim to clarifying the meaning of law, consequently removing the jurisdiction of litigated cases from the court and dictating relevant claims to be struck out, infringed the applicant's right of fair trial.⁶⁵ Although the Court did not refer to the term of 'an independent and impartial tribunal', the relevance is nevertheless clear in light of the intervention of legislature: its effect, method and timing. The legislative intervention, through the enactment of laws, to on-going litigated disputes undermines the independence of judiciary and violates the applicant's right to fair trial.

The case-law referred to, *Stran Greek Refineries and Stratis Andreadis v. Greece*, is worth noting in detail, as it is highly relevant in determining and ascertaining the independence of Chinese judiciary. In 1972, Andreadis concluded a construction contract with the Greek government, which was then a military regime. Stran Greek Refineries, Andreadis being the sole stakeholder, was established in order to carry out the construct contract. After the democracy was restored, Greek government considered this contract prejudicial to national economy and, by relying on Article 2(5) of Law no. 141/1975, the Greek government terminated this contract. Disputes between Stran Greek Refineries and Greek government arose in both the arbitration and civil judicial procedures. Both proceedings, to a substantial extent, were found against the state.⁶⁶ With regard to the civil proceedings, the case was appealed by the state to the Court of Cassation on 15 December 1986. However, the Greek Parliament enacted Law no. 1701/1987, which in Article 12 reads as follows:

1. The true and lawful meaning of the provisions of Article 2 para. 1 of Law no. 141/1975 concerning the termination of contracts entered into between 21 April 1967 and 24 July 1974 is that, upon the termination of these contracts, all their terms, conditions and clauses, including the arbitration clause, are ipso jure repealed and the arbitration tribunal no longer has jurisdiction.
2. Arbitration awards covered by paragraph 1 shall no longer be valid or enforceable.
3. Any principal or ancillary claims against the Greek State, expressed either in foreign or local currency, which arise out of the contracts entered into between 21 April 1967 and 24 July 1974, ratified by statute and terminated by virtue of Law no. 141/1975, are now proclaimed time-barred.

⁶⁵ *Ibid.*, paras. 38-40.

⁶⁶ *Ibid.*, paras. 6-18.

4. Any court proceedings at whatever level pending at the time of the enactment of this statute, in respect of claims within the meaning of the preceding paragraph, are declared void.

As Law no. 141/1975 was authorized by the Greek Constitution to enact legislation once and for all within three months upon the entry into force of constitution in order to maintain the legal stability, the First Division of Court of Cassation thus held that subsequent amendments, additions to, or authoritative interpretations of Law 141/1975 in the form of ordinary legislation were prohibited by the constitution.⁶⁷ However, the plenary session of the Court of Cassation maintained that ‘the prohibition on supplementing or modifying the content of such laws does not mean that they may never be interpreted’,⁶⁸ and that ‘the purpose of such interpretation is not to amend the substance of the law interpreted, but to clarify its original meaning and to resolve disputes that have arisen in connection with its application or which may do so in the future.’⁶⁹ Basing on this reasoning, the Court of Cassation held Article 12 of Law no. 1701/1987 constitutional, and ruled against the applicant.

Before the ECtHR, the applicant contended that the legislative intervention had effectively removed the jurisdiction of this litigated case. The legislature had decided a case to which it was a party.⁷⁰ On the contrary, Greek Government argued that, as the source of all power, the Parliament was fully justified in authoritatively interpreting enacted laws. This was also affirmed in Article 77 of the Greek Constitution. Legislative interpretation in the form of legislation should not be regarded as an interference of the judiciary, as the latter could determine on its own whether such interpretation violated the principle of the separation of powers. Judiciary could thus safeguard itself against improper intervention.⁷¹ After examining the timing and manner of the adoption of Article 12 of Law no. 1701/1987, the Court held that the legislative intervention in such a manner that was ‘decisive to ensure that

⁶⁷ *Ibid.*, para. 21.

⁶⁸ *Ibid.*, para 22.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, para. 42.

⁷¹ *Ibid.*, para. 43

the imminent outcome of proceedings in which it was a party was favourable to it⁷² infringed the applicant's right of fair trial by an independent and impartial tribunal.

With regard to the finality of judicial decision, the jurisprudence of ECtHR has also touched upon this. In *Findlay v. the United Kingdom*, where the applicant complained that the court martial is not 'an independent and impartial tribunal', the Court examined the composition of the court martial and the influence of the convening officer to it. The Court observed that the convening officer played a significant role in deciding the charges against the applicant, the type of court martial and its composition, and the appointment of prosecuting and defending officers.⁷³ Besides, members of the court martial were subordinate in rank to the convening officer.⁷⁴ Above all, the convening officer had the power, in certain circumstances, to dissolve the court martial both before and during the proceeding. The convening even acted as a 'confirming officer'; without his ratification, the decision of the court martial could not be effective.⁷⁵ The Court then concluded that the court martial is 'contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of 'tribunal' and can also be seen as a component of the 'independence' required by Article 6 para. 1[of the European Convention]'.⁷⁶ The Court thus held that the applicant's doubts with the independence of the court martial were objectively justified.

2. INDIVIDUAL INDEPENDENCE

As previously noted, individual independence refers to the autonomy of an individual judge in adjudicating a given case. A judge should be free from unwarranted interference from both other governmental branches and the judiciary itself. There should be no 'any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any

⁷² *Ibid.*, para. 50.

⁷³ *Ibid.*, para 74.

⁷⁴ *Ibid.*, para. 75.

⁷⁵ *Ibid.*, paras. 75, 77.

⁷⁶ *Ibid.*, para. 77.

reason'.⁷⁷ In decision-making, a judge should be able to pronounce its decision freely. No matter of what grade or rank, in terms of the hierarchical organization of judiciary where exists, the judge is, he/she should enjoy full autonomy in making his/her decision, independent of his/her colleagues and superiors.⁷⁸ The *Council of Europe Recommendation* also stipulates that sanctions against those who seeking to interfere the judicial decision-making should be provided. Besides, judiciary should not be obliged to report the merits of cases to anyone outside the judiciary.⁷⁹

Individual independence is also closely related to the administration of justice.⁸⁰ As pointed out, the institutional independence and the individual independence may not be always complementary to each other.⁸¹ The judiciary as a whole may constitute a hindrance to the autonomy of individual independent judge through the administration of justice. The administration of justice covers various elements, ranging from selection recruitment and training, appointment and removal to remuneration and social welfare. Detailed rules are laid down in *European Charter on the statute for judges and Explanatory Memorandum*.⁸² As prescribed in the general principles, decisions in relation to the 'selection, recruitment, appointment, career progress or termination of office of a judge' should be made by an authority independent of legislature and the executive powers. This authority should be composed of more than a half of judges elected by their fellow judges.⁸³ An internal self-governance by judges inside the judiciary is indispensable in the administration of justice, and is essential to guarantee the individual independence. These various elements of the administration of justice also affect the qualification of 'an independent tribunal'. In *Bryan v. the United Kingdom*,⁸⁴ the ECtHR was called upon to rule whether a housing and planning inspector constitutes 'an independent and

⁷⁷ The UN Principles, Principle 2.

⁷⁸ The Draft Universal Declaration, Art. 3.

⁷⁹ The Council of Europe Recommendation, Paragraph 2(d).

⁸⁰ Both institutional independence and individual independence may be subject to interference through the administration of justice. In respect of institutional independence, it may concern with the appointment of judges in higher courts, budgetary issues, and the interaction of the judiciary and Ministry of Justice, which is normally allocated in the executive branch.

⁸¹ A Winkler and J Zagel, 'The Independence of Judges' (1992) 46 Mercer Law Review 795, 798.

⁸² European Charter on the Statute for Judges and Explanatory Memorandum, Strasbourg 8-10 July 1998 (DAJ/DOC(98)).

⁸³ European Charter on the Statute for Judges and Explanatory Memorandum, Art. 1.3..

⁸⁴ *Bryan v. the United Kingdom* (app no 44/1994), 22 November 1995 ECtHR, Series A no 335.

impartial tribunal.’ The Court held that ‘in order to establish whether a body could be considered ‘independent’, regard must be had, *inter alia*, to the manner of appointment of its members and to their term of office.’⁸⁵ Thus, a ‘good administration’ of justice does not only constitute a safeguard to individual independence, according to this holding, but it is also a factor to determine whether an entity constitutes an independent tribunal or not. This view is reaffirmed in *Findlay v. the United Kingdom*. Besides, the Court further elaborates in *Incal v. Turkey*⁸⁶ that, in determining whether a tribunal or court is independent or not, the decisive point is the applicant’s doubts about the independence of the tribunal can be held to be objectively justified.⁸⁷ An appearance of independence is thus of importance to clear the doubts of the applicant.

Two major issues in relation to the administration of justice deserve to be further examined: promotion and disciplining. In order to prevent the promotion of judges, where such system exists, from serving as an inducement which undermines individual independence, this promotion mechanism should be based on objective factors and standards, in particular ability, integrity and experience.⁸⁸ To ensure its objectivity, as previously noted, substantial participation of judges in the decision-making process should be made available, if these decisions are not directly decided by judges or their representatives. This requirement is equally applicable to disciplining. The term of office of judges should be secured. The suspension or removal of judges should be only possible in accordance with the law. An opportunity of independent and impartial judicial review should be provided against these decisions.⁸⁹

B. IMPARTIALITY

The impartiality of a court may be explored in two dimensions: the case and the parties to it. That is, an impartial court suggests the absence of interest or stake in a

⁸⁵ *Ibid.* para. 37.

⁸⁶ *Incal v. Turkey* (app no 22678/93), 9 June 1998 ECtHR, ECHR 1998-IV 1547.

⁸⁷ *Ibid.* para. 71.

⁸⁸ UN Principles, Principle 13; The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Art. 4(o)

⁸⁹ UN Principles, Principle 19-20; The Council of Europe Recommendation, Paragraph 3.

particular case as well as the absence of bias, animosity or sympathy of either of parties. In parallel to ‘independence’, global and regional instruments have also laid down some standards in relation to the impartiality of judiciary. The afore-mentioned Principle 2 of *the UN Principles* does not only prescribe the independence of judiciary, but also dictates the courts to decide cases before them impartially based on facts and in accordance with the law. In addition, unfettered freedom should be had to the courts. Similar to *the UN Principles*, it is prescribed, in 2(d) of the *Council of European Recommendation*, that cases should be impartially decided in accordance with the conscience of judges, their interpretation of facts, and the prevailing rules of the law. The *African Union Principles and Guidelines* spells out the impartiality of the judiciary in more detail. The judiciary is obliged to base its decisions on objective evidence, facts and arguments.⁹⁰ It also prescribed three aspects for the determination of the impartiality of judiciary: equal position to act in the proceeding; the judge’s expression of an opinion, and the existence of his/her own priority.⁹¹ Concrete examples are also provided to demonstrate the undermining of the impartiality of the judiciary.⁹² Above all, the *Bangalore Principles of Judicial Conduct*⁹³ stipulate, in detail, various norms of conduct in order to ensure the impartiality of the judiciary. Judges are obliged to disqualify themselves wherever there are doubts in relation to their ability in deciding the cases impartially.⁹⁴

The ECtHR has also dealt with the impartiality of judiciary in a number of cases. The Court held, in *Castillo v. Spain*,⁹⁵ that two tests should be applied to determine the existence of the impartiality of tribunals: subjective test and objective test. The subjective test relies upon ‘the personal conviction of a particular judge in a given case’;⁹⁶ the objective test is to ascertain ‘whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.’⁹⁷ The personal impartiality

⁹⁰ African Union Principles and Guidelines, Art. 5(a).

⁹¹ African Union Principles and Guidelines, Art. 5 (c).

⁹² African Union Principles and Guidelines, Art. 5 (d)

⁹³ Draft Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justice held at the Peace Palace, The Hague, 25-26 November 2002.

⁹⁴ Draft Bangalore Principles of Judicial Conduct, Value 2.

⁹⁵ *Castillo Algar v. Spain* (app no 79/1997), 28 October 1998 ECtHR, ECHR 1998-VIII 3124.

⁹⁶ *Ibid.*, para. 43.

⁹⁷ *Ibid.*, para. 43.

of a particular judge is presumed unless proof to the contrary is demonstrated.⁹⁸ With regard to the objective test, the Court held that confidence in the impartiality of the courts must ‘inspire in the public’⁹⁹. ‘Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.’¹⁰⁰ In deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the decisive criterion is ‘whether this fear can be held to be objectively justified’¹⁰¹

These two tests have been repeatedly referred to in the jurisprudence of the ECtHR. The Court in this litigated case referred to its previous case-law, *Incal v. Turkey*, where the Court has held that ‘as to the condition of ‘impartiality’ within the meaning of that provision, there are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.’¹⁰² Besides, this view is also re-affirmed in *Findlay v. the United Kingdom*.¹⁰³ In sum, as subjective impartiality is normally presumed, unless the contrary is proved, the operative part of the Court’s jurisprudence is thus whether the litigant’s fear of the impartiality of the tribunals can be objectively justified. Nevertheless, the Court seems not to have a clear picture in relation to what factors to be taken into account in determining the existence of the ‘objectively justified fear of impartiality’.

⁹⁸ *Ibid.*, para. 44.

⁹⁹ *Ibid.*, para. 46.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Incal v. Turkey*, para. 65. For earlier cases, see e.g. *Pullar v. the United Kingdom*, where the Court, in paragraph 30, held that, ‘[I]t is well established in the case-law of the Court that there are two aspects to the requirement of impartiality in Article 6 para. 1 (art. 6-1). First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.’ In this case, the Court further refers to its previous case-law *Fey v. Austria* (judgment of 24 February 1993, Series A no. 255-A).

¹⁰³ *Findlay v. the United Kingdom*, esp. para. 73.

IV. JUDICIAL REVIEW IN CHINA: LAW AND PRACTICE

A. PROGRESS SO FAR MADE

1. SECOND FIVE-YEAR COURT REFORM PROGRAM

In 2005, Supreme People's Court issued its Second Five-Year Reform Program for People's Courts¹⁰⁴, following its first Five-Year Reform Program in 1999. The Reform Program comprises seven dimensions: (1) litigation procedure systems; (2) the system of trial guidance and the mechanisms for the uniform use of law; (3) work systems and methods to enforce judgments; (4) reforming and perfecting trial organs; (5) the management of trials and the political affairs; (6) the system of judicial personnel management; (6) the internal and external supervision for the People's Courts; and (7) continuing reform to the court system.

In the reform program, the objective of establishing a judicial system under the socialist rule of law is reiterated. It also points out the role of the Chinese Communist Party, stating that People's Courts should be subjective to the party's leadership and guidance, and to the supervision of the People's Congress and its standing committee. The courts should preserve, in its judicial system, the characteristic of socialist democracy. Such statements illustrate the political environment where China's judicial reform is situated, and present the potential challenges and interferences ahead. However, the reform program also emphasizes on the importance of 'justice and efficiency' in shaping the new judicial system while it insists the reform should be rooted in Chinese societal context, though borrowing other countries' experiences at the same time. The various objectives present complexities and the conflicts of values in China's legal system, and thus constitute as a constraint of the judicial reform and hindrance to its potential progress.¹⁰⁵

The reform program also emphasizes the importance of the judicial interpretation, case guidance system, and the role of adjudicative committees. It is stipulated that the

¹⁰⁴ An unofficial translation done by the staff of the United States' Congressional-Executive Commission is available at <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingel=38564> (last accessed 14/7/2007).

¹⁰⁵ For an updated review and comments on China's progress in judicial reform, see BL Liebman, 'China's Courts: Restricted Reform' (2007) 21 Columbia Journal Asian Law 1.

Supreme People's Court will issue regulations related to the case guidance system, regulating the designation of standards and procedures for selecting guiding cases, methods for issuing them, and guidance rules, with the objective to unifying legal applicable standards, to guiding the work of lower courts, and to enriching and developing legal theory, and other uses (article 13). The procedures for the Supreme People's Court to issue judicial interpretations should be reformed to ensure greater coherence. The Supreme People's Court will regularly clean up, amend, abolish, and compile judicial interpretations, and regularize the notification systems of judicial interpretations to the NPC Standing Committee (Article 14). Specialized criminal and civil/administrative adjudicative committees will be established in Supreme People's Court while High People's Courts and Intermediate People's Courts can establish specialized criminal committees and civil/administrative committees according to their needs (Article 23).

The judicial interpretation and the case guidance system are some peculiar practices in China's judicial systems. They aim to enhancing the uniformity of the interpretations of laws and regulations and their applications. Given the limited training and knowledge of the judges in lower courts, such practices, from a realistic perspective, have their merits. They contribute to the improvement of the adjudicative quality in the lower courts. However, such practices constitute a stronger form judicial law-making since the interpretation and guidance are of general application, and according the Supreme People's Court, its interpretation of law enjoys the same legal status as legislation. Besides, the legality and legal status of judicial interpretations are explicitly recognized and defined by *The Law on Legislation*.

Given the great threat of the local protectionism, the reform program takes a top-down approach. The Supreme People's Court aims at ensuring the uniform interpretation and application of laws in China's judicial system through strengthening judicial interpretations and case guidance system, and thus prevents incoherent interpretations and applications of laws and regulations due to the interferences of local governments. However, the pursuit and realization of judicial independence should find its roots in the practices of local courts. Only when local

courts have the capacity and are encouraged to challenge, with reasoned rationale based on their own beliefs provided, the ‘authoritative interpretations’ can judicial independence be realized. Precluding the lower courts from interpreting and applying laws by themselves does not lead to the establishment of an independent and impartial judicial review, but on the contrary, estranges from it. The same rationale applies to the adjudicating committee. Although it is seen as a device to enhance the adjudicating quality, it nevertheless also poses to the judicial independence, notably individual independence.

2. JUDICIAL INTERPRETATIONS IN RELATION TO TRADE-RELATED ISSUES

Following China’s accession, Supreme People’s Court issued a number of interpretations with the aim to provide a prompt review of relevant administrative actions. Four among these interpretations are of greater significance and worth of further elaboration, namely, *Regulation on Several Problems in the Trial of Trade-Related Administrative Litigation Cases*; *Regulation on the Application of Law in the Trial of Anti-Dumping Administrative Litigation Cases*; *Regulation on the Application of Law in the Trial of Anti-Subsidy Administrative Litigation*. It also co-issued with the Supreme People’s Procuratorate the *Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property*.

Regulation on Several Problems in the Trial of Trade-Related Administrative Litigation Cases define the scope of trade-related administrative litigation cases, and clarify the standing, standard of review and applicable laws. The regulations also explicitly, in article 9, take the treaty-consistent interpretation approach, stipulating that the interpretation consistent with China’s treaty obligations should apply when two reasonable interpretations of the legal text at issue are available. It should also be noted that courts are limited to review the administrative acts for the legality, based on the examination of the evidences, the interpretations of the legal rules, procedural requirements, misuses or lacks of competence, manifestly unfair or refusal of the legal

duties, and that the inquiry for appropriateness or reasonableness is not allowed (article 6).

Regulations on the Application of Law in the Trial of Anti-Dumping Administrative Litigation Cases define the scope of the anti-dumping acts subjective to administrative review. The regulations also lay down the rules on the standing, defendant authority, jurisdiction, burden of proof, examination of the evidence, and standard of review. Similar stipulations are included in the *Regulations on the Application of Law in the Trial of Anti-Subsidy Administrative Litigation*. With regard to the standard of review, insufficiency of the evidence, misinterpretation of laws and administrative regulations, the violation of procedural requirements, and misuses or lacks of competence are expressly identified (article 12(2)). It should also be pointed out that factual materials not included in the records during the anti-dumping or anti-subsidy investigations should not be presented as evidences to justify the anti-dumping or anti-subsidy decisions (article 7(2)).

In response to an agreement between Deputy Premier Wu Yi and the US government at the 15th annual meeting of the Joint Commission on Commerce and Trade, Supreme People's Court and Supreme People's Procuratorate issued a new judicial interpretation concerning the infringement of intellectual property rights. According to some observers, the interpretation touches upon five main elements: '(1) lower the numerical thresholds determining the criminal status of infringing acts; (2) allow for accomplice liability for importers, exporters, landlords, and others who assist infringers; (3) permit goods produced in factories and/or kept in warehouses to be included in sales calculations; (4) authorize using the number of illegally duplicated disks or internet advertising revenue to satisfy the for-profit requirement; and (5) expand the definition of an infringing trademark.'¹⁰⁶ Prior to the request for consultation of the U.S, the Supreme People's Court, on 5 April 2007, issued another interpretation governing criminal cases of infringing intellectual property rights. It widens the scope of 'reproduction and distribution' governed in Article 217 of criminal law to include advertising for the sale of copyright-infringing product. It also

¹⁰⁶ B Qiang, *et al.*, 'China' (2006) 40 *International Lawyer* 547, 556.

lowers again the thresholds, in terms of illegal copies, determining ‘serious’ or ‘especially serious’ referred to in article 217 of criminal law.

As previously noted, the reason why these judicial interpretations are so important is that provisions in the relevant national legislation are often too vague, and the lower courts are not so equipped with the knowledge to apply laws concerning the international trade. Judicial interpretations issued by the Supreme People’s Court, sometimes co-issued with Supreme People’s Procuratorate, are thus serve as guidance for the lower courts ‘effectively and correctively’ to apply the relevant legislation. It is expected, in so doing, that the coherence of the interpretation of laws and the quality of adjudication can be enhanced. However, as will be examined in the following subsection, these various interpretations serve only ‘effective and correct’ application of laws and regulations in relation to external trade-related disputes. Efforts and progress as to ensure the independence and impartiality of judiciary have not satisfactorily made. As will be illustrated, the practices of judicial interpretations and case guidance system are among those factors undermining the independence and impartiality of Chinese judicial system, and make it difficult to pass the scrutiny of WTO requirements.

B. TASK HALF-ACCOMPLISHED: THE INDEPENDENCE AND IMPARTIALITY OF CHINESE COURTS

1. THE ADMINISTRATION OF JUSTICE

Several legal instruments have been laid down in order to better the administration of justice in China. Three legal (policy) instruments are illustrative, in terms of time point of enactment, legal status, and subject matter: *Law on Judges*; *Code of Conduct for Judges (for Trial Implementation)*; and *Opinions on Strengthening the Adjudicative Work with the aim to Providing Judicial Protection for the Construction of Innovative State*. *Law on Judges*, effectuated on 1 July 1995, lays down the framework for, *inter alia*, the appointment, removal, promotion, and disciplining. In general, it was an advanced legislation, in light of the time of its enactment. While it is prescribed that the president of people’s courts should be

appointed by the people's congress at corresponding level,¹⁰⁷ the Chinese Communist Party is not referred to in this act. Besides, judges are obliged to decide a case impartially based on facts and in accordance with the law.¹⁰⁸ Minimum standards of legal education are also explicitly laid down in this act, with the aim to improving the quality of the judges and consequently the adjudication.¹⁰⁹ Nevertheless, as the very first article provides, the objective and purpose of this act is to ensure that 'people's courts' adjudicate cases independently, and that judges carry out their duties in accordance with the law. It appears that independence should be collectively enjoyed by the judiciary as a whole, namely, people's courts. This echoes some scholarly work. In China, the power of independent adjudication is vested in courts, and not in individual judges, which suggests that judicial independence in China can only be achieved in a collective sense. It explains why it is so difficult, if not impossible, to bring about individual independence in Chinese judicial system.¹¹⁰

Ten years after the enactment of Law on Judges, Code of Conducts for Judges (for Trial Implementation) was issued by Supreme People's Court on 4 November 2005. As this Code of Conduct was specifically laid down for judges, and it had been ten years since the enactment of Law on Judges, it thus serves as a good basis to examine the progress made, or the change of mindset in relation to judicial independence. Surprisingly, Marx-Leninism, Mao, Deng, and 'three-representation' are referred to in the very first article of this code of conduct. Western lawyers may also be bewildered to find that this code covers so detailed regulation, ranging from dress code,¹¹¹ manner,¹¹² to specific issues concerning adjudicating a case, such as jurisdiction,¹¹³ trial hearing,¹¹⁴ mediation,¹¹⁵ and how to hand down a verdict.¹¹⁶ This code of conduct can be seen as a mini-procedural law or a manual for judges. This may suggest that the complexity of cases before lower courts has already

¹⁰⁷ Law on Judges of People's Republic of China (hereinafter Law on Judges), Art. 11.

¹⁰⁸ Law on Judges, Art. 7(2)

¹⁰⁹ Law on Judges, Art. 9(1)(vi)

¹¹⁰ K Zou, *China's Legal Reform* (Martinus Nijhoff Publishers, Leiden, Boston 2006) 150.

¹¹¹ Code of Conduct of Judges (in Trial Implementation, hereinafter Code of Conduct of Judges), Art. 6.

¹¹² Code of Conduct of Judges, Art. 7.

¹¹³ Code of Conduct of Judges, Chapter II

¹¹⁴ Code of Conduct of Judges, Chapter III

¹¹⁵ Code of Conduct of Judges, Chapter IV

¹¹⁶ Code of Conduct of Judges, Chapter V

exceeded the capacity of lower courts, and more detailed guidelines are necessary. It also reflects that the understanding of judicial function by the Supreme People's Court. 'Effective' and 'correct' application of laws and regulations are enforced by a centralized and top-down approach. Nevertheless, this code of conduct does also deal with the independence and impartiality of judiciary. In article 3, it is stipulated that judges shall adjudicate independently in accordance with the law, and shall not be subject to interferences of administrative agencies, social groups, and individuals. Judges should insist on its correct opinions, resisting the improper influences of power, money or social relationships. They shall remain impartial, and equally protect the legitimate interests. The requirements of independence and impartiality do not deviate with international standards. However, they do not offer much help to ensure the independence and impartiality of Chinese courts, as the issue of Chinese Communist Party has not resolved.

Opinions on Strengthening the Adjudicative Work with the aim to Providing Judicial Protection for the Construction of Innovative State,¹¹⁷ issued on 11 January 2007 is even more illustrative. As its title suggests, courts are seen as an actors to carry out policy goals. In the preamble, the central committee of Chinese Communist Party is explicitly referred. Various policy goals are identified in these opinions. They also points out that the major task is being focused upon intellectual property rights, due to the pressure of China's trading partners, notably the US and the EU. The increasing international trade related disputes, following China's WTO entry, have significantly reshaped the composition of case genre in Chinese courts. But with regard to the independence and impartiality, as these opinions seem better to reflect the everyday practices of Chinese courts, it is questionable how much progress has been actually made so far.

2. LEGISLATIVE INTERPRETATION AND JUDICIAL INTERPRETATION

The Constitution assigns the competence to interpret the national law as well as the constitution itself to the People's National Congress whereas the *Organic Law of*

¹¹⁷ Notice Fafa No 1 (11 January 2007) available at http://www.chinacourt.org/flwk/show1.php?file_id=115565 (last accessed 06/09/2007).

People's Courts authorizes the Supreme People's Court to give judicial interpretation on questions concerning specific application of laws and decrees in judicial proceedings for practical reasons. As prescribed, courts, specifically the Supreme People's Court, can only interpret laws and decrees in judicial proceedings. On June 10, 1981, in the 19th Meeting of the Standing Committee of the Fifth National People's Congress, a resolution as to improve the interpretation of laws and decrees had been adopted. Even though the 1982 constitution was not revised yet at that point, the limitation of the competence of judicial interpretation has remained the same, as the prescription with regard to the competence to interpret the constitution and national laws was not amended in the 1982 constitution.

Given the necessity to provide more legislation and a better interpretation of the law in order to improve the socialist legal system, it was decided, in that resolution, that:

(1) In cases where the limits of articles of laws and decrees need to be further defined or additional stipulations need to be made, the Standing Committee of the National People's Congress shall provide interpretations or make stipulations by means of decrees.

(2) Interpretation of questions involving the specific application of laws and decrees in court trials shall be provided by the Supreme People's Court. Interpretation of questions involving the specific application of laws and decrees in the procuratorial work of the procuratorates shall be provided by the Supreme People's Procuratorate. If the interpretations provided by the Supreme People's Court and the Supreme People's Procuratorate are at variance with each other in principle, they shall be submitted to the Standing committee of the National People's Congress for interpretation or decision.¹¹⁸

To be sure, one cannot decipher any clear line between 'further definition', 'additional stipulation' and 'the specific application of laws and decrees.' As prescribed in the second paragraph of this resolution, the Supreme People's Court can only give the judicial interpretations when the specific application of laws and decrees in court trials is needed. In other words, only when these two conditions, namely, 'the specific application of laws and decrees' and 'in court trials', are satisfied can the Supreme

¹¹⁸ An unofficial English version can be downloaded at http://www.novexc.com/interp_of_law.html (last visited 14/07/2005). The resolution covers four paragraphs. The third paragraph deals with those interpretations which fall beyond the scope of judicial and procuratorial affairs while the fourth paragraph deals with the interpretation of local regulations.

People's Court hand down judicial interpretations. However, it seems not to be the case. Some literature even argues that the Supreme People's Court has continuously gone beyond its limits since the Standing Committee has hardly made interpretations except the exceptional Hong Kong Basic Law cases.¹¹⁹

Doubts may also arise with regard to how and when the Standing Committee will hand down its legislative interpretation, and its potential threats to particular cases in trial proceedings. As previously noted, ECtHR clearly laid down, in *Stran Greek Refineries and Stratis Andreadis v. Greece*, that the legislative intervention in question was in such a manner that was 'decisive to ensure that the imminent outcome of proceedings in which it was a party was favourable to it'¹²⁰ had infringed the applicant's right of fair trial by an independent and impartial tribunal. This holding is of great relevance here. First, the most telling part of this holding is that legislature is prohibited from interfering the judicial proceeding by means of legislative intervention to ensure a particular result of the proceedings. This holding should not be limited to cases to which the State is a party. Nevertheless, if it is the case, the infringement of the right to fair trial by independent and impartial tribunals is manifest. The argument the Greek government took may also be employed by Chinese Peoples' Congress and its Standing Committee. The People's Congress, through which the people exercise state power, is the source of all powers, and its competence authoritatively to interpret the constitution and laws are explicitly recognized by the Constitution. However, as made clearly by the Court, this argument does not prevail. It should also be noted that the WTO obligation to provide an independent and impartial judicial review is an international obligation, which China cannot justify its derogation on the ground of its constitutional system. This international obligation does not only bind its executive powers, but also its legislature and judiciary.

¹¹⁹ Liu, *supra* note 35, at 59-62. Further initiatives to clarify the allocation of jurisdiction and to strengthen legislative interpretation can be found in *Law on Legislation*, and *Working Procedures Governing Notification and Review of Administrative Regulations, Regional Laws, Autonomous Decrees and Special Decrees, Regulations of Special Economic Zones and Working Procedures Governing Notification and Review of Judicial Interpretations*.

¹²⁰ *Stran Greek Refineries and Stratis Andreadis v. Greece*, para. 50.

3. ADJUDICATIVE COMMITTEE

One of the important features of Chinese judicial system is the existence of adjudicative committee¹²¹, of which the legal basis is founded on the authorization of *Organic Law of People's Courts*. The main task of adjudicative committee is to 'sum up judicial experience and to discuss important or difficult cases and other issues related to the judicial work'.¹²² The president of the court or the presiding judge may refer a particular case (namely, important or difficult cases) to adjudicative committee when necessary. The adjudicative committee would discuss and decide the case based on a summary presentation by the presiding judge in that case as well as any documents presented, and the collegial panel should carry out the decision of the adjudicative committee.¹²³

Such practices deviate from international standards in relation to judicial independence, in particular individual independence. As noted above, an individual judge, when adjudicating a case should decide it based on facts and in accordance of the law. It must be the judge's own examination of facts and interpretation of laws. These practices bring into improper interferences and undue influences of the president or vice-president of the courts, or other judges not hearing this case. These interferences and influences are improper and undue in the sense that there is no space for them in the decision-making process of an individual judge. It does not matter whether decisions made by adjudicative committee are more 'correct' or not, as the essence of the judicial function is to decide a case based on one's own assessment of the facts as well as reading of the law, instead of someone else. Besides, as the ECtHR has repeatedly pointed out, the independence of tribunals should be sufficient

¹²¹ Views among Chinese scholarship on the abolishment of adjudicative committees are also diverse, sometimes to the opposite. A stipulating debate between Suli Zhu and Weifang He reflects best this divergence. See, W He, 'Two Problems of the Administration of Justice in China' (1997) 6 *China Social Science* 117 (in Chinese); W He, 'Some Comments on the Adjudicative Committees' (2002) 1 *Beijing University Law Review* 265 (in Chinese); S Zhu, 'Examination and Reflection on the Adjudicative Committee in Chinese Local Courts' (2002) 1 *Beijing University Law Review* 320 (in Chinese). In the meantime, Supreme People's Court is proposing a reform for adjudicative committees in Chinese judicial systems, available at <http://www.nanfangdaily.com.cn/zm/20071115/xw/200711150013.asp> (last accessed 29/11/2007).

¹²² *Organic Law of People's Court of the People's Republic of China*, Art. 11.

¹²³ RC Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (Kluwer Law International, The Hague ; Boston 1997) 76-77.

to exclude any legitimate doubts. Even appearance is of relevance. It is difficult, if not impossible to exclude legitimate doubts of litigants when cases are not directly and exclusively decided by judges sitting before them, but behind the courtroom instead, where even an opportunity to be heard is not provided. In this case, the litigants' doubts about the independence may be objectively justified.

It should also be pointed out that the objective and purpose to include the 'independent and impartial judicial review' in China's Accession Protocol is better to protect the rights and interests of individual economic actors through the prompt review of relevant administrative actions by independent and impartial tribunals. It was expected that this obligation might contribute to judicial independence in China. However, it seems Chinese judiciary is not going to the right, if not opposite, direction. This can be clearly illustrated by the two judicial interpretation issued by the Supreme People's Court with regard to the protection of intellectual property rights. The second judicial interpretation, due to the political pressure of the U.S, is aimed at lowering down again the thresholds of the determination of 'serious' or 'especially serious,' in terms of illegal copies, referred to in article 217 of criminal law. Judiciary is seen as an instrument to meet policy goals, and the Supreme People's Court dominates the competence of judicial interpretation. Lower courts should thus abide by the judicial interpretation issue by the Supreme People's Court. However, as this Chapter emphatically argues, a centralized judicial interpretation dominated by the Supreme People's Court will not bring about real independent and impartial judges in China. Inferior judges should be encouraged and obliged to apply the law in accordance with their own reading and interpretation. Not so those of the Supreme People's Court.

4. CASE GUIDANCE SYSTEM

One major competence of Supreme People's Court conferred by the Constitution is to supervise the lower courts.¹²⁴ The adjudicative committee of Supreme People's Court uses the competence of 'summing up judicial experience and of discussing important or difficult cases and other issues relating to the judicial work of judicial

¹²⁴ Constitution of People's Republic of China, Art. 127 (2).

interpretation of national laws, by issuing a variety of ‘decisions’, including opinions, instructions, and official replies to lower courts. Those decisions can be in the forms official opinions (*dafu*), letters (*fuhan* or *han*), notices (*tongzhi* or *tonggao*), explanations (*jieda* or *jieshi*), official answers (*pifu* or *dafu*), or conference summaries (*jiyao*). This practice of seeking decisions replies, opinions or instructions from Supreme People’s Court is referred as ‘case guidance system (*qingshi*)’.

This ‘case guidance system’ shares the same weakness with the adjudicative committee. After seeking official replies from the Supreme People’s Court, lower courts are obliged to decide the case according to these official replies. In other words, those who decide the cases are not who sitting in front of the litigants, but those in Beijing. This system prevents from the litigants from presenting evidence and arguments to those judges who really decide their case, let alone persuading them. Litigants have no idea about how these decisions are made, and are not sure whether those judges referred to emphasize on the same focus as they do. The answer as to the independence of those judges sitting before litigants is apparently not, as they are subordinate to their superiors. They should decide the case according to the Supreme People Court’s assessments of facts and interpretation of laws, instead of their own. As is made clear above, the individual independence of every single judge is of no less, if not more, importance than the institutional independence. The image of judiciary cannot be mapped as a whole if there are no tiny pieces of every single judge. One should not always perceive the judiciary collectively as an entire entity. Various independent judges are the foundation of an independent judiciary. This view can be also supported by those international instruments referred to above, which place the emphasis not only on the institutional independence but also on the individual independence.¹²⁵

¹²⁵ An interesting analogy or contrast can be drawn between Chinese and Taiwanese judicial systems. Chinese case guidance system to some extent follows the pattern or the conventional practice of *Panli* maintained by Republic of China before Chang Kai-shek retreated to Taiwan. After the People’s Republic was established, the case guidance system provides an easier way to tackle the insufficiency of the judiciary and its bad quality. In Taiwan, the Constitutional Court in its *Judicial Yuan Interpretation No. 86* tries to reconcile the potential conflicts, aiming to provide potential space for interpretation for the individual judge hearing the case. By doing so, individual judicial independence can be to some degree maintained. In some sense, one may argue the Constitutional Court in Taiwan successfully resolve the conflicts, and can offer a good example to Chinese judicial system.

V. SHORT CONCLUSION

This Chapter examines the scope and nature of China's WTO obligation to provide an independent and impartial judicial review. It first presents the trend in the WTO to strengthen domestic judicial review, and then analyzes this obligation embodied in China's Accession Protocol. The requirements laid down by Article 2(D) of China's Accession Protocol relating to the 'prompt review' of administrative actions are more stringent. The scope is also wider than existent provisions in the WTO agreements. This Chapter then examines the existent WTO jurisprudence in order to clarify the criteria of 'independence' and 'impartiality', and finds that no sufficient and clear guidance is available. As informed by Article 3. 2 of Dispute Settlement Understanding, it is thus feasible and indispensable to examine international standards as well as jurisprudence concerned. This Chapter then discusses various global and regional standards in relation of independence and impartiality, and explores the jurisprudence laid down by the ECtHR. Based on these standards and jurisprudence, laid down by on the WTO and other international legal instruments, and international tribunals, this Chapter then presents the efforts and progress that China has so far made for the implementation of this 'independent and impartial judicial review' obligation, and then examines the compatibility with standards outlined in previous sections. It finds that the administration of justice, the practices of legislative interpretation, adjudicative case guidance system cannot pass the scrutiny of the WTO Panel/Appellate Body, if a case is brought into the WTO Dispute Settlement Mechanism. Besides, as doubts about the impartiality of the Chinese member of the Appellate Body was indicated by Taiwan during the selection

Nevertheless, it relates to another issue which this Chapter does not touch upon. It blurs the difference between legislative branch and judicial organ. The *Panli* system maintained in Taiwan or the case guidance system in China are bereaved of their context: the factual basis of the case. The Supreme Court in Taiwan in editing their *Panli*, or the Supreme People's Court, in exercising its power of supervising the lower courts and laying down guidance, turns out to be a legislative organ. While it is also true that Chinese legal system is unique in that its legislature, the People's Congress, can oversee the People's courts, whereby legislative power and judicial power here is a fuzzy mixture. This characteristic seems unpromising for Chinese courts to escape the scrutiny of the WTO Dispute Settlement Mechanism. However, as noted in my concluding remark, the issue of separation of power is not what I intend to deal with in this Chapter. Further, in respect of the adjudicative committee, the major flaw of this system is the discrepancy between those hearing the case and those deciding the case. A case may be decided not by judges sitting before the litigants but behind the veil of whom the litigants are ignorant.

process as well as the Dispute Settlement Body meeting, it would be of great aspiration to see how a WTO ‘judge’ perceive the role of a ‘judge’ in the WTO and in Chinese domestic courts.

In this short conclusion, it is also feasible to point out some fundamental issues that are not dealt with in this Chapter. Due to the approach taken in this Chapter, I do not cover issues of the separation of powers. Nor do I touch upon in detail the relationship between Chinese courts and People’s Congress and Chinese Communist Party. If one wishes to explore how to establish an independent and impartial judicial review, which is beyond the aim and scope of this Chapter, it would be feasible and essential to examine the role of Chinese Communist Party, in particular Legal-Political Committee and Disciplining Committee, in influencing judicial policy and judicial decision-making. It is also important to examine in what aspect Chinese courts are responsible to People’s Congress, and in what way People’s Congress supervises Chinese courts at the corresponding level.

CHAPTER VI TWENTY YEARS AFTER DEMOCRATIZATION: IS IT TIME FOR TAIWAN'S COURTS TO FACE WITH CROSS-STRAIT TRADE?

I. INTRODUCTION

This Chapter aims to explore the role of Taiwan's courts in foreign (trade) relations, specifically foreign (trade) relations with China. It will examine the jurisprudence laid down by Taiwanese courts, notably the Constitutional Court. This case-law is to be examined from two perspectives: the perspective of WTO law and the perspective of Taiwan's constitutional/national law. It will then point to the conflicts between these two and propose an answer to the resolution of these conflicts.

The relevance of WTO law is comprehensible as Taiwan currently adopts and maintains a large number of discriminatory restrictions on trade against China. Complexities are no less from the domestic constitutional/legal framework as these trade restrictions or other measures with a bearing on trade may affect rights and interests of Taiwanese nationals. Since more and more natural and legal persons are engaging economic activities with China, including trade and investments, their rights and interests both under the WTO Agreement and under domestic constitutional/legal framework may be infringed in case of arbitrary and capricious restrictions. Judicial review in foreign trade relations is also thus great significance, in particular in light of the long-established self-restraint approach of Taiwanese courts in this sphere.

In addition, WTO law and national constitutional law are interrelated. The story of Chinese immigrants, who mostly come to Taiwan through marriage with Taiwanese nationals, is telling. These Chinese immigrants, under Taiwan's existent regulatory regime on China trade, inevitably suffer from discriminatory treatments in terms of WTO law, especially when their qualification and equivalency in engaging economic or professional activities is at stake. Besides, even after they acquire Taiwanese nationality, they continue to suffer from discriminatory and unequal treatments. Equal rights protection under the national constitution thus adds additional complexities to this issue.

Bearing these in mind, I will firstly examine the legal status of the WTO Agreement under the constitutional framework of Taiwan, and its judicial practice in the field of foreign (trade) relations, in particular external (trade) relation with China. Based on this examination, I aim to find out whether a discernable approach or pattern can be registered. After these, I will then propose to redefine, through a case study, the role of Taiwanese courts in external trade relations with China based on the constitutional approach on external trade relation as elaborated in Chapter III.

II. THE LEGAL STATUS OF WTO AGREEMENT IN TAIWAN'S CONSTITUTIONAL FRAMEWORK

This section deals with the legal status of the WTO Agreement under Taiwan's domestic constitutional framework. It will start with the legal status of treaties and international agreements, and then examine the specific case of the WTO Agreement. After examining national constitutional/legal provisions governing this issue, this section investigates relevant jurisprudence on the legal status of treaties and international agreements in Taiwan. It will mainly focus on three aspects: the scope of treaties and international agreements and the corresponding ratification/incorporation procedures, direct effects and legal hierarchy. In relation to the WTO Agreement, it starts with its legislative history and then examines relevant jurisprudence in the courts.

A. LEGAL STATUS OF TREATIES/INTERNATIONAL AGREEMENTS IN TAIWAN

1. SCOPE OF TREATIES AND INTERNATIONAL AGREEMENTS AND CORRESPONDING RATIFICATION/ INCORPORATION PROCEDURES

In 1992, Koo Chen-fu, the President of Strait Exchange Foundation (the SEF) in Taiwan and Wang Daohang, the President of the Association for Relations across the Taiwan Strait (the ARATS) in China signed four agreements in Singapore.¹ Controversies arise as to whether these four agreements should be deliberated by the Legislative Yuan (the Congress of Taiwan). It was, and still is, not clear due to two

¹ For the background and results of this negotiation and other relevant meetings between Koo and Wang, *see*, Strait Exchange Foundation (ed), *Talks and Meeting between Koo and Wang* (Strait Exchange Foundation Taipei 2001).

reasons. Firstly, the Constitution does not clearly define the scope of treaties and international agreements that should be deliberated by the Legislative Yuan and subsequently ratified by the President. Secondly and maybe more importantly, whether the relationship between China and Taiwan is ‘international’ and should thus be governed by international law is subject to dispute.

This issue was subsequently referred to the Constitutional Court upon the request of one-third of deputies of Legislative Yuan. On 24 December 1993, the Constitutional Court clarified the scope of ‘treaties and international agreements’ as defined within the Constitution. The Constitutional Court then in its *Judicial Yuan Interpretation* No. 329 declares that within the Constitution, a ‘treaty’ means an international legally-binding agreement concluded between Taiwan² and other nations or international organizations that relates to the ‘important issues’ of the State or to rights and obligations of its people, regardless of the title of ‘treaty’, ‘convention’ or ‘agreement’. Clearly, such agreements where a ‘ratification clause’ is provided for should be referred to the Legislative Yuan for deliberation. In addition, other international agreements that fall into the scope of this interpretation should also be referred to the Legislative Yuan for deliberation. This interpretation nevertheless excludes those treaties or international agreements which are authorized by laws or pre-determined by the Legislative Yuan or those whose contents are identical with national laws. Treaties and international agreements after deliberation and ratification of the Legislative Yuan enjoy the same legal status of national legislation. Nevertheless, in respect of the controversy at dispute, namely the four agreements signed by Koo and Wang, the Constitutional Court briefly notes that, ‘agreements concluded between Taiwan and [mainland] China are not international agreements to which this interpretation relates.’³ Based on this reasoning, the Constitutional Court

² Here, the terms employed by the Constitutional Court is ‘Republic of China’, the official name of Taiwan. Nevertheless, China is normally referred to ‘People’s Republic of China’. It could be confusing if both ‘People’s Republic of China’ and ‘Republic of China’ are both used in this thesis. Therefore, with the same reason provided in Chapter I, this Chapter uses the term Taiwan when ‘Republic of China’ is referred to, unless the context requires otherwise.

³ *Judicial Yuan Interpretation* of the Constitutional Court, No 329, available at <http://www.judicial.gov.tw/constitutionalcourt/index.asp> (last accessed 16/04/2008). A multilingual website bearing legal bases and jurisprudence of the Constitutional Court can be reached at the above link. This may not be reproduced in this Chapter except as necessary.

It should be noted that this case was decided on 24 December 1993, when the democratization and of

thus concludes that, ‘whether or not these agreements should be sent to the Legislation Yuan for deliberation is not included in this interpretation’.⁴

According to the Constitutional Court, whether an international agreement should be referred to the Legislative Yuan for deliberation, as dictated by Article 58(2) and 63⁵ of the Constitution, depends on the contents of the international agreement concerned. In case of a legally binding international agreement which relates to the ‘important issues’ of the State and rights and obligations of the people, the deliberation procedure set out by the Constitution should be followed. As far as the deliberation procedure is concerned, it is of no difference whether this international agreement concerned carries a title of ‘treaty’, ‘convention’, or ‘international agreement’.

2. SELF-EXECUTING

Taiwan’s Constitution does not provide anything in relation to the direct effect of international agreements. Two cases by the Supreme Court and Supreme Administrative Court are relevant in this regard. When dealing with the legal status of *Treaty of Friendship, Commerce and Navigation between United States of America and Republic of China*⁶ in Taiwan, the Supreme Court held, the treaty concerned was signed on 4 November 1946, subsequently ratified by the Legislative Yuan. In light of the wording of ‘respect of treaties’ in Article 141 of the Constitution and the

Taiwan just started. In 7 July 1999, in an interview by Deutsche Welle radio station, the former President Lee Tung-hui remarked that the cross-strait relationship is ‘at least a special state-to-state relationship. Whether the agreements signed by China and Taiwan are ‘international’ agreements may be subject to dispute today. Further on this point, see, T-L Hsu, *et al.* (eds), *The Special State-to-State Discourse and Taiwan's National Identity* (Xunlin Press Taipei 2000). It should also be pointed that whether the new ‘philo-China’ President, Ma Ying-jeou defines the relationship between China and Taiwan as not ‘international’ in terms of the relationship between State and State. See further Chapter X. *infra*, text to n. 8, ff.

⁴ *Ibid.*

⁵ Article 58(2) of Taiwan’s constitution reads, ‘statutory or budgetary bills or bills concerning martial law, amnesty, declaration of war, conclusion of peace, *treaties*, and other important affairs, all of which are to be submitted to the Legislative Yuan, as well as matters that are of common concern to the various Ministries and Commissions, shall be presented by the President and various Ministers and Chairmen of Commissions of the Executive Yuan to the Executive Yuan Council for decision.’ Article 63 reads, ‘the Legislative Yuan shall have the power to decide by resolution upon statutory or budgetary bills or bills concerning material law, amnesty, declaration of war, conclusion of peace or *treaties*, and other important affairs of the State.’ (emphasis added).

⁶ ‘Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China’ (1949) 43 *American Journal of International Law* 27.

deliberation procedure as set out in Article 63, this treaty concerned enjoys the legal status of national legislation, and should be applied in domestic courts.⁷ According to this holding, whether an international agreement signed by Taiwan enjoys the legal status of national legislation and can be applied in domestic courts relies mainly upon the deliberation procedures, namely the deliberation by the Legislative Yuan. The Supreme Court also bases its reasoning on the constitutional provision that directs the State to respect treaties. In a letter to Ministry of the Administration of Justice, the Judicial Yuan states that the *Treaty of Friendship, Commerce, and Navigation between United States of America and Republic of China* is self-executing in nature, and thus can be directly applied by courts.⁸ Whether the ruling of the Supreme Court is influenced by the letter is unclear since this letter is not explicitly referred to in this case. Further, whether the Supreme Court intends to distinguish the self-executing and non-self-executing treaties is also subject to dispute.

In accordance with the holding of the Supreme Court, one might be tempted to draw the conclusion that international agreements deliberated by the Legislative Yuan enjoy the same status as national legislation and can be applied by Taiwanese courts. The position is nevertheless far from settled. In a recent case concerning the ‘effective protection’ of inventions, trademarks and trade names, as provided in Article IX of the same treaty,⁹ the Supreme Administrative Court held, the international law and national law are two parallel legal systems, either of which may constitute a part of the legal source of the administrative law. Nevertheless, it is not without limit and of no condition for the international law to constitute a part of the legal source of the domestic administrative law. The treaty or international agreement concerned should be clear and specific in its content, and may thus be relied upon by domestic courts.

⁷ Taishangzhi No. 1412 (1985), available at <http://jirs.judicial.gov.tw/Index.htmv.tw/Index.htm> (last accessed 17/04/2008). Cases and interpretations of Taiwanese courts, as well as the Constitutional Court can normally found in the database referred above. This Chapter may not specify except as necessary.

⁸ In a letter to Ministry of the Administration of Justice, the Judicial Yuan states that the *Treaty of Friendship, Commerce, and Navigation between United States of America and Republic of China* is self-executing in nature, and thus can be directly applied by courts.’ Xunling No 449 (27 July 1931). Whether the ruling of the Supreme Court is influenced by this letter is unclear as this letter is not explicitly referred to in this case.

⁹ *Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China*, above n. 6.

Otherwise, the treaty or international agreement concerned should be transformed into national legislation that domestic courts can apply. Since the ‘effective protection’ in Article IX of the treaty concerned is not clearly and specifically defined, it is not possible for domestic courts directly to apply this provision. The Supreme Administrative Court further notes that, while in general the international law is of higher legal hierarchy than national laws, it is only when these conditions are satisfied that the international law can be applied in domestic courts and thus prevents the application of conflicting national laws.¹⁰ However, the Supreme Administrative Court gives little guidance on the requirement of ‘clear and explicit in its content’. In addition, whether the Supreme Administrative Court intends to refer to the concept of ‘self-executing’ or ‘direct applicability’ is also unclear.

3. LEGAL HIERACHY

Divergent views exist in relation the legal hierarchy between treaties or international agreements and national legislation. In the *Judicial Yuan Interpretation* No. 329, the Constitutional Court held that, treaties or international agreements deliberated by the Legislative Yuan enjoy the same legal status of national legislation. In case of conflicts between those treaties and international agreements deliberated by the Legislative Yuan and national legislation, the Supreme Court holds the rule of *lex specialis* applies, the treaties and international agreements being *lex specialis*.¹¹ The Supreme Administrative Court qualifies the primacy of treaties and international agreements to those whose contents are clear and specific. Only when the condition of clarity and specificity is satisfied with can these treaties and international agreements be directly applied in domestic courts, and thus enjoy higher legal hierarchy than national legislation.

There are some nuanced differences among the jurisprudence of the Constitutional Court, the Supreme Court and the Supreme Administrative Court. The Constitutional Court clarifies the procedural requirement for treaties and international agreement to be directly applicable in domestic courts as prescribed in the

¹⁰ Supreme Administrative Court, Panzhi No. 181 (2004), available at <http://jirs.judicial.gov.tw/Index.htm> (last accessed 17/04/2008).

¹¹ Supreme Court Judgment Taifeizhi No. 69 (1984).

Constitution, namely, the deliberation of the Legislative Yuan. Both the Supreme Court and Supreme Administrative Court share this view on procedural requirement. Nevertheless, in respect of the legal hierarchy, the Constitutional Court is of the opinion that these deliberated treaties and international agreement have the same legal status, while the Supreme Court held that, as the treaties and international agreements concerned are *lex specialis* in nature, they should exclude the application of national legislation. By contrast, the Supreme Administrative Court qualifies the primacy of treaties and international agreements only to those provisions that contain clear and specific rights and obligations. Notwithstanding their nuanced differences of the jurisprudence by the Constitutional Court, the Supreme Court and the Supreme Administrative Court, it is clear that conflicts between Constitution and deliberated treaties and international agreements have never been dealt with. It is also clear that none of these courts touches upon the issue whether a violation of deliberated agreements should ever constitute an infringement to the Constitution, in light of the ‘respect of treaties’ as provided in the Constitution.

B. LEGAL STATUS OF WTO AGREEMENT IN TAIWAN

1. LEGISLATIVE HISTORY

With regard to the legal status of the WTO Agreement in Taiwan, the decision on Taiwan’s Accession to the WTO was agreed on 11 November 2001 at the Doha Ministerial Meeting. In respect of the deliberation and ratification processes, the Accession Protocol was deliberated by the Legislative Yuan of Taiwan on 16 November 2001 and ratified by the President on 20 November 2001. In light of this deliberation process, one may be safe to say that the WTO Agreement enjoy the same legal status as national legislation according the afore-mentioned jurisprudence, since the procedural requirement of deliberation has been met. However, the same difficulty persists. It is not clear whether one should adopt the approach as proposed by the Supreme Court: the WTO Agreement should exclude the application of conflicting national legislation. Or should one adopt the approach proposed by the Supreme Administrative Court: only those provisions in the WTO Agreement with clarity and specificity may have primacy over national legislation? This issue becomes even

more complicated when China (trade) relation is at stake, as the Constitution prescribes differently and authorizes the Legislative Yuan to regulate the relationship between Taiwan and China through a special legislation.¹²

2. RELEVANT JURISPRUDENCE

Since Taiwan's Accession to the WTO, private litigants have occasionally relied upon WTO laws to challenge domestic measures. Nevertheless, the courts seldom deal with the legal status of the WTO Agreement in Taiwan; neither do they touch upon the substantial rules provided therein. In an earlier case, the Taipei Higher Administrative Court, in dealing with a case related to the Information Technology Agreement (the ITA), held that, as the product concerned does not fall into the scope of products provided in Attachment A to Annex to the ITA, and thus goes beyond Taiwan's commitments. Following this reasoning, the court concludes that potential trade disputes with other Members as well as possible trade retaliations do not exist.¹³ In this case, the court does not clarify the legal status of the ITA in Taiwan's domestic legal system. Instead, it goes straightforward to examine the conformity of administrative measures with the ITA and relevant commitments. It appears that the court is of the view that the ITA can be relied upon by private parties to challenge administrative measures and may be of higher legal hierarchy. Otherwise, there is no need for the court to examine the conformity

In a case relating to anti-dumping measures, the plaintiff relies upon the Anti-Dumping Agreement (the ADA) to challenge the legality of anti-dumping measures by administrative agencies. The plaintiff refers to Article 3.4 and 3.7 of the ADA to challenge the determinations of the agencies concerned in relation to possibility of increased imports and the effect of dumped imports to domestic industry. While the plaintiff refers to the ADA in his arguments, the court puts this issue aside and rules this case based merely on national anti-dumping laws and regulations.¹⁴

¹² See further, *infra*. Section III, esp. text to n. 18, ff.

¹³ Taipei Higher Administrative Court, Jianzhi No 562 (2003).

¹⁴ Taipei Higher Administrative Court, Suzhi No 562 (2002).

In a recent case, a trader importing products mainly from China bid for a government procurement by the Police Agency in Ministry of Interior (the MOI) on the product of ‘rapiscan eagle fixed site,’ a device for cargo and vehicle inspection to be installed at the customs. The bid was subsequently excluded since the products were imported from China. After arbitration, this case was referred to the administrative court, which found against the trader again. The court held that, since neither Taiwan nor China is a party to the Government Procurement Agreement (the GPA), Taiwan’s government procurement is thus not bound by the GPA. In light of the political enmity between China and Taiwan and national security at stake, the decision of the Police Agency to exclude Chinese products in this bid is justified.¹⁵ The court does not clarify the legal status of the GPA in Taiwan’s national legal system since Taiwan is not a party to the GPA. Nevertheless, the court seems to imply that the GPA may be relied upon by the plaintiff if Taiwan were a party to it.¹⁶

In light of these cases noted above, it is safe to say that the courts in Taiwan tend to examine the legality and reasonableness of administrative measures in light of their conformity with WTO law. With regard to the GPA, since Taiwan is not a party to this agreement, Taiwan’s courts are thus not in a position to refer to it. Taiwanese courts tend to go directly to laws and rules provided in the WTO agreements without clarifying the legal status of these agreements. In general, one may be tempted to say that Taiwan’s courts make no distinction between the WTO Agreement and other treaties and international agreements. Therefore, the legal status of the WTO Agreement in Taiwan bears the same ambiguity: it is not clear whether the primacy of the WTO Agreement is conditional on the clarity and specificity of its contents. The relationship between the Constitution and the WTO Agreement is also unclear. In respect of China trade, the afore-mentioned government procurement case illustrates a bit its complexity. The argument of political enmity and national security has its

¹⁵ Supreme Administrative Court, Panzhi 1881 (2005). See further on this case, and issues related to China trade, *infra*, Section IV, text to n 95, ff.

¹⁶ It should be noted that Taiwan’s *Government Procurement Act*, in Article 17.1, provides that ‘[T]he participation of foreign suppliers in the procurement by each entity shall be governed by the requirements set forth in the treaties or agreements to which this nation is a party’. Based upon this arrangement, requirements set forth in the treaties or agreements to which Taiwan is a party becomes applicable law and can be directly relied upon in domestic courts.

weight. This argument is to be reinforced by the constitutional provision governing China (trade) relations and those laws and regulations authorized by the Constitution. In this vein, the following section will deal with existent constitutional/legal framework governing foreign (trade) relations with China, and examine their conflicts with WTO law.

III. CONSTITUTIONAL/LEGAL FRAMEWORK GOVERNING (TRADE) RELATIONS WITH CHINA AND THEIR COMFORMITY WITH WTO LAWS

In this section, I will examine the existent constitutional/legal framework governing foreign (trade) relations with China. I will also analyze existent jurisprudence in this regard. The constitutional/legal framework focuses mainly on the Article 11 of the Amendment to the Constitution, and the *Statute Governing Relations between People of the Taiwan Area and Mainland Area* (last amended 25 June 2008).¹⁷ Besides, I will also investigate relevant administrative regulations related to China trade. In respect of jurisprudence, I will examine several decisions by the Constitutional Court: the delimitation of national territory; ‘international’ agreements signed between Taiwan and China, restrictions on the entry of Chinese nationals into Taiwan; restriction for naturalized Chinese nationals to hold public offices; and the ‘Presidential State Secrets Privilege’. A short conclusion summarizing the development in the regulatory framework and the jurisprudence will be provided in the end of this section.

A. CONSTITUTIONAL/LEGAL FRAMEWORK

1. CONSTITUTIONAL ARRANGEMENTS

In parallel to its democratization, Taiwan’s perception on China in its Constitution has been constantly reshaped.¹⁸ After a series of constitutional reform, several articles are added to the original constitutional text as an Amendment. Article

¹⁷ The latest revision was made after the new President Ma came to power. Two articles in the Statute were amended in order to provide the legal basis for the foreign exchange to Chinese currency in Taiwanese banks. Nevertheless in the meantime, there is still no clearing agreement between Taiwan and China in relation to the foreign exchange.

¹⁸ For the interrelationship between democracy, constitutionalism and the role of courts in these regards, see, W-C Chang, *Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective* (Yale Law School 2001).

11 of the Amendment to the Constitution governs the regime of China relations, providing that ‘rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related affairs may be specified by law’¹⁹. In this provision, the ‘Chinese mainland’ refers to People’s Republic of China while the ‘free area’ refers to Taiwan. By this article, the Constitution authorizes the legislature to regulate rights and obligations between people in China and those in Taiwan. This authorization also covers other affairs related to China. In light of this article, the Constitution intends to authorize the legislature to regulate China affairs in a way that may deviate from existent national legislation. It may also be argued that, different treatments or even discriminatory treatments in relation to nationals of other foreign countries are intended by the Constitution.

2. AUTHORIZED NATIONAL LEGISLATION AND RELEVANT REGULATIONS

Under the authorization of the Constitution, the Legislative Yuan enacted the *Statute Governing Relations between People of the Taiwan Area and Mainland Area* (hereinafter the *Statute*), which lays down a comprehensive regulatory framework governing China relations. Similarly, the term ‘Taiwan area’ refers to Taiwan and the term ‘mainland area’ refers to People’s Republic of China.²⁰ Since its promulgation in 1992, this *Statute* has been frequently amended because of the change of political climate between Taiwan and China. Two aspects of trade regulation in this *Statute* deserve careful examination: trade in goods and trade in services. In contrast to these two aspects, the *Statute* says little on trade related intellectual property rights. This may be understandable since services trade relates closely to the movement of natural/legal persons into Taiwan that necessitates high degree of regulation in this regard.²¹ Besides, regulation of trade in goods may have a side-effect on trade-related intellectual property rights owned by Chinese nationals and enterprises. Even though the intellectual property rights owned by Chinese nationals and enterprises are

¹⁹ This amendment was firstly added into the Constitution as Article 10 on 1 May 1999, now renumbered as Article 11.

²⁰ The *Statute*, Art. 2.

²¹ Except mode 1 (cross-border supply), mode 2 (consumption abroad), mode 3 (commercial presence) and mode 4 (presence of natural persons) may all relate to the entrance into Taiwan of Chinese legal/natural persons.

recognized and protected in Taiwan, the restriction of Chinese imports can effectively exclude these Chinese products from the market competition. Therefore, the regulation of trade in goods simultaneously regulates trade-related intellectual property rights and lessens the need of high degree of regulation in the area of intellectual property rights.

However, apart from trade issues, the *Statute* also imposes strict control on inbound and outbound investments that the *Statute* virtually mingles with trade in financial services.²² Although investment issues are part of the Single Undertaking of the WTO Agreement, the Agreement on Trade-Related Investments Measures (the TRIMs Agreement) limits its application only to ‘investment measures related to trade in goods’.²³ In addition, Article 2.1 of the TRIMs Agreement refers to Article III and Article XI of the GATT 1994. By acting inconsistent with these two referred articles, a Member thus breaches its obligation under the TRIMs Agreement. Since any WTO-inconsistent trade-related investment measure adopted or maintained by Taiwan should be eventually examined in accordance with these two referred articles in the GATT 1994, this Chapter will thus not examine Taiwan’s investment regulatory regime separately. Above all, given the wide diversity among different types of services trade, it is impossible and infeasible to examine all categories of services trade. In light of the fact that financial services are among the most regulated in Taiwan, they prove to be an illustrative example of Taiwan’s regulatory regime on trade in services with China. This section thus chooses to focus solely on financial services.

Therefore, the following will deal with two aspects: trade in goods; trade in (financial) services. In respect of trade in (financial) services, I will firstly deal with market access of Taiwan’s (financial) services trade, and then examine Taiwanese services provider in China. Relevant investment regulatory measures will also be here be touched upon here. Finally, this section ends up with an examination of ‘three-link’

²² See *e.g.* the *Statute*, Art. 35.1, 36.2 and 73.

²³ The Agreement of Trade-Related Investment Measures (the TRIMs Agreement), Art. 1.

issue: direct communication, direct commerce, and direct transportation. Emphasis will be placed on the direct transportation since it is the most trade-related element.

a. Trade in Goods

Article 35 of the *Statute* lays down a general regulatory framework on trade and other related economic activities with China: investment and technical cooperation in China (Article 35.1); a general and vague idea of business dealing (Article 35.2); and trade between Taiwan and China (Article 35.3). Under the second paragraph, individuals, juristic persons, organizations or other institutions in Taiwan may engage in business dealing with those in China. The Ministry of Economic Affairs (the MOEA), in consultation with other competent authorities may prohibit the said business dealing or require permission thereof on particular items. Under the authorization of the *Statute*, in Article 35.4, the MOEA issues *Regulation Governing the Permission of Business Dealing in China* (last amended 2 March 2004, hereinafter the *Business Dealing Regulation*).²⁴ The *Business Dealing Regulation* then excludes its application where the business dealing extends to investment, technical cooperation or trade as regulated by relevant paragraphs of Article 35. This *Business Dealing Regulation* lays down a loose threshold for the permission by submission a project plan stating the category, content, period and place of the business dealing engaged.²⁵ If the business dealing extends to trade activities, it falls into the scope of Article 35.3, which deals specifically with this issue. As provided, any individual, juristic person, organization or other institution in Taiwan may be permitted by competent authorities to engage in trade between Taiwan and China. The second sentence then delegates the competent authorities, upon the approval of the Executive Yuan (the Cabinet of Taiwan) to regulate the permission in question, in terms of the items liberalized, conditions and procedures for the liberalization and its suspension, and relevant provisions for import/export administration.²⁶

²⁴ MOEA Order Shangzhi No. 201625 (the MOEA, 31 January 1994), available at http://www.moeaic.gov.tw/system_external/ctrl?PRO=LawsLoad&lang=1&id=28 (last accessed 25/04/2008).

²⁵ The *Business Dealing Regulation*, Art. 5.2.

²⁶ The *Statute*, Art. 35.3.

In accordance with Article 35.3 of the *Statute*, the MOEA, in 1993 adopted the *Regulation on the Permission of Trade between Taiwan and China* (last amended 26 August 2003, hereinafter the *China Trade Regulation*).²⁷ Similar to the *Statute*, the *China Trade Regulation* has also been often revised. Trade between Taiwan and China is defined as ‘imports and exports of goods between Taiwan and China, and other relevant subjects.’²⁸ Besides, ‘goods’ as defined in the *China Trade Regulation* cover those exclusive rights of trademarks, copyrights, patents, and other intellectual property rights under protection to which the goods concerned are attributed.²⁹ Further, while trade between Taiwan and China is conditional upon the permission of competent authorities, the application for permission may nevertheless be waived.³⁰ In Article 7, the *China Trade Regulation* lists 13 categories of Chinese goods eligible for importation into Taiwan. Among these 13 items, it nevertheless authorizes again the competent authorities to decide the items for liberalization through a public notice.³¹ Article 9 reinstates the required permission for trade between Taiwan and China, but the competent authorities may waive the application for permission through a public notice.³² While transactions of trade between Taiwan and China can be directly concluded, the shipment of goods should be carried out through a third port or extraterritorial transportation zones.³³

²⁷ MOEA Order Maozhi No. 083651 (the MOEA, 26 April 1993).

²⁸ The *China Trade Regulation*, Art. 3.1.

²⁹ The *China Trade Regulation*, Art. 3.2.

³⁰ The *China Trade Regulation*, Art. 3.3.

³¹ The *China Trade Regulation*, Art. 7.1(1).

³² The *China Trade Regulation*, Art. 9.1(1), 9.3.

³³ The *China Trade Regulation*, Art. 5.

b. Trade in (Financial) Services³⁴

Upon Taiwan's accession into the WTO, its market access in financial services is largely liberalized. For example, while mode 1 (cross-border supply) and mode 4 (presence of natural persons) are unbound, there is no limitation, albeit with certain exception, on market access on mode 2 (consumption abroad) and mode 3 (commercial presence). Commercial presence of banking and other financial services (excluding insurance, securities and futures) may be established in the form of commercial banks, branches of foreign banks, offshore banking branches of banks, foreign exchange brokerage firms, credit card institutions and bills finance companies.³⁵ Besides, Taiwan also commits to permit the opening of foreign currency deposit accounts abroad and the transfer of funds to these accounts.³⁶ In spite of these commitments, banking and other financial services by Chinese service providers are still subject to strict restrictions in Taiwan.

In 2003, Article 73 of the *Statute* was amended in order to liberalize investment³⁷ from China. This revision is also aimed to provide a legal basis for the commercial presence of Chinese banking enterprises in Taiwan. As provided, with permission of competent authorities, any individual, juristic person, organization, or other institution from China or any other company they invest in a third area may engage in

³⁴ As this Chapter aims to examine the role of Taiwan's courts in China (trade) relations, therefore, this subsection of trade in service focuses on Taiwan's regulation and restriction in this regard. Nevertheless, it should be pointed out that Taiwan's service trade with in China is subject to the regulation of both Taiwan and China. On the one hand, Taiwan has to 'liberalize' its service enterprises to provide service in China. On the other hand, these service providers should also satisfy the requirements laid down in Chinese regulatory regime, one of which is the signature of Memorandum of Understanding (MOU) between the financial supervision agencies. As there is no, and may be never no MOU between Taiwan and China, Taiwanese financial services in China remain highly restricted. Besides, given the inexistence of clearing arrangements on foreign exchange, direct exchange between New Taiwan Dollar and Chinese Yuan was not possible, except in Kinmen and Matsu, where the mini-three-links are established. In China, New Taiwan Dollar is to be firstly converted into US Dollar, and then converted into Chinese Yuan. Nevertheless, as noted above, when the philo-China President came into power, the Statute was revised to provide the legal basis for banks in Taiwan to provide the services for foreign exchange of Chinese Yuan.

³⁵ WTO, *Protocol on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu* (Cambridge University Press, Cambridge 2003) 862.

³⁶ *Ibid.*

³⁷ It should also be noted that Taiwan makes a horizontal commitment in relation to investment in mode 3 (commercial presence). Unless specified in the specific sectors, foreign business and individuals may directly invest in Taiwan. No limitation exists either with respect to portfolio investment in companies whose shares are listed in Taiwan's securities markets. *Ibid.*, at 835.

investment activities in Taiwan.³⁸ Investment activities here are interpreted by the Mainland Affairs Council (the MAC) as covering, *inter alia*, business investment and securities investment.³⁹ Soon after this amendment, China approved four Chinese banks (China Merchants Bank; Shanghai Pudong Development Bank; Industrial and Commercial Bank of China (Asia); and Industrial Bank) to establish a representative office in Taiwan. A clear link between this revision and the intended commercial presence of Chinese banks in Taiwan can thus be delineated.

Following the conventional practice, the *Statute* authorizes competent authorities, upon the approval of the Executive Yuan (the Cabinet of Taiwan) to draft rules governing the ‘qualifications of investors, permission requirements, procedures, investment means, business items and amount limits, investment percentage, foreign exchange settlement, review and determination, re-investment, filing items and procedures, application format and any other requirements.’⁴⁰ In terms of the language of the legal text of the *Statute*, it appears that that Chinese investment in Taiwan had already been liberalized. Nevertheless, the competent authorities have so far not adopted any rule governing these investment activities. The representative offices of these four banks in Taiwan are thus not yet established. The situation remains unchanged after the philo-China President Ma came to power on 20 May 2008. A small step made by the new-elected government in this regard is its liberalization of Chinese qualified domestic institutional investors (QDII) to invest on Taiwan’s securities and futures market.⁴¹ Nevertheless, this liberalization requires the ‘counter-liberalization’ of China. Namely, China has to allow its QDII to invest on Taiwan’s market. Further, in light of the absence of the Memorandum of Understanding (the MOU) between Taiwan and China, this effort seems to be fruitless.

³⁸ The *Statute*, Art. 73.1.

³⁹ ‘Q & A on Cross-strait Relations’, (the MAC, 1 February 2008, in Chinese), available at <http://www.mac.gov.tw/big5/answer/qa03.htm> (last accessed 23.04/2008).

⁴⁰ The *Statute*, Art. 73.2.

⁴¹ Press release, ‘Deregulation of Foreign Enterprises and Chinese Capital on the Investment Taiwan’s Stock Market’ (the MAC, 31 July 2008, in Chinese) available at <http://www.mac.gov.tw/big5/520/10.htm> (last accessed 13/10/2008).

In relation to the commercial presence of Chinese banks, another element should be noted: the acquisition, creation and transferral of a right over a real property. In this regard, the *Statute* regulates differently. Article 69 provides the legal basis, conditional upon the permission of competent authorities, for Chinese individual, juristic person, organization, or other institution, or any other company they establish in any third area to acquire, create or transfer any right over any real property in Taiwan.⁴² The *Statute* then authorises competent authorities, after submission to the Executive Yuan for approval, to draft rules governing ‘the qualifications of applicants, permission requirements, permitted uses, application procedures, filing items, required documents, review means, the disposition for uses not in accordance with the permitted uses and any other requirements’.⁴³ Under the authorization of this *Statute*, the Ministry of Interior (the MOI) issued *Regulation Governing Permission for Chinese People to Acquire, Create or Transfer Rights over Real Property in Taiwan* (hereinafter the *Real Property Regulation*).⁴⁴ According to the statistics of the MAC, only four transactions are successfully made in accordance with this regulation.⁴⁵

With regard to Taiwanese service providers in China, the *Statute* also lays down strict conditions for financial services. In Article 36.1, any financial, insurance, securities or futures institution in Taiwan, or any of its branches in any country or area outside Taiwan, with the permission of the Ministry of Finance (the BOF), may conduct direct business dealing with any individual, juristic person, organization, or other institution in China. The second paragraph further provides that any of these individual, juristic person, organization or institution which wishes to establish a branch in China, should apply for the permission of the BOF.⁴⁶ The *Statute* then authorizes the BOF, after submission to the Executive Yuan for approval, to draft a regulation governing ‘the permission requirements, business scope, procedures,

⁴² The *Statute*, Art. 69.1.

⁴³ The *Statute*, Art. 69.2.

⁴⁴ MOI Order Tainei dizhi No. 0910071523 (the MOI, 8 August 2002)

⁴⁵ Q & A on Cross-strait Relations, (the MAC, 1 February 2008), available at <http://www.mac.gov.tw/big5/answer/qa03.htm> (last accessed 23.04/2008).

⁴⁶ The *Statute*, Art. 36.2, first sentence. The second sentence then further provides that in case where this individual, juristic person, organization or institution establishes a branch in China, its investment in China is subject to the regulation of Article 35 of the same *Statute*.

administration, restrictions and any other requirements’⁴⁷ as referred to in Article 36.1 and 36.2.

The BOF subsequently in 1993 adopted the *Regulation Governing the Permission for the Business Dealing of Banking Service between Taiwan and China* (last amended 14 March 2008, hereinafter the *Banking Service Regulation*).⁴⁸

The scope of permitted financial activities covers:

1. Accepting deposits;
2. Outward and inward remittances;
3. Export-related foreign exchange business including export bill negotiation, export bill collections, export factoring, and advice of letters of credit and bonding business;
4. Import-related foreign exchange business including issuance of letters of credit, acceptance of drafts, import foreign exchange settlements, and import bill collections;
5. Acting as a collecting and paying agent; and
6. Credit extension business;
7. Factoring;
8. Inter-bank transactions related to business specified in the preceding 7 subparagraphs.
9. Other activities approved by the Competent Authority.⁴⁹

In respect of these permitted financial activities, some points should be noted. Firstly, they should be conducted through the overseas branches or overseas banking units of Taiwanese banks. Besides, it is clear that these financial activities are closely related to trade, since one of the major purposes to allow Taiwanese banks to engage financial activities in China is to satisfy the collecting and paying needs, resulting from trading activities, of Taiwan-invested enterprises. Nevertheless, Article 10 of the *Banking Regulation* provides that, with the approval of the BOF, Taiwanese banks may establish merely a *representative office* in China. In contrast to the legal text of

⁴⁷ The *Statute*, Art. 36.3

⁴⁸ BOF Order Taicai rongzhi No. 820178343 (the BOF, 30 April 1993).

⁴⁹ The *Banking Regulation*, Art. 4(1).

the *Statute*, where a *branch* in Taiwan may be possible, the *Banking Service Regulation* limits its liberalization of Taiwanese banks to engage financial service in China only in the form of a representative office. This in turn limits the scope of its financial activities. Above all, Article 5 of this regulation also provides that the designated foreign exchange banks, through their overseas banking units or their overseas branches, may conduct limited foreign exchange activities in relation to the Chinese Yuan (Chinese Reminbi). After the presidential election in 2008, foreign exchange activities on Chinese Yuan by Taiwanese banks were further liberalized. Article 38 of the *Statute* was amended in order to provide the legal basis for the circulation of Chinese Yuan in Taiwan. The Act on the Control of Foreign Exchange shall apply *mutatis mutandis* in relation to the regulation of Chinese currency in Taiwan before the signature of a clearing agreement between Taiwan and China or the establishment of a bilateral settlement mechanism on currency exchange.⁵⁰ Therefore, Chinese Yuan is allowed to be carried into Taiwan.⁵¹ Article 38.2 then authorizes the Financial Supervision Committee, in conjunction with the Central Bank to issue the regulation governing the entry of Chinese Yuan into Taiwan. Article 38.4 also authorizes the Central Bank, in conjunction with the Financial Supervision Committee to regulate the management, clearing and settlement of Chinese Yuan in Taiwan prior to the signature of a clearing agreement or bilateral settlement mechanism. Preoccupied about failing to guarantee the supply of Chinese Yuan, the Central originally maintained that this liberalization should be taken in two steps. That is, Chinese Yuan could be firstly converted into New Taiwan Dollar in Taiwanese banks, and then vice-versa. Eventually, this position was not supported by the Executive Yuan. In order to guarantee the supply of Chinese Yuan in Taiwanese banks, the Central relies mainly those currency carried back into Taiwan by Taiwanese individuals and enterprises from China and Chinese tourists into Taiwan. When the insufficiency of the supply comes, the Central Bank may purchase Chinese Yuan in

⁵⁰ The *Statute*, Art. 38.3.

⁵¹ The liberalization of Chinese exchange activities by Taiwanese banks is a measure to support the liberalization of Chinese tourists into Taiwan, see, *infra* (c), three-link issues, text to n. 55, ff.

the foreign exchange market from third countries given the lack of formal arrangements between Taiwanese Central Bank and the People's Bank of China.⁵²

Another strong incentive to allow Taiwanese banks to engage financial activities in China is to meet loaning needs of Taiwan-invested enterprises, while at the same time these banks may also wish to engage in investment activities. Parallel liberalization of Taiwanese financial enterprises and other investment in China can be registered. Based on this rationale, the *Statute* thus provides that Taiwanese banks' branches in China, when engaging investment activities, should be subject to the regulation of Article 35 of the *Statute*.⁵³ However, as noted above, Taiwanese banks can only establish a representative office in China with limited scope of financial activities. They are still not in a position to engage in investment activities. This being said, those Taiwan-invested enterprises in need of capital may nevertheless resort to the overseas branches or overseas banking units of Taiwanese banks, which are allowed to provide credit extension services. It should also be noted that, when conducting credit extension services, the clients are limited only to three categories: Taiwanese investors in China with permission in accordance with Article 35 of the *Statute*; Chinese branches of any legal entities in a third area; and Chinese subsidiaries of which more than 50% of the share is held by these legal entities. These legal entities in any third area exclude those invested by Chinese individuals, juristic persons, organizations or any other institutions.⁵⁴

In relation to the investment in China of Taiwanese banks, a step forward was made on 14 March 2008. Taiwanese banks are allowed to invest Chinese banks through the form of 'shareholder.' The financial holding companies or banks may indirectly invest Chinese banks through their overseas subsidiaries. By purchasing the stock of Chinese banks and thus becoming their shareholder, Taiwanese banks can

⁵² According to the statistics of the Central Bank of Taiwan, up to 15 July 2008, 15 banks (1570 branches) are approved to engage in Chinese exchange activities. During the period from 30 June to 15 July, the buy-in for the Chinese currency amounted to 102.76 million Yuans, while the sell-out amounted to 238.06 million Yuans. Liberalization of Chinese Currency Exchange in Taiwan and its Implementation, Press release, NO. 46 (the MAC, 22 July 2008), available at <http://www.mac.gov.tw/big5/cnews/cnews970722b.htm> (last accessed 14/10/2008, in Chinese).

⁵³ The *Statute*, Art. 36.2, second sentence.

⁵⁴ The *Banking Regulation*, Art. 4.2(1).

thus intervene and participate in China's banking activities as a 'shareholder'. Nevertheless, the ceiling is 20%. So far, one Taiwanese bank, Fubon Financial Holding Co. has acquired 19.9% of China's Xiamen City Commercial Bank through its Hong Kong-based subsidiary, Fubon Bank (Hong Kong) Ltd.⁵⁵

c. Three-Link Issues

The three-link issue can be understood differently according to its context. The terminology was firstly introduced in a statement by the Standing Committee of China's National People Congress (the NPCSC) in 1979 to facilitate the unification between Taiwan and China. It referred to direct postal services, transportation, and commerce.⁵⁶ With Taiwan and China's accession to the WTO, it can also be understood as their WTO obligations to each other. Further, it may also be interpreted in a broader context, namely, to treat each other as a normal trading partner in those aspects not covered by the WTO Agreement. In whatever sense, it goes beyond the aim and scope of this Chapter, and this dissertation. Therefore, I choose to focus on the direct transportation issue with the aim to present the complexity to its necessary extent. On the one hand, it is the most important trade-related issue between Taiwan and China. On the other hand, it seems the best example to illustrate the WTO-inconsistency of Taiwan's trade regulatory regime.

In the meantime, goods imported from and exported to China should be shipped via a third port, normally Hong Kong, China. A direct flight and direct shipment, except some occasional arrangements, between Taiwan and China are not possible. Article 95.1 of the *Statute* dictates the competent authorities to acquire the approval of the Legislative Yuan prior their decision to engage direct transportation with China. A trial mini-three-link is carried out between Kinmen, Matsu and Penhu⁵⁷ in Taiwan and several coastal cities of China, including Xiamen, Quanzhou, and Fuzhou.⁵⁸ The

⁵⁵ Government Information Office Taiwan, 'Fubon Gets Green Light to Invest in PRC Bank' Taiwan Journal (11 April 2008), available at <http://taiwanjournal.nat.gov.tw/ct.asp?xItem=33723&CtNode=122> (last accessed 02/05/2008).

⁵⁶ Letter to Taiwanese Compatriots of the NPCSC, 1 January 1979, available at http://www.mac.gov.tw/big5/rpir/1_1.htm (last accessed 13/05/2008, in Chinese)

⁵⁷ This trial mini-three-link was firstly applied to Kinmen and Matsu in 2001 and subsequently extended to Penhu in 2007.

⁵⁸ With the agreements signed between Taiwan and China on 4 December 2008, there will be soon a

Executive Yuan, coordinating all relevant ministries and agencies, publishes its *Impact Assessment on the Direct Transportation between Taiwan and China*,⁵⁹ but so far little progress has been made except the mini-three links mentioned above. While the WTO-compatibility of this third-port transshipment requirement may be questioned, it may not be however as self-evident as it appears at the first glance.

Firstly, the direct air and sea transportation between Taiwan and China may not fall squarely into the scope of the WTO Agreement. The most relevant issue here might be the liberalization of transport services. Nevertheless, Chinese services providers in Taiwan should be distinguished from direct shipment of Chinese goods to Taiwan. While the former relates to the liberalization of Taiwan's sea and air transport services, the latter relates to discriminatory treatment against Chinese goods and should thus be governed by the GATT 1994.

With regard to the liberalization of Taiwan's transport services, if the direct sea and air transportation between Taiwan and China is to be conducted, it will trigger those most controversial sovereignty issues, e.g., flag-flying. It is not only Taiwan but also China that is reluctant to table these issues. Besides, as Taiwan is not a member of the International Civil Aircraft Organization (the ICAO), arrangements under the framework of the ICAO is also not possible. Moreover, the Agreement on Trade in Civil Aircraft may be of limited significance in this regard given that China is still not a party to it. In addition, this agreement regulates mainly the trade of the following products: civil aircrafts; civil aircraft engines and their parts and components; any other parts, components, and sub-assemblies of civil aircraft; and all ground flight simulators and their parts and components. Therefore, the Agreement on Trade in Civil Aircraft is of little relevance in this regard.

significant change in this regard. This issue will be further elaborated in the following passage.

⁵⁹ The Executive Yuan of Taiwan, *Impact Assessment on the Direct Transportation between Taiwan and China* (15 August 2003).

That being said, it might be helpful to come back to take a closer look on Taiwan service schedule. In terms of maritime transpiration service, Taiwan did not make any specific commitment in this regard.⁶⁰

Regarding the air transport services, paragraph 2 of the Annex on Air Transport Services explicitly excludes the application of the GATS on traffic rights issues or services directly related to traffic rights, except as provided in paragraph 3. This Annex clarifies the application of the GATS in air transport services may be limited to measures affecting aircraft repair and maintenance services, the selling and marketing of air transport services, and computerized reservation system services.⁶¹ In addition, according Taiwan's schedule, in these subsectors of air transport services, the mode 4 is unbound except as indicated in the horizontal section while no limitation is imposed on the other three modes, except the cross-border supply of air maintenance and repair services.⁶² In the MFN exemptions list, it is specified that supporting and auxiliary air transport services are conditional on bilateral air services agreements.⁶³ In sum, given the absence of commitment regarding maritime transport services, the GATS is of no relevance in this regard. In respect of air transport services, traffic rights are not subject to the regulation of the GATS at the first place. Besides, those supporting and auxiliary air transport services are subject to the MFN exemptions, condition on bilateral service agreements. Therefore, Taiwan's reluctance and refusal to liberalize its maritime and air transport services to Chinese services providers is not WTO-inconsistent.

Nevertheless, this transshipment requirement extends to all Chinese goods transported by third countries that may enjoy traffic rights both in Taiwan and in

⁶⁰ In fact, whereas negotiations on maritime transport services aim to improve commitments in international shipping, auxiliary services, and access and use of port facilities, little progress was made during Uruguay Round or post-Uruguay Round negotiations in this sector. While the Ministerial Decision on Negotiations on Maritime Transport Services and the Annex on Negotiations on Maritime Transport Service provide the mandate for further negotiations in this regard, the negotiation had been suspended on 28 June 1996. The negotiations were subsequently incorporated into the comprehensive services negotiations initiated by the Doha Round. Up to date, the Doha Round negotiation is obviously not so promising. While the Chairman on Service Negotiation in his report on 26 May 2008 mentions maritime transport service, little is said on this point. WTO document, TN/S/33 (26 May 2008) at 2.

⁶¹ Annex on Air Transport Service to the GATS, paragraph 3.

⁶² Protocol on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu , above n. 34, at 871.

⁶³ *Ibid.*, at 874.

China. In other words, even when Chinese goods are shipped by third-country carriers, those goods cannot be directly shipped into Taiwan. Then this transshipment requirement may constitute a non-tariff barrier as envisaged in Article XI of the GATT 1994. It may also constitute an infringement on Most-Favoured-Nation Treatment principle, as enshrined in Article I of the GATT 1994.

However, there has been a significant regulatory change in this regard since the philo-China President came to power on 20 May 2008. After the suspension for almost 15 years, the President of the SEF, Chiang Pin-Kung and the President of the ARTAS, Chen Yunlin met again in Beijing on 12 June 2008, and subsequently in Taipei on 4 November 2008. The Chiang-Chen meeting in Beijing resulted in an agreement on the Chinese tourists travelling to Taiwan⁶⁴ and minutes on charter flights between Taiwan and China.⁶⁵ The agreement and the minutes of the Chiang-Chen talks effectuated the liberalization of Chinese tourists to Taiwan up to a quota of 3000 persons per day.⁶⁶ The travelling should be conducted through group tourism.⁶⁷ Besides, the minutes on the charter flights provide the legal basis for charter flights for passengers between Taiwan and China during the weekends, as defined as from Friday afternoon to Monday morning.⁶⁸ During the meeting in Taipei on 4 November 2008, four agreements were signed in relation to the cooperation of food safety,⁶⁹ direct air transport,⁷⁰ sea transport,⁷¹ and postal service.⁷² With the

⁶⁴ Cross-Strait Agreement Signed between SEF and ARATS Concerning Mainland Tourists Travelling to Taiwan, Beijing, 23 June 2008 (hereinafter 'the Chinese Tourists Agreement'), an official English translation version is available at <http://www.sef.org.tw/> (last accessed 13/11/2008).

⁶⁵ SEF-ARATS Minutes of Talks on Cross-Strait Charter Flights, Beijing, 23 June 2008 (hereinafter 'the Charter Flights Minutes'); an official English translation version is available at <http://www.sef.org.tw/> (last accessed 13/11/2008).

⁶⁶ Special Arrangements Concerning Cross-Strait Tourism, Annex I to the Chinese Tourists Agreement, Art. 1.

⁶⁷ Chinese Tourists Agreement, Art. 2.1

⁶⁸ Annex to the Charter Flights Minutes, Time, Destination, and Flights of Cross-Strait Charter Flights, Art. 1.

⁶⁹ Cross-Strait Food Safety Agreement, Taipei, 4 November 2008 (hereinafter 'the Food Safety Agreement'); an official English translation version is available at <http://www.sef.org.tw/> (last accessed 13/11/2008).

⁷⁰ Cross-Strait Air Transport Agreement, Taipei, 4 November 2008 (hereinafter 'the Air Transport Agreement'); an official English translation version is available at <http://www.sef.org.tw/> (last accessed 13/11/2008).

⁷¹ Cross-Strait Sea Transport Agreement, Taipei, 4 November 2008 (hereinafter 'the Sea Transport Agreement'); an official English translation version is available at <http://www.sef.org.tw/> (last accessed 13/11/2008).

⁷² Cross-Strait Postal Service Agreement, Taipei, 4 November 2008 (hereinafter 'the Postal Service Agreement'); an official English translation version is available at <http://www.sef.org.tw/> (last accessed

effectuation of the Sea Transport Agreement and Air Transport Agreement, direct sea and air transportation between Taiwan and China can be conducted. The requirement of transshipment through a third-port is thus lifted. Direct passenger and cargo charter flights can be conducted by airline companies capitalized and registered on either side of Taiwan Strait, namely, Taiwan and China.⁷³ In order to implement this direct air transport agreement, air traffic control agencies in Taiwan and in China should establish the procedure for the direct handover of air traffic control.⁷⁴ Direct cross-strait air transport path is opened through a northern line across the Taiwan Strait, from Taipei to Shanghai Flight Information Regions. The Air Transport Agreement also provides a very primitive dispute resolution mechanism. According to Article 11 of this agreement, any dispute arising from its application shall be resolved by prompt negotiation. Nothing else is offered with regard to this ‘prompt negotiation’.⁷⁵

In respect of the direct sea transport, vessels owned and registered on either side of Taiwan Strait, i.e. Taiwan and China can engage in direct cross-strait transport of passengers and cargo.⁷⁶ With regard to the controversial flag-flying issue, it is agreed that, ‘vessels registered on either side of the Taiwan Strait shall not fly their flag on the stern or mainmast of the vessel between entering and leaving the other side’s port, but shall fly their company flag for vessel identification’.⁷⁷ The sovereignty controversies are avoided but unresolved. Another issue relating great economic interests is the flag-of-convenience flags owned by the shipping companies of Taiwan and China may undertake direct cross-strait sea transport if they have already been engaging in offshore shipping centre transport (‘testing point for direct shipping’), cross-strait third-territory container line transport, and sand and gravel transport before the signature of this agreement.⁷⁸ This has the effect to limiting the scope of application to Taiwanese capitalized flag-in-convenience vessels. As reported, 95% of

13/11/2008).

⁷³ The Air Transport Agreement, Art. 2.

⁷⁴ The Air Transport Agreement, Art. 1.1.

⁷⁵ The same ‘prompt negotiation’ provision is included in all these four agreements. While this ‘prompt negotiation’ does not necessarily prevent Taiwan or China from referring to the WTO Dispute Settlement Mechanism, it nevertheless signals their intent not to.

⁷⁶ The Sea Transport Agreement, Art. 1.

⁷⁷ The Sea Transport Agreement, Art. 3.

⁷⁸ Annex to the Sea Transport Agreement, Art. 2.

Taiwanese flag-in-convenience vessels cannot benefit from this direct transport agreement.⁷⁹ By contrast, vessels capitalized by Taiwan or China that are registered in Hong Kong may benefit from this direct air transport agreement.⁸⁰ In total, China has liberalized 63 ports, including 48 seaports and 15 river ports while Taiwan has liberalized 11 ports, including the five 'mini-three-link' ports.⁸¹ This sea transport agreement includes the same dispute resolution mechanism as contained in the Air Transport Agreement.

Nevertheless, the prompt negotiation virtually provides no legal/judicial protection for international economic actors. The prompt negotiation relies mainly upon the attitude of the government, especially that of Chinese government. Two cases reveal the weakness or the uselessness of this mechanism. After the signature of the Sea Transport Agreement, Taiwanese enterprises, which previously operated between Taiwan and China for gravel shipment, were not able to acquire the permit from China to continue their business. In the absence of a thicker form of dispute resolution mechanism in the Sea Transport Agreement, the operators were forced to stage a protest in front of Taiwan Democracy Memorial Hall.⁸² The second case related to the allocation of flights during the Lunar New Year 2009 - Taiwanese airlines were not able to obtain the approval from Chinese authorities on their scheduled 36 flights while the tickets had already been sold out. Due the weak dispute settlement mechanism provided in the Air Transport Agreement, all the SEF could do was to ask the ARATS to look into the possibilities to increase the charter flights.⁸³ These two examples expose the ineffectiveness of the dispute settlement mechanisms provided in these agreements. The fatal point nevertheless lies in the State-centered approach. Under these agreements, Private individuals and enterprises have no enforceable rights. In case of any dispute, they have to refer to the governments to negotiate on the subject matter concerned. Whether the governments are willing to negotiate for the

⁷⁹ Broadcasting Company of China, '95% Taiwanese Flag-in-convenience Vessels not Benefit from Direct Transport Agreement', http://tw.money.yahoo.com/news_article/adbf/d_a_081104_22_17kx3 (last accessed 13/11/2008, in Chinese).

⁸⁰ Annex to the Sea Transport Agreement, Art. 1.

⁸¹ Annex to the Sea Transport Agreement, Art. 3.

⁸² S-L Kuo, 'Gravel Shippers to Stage Protest' *Taipei News* (Taipei 19 January 2009) 3, available at <http://www.taipetimes.com/News/taiwan/archives/2009/01/19/2003434117> (last accessed 20/01/2009).

⁸³ China Post news staff, 'China Asked to Boost direct Flights for Lunar New Year Holiday' *China Post* (Taipei 10 January 2009), available at <http://www.chinapost.com.tw/taiwan/china-taiwan-relations/2009/01/10/191357/China-asked.htm> (last accessed 20/2/2009).

interests of these injured private economic actors depends solely on their discretionary power. Therefore, the protection provided in these agreements is extremely insufficient.

Finally, as dictated by Article 95 of the *Statute*, the Air Transport Agreement and the Air Transport Agreement shall refer to the Legislative Yuan for resolution, while the Food Safety Agreement and the Postal Agreement shall only notify the Legislative Yuan. With the entering into effect of the Air Transport Agreement, Sea Transport Agreement and Postal Service Agreement, the three direct links between Taiwan and China are finally realized.⁸⁴ Nevertheless, it should be noted that serious demonstration was taking place when the agreement were signed. This again points to the legitimacy and constitutionalization aspects of China trade relations. China trade relations should not be regarded as the sole realm of executive branch. Legislative oversight and judicial scrutiny are indispensable.

B. RELEVANT JURISPRUDENCE ON (TRADE) RELATIONS WITH CHINA

1. POLITICAL QUESTIONS/THE BOUNDARIES OF NATIONAL TERRITORIES

Externally, Taiwan applied its GATT/WTO membership in 1992 as a separate customs territory of which the ‘full autonomy in the conduct of its external commercial relations and of the other matters provided for’ is limited to Taiwan, Penghu, Kinmen and Matsu. In contrast, one year after, Taiwan’s Constitutional Court was called upon to delimit the boundaries of the national territory of the Republic of China. During the 1993 budgetary review, especially the budget for the MAC, the deputy of the opposition party in Legislative Yuan referred to the Constitutional Court for the interpretation of the term ‘according to its existing national boundaries’, as provided in Article 4 of the Constitution. It would be problematic, and obviously ridiculous for Taiwan to maintain internally a stance that, under the official title of Republic of China, its national territory still extends to mainland China while, at the same time

⁸⁴ It should nevertheless be noted demonstration was taking place when the agreement were signed. This again points to the legitimacy and constitutionalization aspects of China trade relations. China trade relations should not be regarded as the sole realm of executive branch. Legislative oversight and judicial scrutiny are indispensable.

externally recognizing its limit in full autonomy of external commercial relations. The external/internal coincidence can thus be registered.

Nevertheless, the Constitutional Court chose not to face with this issue. Relying upon the ‘political question’ doctrine, the Constitutional Court denied the application for interpretation of the national territory of the Republic of China. According to the Constitutional Court, the reason why the drafters of the Constitution chose not to enumerate the components of its territory was based upon historical and political considerations.⁸⁵ In light of this legislative policy, the delimitation of national territory is not subject to judicial review according to the constitutional principle of separation of powers. Based on this reasoning, the Court consequently holds:

Instead of enumerating the components, Article 4 of the Constitution provides that the national territory of the Republic of China is determined ‘according to its existing national boundaries.’ Based on political and historical reasons, a special procedure is also required for any change of territory. The delimitation of national territory according to its history is a significant political question and thus it is beyond the reach of judicial review.⁸⁶

What is at stake in this present case is the relationship between China and Taiwan. It goes far beyond trade relation with China, covering, *inter alia* national security and foreign relations. The Constitutional Court highly restrained itself from stepping into this field. Consequently, it refers to the ‘political question’ doctrine and denies the application for interpretation. As a beginning of a series of cases relating China (trade) relations, the Constitutional Court takes a very cautious approach. It has to build up with more experiences for it to step into this field.

2. AGREEMENTS BETWEEN TAIWAN AND CHINA AS ‘TREATY’ IN TERMS OF TAIWAN’S CONSTITUTION

Immediately after the afore-mentioned national territory case, the Constitutional Court was called upon to define the ‘treaty’ in terms of Article 38, Article 58 (2) and Article 63 of the Constitution. More specifically, what stands before the Constitutional Court is: whether the agreements signed by China and Taiwan are

⁸⁵ *Judicial Yuan Interpretation* No 328, available at <http://www.judicial.gov.tw/constitutionalcourt/en/p03.asp> (last accessed 02/05/2008).

⁸⁶ *Ibid.*

‘international’ agreements or not. While the Court lays down guidance to determine those ‘treaties’ subject to the deliberation procedure,⁸⁷ the Court provides no clear answer as to the congressional oversight of these agreements signed between Taiwan and China. Nonetheless, the Court hints that those agreements are not ‘international’ in the sense of ‘State to State’ or ‘inter-State’. It thus indirectly clarifies its perception of the relationship between Taiwan and China. At this stage, the Constitutional Court does not see this relationship as one between state and state. While the substance of this interpretation appears awkward, the Court in this case seems to take a more activist approach on China relations. Nevertheless, it is paradoxical that within one month, the Court has a different perception on this issue. While the Constitutional Court denies to rule upon whether the territory of Republic of China extends to mainland China in its *Judicial Yuan Interpretation* No. 328, it interprets the relation between Taiwan and China not to be ‘international’. It clearly contradicts its stance in the previous case where the ‘political question’ doctrine is preferred. Nevertheless, it should also be noted that, while the majority steps into this field, several Justices dissent. They dissent individually, but their arguments are similar, mainly based on the ‘political question’ doctrine.⁸⁸

3. RESTRICTION FOR THE ENTRY OF CHINESE NATIONALS INTO TAIWAN

The issue of China relations came before the Constitutional Court once again in 1999. In a case related to the re-entry into Taiwan of a Chinese national, who is the spouse of a Taiwanese citizen, the Constitutional Court is called upon to review the legality of the delegated regulations: *Regulation Governing the Entry Permission to Taiwan for the People from China* and *Regulation Governing Permanent or Temporary Residence Permission for the People from China*. Article 10 (3) of the *Statute* authorizes the MOI to draft, after submitting to the Executive Yuan for approval, a rule governing the permission of Chinese entry into Taiwan. Article 17(7) of the *Statute* (amended and renumbered as 17(9)) authorizes the MOI in conjunction with the authorities concerned, upon the approval of the Executive Yuan, to draft the

⁸⁷ See *supra*, subsection II A (1) Scope of treaties and international agreements and corresponding ratification/incorporation procedures.

⁸⁸ See dissenting opinion of Justice Te-Sheng Zhang; Yu-Ling Yang; Zhi-Peng Li; and Zhong-Sheng Li.

rules governing ‘the requirements, procedures, means, restriction, revocation, or annulment of permission and any other requirements for residency, long-term residency or permanent residency’ referred to in the Article 18 and Article 19 (1) to 19 (5).

In this case, the legal status of Chinese nationals in Taiwan is at stake. On the one hand, the Constitutional Court should examine the legality of these two regulations. On the other hand, since these two regulations are authorized by the *Statute*, the constitutionality of the *Statute* might be indirectly challenged. In this line, the relationship between the *Statute* and Article 11 of the Amendment to the Constitution should also be clarified. However, the Constitutional Court takes a narrow and shallow approach. Relying mainly upon its jurisprudence on principle of legal reservation and clarity and definitiveness of delegation, the Constitutional Court upholds the legality of the regulations at issue.⁸⁹ According to the Court, the delegation of the legislature to the executive branch, as contained in the *Statute*, is explicit and concrete since the construction of the legislative intent could be sought from the relevant context of its entirety. These two regulations adopted by the MOI are to protect the security and welfare of Taiwan’s people. They are in accordance with the legislative purpose of the *Statute*, and within the scope of its delegation. The Court then touches upon the principle of proportionality, as enshrined in Article 23 of the Constitution. The Court firstly reinstates the legal text under this article, noting that rights and freedoms conferred by the Constitution may be restricted by law in order to prevent the infringement upon others’ freedoms; to avert an imminent crisis; to maintain social order and to enhance public welfare. Then it briefly argues that the measures set out in these two regulations are essential to protect security and welfare of people in Taiwan. Their legality in terms of proportionality should thus be sustained.⁹⁰

⁸⁹ The jurisprudence of Taiwan’s Constitutional Court has been greatly influenced by German legal schools. The Court repeatedly emphasizes on ‘Vorbehalt des Gesetzes’, and then examines the clarity and definitiveness of delegation to the administrative power in terms of the purpose, scope, and content. See *e.g.*, *Judicial Yuan Interpretation* No. 443, available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=443 (last accessed 03/11/2008).

⁹⁰ *Judicial Yuan Interpretation* No. 497, available at http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=497 (last accessed 03/11/2008).

The Court does not clarify the role of Article 11 of the Amendment to the Constitution in relation to rights provided therein. Nor does the Court answer to what extent the constitutional rights may be extended to those Chinese nationals who reside in Taiwan. Further, the Court puts aside the constitutionality of the *Statute*. Nothing has been said as to whether the *Statute* may infringe the constitutional rights, if any, of these Chinese nationals, regardless of the authorization by Article 11 of the Amendment to the Constitution. The standard of the review adopted in the case is rather deferential. Without clearly defining the scope of security and welfare of Taiwan people, the legality of the regulations concerned is upheld. Great discretionary power is thus endorsed not only to the legislature but also to the executive branch.

4. RESTRICTION FOR NATURALIZED CHINESE NATIONALS TO HOLD PUBLIC OFFICES IN TAIWAN

Following the afore-mentioned case, another case relating to rights and freedoms of those Chinese nationals who are married with Taiwanese nationals, came into the Constitutional Court in 2006. Nevertheless, this time the question is the equal protection of Taiwanese citizens, instead of the relation between Chinese people and Taiwanese people. A Chinese national, after her marriage with a Taiwanese citizen and residence in Taiwan, finally acquires her Taiwanese nationality. With this Taiwanese nationality, she participates in an examination for the public offices in which she succeeds. Nevertheless, she is disqualified and excluded from civil service due to her original Chinese nationality. After administrative review and administrative litigation, this case is brought into the Constitutional Court, where the remedies are eventually denied.

According to Article 21 (1) of the *Statute*, as amended and promulgated on 20 December 2000, Chinese nationals may not register as a candidate for any public office, serve in any military, governmental or educational organization or state enterprise, or organize any political party unless he or she has had a household registration in Taiwan at least ten years. One of the requirements for this household registration is their Taiwanese nationality. Therefore, Chinese nationals can participate in the afore-mentioned activities ten years after their acquiring Taiwanese

citizenship. The issue before the Constitutional Court is thus the constitutionality of this provision in terms of the equal rights protection and the principle of proportionality. Compared to the case noted above, even clearer and stronger tone of deference to legislature can be evinced.

The Court starts with its reasoning by clarifying the equal rights protection, as enshrined in Article 7 of the Constitution. According to the Court, while all citizens of Taiwan, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law and thus shall enjoy equal rights of taking public examinations and of holding public offices under Article 18 of the Constitution, it does not nevertheless exclude different treatments based on reasonable differentiation. Equality as set out in the Constitution refers to substantial equality, where different treatments may be justified based upon the differences of the nature of subject matters.⁹¹ In upholding the constitutionality of Article 21(1) of the *Statute*, the Court firstly points to the special authorization by Article 11 of the Amendment to the Constitution. While the Constitutional Court does not clarify the relevance of this authorization, this authorization seems to shield the *Statute* from the challenge of its constitutionality. One may argue that in light of this authorization, the *Statute* is presumably constitutional. This explains why the Constitutional Court takes a highly deferential approach in this case. According to the Court, when cross-strait affairs are at stake, numerous social-political-economical factors are to be evaluated and balanced. Unless there is a clear and manifest oversight, the Constitutional Court should show due respect to those decisions made by the legislative branch which represents diverse opinions of people and is better informed of in this regard.⁹²

Based on this deferential approach, the Court reviews the constitutionality of the *Statute* in light of the principle of proportionality, as enshrined in Article 23 of the Constitution. The Court firstly points to the duty of loyalty to the State of a public functionary. It further elaborates that a public functionary, entrusted with public authorities, should bear in mind the overall interests of the State when carrying out

⁹¹ *Judicial Yuan Interpretation* No 617, available at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=617 (last accessed 09/05/2008).

⁹² *Ibid.*

his/her official duties under public law. By doing so, he/she may take every action and adopt every policy possible that he/she considers is in the best interests of the State. The Court then emphasises the status quo of cross-strait relationship: Taiwan and China are two separate and antagonistic entities with significant differences in essence between each other in respect of the political, economic and social systems. This is the context where the security of Taiwan, the welfare of its people and the constitutional structure of a free democracy therein are to be ensured and preserved. Based on this reasoning, the Court then concludes that Article 21(1) of the *Statute* does not run counter to the legislative intent to Article 11 of the Amendment to the Constitution. Besides, different treatments for naturalized Chinese nationals in respect of public offices can be justified in terms of equality rights protection and the proportionality test, as there is no clear and manifest oversight of the legislature in their decision-making.⁹³

The special authorization by Article 11 of the Amendment to the Constitution and the status quo of two separate and antagonistic entities with significant differences in essence are two cornerstones of the Court's reasoning. Since the Constitution authorizes the legislature to regulate China relations with a special law, it envisages different treatments to be arranged. In light of the intent of the drafters of the Amendment to the Constitution, different treatments toward Chinese nationals in the *Statute* should be respected by the Constitutional Court. In accordance with this deferential approach, the Court further upholds the constitutionality of the *Statute* in terms of the principle of the proportionality. The Court seems to have little difficulty in reaching this decision since the security of Taiwan, the welfare of its people and the constitutional structure of a free democracy therein are at stake. Nevertheless, it is highly problematic that the Constitutional Court hands off in the name of national security whenever it comes across with China relations. What is more, the Court never explains what it is.

⁹³ *Ibid.*

5. PRESIDENTIAL STATE SECRETS PRIVILEGE

In a recent case, relating to the President's obligation to the disclosure of information on national security and foreign affairs during criminal proceedings, greater discretion and privilege is endorsed to the President by the Constitutional Court. During the criminal proceedings in Taipei District Court, the Presidential Office is ordered to give access to confidential information related to national securities and foreign affairs.⁹⁴ In response to this order, the Presidential Office refers to the Constitutional Court to define the scope of the 'presidential criminal immunity' and to determine the existence and scope of 'presidential state secrets privilege' under the Constitution.

Relying on the 'state secrets doctrine', the Constitutional Court held that, 'subject to the scope of his executive powers granted by the Constitution and the Amendments to the Constitution, the President has the power to decide not to disclose any information relating to national security, defence and diplomacy if he believes that the disclosure of such information may affect national security and national interests and hence should be classified as state secrets.'⁹⁵ The Court further notes that, 'based on this presidential state secrets privilege, the President should have the right to refuse to testify as to matters concerning state secrets during a criminal procedure, and, to the extent that he may refuse to so testify, he may also refuse to produce the relevant evidence.'⁹⁶

Given the absence of this 'presidential state secrets privilege' in the legal text of the Constitution and Amendment thereto, the Court has to justify itself in relation to the legal basis of this privilege. The Constitutional Court bases its reasoning on the principles of the separation of powers and checks and balances, arguing that the power of the Chief Executive, based on the functions and authorities intrinsic to his office, to decide not to disclose any classified information regarding national security, defence and diplomacy is part of the executive privileges of the Chief Executive.⁹⁷

⁹⁴ Taiwan Taipei District Court, Letter zhuzhong suzhi No 0960001154 (2006).

⁹⁵ *Judicial Yuan Interpretation* No. 627. available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=627 (last accessed 07/05/2008).

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

One is also safe to say that the Court relies much upon the notion of national security as the Court further notes that, being the highest executive officer, the President has the duty to preserve national security and national interests.⁹⁸

Notwithstanding greater importance attached to this ‘state secrets privilege,’ the Constitutional Court nonetheless emphasizes that the fundamental constitutional principles of separation of powers and checks and balances should also be adhered to in respect of the exercise of this privilege. According to the Court, this privilege is not an absolute power and should be governed by the afore-mentioned constitutional principles. The Court then lays down further guidance for the President to elaborate his/her reasoning to classify information as a ‘state secret,’ and subsequently for the trial court and prosecutor to rule on this point.⁹⁹ Still, it is difficult to overvalue the effectiveness of the review of the prosecutor and trial court, since a deferential standard of review tends to be applied in this regard.

C. SHORT CONCLUSION: APPROACHES OR PATTERNS

With regard to trade relations with China, parallel developments on the legal regulation and judicial jurisprudence can be registered. Regardless of a number of WTO-inconsistent regulations relating to China trade, Taiwan’s regulatory regime governing this subject matter has been gradually liberalized. A first step in this liberalization took place in the areas of trade in goods. With the increase trade volume between Taiwan and China, the need for liberalization in services trade comes along. This is especially true when the transactions of trade in goods are to be carried out, where trade in financial services, transportation services, etc, are related. The liberalization of services trade also comes in two directions. Not only Taiwan’s market access has been gradually opened to Chinese services providers, but Taiwan’s service providers into China should also be ‘liberalized.’ Due to the great amount of Taiwanese investments in China, liberalization in financial survives, notably banking services, to sustain these investments are compelling. In response to this need, the commercial presence of Taiwanese banks in China is thus inevitable.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

With the surging trade volume, accompanied by other trade-related issues such as the entry of Chinese nationals into Taiwan and their residence therein, Taiwan's courts are forced to face with these issues. While it may take its root in the aspect of trade and other economic activities, it nevertheless spills-over into other non-trade related fields where civil and political rights are to be triggered. The Constitutional Court has long taken a deferential approach on China (trade) relations. Among those cases examined above, the Court firstly denies the case of national territory based on the 'political question' doctrine. Then the Court does interpret the meaning of 'treaty' within the Constitution, but it provides no answer for the real question: whether agreements signed between Taiwan and China are 'international'. With regard to Chinese entry into Taiwan and the right to hold public offices of a naturalized Chinese, the Court defers to the discretion of the legislature. Finally, even greater discretionary power is endorsed to the President through the doctrine of 'state secrets privilege.'

While a flood of cases related to China relations is inevitable and irresistible, the Court seems very awkward in this regard. So far, it has not developed a good approach to deal with China relations under the shadow of national security. In light of this, in the following section, I will propose my answer for the resolution of those WTO-incompatible (constitutional) laws and regulations adopted and maintained in the name of national security. My proposal focuses on the role of constitutionalism in reconciling these conflicts. A constitutional approach will interconnect domestic constitution and the WTO Treaty constitution.

IV. CASE STUDY IN RELATION TO CHINESE DIPLOMAS: A CONSTITUTIONAL APPROACH

In this section, I examine a case handed down by Taiwan Higher Administrative Court in relation to the recognition of Chinese diploma. Given that this is a case dealt with by the administrative court, notwithstanding its limited competence of constitutional review, a typical administrative approach is adopted. According to the court, whether to recognize Chinese diplomas is not discretionary, but mandatory. Once the positive and passive conditions, as set out in the *Statute and Regulation on the Examination and Recognition of Chinese Diplomas* (hereinafter the *Chinese Diplomas Regulation*) are satisfied, the administrative agency is obliged to recognize

the effect of the Chinese diploma concerned. There is no room for discretion since the plaintiff enjoys a subjective right under the *Statute* and the *Chinese Diplomas Regulation*¹⁰⁰ Apart from the administrative law issues touched upon by the court, this case relates to those complex issues elaborated in section III. On the one hand, it relates to Taiwan's international obligation under WTO law. The mutual recognition on this subject matter between these two WTO members has to be clarified in the spirit of the WTO disciplines. Besides, this case also triggers the equal rights protection under the Constitution. The judiciary has to define clearly the notion of national security and can thus balance and reconcile it with fundamental rights of individuals. Therefore, in this section I firstly present the development of this case in the administrative court and examine the strength and weakness of its reasoning. I will then argue that a constitutional understanding on both WTO law and foreign (trade) relations with China is necessary. The approach as elaborated in Chapter III of this dissertation may offer a better perspective for Taiwanese courts to face with foreign (trade) relations with China.

A. STRENGTH AND WEAKNESS OF THE COURT'S REASONING: ARGUMENTS BASED ON ADMINISTRATIVE LAW, CONSTITUTIONAL LAW AND WTO LAW

This case results from an application to the Ministry of Education (the MOE) to recognize the effect of the plaintiff's diploma in China. The plaintiff, after her marriage with a Taiwanese citizen, enters into and resides in Taiwan. Subsequently, she acquired the nationality of Taiwan on 2 September 2004. One day after, she applied to the MOE for the recognition of the diploma which she acquired in China in 1994. This application was rejected by the MOE on 10 September 2004 on the ground that the review and recognition of Chinese diplomas of higher education is not open; the notification of the diplomas acquired is also unavailable.¹⁰¹ After administrative review, this case was brought into the administrative court. The court rules favourable to the plaintiff on 4 May 2005.

¹⁰⁰ Taipei Higher Administrative Court, Suzhi No 582 (2005), available at <http://jirs.judicial.gov.tw/Index.htm> (last accessed 09/05/2008). The court here refers to the concept of 'subjektiv-öffentliches Recht'.

¹⁰¹ *Ibid.*

In this case, the plaintiff argues that unjustified different and discriminatory treatments relating to the recognition of diplomas between foreign spouses of Chinese nationality and other nationalities infringe her equal rights protection as enshrined in the Constitution. Those Chinese nationals, who are married with Taiwanese citizens, should refer to the *Chinese Diplomas Regulation* for the examination and recognition of their Chinese diplomas after acquiring the nationality of Taiwan.¹⁰² Besides, according to the existent policy of the MOE, Chinese diplomas of higher education are not recognized in Taiwan. By contrast, those spouses of other nationalities can refer to *Regulation Governing the Examination of Foreign Diplomas* (hereinafter the *Foreign Diplomas Regulation*) once they acquire their residence in Taiwan. These different and unfavourable treatments are not based on the nature of things (*Natura Rerum*) and cannot be justified.¹⁰³ Besides, the MOE's failure to recognize the effect of the plaintiff's higher education received in China prevents her from taking public examination, holding public offices, and from being qualified to provide professional services.¹⁰⁴ These unjustified and discriminatory treatments also infringe her right of existence, to work and of property and right to take public examinations and hold public offices, as provided for by Article 15 and 18 of the Constitution.¹⁰⁵ By contrast, the MOE asserts that the examination and recognition of Chinese diplomas relates to the sustainable development and allocation of human resource in higher education. This issue should be considered in accordance with its consistency with other China policies and the political sensitivity between Taiwan and China.¹⁰⁶ As this issue relates to the employment, reorganization of human resource, and social security, it cannot be decided solely by the MOE. Moreover, in light of public interests, the decision not to recognize Chinese diplomas is constitutional in terms of principle of proportionality as set out in Article 23 of the Constitution.¹⁰⁷

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Article 15 of the Constitution reads that 'the right of existence, the right to work and the right of property shall be guaranteed to the people'.

¹⁰⁶ Taipei Higher Administrative Court, Suzhi No 582 (2005), above n. 98.

¹⁰⁷ *Ibid.*

In contrast to human rights argument advanced by the plaintiff and policy arguments maintained by the MOE, the court rules this case mainly on the ground of principles of administrative law. According to the Court, Article 22 of the *Statute* directs the competent authorities to draft rules governing the examination and recognition for those Chinese people who have a permanent residency in Taiwan on their education in China.¹⁰⁸ The MOE, upon the approval of Executive Yuan subsequently adopted the *Chinese Diplomas Regulation* on 24 October 1997.¹⁰⁹ Article 22 of the *Statute* and the *Chinese Diplomas Regulation* are mandatory in nature. There is no room for the discretion of the MOE. The MOE is obliged to decide whether to recognize based on the positive and passive conditions, as set out in Article 7 and 9 of the regulation. The plaintiff has a subjective right under Article 22 of the *Statute* and the *Chinese Diplomas Regulation*. Based on this reasoning, the Court repeals the decision of administrative review and orders the MOI to accept the plaintiff's application to examine and recognize her Chinese diploma.

In the appellate proceedings, the Supreme Administrative Court repeals the decision of the Taipei Higher Administrative Court and remands this case back to Taipei Higher Administrative Court.¹¹⁰ According to the Supreme Administrative Court, the *Chinese Diploma Regulation* is applicable to those Chinese nationals residing in Taiwan. Since the applicant had already obtained her Taiwanese citizenship, it is thus questionable whether the *Chinese Diploma Regulation* is applicable in this instant case.¹¹¹ In other words, the recognition of the diploma of a Taiwanese national that is obtained in China may be governed by other law or regulation, instead of the *Chinese Diploma Regulation*. This holding relates back to the identity and legal status of a naturalized Chinese in Taiwan. While it is the

¹⁰⁸ Article 22 provides that 'for any of the people of the Taiwan Area or any of the people of the Mainland Area permitted to have a permanent residency in the Taiwan Area, rules governing its examination and the recognition of its education in the Mainland Area shall be drafted by the Ministry of Education and submitted to the Executive Yuan for approval'.

¹⁰⁹ Regardless of Article 22 of the *Statute*, and the *Chinese Diplomas Regulation*, the MOE openly and officially denies the possibility for this examination and recognition.

¹¹⁰ Supreme Administrative Court, Panzhi No. 602 (2008), available at <http://jirs.judicial.gov.tw/Index.htm> (last accessed 14/11/2008).

¹¹¹ *Ibid.*

Chinese diploma subject to discriminatory treatment, but the discrimination is against a Taiwanese citizen.

This case resembles with the afore-mentioned restriction for naturalized Chinese to hold public offices. In fact, the plaintiff in this case argues that the MOE's refusal to recognize her diploma infringe her constitutional rights to take public examinations and hold public offices. The decisions by this administrative court and the Constitutional Court are completely different in terms of the results and their approaches. In this present case, both the *Statute* and the *Chinese Diplomas Regulation* provide the legal basis for the plaintiff's application. The MOE refuses the plaintiff's application mainly based upon policy arguments. Consequently, the court has only to ensure the *Statute* and the *Chinese Diplomas Regulation* to be abided by. Since the *Statute* and the *Chinese Diplomas Regulation* oblige the MOE to decide whether to recognize the diploma concerned according to the criteria set out therein, the court thus has little difficulty revoking the decision of the MOE and ordering it to accept the plaintiff's application. Besides, as this case relates only to the recognition of Chinese diplomas, national security may not be a concern. By contrast, in respect of public offices, according to the legislature as also endorsed by the Constitutional Court, national security is at stake. Besides, the public office case relates to the prohibition in the *Statute*, where the legislature clearly expresses its evaluation and balance in the form of congressional legislation. In particular, this congressional legislation is specially authorized by the Constitution. The Constitutional Court is thus in a more difficult position than that of the administrative court. However, the public offices case relates also to a fundamental right: equal rights protection under the Constitution, even though the administrative court does not touch upon this issue.

In the Chinese diploma case, the plaintiff relies on human rights arguments whereas the MOE resorts to policy arguments of political sensitivity. By contrast, the court rules mainly based on principles of administrative law. Insofar as the diploma case is concerned, the Higher Administrative Court's decision has its merit. A narrow and shallow approach may be sufficient to resolve this present case. Nevertheless, in light of the policy arguments based on political concerns of cross-strait relations

which the MOE greatly and emphatically relies upon during the proceedings, a different approach is needed in order to balance the MOE's political sensitivity arguments with the plaintiff's human rights arguments. The holding of the Supreme Administrative Court adds complexities to this issue. It points to the identity and legal status of a naturalized Chinese in Taiwan. Different treatments simply because of her prior Chinese nationality are difficult to be justified.

Besides, WTO law is also relevant in this case. With the liberalization of education services, two issues should be addressed: the consumption abroad of Taiwanese nationals in China and the recognition and equivalency of Chinese diplomas in Taiwan. Further, in terms of the recognition of diplomas, one should also take into account of the penetration into national legal systems of WTO law in relation to domestic regulation, as set out in GATS, notably Article VI and VII.¹¹² The question arises as to whether a constitutional approach or an administrative approach of WTO law in respect of mutual recognition to be taken.

B. A CONSTITUTIONAL APPROCH OF WTO LAW IN TAIWAN'S NATIONAL LEGAL SYSTEM

In Chapter III, I structure my arguments of judicial governance in China trade relations based on the WTO Agreement as a pre-commitment, its domestic constitutional function, non-discriminatory principle and unconditional market access commitments, and right to work and freedom of profession under Taiwan's Constitution. In Chapter II, I also emphasize the importance of judicial governance in foreign trade relations in order to ensure rational decision-making. Constitutionalism governs the exercise of public power not only in internal affairs but also in external relations.

In this present case, the court has to acknowledge the constitutional significance of the WTO Agreement in Taiwan. Taiwan's accession into the WTO is of not only economic importance, but also constitutional importance. In this WTO forum, Taiwan

¹¹² See M Krajewski, *National Regulation and Trade Liberalization in Services: the Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International, The Hague; London 2003). See also, S Cassese, 'Global Standards for National Administrative Procedures' (2004-2005) 68 *Law and Contemporary Problems* 109.

presents itself as an international actor, and signals out Taiwan's intention to look upon China as a normal trading partner. The competence and capacity to carry out its WTO obligations and to normalize trade relations with China helps to shape internal/external constitutional identity of Taiwan. This thus clarifies the weight of the MOE's policy arguments based on national security, political sensitivity, and public interests. Limiting itself to those policy arguments prevents a potential constitutionalization of China trade relations in Taiwan and thus prevents a normalized constitutionalism therein.

Besides, Taiwan's national constitution interconnects the national legal system and the WTO treaty constitution. Arguments based on the WTO non-discrimination principles and national equal rights protection can complement each other in this present case in order to control the abuse of public power. While equal rights protection under national constitution prevent unjustified discriminatory treatments between those Chinese spouses and other foreign spouses, Most-Favoured-Nation Treatment under WTO law also prevents Taiwan from singling out Chinese education services of which the diplomas it refuses to recognize. In the context of this case, two issues are most relevant in relation to the recognition of Chinese diplomas. Firstly, it relates to market access of Chinese education services, here, mode 2 (consumption abroad). Secondly, it relates to domestic regulation on mutual recognition where requirements laid down in Article VI and VII of GATS should be taken into due account.

In respect of education services (CPC, 9222, 9223, 9224, 923, 924 and 929), there is no limitation on the market access in cross-boarder supply and consumption abroad.¹¹³ Nevertheless, Article 23 of the *Statute* provides that recruiting students or acting as an intermediary for any Chinese educational institution may be permitted condition upon the approval of the competent authorities. The *Statute* then authorizes the MOE to draft a rule governing the permission procedures, which has so far yet to be issued. Criminal penalty is to be imposed in case of these conducts without

¹¹³ Protocol on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, above n. 34, at 857.

appropriate permission.¹¹⁴ As the market access of education service in higher education (CPC, 923) is liberalized, restrictions for Taiwanese citizens to study in China or other incidental recruiting or intermediary activities cannot be justified. While the plaintiff acquired her diploma in China prior to Taiwan's WTO accession, it does not undermine the importance of Taiwan's WTO commitment in this regard given the continuance of restriction on Chinese education services.

The liberalization of education services, in this case, the mode of consumption abroad, does not necessarily leads to the recognition of the diplomas obtained in China. Article VII of the GATS regulates the recognition. Paragraph 1 provides the possibility for a Member to recognize the 'education or experience obtained, requirements met, or licenses or certifications granted in a particular country' in considering whether criteria or standards for the authorization, licensing or certification of services suppliers are met. This recognition may be achieved either through harmonization or based upon Mutual Recognition Arrangements (the MRAs).¹¹⁵ In the absence of MRAs, a Member may also accords recognition autonomously on the condition that it provides an opportunity for any other Member to demonstrate to its 'education, experience, licenses, or certifications obtained or requirements met' to be recognized as well.¹¹⁶ Further, this recognition should not be accorded in a discriminatory manner.¹¹⁷ In this present case, to single out education received in China and deny the recognition is apparently incompatible with Article VII of GATS, in particular paragraph 3. Lastly, it should also be pointed out that Taiwan's regulatory measures in relation to Chinese diplomas are also inconsistent with Article VI:1, which dictates a Member to administer all measures of general application affecting trade in services 'in a reasonable, objective and impartial manner.' The measure adopted by the MOE in this present case clear deviates from this requirement.

¹¹⁴ The *Statute*, Art. 83.

¹¹⁵ GATS, Art. VII:1.

¹¹⁶ GATS, Art. VII:2.

¹¹⁷ GATS, Art. VII:3

Lastly, with a shift of regulatory power to trans-national or global level, domestic regulatory agencies are subject to the control of various global laws, rules and standards. On the other hand, a domestic regulatory measure affects not only national enterprises and individuals but also foreign enterprises and individuals. Taiwan's courts cannot isolate themselves from this trend. While the WTO has not developed detailed rules in relation to the recognition of education, fundamental non-discriminatory principles should be respected. The jurisprudence of Taiwan's courts has not dealt with the conflicts between national constitution and its international obligations. The importance of Article 11 of the Amendment to the Constitution should be carefully weighed. As clarified above, the WTO Treaty constitution and national constitution complement with each other, courts are under their constitutional obligation to ensure the compliance to these global norms. The court should refrain itself from readily referring to Article 11 of the Amendment of the Constitution and from relying on national security arguments,

V. SHORT CONCLUSION

The objective of this Chapter is to propose a better approach for Taiwan's courts to deal with cases relating China (trade) trade relations. It firstly examines the legal status of treaties and international agreements in Taiwan's national legal system. Based on this, it then explores the role of the WTO Agreement in Taiwan, focusing on the legal hierarchy, self-executing, and relevant jurisprudence. While there are some arguments based on WTO law in these cases, the courts do not clarify those issues. This Chapter then investigates the regulatory regime on China trade, covering three levels: Article 11 of the Amendment to the Constitution, the *Statute Governing the Relationship between People in Taiwan Area and Mainland Area*, and other relevant administrative regulations. This Chapter then examines a series of cases in the Constitutional Court relating to China (trade) relations. It begins with the delimitation of national territory and the definition of 'treaty' as set out in Taiwan's constitution and the nature of agreements signed between Taiwan and China. Then it deals with restriction for Chinese nationals who are married with Taiwanese citizens on their re-entry into Taiwan and their right to hold public offices. Finally, it examines the

'state secrets privilege' as endorsed to the President by the Constitutional Court. Lastly, I use a case handed down by Taipei Higher Administrative Court to illustrate the strength and weakness of the approach taken by the court. I argue that a constitutional approach is essential for Taiwan's court to face with China (trade) relations. Taiwanese courts should not be tempted to refer to Article 11 of the Amendment and national security arguments. On the contrary, they are under their constitutional obligation to ensure both the WTO Treaty constitution and national constitutional to be respected. In so doing, judicial governance in trade relations with China can thus not only contribute to Taiwan's faith implementation of international obligations under the WTO Treaty constitution, but also guarantee the right to work, freedom of profession and equal rights protection as enshrined in Taiwan's constitution.

CHAPTER VII TRADE DISPUTE RESOLUTION BETWEEN CHINA AND TAIWAN: AN INDIRECT APPROACH THROUGH THIRD PARTY PARTICIPATION

I. INTRODUCTION

This Chapter examines trade dispute resolution between Taiwan and China. It will cover two levels of (quasi-)judicial remedies: the WTO Dispute Settlement Mechanism and the domestic trade regulatory regime. So far, there has been no direct complaint against each other in the WTO dispute settlement mechanism. Nevertheless, this does not mean the absence of confrontation between Taiwan and China in this multilateral forum. On the one hand, both China and Taiwan actively intervene as a third party in the Dispute Settlement Mechanism. They may take the same position; they may well argue with each. On the other hand, Taiwan also intervenes as a third party participants in those complaints brought about against and by China. An indirect interaction in the WTO Dispute Settlement Mechanism may well exist. In addition to the international level, domestically, China has taken a number of trade defence measures against products originating from Taiwan while Taiwan also adopted some trade defence measures against Chinese products.

As of 31 January 2009, seven complaints have been brought about in the WTO against China. The first complaint, *China — Value-Added Tax on Integrated Circuits*¹ was finally settled when a mutually satisfactory agreement was reached between China and the United States. However, Taiwan intervened in this case through joint-consultation request even though this request was eventually not accepted by China. The latest two cases, *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (China – Financial Information Service)* and *China – Grants, Loans, and Other Incentives*.² are still at the consultation phase. The remaining complaints are *China — Measures Affecting*

¹ *China — Value-Added Tax on Integrated Circuits (China – Integrated Circuits)*, Request for Consultation by the United States, WT/DS309/1 (23 March 2004).

² *China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (China – Financial Information Service)*, Request for Consultations by the European Communities, the United States and Canada, WT/DS372/1, WT/DS373/1(5 March 2008); WT/DS378/1 (23 June 2008). *China – Grants, Loans and Other Incentives*, WT/DS387/1, WT/DS388/1 (8 January 2009); WT/DS390/1 (22 January 2009).

*Imports of Automobile Parts (China – Auto Parts)*³; *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments (China – Taxes)*,⁴ *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – Intellectual Property Rights)*,⁵ and *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Trading Rights and Distribution Services)*.⁶ In these complaints, Taiwan has reserved its third party rights and, with various efforts, participated in the panel proceedings.⁷

With regard to trade remedies measures in domestic level, various examples can be found. As in the area of anti-dumping measures, since its accession to the WTO, China has initiated a number of investigations procedures against products from Taiwan, including unbleached kraft liner/linerboard, polyurethane, polybutylene, terphthalate resin, nonyl phenol, phenol, bisphenol-A (BPA), cold rolled steel products, nylon 6,66 filament yarn.⁸ As of 7 March 2008, according to China's semi-annual report under Article 16.4 of the Anti-Dumping Agreement (the ADA), definite anti-dumping duties were imposed upon polyvinyl chloride, phenol; ethanolamine; polybutylene terphthalate resin; polyurethane; nonyl phenol, bisphenol-A; and methyl ethyl ketone 2-butanon. Unbleached kraft liner/linerboard

³ Panel Reports on *China – Measures Affecting Imports of Automobile Parts (China – Auto Parts)*, WT/DS339/R, WT/DS340/R, WT/DS342/R (18 July 2008).

⁴ *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, Request for Consultations by the United States, WT/DS358/1 (7 February 2007); WT/DS359/1 (28 February 2007). A mutual agreement was reached between China and the complaining Members during the panel proceedings. WT/DS358/13 (4 January 2008); WT/DS359/14 (13 February 2008).

⁵ *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – Intellectual Property Rights)*, WT/DS362. The Panel on *China – Intellectual Property Rights* was established on 25 September 2007 but the Panel report has not yet been completed.

⁶ *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Trading Rights and Distribution Services)*, WT/DS353. The Panel on *China – Trading Rights and Distribution Services* was established on 27 November 2007, but the Panel report has not yet been completed.

⁷ In *China – Taxes*, an agreement was reached between China and complaining members (the United States and Mexico). Consequently, the panel proceeding was temporarily suspended. The Panel report on *China – Auto Parts* has been circulated, but Taiwan neither submitted a third party submission nor made any oral statement. The Panel report on *China – Intellectual Property Rights* has not be completed, but Taiwan did submit its third party submission and make an oral statement during the first substantial meeting of the panel. The submission is available at <http://www.moea.gov.tw/~meco/otn/> (last accessed 04/12/2008).

⁸ WTO document, G/ADP/N/166/CHN (7 March 2008); see also other previous semi-annual reports of Anti-dumping committee.

had also been previously imposed upon anti-dumping duties on 30 September 2005, but this measure was subsequently repealed by administrative review on 9 January 2006.⁹ On the other hand, Taiwan has also taken some anti-dumping measures against Chinese products. It has so far initiated three investigations procedures against towelling products, footwear, uncoated printing and writing paper since its accession to the WTO.¹⁰ As of 20 February 2008, according to the semi-annual report of Taiwan under Article 16.4 of the ADA, Taiwan imposed definitive anti-dumping measures on the towelling products and certain footwear products. Besides, Taiwan initiated an anti-dumping investigation on uncoated printing and writing paper on 14 October 2006 notwithstanding neither provisional nor definitive anti-dumping measures imposed.¹¹

Following this introductory section, Section II will examine the confrontation between China and Taiwan in the WTO Dispute Settlement Mechanism. As there has not yet been any direct complaint against each other, it analyzes their interaction in the WTO Dispute Settlement Mechanism through the lens of Members' third party intervention.¹² With this aim, Section II begins with a survey of the existent WTO law and practice in relation to third party participation in the WTO Dispute Settlement Mechanism. Then it examines Taiwan's third party participation in complaints brought against and by China. This section ends with an overall evaluation of their interaction in the WTO Dispute Settlement Mechanism. Section III will deal with trade disputes at the domestic level. As China was one of the complainants in *United States – Definitive Safeguard Measures on Imports of Certain Steel Products (US – Steel Safeguards)*¹³ where Taiwan participated as a third party, and China adopted

⁹ *Ibid.*

¹⁰ International Trade Commission, Ministry of Economic Affairs of Taiwan, available at <<http://portal.moeaitc.gov.tw/icweb/default.aspx>> (last accessed 09/02/2007).

¹¹ (WTO Document, G/ADP/N166/TPKM, 20 February 20068); see also other previous semi-annual reports of Anti-dumping committee.

¹² When one defines 'third party intervention' as the intervention other than that of parties to the dispute, this definition will cover '*amicus curiae*' beliefs. Nevertheless, this Chapter does not intend to deal with this subject since it is not relevant to the main theme of this Chapter, namely, to examine Taiwan's third party participation in complaints brought about against and by China. Therefore, the third party intervention/participation referred to in this Chapter covers only Members' third party participation. The author owes this point to Professor Gabriella Marceau.

¹³ Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products (US – Steel Safeguards)*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, and Corr.1, adopted 10 December 2003, modified by

safeguard measures on certain steel product originating from Taiwan in 2002, a parallel relationship may be delineated between these two levels of trade dispute resolution mechanism. In respect of Taiwan, it initiated a special safeguard investigation as provided for in China's Accession Protocol, followed by an anti-dumping investigation, on Chinese towelling products.¹⁴ As it is the first trade defence measure adopted by Taiwan against Chinese products, and this case relates to China's 'WTO-plus' obligation, it provides a good example to examine how Taiwan deals with trade disputed with China, and its approach on these particular 'WTO-plus' obligations. This Chapter then ends with a short conclusion.

II. THE CONFRONTATION OF CHINA AND TAIWAN IN THE WTO DISPUTE SETTLEMENT MECHANISM

This section will examine the confrontation of China and Taiwan in the WTO Dispute Settlement Mechanism. As noted above, I will conduct the analysis based on Taiwan's third party participation in complaints brought about by and against China. Before examining Taiwan's third party participation, it is feasible to define third party rights under the existent WTO law and practice. This helps to clarify what third party rights Taiwan can enjoy if it chooses to deal with its trade disputes with China through third party participation. This also contributes to the evaluation of the effectiveness of Taiwan's approach. Therefore, this section will start with WTO law and practice regarding third party intervention. It will firstly ascertain the objective of third party participation in the WTO Dispute Settlement Mechanism. Then it examines third party rights during the WTO Panel/Appellate Body proceedings. It also touches upon the issue of 'enhanced third party rights'. In addition to the WTO Panel/Appellate Body proceedings, it also deals with the third party rights during the proceedings of the Compliance Panel and Arbitration Panel.

Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, 3273

¹⁴ As of 20 February 2008, according to the semi-annual report of Taiwan under Article 16.4 of the ADA, apart from the toweling products, definitive anti-dumping measures are imposed upon certain footwear products. Besides, Taiwan initiated an anti-dumping investigation on uncoated printing & writing paper on 14 October 2006 notwithstanding neither provisional nor definitive anti-dumping measures imposed (WTO Document, G/ADP/N166/TPKM, 20 February 20068).

Based on this analysis on WTO law and practice relating to third party participation, this section then examine the existent practice of Taiwan's third party participation in complaints brought about against and by China. In respect of complaint brought by China, I focus on the *US – Steel Safeguards* for two reasons. Firstly, in addition to its third participation in the complaint brought by China, Taiwan requested for consultations with the United States on its own behalf even though it did not request for the establishment of a panel in the end. Secondly, at the national level, China adopted safeguard measures against Taiwanese steel products. The *US – Steel Safeguards* proves to be the best example to explore their international and national interaction in this regard. Regarding complaints brought against China, this section will examine both the consultation phase and panel proceedings. Particular attention will be paid to *China – Auto Parts* and *China – Intellectual Property Rights*. This is because the former is the first complaint coming to the panel proceedings and the latter is the first complaint where Taiwan submitted its third party submission and made an oral statement in the panel proceedings.

This section ends with a short conclusion that will briefly evaluate the performance of Taiwan's third party participation in complaints brought about against and by China and the effectiveness of this third party participation approach in resolving trade disputes between Taiwan and China. It will further explore the possibility of direct complaints against each other in light of the primitive dispute resolution mechanism provided in Taiwan-China agreements on direct air transport, sea transport, postal service and food safety.

A. WTO LAW AND PRACTICE IN RELATION TO THIRD PARTY INTERVENTION

1. THE OBJECTIVES OF THIRD PARTY INTERVENTION

The WTO, a multilateral trading system by nature provides opportunities for Members other than parties to the dispute to participate in dispute settlement proceedings. Members' third party participation in the proceedings helps to 'multi-lateralize' the dispute. The designation of this third party participation is aimed to ensure that rights and interests of Members, other than parties to the dispute, under

the covered agreements, will not be prejudiced. This is particularly true when parties to the dispute reach a mutually satisfactory agreement. Third party participation, by offering the opportunity for a Member other than parties to the dispute to submit a third party submission, to receive the first submission of parties and to make an oral statement in the first substantial meeting, contributes to due process in the WTO Panel/Appellate proceedings. At the same time, members' third party participation also helps the WTO Panel/Appellate Body to reach better-informed decisions with different perspectives from those of complaining and respondent members.¹⁵

As submitted, third party participation may help to prevent potential violation, to enhance the security and predictability of this world trading system, and to contribute to its transparency.¹⁶ As argued, an effective dispute settlement mechanism entails public good characteristics. From the institutional perspective, this effective dispute settlement mechanism is essential to the WTO. Besides, an appropriate participation of memberships in this mechanism can bring about positive externalities.¹⁷ Given the lack of capacity and resource of most developing country members and the least developed country members, third party participation is an important designation to widen the participation of its membership. In light of this, third party participation is of 'systemic' value to the WTO Dispute Settlement Mechanism. On the other hand, apart from this 'systemic' value, members benefit from third party participation. Members may take advantage of the third party participation as a means of surveillance and can thus ensure that their rights and interests under the WTO Agreement would not be diminished. As pointed out, the pressure of third party participation prevents parties to the dispute from settling the disputes in a manner incompatible with the WTO rules. It is also argued that parties tend to litigate the cases until the final ruling of the WTO Panel/Appellate Body is made available.¹⁸

¹⁵ N Covelli, 'Member Intervention in World Trade Organization Dispute Settlement Proceedings After EC-Sardines: The Rules, Jurisprudence, and Controversy ' (2003) 37 *Journal of World Trade* 673, 673.

¹⁶ NH Yen Kong, 'Third Party Rights and the Concept of Legal Interest in World Trade Organization Dispute Settlement: Extending Participatory Rights to Enforcement Rights' 38 (5) *Journal of World Trade* 757, 761.

¹⁷ CP Bown and BM Hoekman, 'WTO Dispute Settlement and the Missing Developing Countries: Engaging the Private Sector' (2005) 8 *Journal of International Economic Law* 861, 862.

¹⁸ ML Busch and E Reinhardt, 'Three's a Crowd: Third Party and WTO Dispute Settlement ' (2006) 58 *World Politics* 446, 448.

Besides, due to the limits of capacity and resource, third party participation may be a good alternative for developing countries to wield their interests in the WTO Dispute Settlement Mechanism. In addition, third party participation in the dispute settlement proceedings can also be used for training purposes and constitutes a vehicle for capacity building.¹⁹

2. WTO LAW AND PRACTICE IN RELATION TO RIGHTS AND OBLIGATIONS OF THIRD PARTY PARTICIPATION

Two legal instruments govern the framework of third party intervention in the WTO Panel/Appellate Body proceedings: Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) and the Appellate Body's Working Procedures for Appellate Review (the Working Procedures). Prior to the panel proceedings stage, third party participation in the consultation phase is made possible through the request for joint-consultation on the condition that members have 'substantial trade interests' in this matter.²⁰ In order to be joined in the consultations, a third party should notify its intent within ten days of the circulations of the request for consultations. The acceptance of this joint-consultation request depends solely on the determination of the existence of substantial trade interests by 'the member to which the request for consultations was addressed.' While a member refused to be joined in the consultation can initiate its own consultation, no remedy is provided under the DSU.²¹

At the panel stage, third parties are entitled to receive the first submissions of parties to the disputes, to make their written submissions, and to be heard in the first substantial meeting of the Panel.²² They may also comment the first submissions of disputing parties and questions addressed to them in this first substantive session.²³ However, third parties are not able to participate in subsequent sessions.

¹⁹ See, e.g., F Pierola, 'Third-party Participation in WTO Dispute Settlement Proceedings for Training Purposes' (2007) 2 *Global Trade and Customs Journal* 367, 367-368.

²⁰ DSU, Art.4.11.

²¹ G Marceau, 'Consultations and the Panel Process in the WTO Dispute Settlement System' in R Yerxa and B Wilson (eds) *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press, Cambridge 2005) 31-32.

²² DSU, Art. 10.2-3.

²³ DSU, Appendix 3.6, 3.8

As for proceedings before the Appellate Body, three categories of third party participants are prescribed in the Working Procedures.²⁴ In order to influence the final ruling of the appeal, a third party may, within 25 days of the notice of appeal file a written submission with grounds and legal arguments to support its positions.²⁵ A ‘passive’ third party may also notify its intent to be present at the oral hearing within the same time constraint.²⁶ This passive third party is free to decide whether to make an oral statement or not. A Member that neither files a written submission nor notifies the secretariat of its intent to be a passive observer within the 25 days time constraint may nevertheless notify the secretariat of its intent to appear at the oral hearing and may request to make an oral statement.²⁷ These rules codify the previous practice in the appellate review proceedings. However, it brings about some controversies. According to Article 24.4 of the Working Procedure, a member may always request to intervene as a third party. In light of this, the 25 days’ time constraint after the notice of the appeal appears redundant.²⁸ It may overcomplicate the appellate review and cause unnecessary delay for proceedings before the Appellate Body.

Article 27.3 of the Working Procedures offer more guidance on third party rights during the oral hearing. The first two categories of third parties, i.e., either filing a written submission or notifying the secretariat of the intent to appear at the oral hearing within the time constraint, may ‘passively’ appear at the oral hearing or ‘actively’ make an oral statement and/or respond the questions addressed to them.²⁹ The third category of third parties, namely those who notify the secretariat of their intent to appear at the oral hearing beyond the time constraint, may appear at the oral hearing. In accordance with the discretionary power of the division hearing the case, this third category of third parties may be offered an opportunity to make an oral statement, or to respond questions. The exercise of discretion should take into account of the requirement of ‘due process.’³⁰ As noted above, the admission of the third

²⁴ WT/AB/WP/4 (1 May 2003).

²⁵ Working Procedures, Art. 24.1.

²⁶ Working Procedures, Art. 24.2.

²⁷ Working Procedures, Art.24.4.

²⁸ For criticism of this lenient rule, and admittance of this third category of third participants being left to the discretion of the Appellate Body, see, *e.g.*, Covelli, above n 15, at 680-686.

²⁹ Working Procedures, Art. 27.3(a), (b).

³⁰ Working Procedures, Art. 27.3(c).

category of third parties contradicts to the 25 days' time constraint, as set out in Article 24.1 and Article 24.2 of the Working Procedures. It may also cause unnecessary delay for the appellate review. While whether to invite this category of third parties to the appellate proceedings is at the discretion of the division hearing the appeal, some sort of limitation is desirable and necessary. This category of third parties should objectively present their interests in this appellate review, and clarify the difficulties to notify the secretariat their intent to appear at the appellate proceedings within the time constraint, as set out in Article 24.2 of Working Procedures.

With regard to the rights and obligations of third parties in the appellate review, while third parties are encouraged to make a written submission in order to facilitate appellate proceedings, this is not obligatory.³¹ In respect of written response during the appellate proceedings, whenever the division hearing the appeal addresses to participants of the case or requests for memoranda, regardless at the oral hearing or prior to it, the response or requested memoranda should be made available to third parties, and an opportunity to comment should also be provided.³²

Besides, pre-existing practice from the GATT era has mostly been carried over, and the WTO follows the conventional practice in relation to panel proceedings.³³ However, one issue deserves further elaboration with regard to the WTO practice on third party participation: enhanced third party rights. In some GATT complaints,³⁴ more expansive third-party rights were granted based on the agreement of parties to the dispute. Under the WTO practice, the Panel has conferred the third parties 'enhanced third party rights' in some complaints even in the absence of the agreement

³¹ Working Procedures, Art. 24.3

³² Working Procedures, Art. 28.

³³ For third-party intervention in the GATT, see, C Carmody, 'Of Substantial Interest: Third Parties Under GATT' 18 Michigan Journal of International Law 615, 622-635; ME Footer, 'Some Aspects of Third Party Intervention in GATT/WTO Dispute Settlement Proceedings' in EU Petersmann (ed) *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Law International London, The Hague, Boston 1997) 216-235.

³⁴ In footnote 330 of the Panel report, the panel recalls GATT cases wherein expansive third party rights conferred based upon the agreement of parties to disputes. The following cases are referred to: the two un-adopted *EEC – Import Regime for Bananas*; *Japan – Trade in Semiconductors*; *United Kingdom – Dollar Area Quotas*; and the un-adopted *EEC – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region (EEC – Citrus Products)*(WT/DS27/R/USA, 22 May 1997).

of parties to the dispute. In *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*,³⁵ third parties requested for fuller participation in the panel proceedings. Four relevant issues were specifically referred to in these requests:

to be present at all meetings between the panel and the parties to the dispute; to be able to present their point of view at each of these meetings; to receive copies of all submissions and other written material; and to be allowed to present written submissions both to the first and to the second meetings of the panel.³⁶

The Panel firstly recalled the legal bases for third party participatory rights in the panel proceedings and pointed out the absence of an agreement between parties to the dispute. The Panel nevertheless decided ‘enhanced third party rights’ to be granted. Third parties in the dispute are permitted to appear at the whole panel proceedings, instead of being limited to the first substantive meeting. Precisely, at the second substantive meeting, third parties would have the opportunity to make a brief oral statement, and may present a written submission in response to questions addressed to them at the first substantive meeting.³⁷ The Panel reached its decision on the following grounds: given the absence of agreement between parties to the dispute, and in light of the past practice in the GATT panel proceedings concerning EC banana regime, and of its large economic effects that were claimed, by some third parties to derive from an international treaty between them and the European Communities. Broader participatory rights than those granted under the DSU were conferred in this case.³⁸ However, further extension of third party rights to the interim review process was denied, as, according to the Panel, it would ‘inappropriately blur the distinction drawn in the DSU between parties and third parties.’³⁹

However, one ‘unordinary’ third party should be identified. In multiple-complaints, a complaining member may intervene as a third party in the

³⁵ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States (EC – Bananas III)*, WT/DS27/R, adopted 25 September 1997, modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943.

³⁶ *Ibid.*, para. 7.4

³⁷ *Ibid.*, para., 7.8(a).

³⁸ *Ibid.*, para. 7.8(b).

³⁹ *Ibid.*, para. 7.9.

complaint brought about by another complaining member. Additional third party participatory rights may be granted to a third party participant that at the same time files a parallel complaint in other proceedings. In the two *EC – Measures Concerning Meat and Meat Products (EC – Hormones)*⁴⁰ complaints by the United States and Canada, both complainants intervened as a third party in the other parallel complaint. Some broader third-party rights were granted to the United States and the Canada given the fact that they are not merely a third party in these two disputes.⁴¹ It was decided during the panel proceedings that a joint meeting with scientific experts to be held. Besides, access to all information submitted in the US’s proceedings would be made possible to Canada, and vice versa. Further, the United States was permitted to observe and to make a statement at the second substantive meeting in the Canada proceedings.

During the appellate review proceedings, the Appellate Body is called upon to review the Panel’s decision in this regard. The Appellate Body firstly refers to Article 9.3 of the DSU, which prescribes that the same panellists and timetable for panel proceedings should be made to the greatest extent possible. Building on this, the Appellate Body agrees on the Panel’s decision of a joint meeting with scientific experts, emphasizing that it would be ‘an uneconomical use of time and resources’ if the panel were forced to hold ‘two successive but separate meetings gathering the same group of experts twice’. Besides, with regard to the decision to give access to information submitted in parallel proceedings, the Appellate Body puts emphasis on the importance and complexity of scientific evidence in this dispute. According to the Appellate Body,

in disputes where the evaluation of scientific data and opinions plays a significant role, the panel that is established later can benefit from the information gathered in the context of the proceedings of the panel established earlier. Having access to a common pool of information

⁴⁰ Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada (EC – Hormones (Canada))*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235; Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States (EC – Hormones (US))*, WT/DS26/R/USA, adopted 13 February 1998, as modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699.

⁴¹ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 151.

enables the panel and the parties to save time by avoiding duplication of the compilation and analysis of information already presented in the other proceeding.⁴²

In addition, as the second substantive meeting in the US complaint was scheduled before the meeting with scientific experts, according to the Panel, in order to safeguard its rights, it is necessary to grant the United States an opportunity to observe in the second substantive meeting of the complaint brought about by Canada, and to make a brief statement.⁴³ This decision was upheld by the Appellate Body, indicating that, if an opportunity to participate in the second substantive meeting in the Canada complaint had not been offered, the same degree of opportunity to comment on views expressed in the joint meeting with scientific experts would not be enjoyed as the European Communities and Canada did. The Appellate Body further notes that, while Article 12.1 of the DSU and Appendix 3 do not require the panel to grant this opportunity to the United States, in light of the due process of law, this decision falls within ‘a sound discretion and authority of the panel’.⁴⁴

However, it should also be noted that, in the two *United States – Anti-Dumping Act of 1916 (US – 1916 Act)*,⁴⁵ multiple-complaints by nature, the Panel refused to grant ‘enhanced third-party rights’ to the European Communities and Japan mainly on the ground that there is no ‘consideration of complex facts or scientific evidence’⁴⁶ involved in this case. The Panel recognized that Article 10 or any other provision of DSU did not prevent the Panel from granting ‘enhanced third party rights’, and that to grant enhanced third party rights is part of discretion of the Panel under Article 12.1 of the DSU.⁴⁷ The Panel nevertheless turned to emphasize that the differentiation of parties to the dispute and third parties is a principle embedded in the DSU, and should be respected. Therefore, enhanced third party rights should be granted only for specific reasons. The ‘consideration of complex facts or scientific evidence’ was not

⁴² *Ibid*, para. 153.

⁴³ WT/DS/48/R/CAN, Para. 8.20.

⁴⁴ Appellate Body Report, para. 154.

⁴⁵ Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831. para. 6.33; panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593.

⁴⁶ Panel Report, *US – 1916 Act (Japan)*, para. 6.33; Panel Report, *US – 1916 Act (EC)*, para. 6.33.

⁴⁷ *Ibid*, para. 6.32.

involved in *US – 1916 Act*. Besides, the Panel supported its decision by noting that there was no request for harmonizing the timetable for these two panel proceedings.⁴⁸ This decision was upheld. The Appellate Body firstly noted that the discretionary authority of a Panel to decide whether to grant enhanced third party participatory right is limited. The exercise of this discretion should be subject to the requirement of due process of law. However, the Panel has not erred in exercising its discretion since the European Communities and Japan had not shown that the Panel had exceeded its limits of discretion.⁴⁹

3. LEGAL EFFECT OF PANEL/APPELLATE BODY DECISIONS ON THIRD PARTIES

As argued, these procedural rights suffice for members simply wishing to present their views before the Panel, as they intend only to influence the Panel decisions without being bound by them. Even though the Panel is obliged to take due account of ‘interests of parties to the dispute and those of other members under a covered agreement’,⁵⁰ for members having pressing interests at stake, these procedural rights are far from adequate.⁵¹ In addition, as rightly pointed out by one commentator, a more fundamental issue is whether third parties can obtain a particular remedy when the Panel finds disputed measures to be WTO-inconsistent, or whether third parties can influence the implementation of the rulings and recommendations of the WTO Dispute Settlement Body (the DSB).⁵²

With regard to the remedy aspect, a good starting point is still the distinction between parties to the dispute and third parties. As the Panel in *US – 1916 Act* rightly points out, this distinction is a principle underlying in the DSU and should not be blurred. Besides, it is also clear that the possibility of compensation and suspension of concessions provided in the DSU is reserved only for complaints to which benefits accruing under the covered agreement are directly or indirectly nullified or impaired.

⁴⁸ *Ibid*, para. 6.34.

⁴⁹ Appellate Body Report, *United States – Anti-Dumping Act of 1916 (US – 1916 Act)*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793, para. 150. For critics on this decision, see, A Antoniadis, ‘Enhanced Third Party Rights in the WTO Dispute Settlement Understanding’29 (3) *Legal Issues of Economic Integration* 285.

⁵⁰ DSU, 10.1.

⁵¹ Covelli, above n 15, at 675.

⁵² Yenkong, above n. 16, at 763.

There exists no ‘subject matter’ for third parties. Besides, third parties are not bound by *res judicata*, as *res judicata* is limited to parties to the dispute. Therefore, a ‘remedy’ in terms of compensation and suspension of concessions is not and should not be made possible to third parties. However, a ‘remedy’ in terms of the removal of violations against obligations under the covered agreements, and of the compliance to WTO law is available to third parties. Third parties may indirectly benefit from the ruling of the WTO Panel/Appellate Body when a WTO-inconsistent measure is brought into conformity. This is actually the spirit enshrined in the DSU, which reads: ‘neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.’⁵³

This also points to the importance of a correct reading of the relationship between compliance to the WTO Panel/Appellate Body ruling, and suspension of concessions and mutually agreed compensation. It is pointed out that the obligation to comply with the WTO Panel/Appellate body reports is unconditional, and compensation is ‘no alternative to compliance, but a temporary measure available’⁵⁴ when recommendations and rulings are not duly enforced. By comparing relevant provisions of the DSU in a systemic manner, namely, condition of compensation, prompt compliance, preference to full implementations, and surveillance of the implementations of recommendations and rulings, Griller argues, ‘the binding force of the panel and Appellate Body reports is unconditional, and there is no authorization to depart from such findings, even on a temporary basis.’⁵⁵ This view can also find its

⁵³ DSU, Art. 22.1.

⁵⁴ S Griller, 'Judicial Enforceability of WTO Agreement in European Union: Annotation to Case C-149/96 *Portugal v. Council*' (2000) 3 *Journal of International Economic Law* 441, 451.

⁵⁵ *Ibid.* It is also argued that the arrangement to put into the same paragraph of ‘suspension of concessions’ and ‘compensations’ in the same paragraph indicates that the latter is aimed to prevent the retaliatory measures. This arrangement also reveals the coercive character of the recommendations and rulings. Retaliations and compensation should be understood as mechanisms to ensure full compliance, but not as alternative to compliance. According to him, such view is coined with general international law insofar as the obligation to repair the damage does not constitute an alternative to compliance with the primary obligation of not infringing an international obligation. While compensation might be viewed as an alternative to suspension of concessions, but not to compliance, it is thus clear that, even in the case where compensation is mutually agreed with upon, the mandatory nature of panel and Appellate Body reports remains unaffected. *Ibid.*, at 452-453. For the counterargument, see e.g., P Eeckhout, 'The Judicial Enforcement of WTO Law in European Union: Some Further Reflections' (2002) 5 *Journal of International Economic Law* 91; P Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems' (1997) 34 *Common Market Law Review* 11.

support from Arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)*. The Arbitrators, after recalling Article 22.1 of the DSU, decide that ‘the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned,’ and that ‘this *temporary* nature indicates that it is the purpose of countermeasures to *induce compliance*’.⁵⁶ This illustrates the significance of the preference to compliance. It also clarifies the importance of ensuring the compliance to the WTO Panel/Appellate Body ruling, in particular from the perspective of third parties.

In order to ensure full compliance with the WTO Panel/Appellate Body ruling, members’ third party participation both in the Compliance Panel and in the Arbitration Panel enjoys equal significance. Acting as an ‘observer’, third party participation in the arbitration process contributes to the compliance to the WTO Panel/Appellate Body ruling, and ensures that the authorized countermeasures would not deviate from WTO rules and that the mutually-satisfactory agreement, if any, would not be WTO-inconsistent. Some Arbitration Panels have dealt with third party participation in the arbitration phase. The following will be examining these panel decisions.

Proceedings in the Compliance Panel basically mirror the normal panel proceedings. Members may reserve their third party rights within ten days of the establishment of the Panel. However, due to the shorter time limit, the substantial meeting of the Compliance Panel is usually held only once. Therefore, different interpretation arises with regard to ‘the submissions of the parties to the dispute to the first meeting of the panel’, as set out in Article 10.3 of the DSU. In the WTO jurisprudence, panels also have divergent views on the entitlement of third parties, in Compliance Panels, to receive rebuttal (usually the second) submissions.

Several Compliance Panels denied the request to receive second submissions on different grounds. With the reference to the Working procedures, it was argued that,

⁵⁶ Decision by the Arbitrators on *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU – (EC – Bananas III (US) (Article 22.6 – EC))*, WT/DS27/ARB (9 April 1999), para. 6.3 (emphasis original).

had the Panel decided to hold two meetings, third parties would have been entitled to receive only the first submissions.⁵⁷ Besides, it was also argued that ‘the article should be understood as limiting third party rights in these proceedings to access to the first written submissions only,’⁵⁸ even though Article 10.3 does not explicitly clarify the extent to which third-party rights cover in compliance panels.⁵⁹

By contrast, the Panel in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU (New Zealand and the U.S)* reached a different decision. Starting with the legal text of the submissions and taking into account the object and purpose of this article, the Panel argues that, in order to participate in an informed and meaningful manner, third parties should be allowed to receive ‘the submissions of the parties to the dispute to the first meeting of the Panel.’⁶⁰

While the Panel report of *Canada – Dairy (Article 21.5 – New Zealand and US)* was reversed by the Appellate Body, the Appellate Body report did not touch upon this point, since this issue of third party rights was not included in the appeal. Further, this holding was referred to by the Appellate Body in its report on *United States – Tax Treatment for ‘Foreign Sales Corporations’ – Recourse to Article 21.5 of the DSU by the European Communities*,⁶¹ where the Appellate Body disagreed with the interpretation of the Panel. The Appellate Body firstly clarified that the Panel enjoyed discretion to grant additional participatory rights to third parties, as set out in Article

⁵⁷ Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States (Australia – Automotive Leather II (Article 21.5 – US))* WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189, para. 3.7.

⁵⁸ Panel Report, *United States – Tax Treatment for ‘Foreign Sales Corporations’ – Recourse to Article 21.5 of the DSU by the European Communities (US – FSC (Article 21.5 – EC))*, WT/DS108/RW, adopted 29 January 2002, modified by Appellate Body Report, WT/DS108/AB/RW, DSR 2002:I, 119, para. 6.3. See also panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada Australia – Salmon ((Article 21.5 – Canada))*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031, para. 7.5.

⁵⁹ D Palmetier and PC Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (2 edn, Cambridge University Press, Cambridge 2004) 257.

⁶⁰ Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States (Canada – Dairy (Article 21.5 – New Zealand and US))*, WT/DS103/RW, WT/DS113/RW, adopted 18 December 2001, as reversed by Appellate Body Report, WT/DS103/AB/RW, WT/DS113/AB/RW, DSR 2001:XIII, 6865, para. 2.33. (emphasis original).

⁶¹ Appellate Body Report, *United States – Tax Treatment for ‘Foreign Sales Corporations’ – Recourse to Article 21.5 of the DSU by the European Communities (US – FSC (Article 21.5 – EC))*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55, para. 250.

10 of the DSU and Appendix 3 to the DSU, on the condition that the Panel's exercise of discretionary power is consistent with provisions of the DSU and the principle of due process. Nevertheless, minimum participatory rights granted by the DSU to third parties shall not be circumscribed.⁶² In interpreting Article 10.3 of the DSU, the Appellate Body started with the express wording of the legal text, emphasizing that Article 10.3 does not limit the number of submissions to the panel at the first meeting. The Appellate Body then reasoned that this interpretation is consistent with the context. The entitlement to receive all submissions to the first meeting is essential for third parties to participate in this meeting 'in a full and meaningful fashion'. Panels may also benefit from this full and meaningful participation, and can thus be able 'fully' to take into account the interests of Members other than the parties to the dispute, as dictated by Article 10.1 of the DSU.⁶³ Lastly, the Appellate Body referred to the 'objective and purpose' interpretative approach taken by the Panel in *Canada – Dairy*, and then arrived at the conclusion that 'Article 10.3 has the same meaning, and can be applied in the same way, regardless of the number of panel meetings that are held in a particular case.'⁶⁴

In light of the contribution to and enhancement of compliance, the stance taken in *Canada – Dairy (Article 21.5 – New Zealand and US)* should be embraced. In some cases, third party participation may also act as a very active actor. Ecuador's intervention in *EC – Bananas III (Article 21.5 – US)* is an illustrative example of third party participation in Compliance Panels.⁶⁵ In addition to its own Compliance Panel, Ecuador's third party participation in other members' Compliance Panels help to ensure its rights not to be prejudiced by any mutually-satisfactory agreement between the European Communities and other members.⁶⁶

⁶² *Ibid*, para.243.

⁶³ *Ibid*, para. 249.

⁶⁴ *Ibid*, para. 251.

⁶⁵ WTO document, WT/DS27/84 (13 August 2007).

⁶⁶ For Ecuador's strategic use of the compliance panel, see, JM Smith, 'Compliance Bargaining in the WTO: Ecuador and the Banana Dispute' in J Odell (ed) *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge University Press, Cambridge 2006) 257-288. Another relevant point should be noted. On 6-7 November 2007, the hearing in *EC – Bananas III (Article 21.5 – US)* was open to the public. However, as the chairperson mentioned in his preliminary remark, this was made possible through the agreement of parties to the panel, and were not intended to set a precedent. Press release, available at http://www.wto.org/english/news_e/news07_e/dispu_banana_7nov07_e.htm (last accessed

With regard to third party participation in Arbitration Panel, in contrast to enhanced participatory rights granted to third parties in the panel proceedings, Ecuador, one of the complainants during the panel proceedings, was denied the opportunity to intervene as a third party in *EC – Bananas III (US) (Article 22.6 - EC)*. The Arbitrators reached their decision on two counts: the absence of third party status in relevant provisions, and their belief that rights and interests of Ecuador would not be prejudiced.⁶⁷ Regardless of this decision, the Arbitrators however, emphasized that their decisions ‘fully respect Ecuador's rights under the DSU, and, in particular, Article 22 thereof.’⁶⁸

By comparison, the United States and Canada were admitted to participate as a third party during the arbitration process. During the panel proceedings in *EC – Hormones*, they were granted enhanced third party participatory rights in the parallel complaint. The Arbitrators reach their decision based on the same concerns as the Panel on *EC – Hormones* does. Third party participation rights in the arbitration proceedings include the following: third parties are allowed to receive written submissions to the arbitral hearings, to attend these proceedings, and to make a statement at the end of each hearing. While the Arbitrators recognized the absence of relevant legal bases in the DSU with regard to third party participation in arbitral proceedings, they nevertheless based their decision on their discretion, in accordance with due process, to regulate procedural matters. This discretionary power is derived from the Arbitrator’s working procedures that refer to the DSU provisions governing the normal panel proceedings.⁶⁹ The Arbitrators declared that, in light of the shared methodology to be used for the calculation of opportunities for export and the

19/11/2007). Following this practice, the Appellate Body also opens the hearing of the appellate proceedings to the public. Press release, available at http://www.wto.org/english/news_e/news08_e/dispu350_1dec08_e.htm (last accessed 5/12/2008).

⁶⁷ Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999, DSR 1999:II, 725, para. 2.8.

⁶⁸ *Ibid.*

⁶⁹ Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU (*EC – Hormones (Canada) (Article 22.6 – EC)*) WT/DS48/ARB, 12 July 1999, DSR 1999:III, 1135, para. 7; Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU (*EC – Hormones (US) (Article 22.6 – EC)*), WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105, para. 7.

competition for market share of beef products in the European Communities, due process required that ‘all three parties receive the opportunity to comment on the methodologies proposed by each of the parties.’⁷⁰ This is because the determination in one arbitration panel may be decisive for the determination in the other. Lastly, in handling the standard of ‘due process,’ the Arbitrators adopted the balancing approach. According to the Arbitrators, the interests of the European Communities or its due process rights would not be prejudiced, whereas the rights of the United States and Canada might be affected if third party participation was not made possible. In balancing interests of these three members and their due process rights, the Arbitrators arrived at the decision to grant the United States and Canada a third party status in each other’s arbitral proceedings.

B. TAIWAN’S THIRD PARTY PARTICIPATION IN COMPLAINTS BROUGHT ABOUT BY/AGAINST CHINA

The above subsection examines the objectives of third party participation in the WTO and existent WTO law and practice in this regard. It covers different phases of the WTO Dispute Settlement Mechanism, ranging from the joint-consultation, the normal Panel/Appellate Body proceedings, the Compliance Panel and the Arbitration Panel. This analysis aims to provide the basis to examine the indirect approach taken by Taiwan in dealing trade disputes with China. In particular, it clarifies what third party participatory rights Taiwan may enjoy if it intervenes as a third party. Following the analysis above, this subsection examines Taiwan’s third party participation in complaints brought about by or against China. As noted in the introductory section, Taiwan intervenes as a third party in each complaint brought about against China. Besides, Taiwan also participates as a third party in *US – Steel Safeguards*, where China is among the complaining members.⁷¹ Through these case studies, this subsection explores and ascertains whether Taiwan’s position is in line with or opposite to that of China. Before commencing the examination of Taiwan’s third

⁷⁰ *Ibid.*

⁷¹ *US – Steel Safeguards* is the only complaint where China has already gone through the panel/Appellate Body proceedings. The other complaint, *United States – Definitive Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China (US – Coated Free Sheet Papers)*, relates to potential parallel anti-dumping and anti-subsidy measures imposed upon Chinese products. A Panel was established on 20 January 2009.

party participation in these complaints related to China, it is requisite to make clear the benchmark for this evaluation. As third parties are entitled to receive the first submission of parties to the dispute and to present their submissions in the first substantial meeting, a third party may have the chance to influence legal reasoning or decision-making of the WTO Panel/ appellate body. From a legal perspective, to evaluate the performance of members' third party participation would mean the extent to which their arguments are taken into account by the WTO Panel/Appellate Body. It is thus practical and apt to analyze Taiwan's arguments presented in these proceedings, and to examine the relevance of these arguments to legal reasoning and decision-making of the WTO Panel/Appellate Body. In practice, the Panel will summarize third party submissions and their oral statements in the first meeting. Besides, relevant arguments of third parties may also be reflected in the Panel report, as appropriate. In light of these, the summary made by the Panel provides a good basis for an overall evaluation of the performance of Taiwan as a third party in these complaints. Based on these reports, the relevance of Taiwan's arguments to the Panel/Appellate Body's reasoning can be examined.

1. TAIWAN'S THIRD PARTY PARTICIPATION IN THE COMPLAINT BROUGHT ABOUT BY CHINA (*US – STEEL SAFEGUARDS*)

On 20 March 2002, the United States imposed definite safeguard measures on certain steel products of various origins, China and Taiwan included. This initiative subsequently brought about a series of safeguard measures by other WTO members. China took safeguard measures to which Taiwanese steel products were also subject on 19 November 2002. China, among others, referred to the WTO Dispute Settlement Mechanism and a single panel was established to examine this dispute. At the same time, Taiwan requested for consultations with the United States under Article 4 of the DSU. Apart from this, Taiwan also intervened as a third party in the complaint brought about by China against the United States. On the face of it, Taiwan took the same position as China since Taiwan argued against the United States for the WTO-inconsistency of definite safeguard measures adopted by the United States. Nevertheless, those WTO rules of safeguard measures on which Taiwan stressed

might be seen as a gesture to challenge indirectly the WTO-compatibility of Chinese safeguard measures.⁷²

In this dispute, China structures its complaint mainly based on the following claims: unforeseen developments; the definition of domestic industry; increased imports; serious injury or threat of serious injury; causation; and parallelism. As a third party participant in this dispute, Taiwan argues against the United States for the WTO-inconsistency of the alleged safeguard measures by addressing the issues of ‘unforeseen developments’, the definition of ‘domestic industry’ and ‘serious injury’, and causation. The definition of ‘serious injury’ relates to the proportionality of the safeguard measures adopted by the United States. However, relying upon judicial economy, the Panel focuses on the requirements of unforeseen development, increased imports, causation and parallelism. Other claims have not been examined. In light of these, I will firstly examine those issues reviewed by the Panel in its Panel report on which both Taiwan and China address, namely, unforeseen developments and causation. In so doing, I will try to ascertain whether and how China and Taiwan might have ‘cooperated’ in this complaint against the United States. While the Panel does not deal with the remaining arguments advanced by Taiwan, they will be nevertheless examined with a view to delineating their implication to Chinese domestic safeguard measures. As noted above, China and Taiwan’s arguments overlap with regard to the issue of unforeseen development and causation. Taiwan also touches upon such issues as the definition of ‘domestic industry’ and ‘serious injury’. Therefore, I will firstly examine the overlapping argument advanced by Taiwan and China, namely, the requirements of ‘unforeseen developments’ and ‘causation’. After this, I will examine Taiwan’s remaining arguments, namely, the definition of ‘domestic industry’ and ‘serious injury’.

⁷² See subsection B *infra*, esp. text to n. 143, ff.

a. Overlapping Arguments: the Requirements of ‘Unforeseen Developments’ and ‘Causation’

i. ‘Unforeseen Developments’

Regarding ‘unforeseen developments,’ China firstly argues that, as the Second Supplementary Report by the International Trade Commission of the United States (the USITC) was finished after its determination of the imposition of safeguard measures, this Supplementary Report cannot constitute a basis for its demonstration of ‘unforeseen developments.’ Besides, China argues that even if this Supplementary Report can be accepted as a basis to justify the decision of the USITC, it does not provide an adequate and reasoned demonstration of ‘unforeseen developments.’⁷³ China further contends that, while the legal standard to determine what constitutes an unforeseen development is relatively subjective, the unexpectedness of a development is something that can be demonstrated.⁷⁴ Consequently, the USITC has to demonstrate this unexpectedness in an adequate and reasoned manner. In rejecting the claim of the United States, China argues that neither the Asian and Russian crises, nor the continued strength of the US market and appreciation of US currency constitutes an unforeseen development. Asian and Russian crises were macroeconomic events affecting all sectors of domestic industry, a direct relationship between these events and increased importation in steel sector did not exist.⁷⁵ Moreover, it is logical that the currency of a country with a robust economy and low inflation will appreciate against other currencies. In view of the strong economy and low inflation of the United States in 1990s, it is thus groundless to claim the strong currency to be unexpected.⁷⁶

Furthermore, China argues that the language of ‘as a result of,’ as set out in Article XIX:1(a) of GATT 1994, indicates a ‘causal link’ between the unforeseen developments and the increased imports allegedly causing or threatening to cause serious injury to domestic industry.⁷⁷ Particularly, the requirements to impose

⁷³ Panel Reports, *US – Steel Safeguards*, paras. 7.96, 153& 155.

⁷⁴ Panel Reports, *US – Steel Safeguards*, para. 7.101.

⁷⁵ Panel Reports, *US – Steel Safeguards*, paras. 7.116, 183.

⁷⁶ Panel Reports, *US – Steel Safeguards*, para. 7.112.

⁷⁷ Panel Reports, *US – Steel Safeguards*, para. 7.118.

safeguard measures should be situated in a ‘logical continuum.’ This logical continuum begins with a tariff concession and/or the acceptance of a WTO obligation, followed by the unforeseen developments that result in the ‘such increased imports’ and the ‘under such conditions’ referred to Article XIX of the GATT 1994 and Article 2.1 of the Agreement on Safeguards (the ASG). The increased imports then in turn cause the ‘serious injury’ in terms of Article 4.1(a) of the ASG.⁷⁸ Importantly; the ‘logical continuum’ should exist for each of the products subject to safeguard measures.⁷⁹

In respect of this issue, Taiwan argues that the requirement set out by Article XIX:1(a) of GATT 1994 should be read together with the three conditions laid down by Article 2.1 of the ASG. In other words, the requirement of ‘unforeseen developments’ should be examined together with the three conditions of ‘increased imports’, ‘serious injury or threat of serious injury’ and ‘causation.’ Only the requirement and conditions set out by these two provisions are demonstrated together, in particular in the same report, can it be possible to establish the logical connection dictated by Article XIX:1(a) of the GATT 1994. Precisely, the increased imports that cause serious injury or threat to cause serious injury to domestic industry should be a result of the unforeseen developments. This logical connection also applies to the acceptance of the WTO obligations, including tariff concessions incurred by the United States under the GATT 1994. In addition, the logical connection dictated by Article XIX:1(a) of the GATT 1994 cannot be reduced into ‘a sequential relationship,’ as asserted by the United States. Taiwan further argues that a merely macroeconomic factor cannot be regarded as an unforeseen development. Specifically, the Russian crisis cannot be qualified as an unforeseen development, since Russian exports, before the conclusion of the Uruguay Round in 1994, the point for determining a development unforeseen or not, into the United States were much higher than thereafter.⁸⁰

⁷⁸ Panel Reports, *US – Steel Safeguards*, para. 7.121.

⁷⁹ Panel Reports, *US – Steel Safeguards*, para. 7.122.

⁸⁰ Panel Reports, *US – Steel Safeguards*, para. 8.12.

The arguments presented by China and Taiwan relating to ‘unforeseen developments’ are mostly accepted by the Panel. The Panel firstly recognizes the Asian and Russian crises as unforeseen developments⁸¹ and admits the Second Supplementary Report by the USITC as a basis to demonstrate the unexpectedness and thus to justify the determination for the imposition of safeguard measures, given that it was issued before the application of safeguard measures.⁸² The Panel nevertheless finds in the end that, even with two reports read together, an adequate and reasoned explanation on the ‘unforeseen developments’ is not provided. As held by the Panel, although the legal standard for the determination of an unforeseen development is subjective, this subjectivity does not discharge the obligation for importing member to demonstrate the unexpectedness of a development through a reasoned and adequate explanation. Besides, this demonstration should be conducted according to each specific product subject to safeguard measures, and should be duly reflected in the published reports of competent authorities.⁸³ The Panel further addresses the logical connection dictated by Article XIX:1(a) of the GATT 1994. ‘As a result of’ is interpreted as a logical connection to be demonstrated in the reports of competent authorities, for the imposition of safeguard measures, between the first two clauses of that Article, namely, between

the elements of the first clause of Article XIX:1(a) – ‘as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions’ –

and the conditions set forth in the second clause of that Article – ‘increased imports causing serious injury.’⁸⁴

The Panel then refers to the USITC report. It finds that the initial report of the USITC does not address ‘unforeseen developments’ *per se*, and that, while the Second Supplementary Report refers to the Asian and Russian Crises as unforeseen developments, the logical connection between these crises and increased imports in respect of specific steel products has not been demonstrated.⁸⁵ In view of these, the

⁸¹ Panel Reports, *US – Steel Safeguards*, paras. 10.68~101.

⁸² Panel Reports, *US – Steel Safeguards*, paras. 10.47~58.

⁸³ Panel Reports, *US – Steel Safeguards*, paras. 10.41~45.

⁸⁴ Panel Reports, *US – Steel Safeguards*, paras. 10.104.

⁸⁵ Panel Reports, *US – Steel Safeguards*, paras. 10.117~126.

Panel therefore, finds against the United States on the claim of ‘unforeseen developments’

In relation to ‘unforeseen developments’, one may say that Taiwan argues concurrently with China against the United States. In other words, Taiwan stands in line with China in this regard. Firstly, they argue that the requirement of ‘unforeseen developments’ is not in isolation from other conditions, as set out in Article 2.1 of the ASG. They both emphasize a certain form of ‘causal link’ between the unforeseen developments and increased imports should be demonstrated in fact in the USITC report, be it ‘logical connection’ or ‘logical continuum.’ Besides, the requirement of ‘unforeseen developments’ cannot be met with a mere reference to a macroeconomic event. A specific link between the unforeseen development and a particular sector of domestic industries should be delineated. Based on this, they reject the Russian crisis as an unforeseen development upon which the USITC can rely, since a direct relationship between the Russian crisis and increased imports in steel industry has not been demonstrated in the USITC report. As illustrated above, while the Panel accepts the Asian and Russian crises as unforeseen developments, it nevertheless agrees mostly with China and Taiwan on the relationship between the requirement of ‘unforeseen developments and the three conditions set out in Article 2.1 of the ASG. It seems that Taiwan successfully cooperates with China on this claim.

ii ‘Causation’

Regarding the causation issue, China firstly refers to the Appellate Body jurisprudence on *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US – Wheat Gluten)*,⁸⁶ where the causal link between increased imports and serious injury is defined as ‘a genuine and substantial relationship of cause and effect.’ Based on this, China argues that the competent authority should, as a first step, establish the coincidence between increased imports and serious injury, and then conduct the non-attribution ‘explicitly and expressly through a reasoned, clear, unambiguous and straightforward explanation’.⁸⁷ In case

⁸⁶ Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717.

⁸⁷ Panel Reports, *US – Steel Safeguards*, para. 7.832

the coincidence between increased imports and serious injury cannot be established, the competent authority's determination of the existence of a causal link should be justified by a compelling analysis. Explanation in relation to the existence of causal link, regardless of the absence of the coincidence, should be provided.⁸⁸ In addressing the requirement of non-attribution, China argues that the competent authority should separate and distinguish the injurious effects caused by increased imports from those caused by other factors. Only when those injurious effects caused by other factors are determined can a causal link between increased imports and serious injury be truly established, since by non-attribution, the injury caused by increased imports to a domestic injury has been clarified.⁸⁹ Relying upon the jurisprudence of the Appellate Body, China further argues that, whether the relationship of cause and effect between increased imports and serious injury is genuine and substantial should be determined by the injurious effects caused by increased imports in relation to the 'interplay', namely, the collective weight of all other factors, instead of each single other factor.⁹⁰

In respect of causation, Taiwan firstly refers to Article 4.2(b) of the ASG, which speaks of two requirements: the existence of a causal link and non-attribution. According to Taiwan, the United States has firstly to establish a causal link between increased imports and serious injury; and secondly to exclude injury caused by factors other than the increased imports. The 'substantial cause' test adopted by the United States in the alleged measures is not WTO-compatible since it cannot establish a casual link as dictated by Article 4.2(b) of the ASG. According to Taiwan, while the relationship of cause and effect of increased imports as compared to one single other factor may be substantial; it is not when the increased imports are compared to other factors as a whole. Taiwan also emphasizes that the United States fails to separate and distinguish other factors causing injury to its domestic industry and thus violates its obligation under the ASG.⁹¹

⁸⁸ Panel Reports, *US – Steel Safeguards*, para. 7.925.

⁸⁹ Panel Reports, *US – Steel Safeguards*, paras. 7.975,1039.

⁹⁰ Panel Reports, *US – Steel Safeguards*, para. 7.1051~1056, *see also* paras. 7.1050~7.1058, esp. para. 7.1053.

⁹¹ Panel Reports, *US – Steel Safeguards*, para. 8.14.

In response to the arguments of China and Taiwan, the Panel takes as its starting point the reference to the jurisprudence of the Appellate Body in *US – Wheat Gluten*, where the Appellate Body concludes that ‘the causal link’ effectively requires a ‘genuine and substantial relationship between cause and effect’. The Panel nevertheless declares that this holding by the Appellate Body offers little help, since major controversies arise as to what it entails. The Panel then states that three elements have to be clarified when determining the existence of a causal link: (a) the standard or threshold for the determination of the existence of a genuine and substantial relationship between cause and effect; (b) the way in which a causal link to be established; and (c) how non-attribution to be performed and its relation with the overall demonstration of a causal link.⁹²

Relying again on *US – Wheat Gluten*, the Panel concludes that the establishment of ‘the causal link’, in terms of Article 4.2(b) of the ASG, does not necessarily prevent other factors from contributing to the injury of a domestic industry. In supporting its finding, the Panel also refers to *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US – Lamb)*, where the Appellate Body reiterates that the ASG does not require the increased imports alone to be capable of causing, or threatening to cause, serious injury.⁹³ While the Panel rejects China and Taiwan’s arguments that the factors other than increased imports should not be taken into account for the establishment of the casual link, it nevertheless agrees with their view that the competent authorities should separate, distinguish and assess the injurious effects of factors other than increased imports. The Panel also confirms their view on the collective weight of injurious effects caused by other factors.⁹⁴

According to the Panel, although the ‘substantial cause test’ does not, in and of itself violate the obligation under Article 4.2(b) of the ASG, the competent authorities have to establish explicitly that ‘the effect of the other factors on the situation of the

⁹² Panel Reports, *US – Steel Safeguards*, para. 10.287

⁹³ Panel Reports, *US – Steel Safeguards*, para. 10.288~290.

⁹⁴ Panel Reports, *US – Steel Safeguards*, para. 10.332.

domestic industry had not been attributed to the increased imports.⁹⁵ This should be supported by a ‘reasoned and adequate explanation.’ The Panel further notes that since the purpose of the non-attribution is to separate, distinguish and assess the injurious effects of factors other than the increased imports, the exercise of non-attribution calls for an overall assessment of those other factors. As the Panel puts it, ‘Article 4.2(b) is not concerned with the relative importance of individual factors as between themselves or as compared with increased imports.’⁹⁶ Rather, Article 2 and 4 of the ASG are concerned with the injurious effects of increased imports as distinct from the injurious effect of *all* other factors.⁹⁷ The Panel then applies this approach to those products subject to safeguard measures and finds most of them inconsistent with Article 4.2(b), as the United States, at the first place, failed to separate, separate, distinguish and assess the nature and extent of the injurious effects of other factors so that these injurious effect was not attributed to increased imports. In addition, the United States failed to provide a reasoned and adequate explanation on the existence of a ‘causal link’ between increased imports and serious injury to its relevant domestic producers.⁹⁸

Regarding the issue of causation, Taiwan takes the same position as China does on major points. They actually refer to almost the same authorities. They identify two requirements as set out in Article 4.2(b) of the ASG in relation to a causal link between increased imports and serious injury to a domestic industry: the establishment of a causal link; and non-attribution. They emphasize the importance of non-attribution and maintain that the injurious effects of factors other than increased imports should be separated, distinguished and assessed. According to them, what is at stake, when performing a non-attribution analysis, is the collective weight of all other factors, instead of an individual factor. Whether a genuine and substantial relationship of cause and effect can be established depends on the injurious effects

⁹⁵ Panel Reports, *US – Steel Safeguards*, para. 10.334.

⁹⁶ Panel Reports, *US – Steel Safeguards*, para. 10.332.

⁹⁷ *Ibid* (emphasis added).

⁹⁸ Regarding China’s claim based on causation, The Panel finds against the United States on CCFRS, tin mill, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar. Only stainless steel rod, stainless steel wire are found to be provided with a adequate and reasoned explanation and thus be consistent with Article 4.2(b) of the ASG. *See*, Panel report, *US – Steel Safeguards*, para. 12.2 (WT/DS252/R).

caused by increased imports in relation to those caused by all other factors a whole. This collective weight argument is of central importance to the Panel's finding on causation.

b. Remaining Arguments: Definition of 'Domestic Industry' and 'Serious Injury'

Apart from the overlapping arguments noted above, Taiwan also briefly comments on the definition of 'domestic industry' and 'serious injury' in the USITC reports. Nevertheless, the Panel puts aside these issues by exercising judicial economy. Therefore, I will briefly summarize Taiwan arguments in these two issues with the aim to exploring the relevance of these arguments to China's safeguard measures against Taiwanese steel products. In other words, these arguments are used to challenge the WTO-inconsistency of the steel safeguard measures adopted both by the United States and by China.

According to Taiwan, domestic industry is defined, in Article 4.1(c) of the ASG as 'producers as a whole' or those whose collective output of the like or directly competitively products account for 'a major proportion' of the total domestic production. Besides, as the determination of domestic industry is among 'all pertinent issues of fact and law', as set out in Article 3.1 of ASG, an adequate and reasoned finding on this issue should be included in the USITC report. Since the USITC failed to provide an adequate and reasoned finding on the definition of domestic industry, it breached its obligation under ASG.⁹⁹

With regard to 'serious injury', Taiwan argues that 'serious injury' in terms of Article 5.1 of the ASG must be interpreted as having the same bearing as other provisions of this agreement. Article 4.2 of ASG is telling in this regard. On the one hand, the factors listed in Article 4.2(a) should also be examined when determining the extent necessary to remedy the serious injury; on the other hand, the non-attribution requirement set out by Article 4.2(b) also applies.¹⁰⁰ In other words, Taiwan argues that, as dictated by Article 5.1 of the ASG, the competent authorities to

⁹⁹ Panel Report, *US – Steel Safeguards*, para. 8.13

¹⁰⁰ Panel Report, *US – Steel Safeguards*, para. 8.15.

apply safeguard measures only to the extent that they address serious injury attributed to increased imports, not all serious injury.

As the Panel does not deal with these two issues, it is difficult to examine the relevance of these arguments to the Panel's reasoning. One might also argue that these arguments are irrelevant to the Panel's decision since the Panel does not deal with these issues. However, as will be shown in Section III, while the Panel on *US – Steel Safeguards* does not examine these arguments, they are of great significance of China's safeguard measures against Taiwanese steel products. In other words, China's safeguard measures against Taiwanese steel products can be challenged based on its definition of 'domestic industry' and 'serious injury'.

2. TAIWAN'S THIRD PARTY PARTICIPATION IN COMPLAINTS BROUGHT ABOUT AGAINST CHINA

a. *China – Integrated Circuits*

After the United States requested for consultations with China on the value-added tax on integrated circuits,¹⁰¹ Taiwan issued a joint-consultation request. In the communication, Taiwan stated that, being one of China's major integrated circuit suppliers with the total value of exports about US\$ 1.8 billion in 2003 it had 'substantial interest' as well as 'systemic interest' in this matter. Based on these interests, Taiwan thus duly requested to be joined in the consultations.¹⁰² In the meantime, the European Communities,¹⁰³ Japan¹⁰⁴ and Mexico¹⁰⁵ had also requested to be made part of this consultation. In a communication dated on 28 April 2004, China notified the DSB that it had accepted the requests of the European Communities, Japan and Mexico to join the consultations without mentioning its refusal for Taiwan to join the consultation.¹⁰⁶ Nevertheless, since the acceptance of requests for joint-consultation had not included Taiwan, Taiwan request was thus rejected.

¹⁰¹ WTO Document, WT/DS309/1 (23 March 2004).

¹⁰² WTO Document, WT/DS309/5 (5 April 2004).

¹⁰³ WTO Document, WT/DS309/2 (30 March 2004).

¹⁰⁴ WTO Document, WT/DS309/3 (1 April 2004).

¹⁰⁵ WTO Document, WT/DS309/4 (5 April 2004).

¹⁰⁶ WTO Document, WT/DS309/6 (28 April 2004).

As provided in Article 4.11 of the DSU, a Member other than the consulting parties can, within 10 days after the circulations of the requests for consultations, request to be made part of the consultations if it considers that it has ‘substantial trade interests’ in these consultations. This request for joint consultations can be rejected if the Member to which the request for consultations was addressed considers that the claimed ‘substantial trade interest’¹⁰⁷ does not exist. The only requirement for joint consultation is that the requesting Member should have substantial trade interests. Taiwan, citing the total values of exports and proving itself as one of the major suppliers in these products, indicated its substantial trade interests in this matter.

As clarified by the Chairman of the DSB in its communication, dated on 17 July 2000, ‘pursuant to the wording of Article 4.11, third-party Members may participate in such consultations only with the approval (acceptance) of the defending Member.’¹⁰⁸ Consequently, although China’s denial for Taiwan’s request to be joined in the consultation was not justifiable, no remedy is offered by the DSU on this point. This is based on the rationale that the requesting member can, in any event, refer to the consultation provisions to request their own consultations.¹⁰⁹ Further, while the DSU sets a lower threshold for third party participation in the panel proceedings, Taiwan did not benefit from this lower threshold.¹¹⁰ Since this case was later settled with a mutually satisfactory agreement,¹¹¹ and consequently no panel has been

¹⁰⁷ The DSU lays down different requirements for joint-consultation and third-party intervention in the panel proceeding. A member wishing to request to be joined in the consultation should have ‘substantial trade interest’, while third-party intervention in the panel proceeding needs only ‘substantial interest’, which ‘systemic interest’ may well satisfy this requirement. However, it is also argued by some member ‘substantial trade interest’ should not be read in purely commercial terms. For example, Canada argues in *US – Section 306 of the Trade Act of 1976 and Amendments Thereto (US – Section 306 Trade Act)*, substantial trade interest should not be interpreted as ‘limited to an immediate commercial interest’. Rather, it should be ‘wide enough to encompass both commercial and systemic interest’. WT/DS200/8 (27 June 2000). Besides, in rebutting the U.S for the refusal to be joined in consultation, Japan argues that substantial trade interest also includes interest ‘of systemic nature.’ WT/DS200/12 (3 August 2000).

¹⁰⁸ This Chairman’s communication addresses Japan’s rebuttal for refusal of the US for its request for joint-consultation, WT/DS200/13 (3 August 2000).

¹⁰⁹ Taiwan could certainly request for consultation independently under Article 4.3 of the DSU. However, Taiwan seemed to take a cautious approach and chose not to prompt to it.

¹¹⁰ In practice, there is virtually no barrier for the third party participation in the panel proceeding since members may simply reserve their rights to intervene as a third party at the DSB meeting. Parties to the dispute are not in a position to object to it.

¹¹¹ WTO Document, WT/DS309/7 (6 October 2004).

established, Taiwan was not able to take advantage of the lower bar of the third party participation in the panel proceedings.

b. *China – Auto Parts*

While Taiwan's first initiative to avail itself of the dispute settlement mechanism in the WTO to deal with potential trade disputes with China seemed not successful, Taiwan have intervened as a third party in the *China – Auto Parts* case,¹¹² brought about against China by the European Communities, the United States and Canada. Pursuant to the requests of these three members, a single panel was established in accordance with Article 9 of DSU. Compared to the request for joint-consultations, the DSU provides more detailed regulation and fuller protection of third party rights: Taiwan is entitled to receive the submissions of the parties to this dispute, to make submissions to panel, and to be heard in the first meeting of the panel proceedings.

Nevertheless, to the author's surprise, Taiwan neither submitted its third-party submission nor made any oral statement during the first substantial meeting of the Panel proceedings. The only reference of 'Chinese Taipei' in the Panel report on *China – Auto Parts* is that Chinese Taipei has reserved her rights to participate in the Panel proceedings as a third party.¹¹³ In the Appellate Body Report, it is merely noted that the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu notified its intention to attend the oral hearing as a third participant.¹¹⁴

Then one may wonder why Taiwan decided to intervene as a third party in the beginning but it chose not to exercise its third-party rights in the end. According to an informal communication between the author and the Office of Trade Negotiation in MOEA on 1-2 November 2008, it is stated that the vice-minister of the MOEA decided in a meeting not to submit any third party submission or to make any oral statement, but simply act as passive observer instead.¹¹⁵ Nonetheless, this reply

¹¹² Panel Report on *China – Measures Affecting on Automobile Parts (China – Auto Parts)*, WT/DS339/R, WT/DS/DS340/R, WT/DS342/R (18 June 2008), para. 1.12.

¹¹³ *Ibid.*

¹¹⁴ Appellate Body Report, *China – Measures Affecting the Imports of Automobile Parts (China – Auto Parts)*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, 15 December 2008), para. 8.

¹¹⁵ Statement of Cheng-chi Chen, Trade Negotiation Office, MOEA (Personal email correspondence, 2 November 2008).

answers nothing. Several guesses may explain Taiwan's behaviour. It may be well because Taiwan has no significant economic interests in this dispute. It may also be because the legal arguments presented by parties and third parties have sufficiently supported the position of Taiwan. It may be also be to political considerations. It is nevertheless difficult to have a clear answer on Taiwan's silence in this dispute.

c. Other Complaints against China

Apart from *China – Auto Parts*, Taiwan has so far intervened as a third party in three other complaints brought about against China. The Panel on *China – Trading Rights and Distribution Service* were newly composed on 27 March 2008.¹¹⁶ The Panel Report on *China – Intellectual Property Rights* was released on 26 January 2009.¹¹⁷ In contrast to its silence in *China – Auto Parts*, Taiwan did submit its third party submission and make an oral statement in *China – Intellectual Property Rights*. In this case, Taiwan argues against the WTO-compatibility of China's regulatory regime on intellectual property rights.

In its submission, Taiwan firstly emphasizes that the TRIPS Agreement lays down a minimum standard of intellectual property rights protection, and then points to the Panel's function to review domestic legislation. Taiwan refers to *US – Section 301 Trade Act* for the review of *Chinese Copyright Law* which should not be interpreted 'as such'. Instead, the Panel should establish the meaning of Chinese domestic law in terms of factual elements. Nevertheless, this should be done solely to determine whether China violates its WTO obligations under the TRIPS Agreement.¹¹⁸ After briefly elaborating on the rule of interpretation and burden of proof,¹¹⁹ Taiwan then turns to relevant articles in this instant case, namely, Article 61 and 46 of the TRIPS Agreement. According to Taiwan, a numerical threshold, as laid down by the *Judicial*

¹¹⁶ WTO Document, WT/DS363/6 (28 March 2008).

¹¹⁷ Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – Intellectual Property Rights)*, WT/DS362/R (26 January 2009). The Panel on *China – Intellectual Property Rights* deals mainly three claims advanced by the United States: content review of China's Copyright Law; customs measures; and the criminal threshold. The Panel finds against China on the claim of content review of China's Copyright Law, but nevertheless in favor of China on the other two claims.

¹¹⁸ Third Party Submission of Taiwan in *China – Intellectual Property Rights* (26 March 2008).

¹¹⁹ *Ibid*, paras. 8-15.

Interpretation of the Supreme People Court may not capture all wilful infringement on a commercial scale, and cannot meet the minimum standard as dictated by Article 61.¹²⁰ Regarding Article 46 of the TRIPS Agreement, Taiwan suggests a two-step approach to examine the WTO-compatibility of *China's Copyright Law*.

Taiwan finally argues with China by maintaining that works before passing the content review cannot be distributed and can thus not be protected by *China's Copyright Law*. In case of the passage of content review with revised version, the original version of works does not enjoy the intellectual property rights protection. An intellectual property rights protection that is conditional on the passage of content review is WTO-inconsistent. Taiwan further points to the contradictory statement of Chinese first submission. On the one hand, China claims that only those works that fail to pass the content review are not protected under China's Copyright Law; on the other hand, China claims that works are under intellectual property protection notwithstanding the fact that they are under the process of content review.¹²¹ Taiwan argues that these two statements obviously contradict with each other.

In terms of the finding of the Panel, Taiwan's arguments are only valid in respect of the content review of *China's Copyright Law*. Besides, since Taiwan's argument relating to content review does not largely differ from arguments of the complainant and other third parties, it would be difficult to ascertain the relevance of Taiwan's argument in this regard. Further, while arguing that the threshold prescribed by *China's Criminal Law* and judicial interpretations issued by Supreme People's Court can not capture all category of wilful trademark counterfeiting and copyright piracy 'on a commercial scale', this argument seems not to be supported by the Panel.¹²² Nonetheless, Taiwan's third party participation approach takes a step forward as, in this case, Taiwan takes the opposition against China and argues with China as a third

¹²⁰ *Ibid*, para. 18.

¹²¹ *Ibid*, para. 33.

¹²² Panel Report, *China – Intellectual Property Rights*, para. 7.492. Taiwan lists multiple factors of local circumstance to be taken into consideration in the determination of willful trademark counterfeit and copyright piracy that should be decided on a case-by case basis. The factors identified are nature of the infringed rights, value and price in the market, motive and purpose of act, method and scale of infringement, damage caused, profit gained, cultural background, advancement of modern technology and living standards.

participant. By submitting its third party submission and making the oral statement, Taiwan has taken better advantage of the procedural rights provided by the DSU. It can thus be argued that, regardless the political constraint, trade disputes between Taiwan and China has gradually undergone a process of legalization and judicialization.

C. SHORT CONCLUSION

This section deals with the confrontation between Taiwan and China in the WTO Dispute Settlement Mechanism. I handle this subject through the lens of third party participation. This section begins with the objectives of third party participation in the dispute settlement proceedings and the existent WTO law and practice in this respect. I then examine Taiwan's third party participation in complaint brought about by China, namely, *US – Steel Safeguards*. I try to compare the argument advanced both by Taiwan and by China and to ascertain the relevance of these arguments to the Panel's decision. I also examine Taiwan's third party participation in complaints brought about against China, covering the consultation phase and the panel proceedings.

In the *US – Steel Safeguards*, I examine arguments advanced by Taiwan and China, some of which overlap. In respect of these overlapping arguments, Taiwan stands in line with China against the United States. It may well be said that Taiwan and China cooperate in arguing against the US in a successful manner since their arguments are mostly accepted by the Panel. I also examine Taiwan's remaining arguments that China does not deal with. The purpose of this is to explore the relevance of these arguments in the safeguard measures adopted by China against Taiwanese steel products.

In respect of Taiwan third party participation in complaints brought about against China, it is difficult to evaluate its performance so far. A steadily cautious and practical attitude may be registered. With China's refusal for the request of joint-consultation in *China – Integrated Circuits*, Taiwan directly intervened as a third party in these three complaints without requesting for joint-consultation. Nonetheless,

Taiwan's silence in the *China – Auto Parts* is confusing. In its first third party participation in complaint brought about against China, Taiwan neither submitted a third party submission nor made any oral statement during the panel proceedings. One may wonder whether political consideration prevails. In the subsequently *China – Intellectual Property Rights* case, Taiwan seems more confident and more comfortable in arguing with China, even indirectly through third party intervention.

On the other hand, Taiwan's third party participation in complaints against China also points to the importance of procedural protection. As the DSU provide almost nothing concerning the acceptance/refusal of the request for joint-consultation, members can thus freely exercise their discretion in deciding acceptance/refusal of the joint-consultation request. By contrast, as members can easily reserve their rights to intervene as a third party, to which the parties to the dispute have no discretionary power to object, rights of other members are better protected in the panel proceedings. In light of the security and predictability of this multilateral trading system, a set of clearly defined rules contribute to these two objectives. Consequently, an enhanced third-party right, both in terms of the consultation phase and of the Panel/Appellate Body phase, is desirable on the condition it does not bring about undue delay to the dispute settlement procedures.

Lastly, it is also feasible to explore the potential approach that Taiwan will take in light of the Taiwan – China Agreements on air transport, sea transport, postal service and food safety. As noted in Chapter VI, Taiwan and China signed four agreements on 4 November 2008 that lead to direct transportation between Taiwan and China. Apart from these direct transport agreement, Taiwan and China also reach an agreement on the cooperation on food safety. In addition, prior to these agreements, Taiwan and China also signed an agreement regarding Chinese tourist travelling into Taiwan. In these agreements, an identical provision governing dispute resolution is included. As provided, any dispute arising from the application of these agreements should be resolved by prompt negotiation between the Parties.¹²³The legal text offers

¹²³ See, e.g., Cross-Strait Agreements on Chinese Tourists Travelling to Taiwan, Art. 10; Cross-Strait Air Transport Agreement, Art. 11; Cross-Strait Sea Transport Agreement, Art. 12; Cross-Strait Postal Service Agreement, Art. 12; and Cross-Strait Food Safety Agreement, Art. 7.

no hint on how to conduct this prompt negotiation. In case of the absence of a satisfactory agreement, just as the instant milk powdered case, does this provision prevents these two members from referring to the WTO Dispute Settlement Mechanism. As far as the raw text is concerned, it is difficult to justify this claim. Nonetheless, the inclusion of 'prompt negotiation' without any strengthened or judicialized dispute resolution mechanism suggestion the parties' intent to reach a resolution with mutual agreement. This sharply decreases the possibility for Taiwan to go for a direct complaint against China, especially in light of the existing political climate. Nonetheless, one may be also safe to say that the indirect third party participation approach will still be a good alternative for the confrontation between Taiwan and China in the WTO Dispute Settlement Mechanism. Taiwan may continue to opt for this approach.

III. TRADE DISPUTES BETWEEN CHINA AND TAIWAN AT THE NATIONAL LEVEL

This section focuses on foreign trade measures domestically taken against each other by Taiwan and China. These measures are mainly trade defence measures in nature, and only very few of them have been subject to administrative review or judicial review. The proceedings normally end up with the final decisions of competent authorities. This section examines these trade defence measures in light of their conformity with the WTO rules, and explores the (limited) role of administrative/judicial review in the external trade measures.

As will be illustrated below, the effectiveness of this administrative/judicial review will be undermined in the absence of a constitutional understanding of the role of courts in foreign trade relations. Cases examined in this section illustrates the insufficiency and weakness of an administrative/judicial review that limits itself to administrative principle without taking due account of the importance of independent and impartial judicial review and rights and interests of individual and enterprises in foreign trade. For example, in a case where the administrative review repeals the decision of Chinese trade defence authorities to imposed anti-dumping duties on Taiwanese products, the decision of the administrative review is not made public available. This is an illustrative example for China's failure to fulfil its WTO

obligation to provide an independent and impartial (judicial) review. Moreover, in those cases relating to Taiwan's administrative review referred to this section, the Administrative Review Committee dismisses them mainly on procedural grounds such as the scope of its jurisdiction and the standing of the petitioner. This again underlines the importance of a strengthened judicial protection in foreign trade relations.

This section will cover domestic regulatory regime of China and Taiwan. The analysis will start with an introduction of the relevant regulatory framework, followed by an analysis of the existent practice through a case study. Regarding China, as far as trade defence measures are concerned, anti-dumping measures are those China relies mostly upon. Apart from anti-dumping measures, China imposed one safeguard measure on certain steel products in 2002. In respect of Taiwan, anti-dumping measures are also the usual practice for its trade defence measures. Apart from anti-dumping investigations, Taiwan self-initiated one product-specific safeguard investigation against Chinese towelling products under Article 16 of Chinese Accession Protocol. As this Chapter aims to examine trade dispute resolution between China and Taiwan under both the WTO framework and domestic trade regulatory regime, and to explore the interrelation between them, the parallel steel trade safeguard measures adopted by China thus offer a good example. With regard to Taiwan's trade defence measures against Chinese products, I focus on the anti-dumping and safeguard investigations against Chinese towelling products based on two reasons. Firstly, these two investigations are the first investigations initiated by Taiwan. Besides, they touch upon the special safeguard measures provided for by Article 16 of China's Accession Protocol and paragraph 242 of China's Working Party Report. Therefore, they provide a good basis for exploring the impact of China's accession to the WTO upon Taiwan's trade regulatory regime as well as Taiwan's response.

Therefore, this section will focus on China's safeguard measure against Taiwanese steel products. Special attention will be paid to the relevance and implication of China and Taiwan's arguments in *US – Steel Safeguards* in the WTO

Dispute Settlement Mechanism to this domestic trade defence measure. Another focus is Taiwan's un-adopted product-specific safeguard measures against Chinese towelling products. The anti-dumping measure that Taiwan opts for will also be dealt with. As China started its trade defence investigation through an anti-dumping investigation against Taiwanese steel products, and subsequently withheld the imposition of anti-dumping measure owing to a parallel safeguard measures investigation against the same steel industry, albeit of different scope and coverage, the analysis of Chinese trade defence measures against Taiwanese products will start with this anti-dumping investigation. On the contrary, Taiwan firstly adopted its trade defence measures against Chinese towelling products through safeguard measures investigation based on petitions, and self-initiated an anti-dumping investigation against Chinese towelling products, analysis on Taiwan's trade measures against Chinese products will thus begin with safeguard measures. Lastly, as noted above, this section follows the same structure: it starts with an outline of the general regulatory framework, and then examines the specific trade defence measures concerned.

Before proceeding with the analysis, it is worth briefly noting the legal status of the WTO Agreement in Chinese legal system¹²⁴ which helps to clarify the relevance of the WTO Agreement in administrative and judicial proceedings. Following the pattern taken in Chapter VI, I focus on direct effects and legal hierarchy by examining relevant constitutional provisions and national legislation. A helpful starting point for the examination is China's statement on the ratification procedure and implementing approach of the WTO Agreement, as included in the Working Party Report:

The representative of China stated that China had been consistently performing its international treaty obligations in good faith. According to the Constitution and the Law on the Procedures of Conclusion of Treaties, the WTO Agreement fell within the category of 'important international agreements' subject to the ratification by the Standing Committee of the National People's Congress. China would ensure that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as to fully perform its international obligations. For this purpose, China had commenced a plan to systematically revise its relevant domestic laws. Therefore, the WTO Agreement would be implemented by China in an

¹²⁴ For the legal status of the WTO Agreement in Taiwanese domestic legal system, see, *supra* Chapter VI, text to n 11, ff.

effective and uniform manner through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement.¹²⁵

Several elements are identifiable in this statement: the nature of WTO Agreement in China's domestic legal system; legal bases for the conclusion of international agreements; and an implementing approach. The statement firstly clarifies that the WTO Agreement falls within the scope of 'important international agreements' and then points to two major instruments governing the conclusion of international agreements: Constitution and the *Law on the Procedures of Conclusion of Treaties* (hereinafter the '*Treaty Conclusion Law*').

Article 67 of the Constitution prescribes the exercise of powers and functions of the Standing Committee of National People's Congress (the NPCSC), including the ratification and abrogation of treaties and important agreements. The *Treaty Conclusion Law* further regulates the procedure of the conclusion of international agreements. Article 2 defines the scope of the application of this law to bilateral or multilateral treaties, agreements or any other instruments of the nature of a treaty or agreement. Without offering an individual definition of 'treaty' or 'agreement,' the *Law on Treaty Conclusion* directly defines the scope of 'treaties and important agreements' by listing three subject matters: friendship and cooperation, peace and similar treaties of a political nature; territory and delimitation of boundary lines; judicial assistance and extradition.¹²⁶ Treaties and agreements containing provisions inconsistent with Chinese domestic laws or subject to ratification also fall into the scope of "treaties and important agreements" as defined by the *Treaty Conclusion Law*.¹²⁷ While acceding to a multilateral treaty or an important multilateral agreement, the State Council, after examination and verification, should refer to the NPCSC for the decision on accession.¹²⁸ The President of the People's Republic of China shall ratify the multilateral treaty or important multilateral agreement concerned in accordance with the decision of the NPCSC.¹²⁹

¹²⁵ China's Working Party Report, para. 57.

¹²⁶ The *Treaty Conclusion Law*, Art. 7(2).

¹²⁷ The *Treaty Conclusion Law*, Art. 7(2).

¹²⁸ The *Treaty Conclusion Law*, Art. 11(2), subparagraph 1.

¹²⁹ The *Treaty Conclusion Law*, Art. 7(2).

China's accession to the WTO basically follows the procedures laid down by the Constitution and the Law on *Treaty Conclusion*. The NPCSC, prior to the Doha Ministerial Meeting, reached its decision on the accession to the WTO and authorized the President to ratify the Accession Protocol. Chinese President, Jiang Zemin, after the Ministerial decision on the adoption of China's accession, ratified the accession protocol on 11 November 2001. It is also worth noting that the signature of China's accession protocol by the Minister of Foreign Trade and Economic Cooperation, Shi Guangsheng and the ratification by Jiang was done on the same date. The ratified accession protocol was almost immediately deposited in the WTO Secretariat.

The statement also hints at how China envisaged its implementing approach. Namely, China would systematically revise its domestic law through which the WTO Agreement would be implemented. However, the statement does not fully spell out the direct applicability of the WTO Agreement in Chinese courts and the way to resolve the conflicts between the WTO Agreement and domestic laws. Divergent views exist in relation to the judicial enforceability of the WTO Agreement in China. The prevailing view seems to deny its direct applicability in Chinese courts. Yang Linping, the former judge of Supreme People's Court, relying upon the afore-mentioned statement, argues that Chinese courts cannot refer to the WTO Agreement. Instead, Chinese courts are obliged to apply domestic law and regulations while taking due account of the principle of consistent interpretation to resolve conflicts between domestic laws and the WTO Agreement.¹³⁰ Apart from the statement cited above, the denial of direct applicability of the WTO Agreement in Chinese courts may be based on the following reasons. Firstly, it is emphasized that the party to the WTO Agreement is China, the State which will resume its state responsibility in case of non-compliance. While private parties are inevitably affected by these WTO rules, they are *indirectly* affected. Besides, WTO rules are not sufficiently clear and precise and are thus non-justiciable by nature. Therefore, the WTO Agreement cannot be a cause of action for private parties to resort to Chinese courts. Further, there is no constitutional authority to support the direct application of

¹³⁰ L Yang, 'Some Issues on China's Judicial Review' (2004) (1) *Justice in China* 70, 70-72, available at http://www.moj.gov.cn/zgsfzz/2004-07/07/content_114771.htm (last accessed 18/02/2009, in Chinese).

the WTO Agreement in Chinese courts. The direct application of treaties or international agreements in Chinese domestic courts is rather exceptional. Moreover, as the WTO Agreement covers extremely complex rules, direct application of these rules may overburden Chinese courts and result in inconsistent interpretation that undermines the uniformity of Chinese legal system. Above all, China may be prejudiced in its future negotiation if it recognizes the direct applicability of the WTO Agreement since most WTO members do not.¹³¹

By contrast, some argue that the direct application of the WTO Agreement helps to fill the lacuna in those areas where China has not revised or enacted WTO-consistent implementing laws and regulations. Besides, the direct application of the WTO Agreement, in particular in the area of intellectual property protection, can contribute to the establishment of a well-functioning legal regime. Further, the direct application will contribute to the rule of law in China, notably the transparency of its judicial review. Based on these arguments, Chen argues that the direct application of the WTO Agreement meets China's real needs and is thus a more practical approach. Following this direct application approach, Chen further argues that, as the WTO Agreement was ratified by the President in accordance with the decision of the NPCSC, it enjoys the same legal status of national legislation and shall prevail over local legislation, autonomous decrees, special decrees, and administrative decrees.¹³²

However, debates on the direct applicability of the WTO Agreement are largely had amongst academics and do not seep into the Chinese domestic courts, except the Supreme People's Court. In a case before Guangdong Higher Court, the court was called upon to examine whether the administrative permit for the publication of audiovisual products and for their reproduction was indispensable for the protection of intellectual property rights. The court repealed the ruling of the lower court, holding that copyrights are rights protected by national legislation. The court further declared that these rights will not be affected even though the right holders are not

¹³¹ L Zhou, *WTO Rules and Theoretical Innovation of Chinese Economic Law* (China University of Political Science and Law Press, Beijing 2003) 160-167.

¹³² J Chen, 'The Application of the WTO Agreement in China' (2002), available at <<http://www.wtolaw.gov.cn/display/displayInfo.asp?IID=200207071511263073>> (last accessed 20/02/2009, in Chinese)

able to obtain an administrative permit for publication and reproduction. Based on these arguments, the court rejected the argument that these products are against the prohibitive rules of Chinese administrative regulations and shall thus not be protected.¹³³ Although this case reflects one of the main issues of *China – Intellectual Property Rights*, neither the parties nor the court raised the issues as to the WTO-inconsistency.

By contrast, the Supreme People's Court is relatively responsive to concerns of other WTO members and sensitive to the WTO-compatibility of Chinese domestic laws. In response to the political pressure of the US, the Supreme Court issued its second *Judicial Interpretation* on the criminal thresholds of 'serious' or 'extremely serious' as prescribed in Article 213-217 of *China's Criminal Law* that turned out to be a major issue *China – Intellectual Property Rights*. Regardless of its responsiveness and sensitivity, the author has not notified any reference to the WTO Agreement by *Judicial Interpretation* of the Supreme People's Court. In its judicial interpretation, *Regulation on Several Problems in the Trial of Trade-Related Administrative Litigation Cases* (the '*Trade-Related Administrative Litigation Regulation*'), the Court makes clear that the applicable laws for the Chinese courts in hearing trade-related administrative cases are national legislation, administrative regulations, and departmental decrees, local decrees or autonomous decrees.¹³⁴ The Supreme People's Court instructs lower courts to rule on trade-related administrative litigation cases according to Chinese domestic laws and regulations. The Court then adds in Article 9 of the Regulation that, in case of two reasonable interpretations of national laws and administrative regulations, the WTO-compatible interpretation should be preferred. According to this Regulation, the Supreme People's Court does not envisage a direct application of the WTO Agreement in Chinese courts. The relevance of the WTO Agreement is limited to the consistent-interpretation approach. The Court does not clarify the legal hierarchy issue, but it is safe to say that this issue

¹³³ *UFO v. Wumuzhao*, reported as Yuekau faminzhongsan zi NO. 210 Ruling (2005), available at <http://ipr.chinacourt.org/public/detail_sfws.php?id=3275> (last accessed 03/05/2007). This case precisely corresponds to the first claim of the United States in *China – Intellectual Property Rights*, see, *supra* text to n 117, ff.

¹³⁴ *Regulation on Several Problems in the Trial of Trade-Related Administrative Litigation Cases*, Art. 7 & 8.

is of little importance in Chinese courts since the WTO Agreement is excluded from the applicable law in Chinese courts when hearing trade-related administrative litigation cases. There is thus no need for the Supreme People's Court to deal with this issue.¹³⁵

A. CHINA'S TRADE DEFENCE MEASURES AGAINST TAIWANESE PRODUCTS

1. ANTI-DUMPING MEASURES

a. General Regulatory Framework

The regulation of anti-dumping practice dated back to Article 30 of the *Foreign Trade Act of People's Republic of China (hereinafter 1994 Foreign Trade Act)*,¹³⁶ enacted in 1994. As China strived to accede to the GATT, and hoped it could become a founding member of the WTO, this *1994 Foreign Trade Act* was among the legislative package that tried to ensure that China's foreign trade regulatory regime was compatible with the GATT/WTO. After the enactment of *1994 Foreign Trade Act*, the State Council issued *Anti-Dumping and Countervailing Regulation of People's Republic of China* in 1997. In connection with China's accession to the WTO, this *Anti-Dumping and Countervailing Regulation* was subsequently repealed on in 2001, as a new *Anti-Dumping Regulation of People's Republic of China* was adopted on 31 October 2001. Further, in relation to the amendment of the *1994 Foreign Trade Act* on 6 April 2004, this anti-dumping regulation was also amended

¹³⁵ An interesting contrast can be drawn in regard to private international law. Chinese statutory designation honors international agreements to which China is a party. Article 142(2) of the *General Principles of Civil Law of People's Republic of China* provides that, regarding civil relations with foreigners, the international treaty concluded or acceded to by China shall apply where conflicts arise between the international treaty concerned and domestic laws. Article 236 of Civil Procedure Law of the People's Republic of China regulates in a similar way. In civil proceedings involving foreign elements, when any international treaty concluded or acceded to by China contains provisions differing from those of the Civil Procedure Law, the provisions of the international treaty shall apply, except those on which China has announced reservations. Nonetheless, these two provisions govern mainly procedural aspect of private international law and of little relevance of the WTO Agreement. China's statutory designation on the legal status and legal hierarchy of international agreements to which it is a party is extremely inconsistent and incoherent.

¹³⁶ An unofficial English version is available at <http://www.lawinfochina.com/law/display.asp?id=664> (last accessed 25/03/2008). Article 30 of *1994 Foreign Trade Act* provides, 'should a well established or fledgling industry at home be in substantial harm or under threat of such harm due to the import of relative goods in under normal value, the State may take any countermeasures to expel or mitigate such harm or threat.'

on 31 March 2004. Consequently, the *2004 Foreign Trade Act* and *2004 Anti-Dumping Regulation* govern the existing framework for anti-dumping measures.

Chapter 8 of the *2004 Foreign Trade Act*, covering from Article 40 to 50 regulates trade remedy measures. Article 41 authorizes the state to take anti-dumping measures in case ‘a product from other countries or regions is dumped into the domestic market at a price less than its normal value and under such conditions as to cause or threaten to cause material injury to the established domestic industries, or materially retards the establishment of domestic industries’. The aim of these anti-dumping measures is to ‘eliminate or mitigate such injury, threat of injury or retardation’.¹³⁷ In respect of the *2004 Anti-Dumping Regulation*, it consists in six chapters. The first and last chapter are general and supplementary provisions respectively. Chapter 2 to 5 deal with substantial elements: dumping and injury; anti-dumping measures; and the time limit for and the review of anti-dumping duties and price-undertaking.

Administrative review and judicial review of foreign trade measures is regulated by Article 66 of *2004 Foreign Trade Act*. Parties engaging in foreign trade activities may refer to administrative review or resort to people’s courts for judicial review in case of dissatisfaction of these measures. The same opportunity for administrative review and judicial review is offered in Article 53 of the *2004 Anti-Dumping Regulation*. Parties may refer to administrative review or judicial review for three categories of decisions: the final determination of anti-dumping investigation under Article 25 of the regulation; the decisions made in accordance chapter 4 of the regulation; and the decisions of interim review. The decision made in accordance chapter 4 cover whether or not to levy anti-dumping duties, the retrospective levy, the refund or the levy of such duties on a new export business operator;

In addition to the *2004 Foreign Trade Act* and *Anti-Dumping Regulation*, the Ministry of Commerce (the MOFCOM, the successor to Ministry of Foreign Trade

¹³⁷ Article 42 instructs the competent authority, notably MOFCOM to consult with governments of exporting countries or regions, where the export of a product, at a price less than its normal value from these countries or regions to the market of a third country causes or threatens to cause material injury to the established domestic industries, or materially retards the establishment of domestic industries.

and Economic Cooperation, the MOFTEC) and State Economic and Trade Commission (SECT) issued a number of ministerial level implementing rules. These rules regulate petition, questionnaire, the disclosure of information, on-site investigation, price-undertaking, interim review, determination of injury, the adjustment of the scope of products, hearing, etc. In addition, the Supreme People's Court also issued *Regulation on the Application of Law in the Trial of Anti-Dumping Administrative Litigation Cases* to guide lower courts in the administrative litigation on anti-dumping measures. As noted in Chapter V, this *Regulation on the Application of Law in the Trial of Anti-Dumping Administrative Litigation* is situated in a broader context of the *Regulation on Several Problems in the Trial of Trade-Related Administrative Litigation Cases* of the Supreme People's Court.¹³⁸

b. Anti-Dumping Measures on Certain Steel Products

On 23 March 2002, China decided to initiate an anti-dumping investigation against Taiwanese cold-rolled steel products. This initiative, situated in the context of the afore-mentioned definite safeguard measures imposed by the United States, is the first trade defence measures taken by China against Taiwanese products since their accession to the WTO.¹³⁹ The MOFCOM released its preliminary and final reports on 20 May 2003 and 23 September 2003 respectively. Surprisingly, the MOFCOM in its preliminary report stated that, although it would continue to accomplish the final report, given the 'particular market condition of the investigated products', provisional anti-dumping measures would not be imposed against the products concerned notwithstanding the found dumping margin and its causal link with material injury to domestic industry.¹⁴⁰ The finding of the existence of dumped

¹³⁸ For the regulatory framework of China's anti-dumping regime, see Z Wang and M Yu, *China Foreign Trade Law* (Wuhan University Press, Wuchang 2006) For an overview of China's Foreign Trade Act and its commentary, see, D Huang and Z Wang, *Understanding Foreign Trade Law of PRC and Related International Rules* (Law Press, Beijing 2004). For Literature in English, see TW Huang, 'The Gathering Storm of Antidumping Enforcement in China' (2002) 36 *Journal of World Trade* 255; KW Almstedt and PM Norton, 'China's Antidumping Laws and the WTO Antidumping Agreement' (2000) 36 *Journal of World Trade* 75. See also MU Killion, 'Quest for Legal Safeguards for Foreign Exporters Under China's Anti-Dumping Regime' (2003-2004) 29 *North Carolina Journal of Law & Commercial Regulation* 417.

¹³⁹ This investigation also covers products originating from Russia, Korea, Ukraine, and Kazakhstan. See, MOFTEC Notice No. 14 (2002), available at <http://gpj.mofcom.gov.cn/index.shtml> (last accessed 12/03/2008).

¹⁴⁰ MOFTEC Notice No. 17 (2002), available at <http://gpj.mofcom.gov.cn/index.shtml> (last accessed

imports, material injury to domestic industry and a causal link is confirmed by the final report. Similarly, in light of the ‘particular market condition’ mentioned in the preliminary report, the MOFCOM, in its final report decides not to take anti-dumping measures. Nevertheless, when the United States decided to stop the safeguard measure consequently of the WTO-inconsistency finding by the Panel and the Appellate Body, Chinese safeguard measures against Taiwanese steel products were also lifted. As a result, the decision not to impose anti-dumping duties was repealed; a definitive anti-dumping duty was thus imposed upon Taiwanese steel products.¹⁴¹ In this case, several issues deserve further examination: normal value and export price; injury; causation between dumping and injury; and the relevance of the safeguard investigation to anti-dumping investigation. These aspects will be examined in connection with the obligation to provide sufficiently detailed explanations in its determinations, as set out in Article 12 of the Anti-Dumping Agreement (the ADA). Administrative review and judicial review is also to be dealt with.

i Fair Comparison between Normal Value and Export Price

In order to conduct a fair comparison between normal value and export price, the MOFCOM firstly establishes the normal by examining whether domestic transaction of Taiwanese producers amounts for five percent of their exports to China, as set out in Article 2.2 and footnote 2 of the ADA. In accordance with Article 2.1 of the ADA, the MOFCOM then excludes below cost sales and related-party sales on the ground that these sales are not ‘in the ordinary course of trade’.¹⁴²

In the case of Shang Shing Industrial Co. Ltd, the MOFCOM firstly indicates that Shang Shing’s domestic sales in Taiwan is more than 5 percent of its exports to China and is thus eligible for the basis of normal value determination. The MOFCOM then excludes the part of below cost sales of one item as it accounts more than 20 percent of domestic sales. The rest of domestic sales of this item constitute the basis

12/03/2008). The reason why MOFCOM chose not to impose anti-dumping measure was mainly because a parallel safeguard investigation on certain steel products was undergoing. See *infra*. IIIA(b) Safeguard measures on certain steel products.

¹⁴¹ MOFCOM Notice 75 (2003), available at <http://gpj.mofcom.gov.cn/aarticle/xxfb/c/200401/20040100170507.html> (last accessed 31/03/2008).

¹⁴² Final report, section 3.1, normal value and export price, the Taiwan section.

for the determination of normal value. In other items whose domestic sales are all below cost sales, the MOFCOM decides to adopt constructed value for the normal value, as these sales are not in the ordinary course of trade and cannot serve as the basis for normal value determination.¹⁴³ In relation to export price, The MOFCOM states, given that Shang Shing Industrial Co. Ltd, exports products under consideration either directly to China or through a non-related trader, these two prices are thus adopted as export price for the price comparison. As far as this passage is concerned, The MOFCOM, arguably, has provided explanation in sufficiently detail with regard to its decision to exclude below cost sales as well as to adopt constructed value and export price.

ii Material Injury

With regard to material injury of domestic industry, the MOFCOM begins with its decision of accumulation as authorized by Article 9 of *Anti-Dumping Regulation*. Then the MOFCOM justifies its decision based upon two reasons. Firstly, the dumping margin of products under consideration in each country is no less than two percent that cannot be neglected. Secondly, there exists the same condition of competition between the dumped imports and that between dumped imports and domestic like products. Thus the injury caused by the dumped imported from different countries can be accumulated. The MOFCOM then establishes the existence of material injury to domestic industry based on the following reasons. Firstly, the MOFCOM examines the volume of dumped imports of products under consideration, and their market share in China. Secondly, the MOFCOM analyzes the price of dumped imports and their impact on price of domestic like products as well as the impact on the domestic industry. Finally, the MOFCOM evaluates other economic factors and indices.¹⁴⁴

The injury assessment appears to comply with Article 3 of the ADA. Nevertheless, the MOFCOM fails to base its determination on an objective examination of positive evidence, as set out in Article 3.1 of the ADA. Besides, an

¹⁴³ *Ibid.*

¹⁴⁴ Final Report, Section four, Injury.

objective ‘examination of the impact of the dumped imports on the domestic industry’ through an ‘evaluation of all relevant economic factors and indices having a bearing on the state of the industry’ as mandated by Article 4.4, read in connection with the overarching Article 3.1 of the ADA, is lacking. An explanation in sufficient detail, as required by Article 12.2.2 of the ADA, is not provided in the final report.

As held by the Appellate Body, the term ‘positive evidence’ focuses on the facts underpinning and justifying the injury determination, and the term ‘objective examination’ is concerned with the investigation process itself.¹⁴⁵ Article 3.1 of the ADA informs other provisions on this article for general guidance of interpretation. According to the Panel on *Thailand – H-Beams*, Article 3.4 of the ADA, read together with Article 3.1 requires the investigation authorities to support its finding of injury with positive factual evidence through a well-reasoned and meaningful analysis of the state of the industry. A mere characterization of the relevance or irrelevance of every economic factor does not satisfy this obligation; a thorough evaluation of the state of industry, in light of those factors set out in the last sentence of Article 3.4 is essential. Above all, a persuasive explanation in relation to these factors leading to finding of injury should be offered.¹⁴⁶ Such objective examination of objective evidence through thorough evaluation of the state of the industry does not exist in the investigation report.

For example, while the MOFCOM argues that imports of products under consideration increase sharply, the imports during 2000 and 2001 increased only 9.84% and 8.32% respectively.¹⁴⁷ From 1999 to 2001, the market share of imported products accounted for 36.17%, 35.06%, and 37.91%,¹⁴⁸ which is a rather level trend, instead of an upward trend. With regard to the price of imported products and its impact on that of like products in domestic industry, the average imported price

¹⁴⁵ Appellate Body Report on Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*(US – Hot-Rolled Steel), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para. 193.

¹⁴⁶ Panel Report on *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* (*Thailand – H-Beams*), WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741, para. 7.236

¹⁴⁷ Final Report, Section four, Injury.

¹⁴⁸ *Ibid.*

increased from 327.73 (US dollar per ton) to 362.46 from 1999 to 2000, which contradicts conclusion of the MOFCOM that the price is in a downward trend.¹⁴⁹ Further, as the MOFCOM notes, the average price of like products in domestic industry lowered 1.3% from 1999 to 2001,¹⁵⁰ this effect cannot be named as material injury. Thirdly, concerning other economic factors or indices, the MOFCOM merely refers to them as a checklist. Explanation in sufficient detail on each factor and the overall impact of these factors are not provided. Take the item of market share for example: the MOFCOM argues that the market share of like products in domestic industry decreased from 1999 to 2001, accounting for 44.9%, 41.70%, and 43.94% respectively. Nevertheless, by comparing these to the market share of imported products, which accounts for 36.17%, 35.06%, and 37.91% respectively, it is thus made clear that the market share of like products of Chinese domestic industry in relation to imported products remains stable and hardly affected. The MOFCOM did not draw its conclusion on the decrease of market share of domestic industry based on positive evidence and objective examination. More importantly, the analysis of the MOFCOM is not objective and unbiased in that, depending on the results, the MOFCOM focuses on the difference through investigation period, namely, from 1999 to 2001, or the difference between every single consecutive year.

iii Causation between Dumping and Material Injury

With regard to the causation issue, the MOFCOM firstly establishes its finding of causal link between dumping and material injury to domestic industry. It notes in the final report that coincidence of the trend between the price and market share of imported products and those of domestic like products. Imported products are the substantial cause of material injury to domestic industry. The MOFCOM then conducts its non-attribution analysis, excluding such those factors indicated in the final sentence of Article 3.5 of the ADA from being injurious factors to domestic industry.¹⁵¹ Two factors should be further elaborated.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Final Report, Section five, Causation.

Firstly, the MOFCOM notes that the impact of imported products from countries other than the investigated countries is lesser since their market share accounts for less than 30% of Chinese market. This non-attribution analysis is not consistent with Article 3.5 of the ADA as the MOFCOM did not go further to separate and distinguish the injurious effects of imports from other countries from the injurious effects of the dumped imports. The MOFCOM thus has no rational basis to determine the degree of injury to be ascribed to dumped imports.¹⁵²

More importantly, the MOFCOM fails to offer a persuasive explanation as to why injury of Chinese domestic industry is not caused by the change of international steel market. The MOFCOM asserts that 15 major steel exporting countries accounts substantially for the market share of the international steel industry, and that the investigated countries in the present case are major exporters in the international steel market and constitute an important element in affecting the change in steel market. While the price of cold-rolled steel products in different markets affects one another, only products competing in the same market are the direct factor. Since products of those countries under consideration account for 70% of the Chinese market share and continue to increase in volume and market share, they have a more direct impact on price of like products in China's domestic industry. Therefore, the products of those countries under consideration are the major cause. It is also through these imports that international steel market affects the price of like products in China's domestic industry as well as the domestic industry as a whole.¹⁵³

The MOFCOM's argument in relation to the change of international steel market is flawed and unfounded. It fails to delineate the international steel market from those countries whose products are under consideration. The MOFCOM's assertion that, even if Chinese industry was affected by the international steel market, the international market injured Chinese market through those investigated countries is not consistent with Article 3.5 of the ADA, in particular in light of the jurisprudence of the WTO Panel/Appellate Body. The MOFCOM did not separate and distinguish

¹⁵² See, Appellate Body Report on *US – Hot-Rolled Steel*, paras. 223-224, 226.

¹⁵³ *Ibid.*

the factor of international steel market from the dumped imports; to the contrary, it mingled these two factors, attributing the (injurious) effects of change in the international steel market to the dumped imports. In addition, the MOFCOM fails to provide a persuasive explanation as to why the reverse cannot be true: it is the change of international steel market, rather than the imported products under consideration, that causes serious injury to domestic industry.

iv Relevance of Safeguard Measures

As noted both in the preliminary and final reports, given the ‘particular market condition of the investigated products’, the MOFCOM decided to suspend its anti-dumping measure. This unuttered particular market condition is believed to be situated in the context to safeguard measures against steel products adopted by major actors in the international trading system. During its anti-dumping investigation on cold-rolled steel products, the MOFCOM was conducting a concurrent anti-dumping investigation against steel products with wider coverage. On the one hand, these two investigations contradict with each other in that, as is generally held, anti-dumping measures are trade remedies against unfair trade practice whereas safeguard measures are against fair trade practice. Products under consideration cannot be fair trade practice and unfair trade practice at the same time. Alternatively, even if one holds that safeguard measures are not necessarily trade remedies against fair trade practice, and that safeguard measure are merely a less stringent trade remedy provided for in the WTO agreement, two concurrent investigations may suffer from the problem of ‘double counting’. In other words, the same injury may be remedied by two trade remedy measures. This explains why MOFCOM chose to halt the imposition of anti-dumping measures until the lift of safeguard measures against steel products.

v Administrative Review/Judicial Review

In section 7 of the final decision by the MOFCOM, it is provided that, according to Article 53 of Anti-dumping Regulation, administrative review and judicial review can be resorted to against the final determination and the anti-dumping measures. This is in line with China’s obligation to provide an independent and impartial judicial

review, including the obligation to inform the applicants of the opportunity for appeal, on foreign trade measures. Nevertheless, exporters, traders of products under consideration or petitioners did not refer to administrative review or judicial review in this present case.¹⁵⁴

2. SAFEGUARD MEASURES

a. General Regulatory Framework

Just as anti-dumping measures, China's safeguard regulatory regime is also an element of trade remedies measures outlined in the *1994 Foreign Trade Act*. Article 29 of the *1994 Foreign Trade Act*, provides the legal basis for safeguard measures and directs the State to take necessary protective measures to eliminate or reduce the injury or threat of injury where domestic producers of like products or directly competitive products suffer material injury or threat of material injury due to the increase of imported products. Nevertheless, it was not until 31 October 2001 that the State Council adopted the *Safeguard Measures Regulation of People's Republic of China*, effective on 1 January 2002. This regulation was subsequently amended in 2004 because of the revision of Foreign Trade Act in 2004. The *2004 Safeguard Regulation* also consists of five chapters: general provisions; investigations; safeguard measures; the time limit for and review of safeguard measures; and supplementary provisions. Moreover, in parallel to anti-dumping measures, several ministerial level implementation rules are issued by the MOFCOM and the State Economic and Trade Commission (the SETC). These implementation rules further define and clarify issues in relation to petition, hearing, safeguard measures and the determination of injury, and the adjustment of the scope of the products.¹⁵⁵

¹⁵⁴ As noted above, Taiwanese unbleached kraft liner/linerboard had also been previously imposed with anti-dumping duties on 30 September 2005, but this measure was subsequently repealed, on 9 January 2006, by administrative review with the decision of Shangfahan No. 1 (2006). While the MOFCOM in its Notice No 8 (2006) refers to this decision, and decided to terminate the levy of anti-dumping duties. This decision of administrative review has not been made public available. This points to the weakness of administrative review/judicial review in China, and lack of transparency in this regard.

¹⁵⁵ Wang and Yu, above n. 138, at 253-254. For the literature in English on China's safeguard regime, see L Chen and Y Gu, 'China's Safeguard Measures Under the New WTO Framework' (2001-2002) 25 *Fordham International Law Journal* 1169; TW Huang, 'China Launches its Safeguard Enforcement: A Critical Assessment' (2002) 37 *Journal of World Trade* 329.

b. Safeguard Measures on Certain Steel Products

On 20 May 2002, the MOFTEC initiated a safeguard investigation on certain Taiwanese steel products in response to the petition of China Steel Industry Association, Shanghai Baoshan Steel and Iron Group Corporation, Anshan Steel and Iron Group Corporation, Wuhan Steel and Iron Corporation (Group), Capital Steel and Iron Corporation, and Handan Steel and Iron Company Ltd.¹⁵⁶ Immediately after the investigation, China imposed provisional safeguard measures on the investigated products. On 19 November 2002, the MOFTEC and the SETC co-issued the final report, and decided to impose definitive safeguard measures on five steel products: non-alloy hot rolled sheets and coils; non-alloy cold rolled sheets and coils; organic coated sheets; non grain-oriented electrical sheets; and stainless non-alloy cold rolled sheets and coils.¹⁵⁷ Apart from this final report co-issued by the MOFTEC and the SETC, the SETC also issued a final report in relation to the determination of injury.¹⁵⁸

China's safeguard measure against Taiwanese steel products should be examined in the context of a series of steel safeguard measures taken by other WTO members. There is a clear link between proceedings in the WTO Dispute Settlement Mechanism and members' domestic investigation proceedings. As noted in Section II, it is worth exploring whether Taiwan's (or even China's) arguments as a third party in *US – Steel Safeguards* the WTO Dispute Settlement Mechanism may be seen as a gesture to argue with China in relation to the WTO-consistency of this Chinese steel safeguard measures. As will be shown below, those arguments Taiwan emphasizes at WTO level are of great relevance and importance to China's steel safeguard measures.

¹⁵⁶ MOFTEC Notice No. 29 (2002), available at <http://gpj.mofcom.gov.cn/index.shtml> (last accessed 26/03/2008). This investigation covered products originating from, *inter alia*, Japan, Republic of Korea, the European Communities and Malaysia. See also China's notification to the Committee on Safeguards, G/SG/N/6/CHN/1, G/SG/N/7/CHN/1, G/SG/N/11/CHN/1 (23 May 2002).

¹⁵⁷ MOFTEC Notice No. 29, in particular the final report in attachment 2, available at <http://gpj.mofcom.gov.cn/aarticle/xxfb/c/200211/20021100048869.html> (last accessed at 26/03/2008). See also China's notification to the Committee on Safeguards, G/SG/N/8/CHN/1, G/SG/N/10/CHN/1 (5 November 2002). In this notification, it is stated that a copy of the notification has been sent to the permanent missions of the aforementioned WTO members. Nevertheless, China did not notify Taiwan, which was already a member of the WTO at that point.

¹⁵⁸ SETC Notice No. 829 (2002), available at <http://www.cacs.gov.cn/DefaultWebApp/showNews.jsp?newsId=300130000015> (last accessed 26/03/2008).

i Unforeseen Development

The ‘unforeseen development’ is one major issue which attracts much attention in the Panel proceedings in *US – Steel Safeguards*. Ironically, China seemed to pay insufficient attention to this issue in its safeguard investigation. In its notification to the Committee on Safeguards, China identifies the safeguard measures against steel products imposed by the United States and the European Union as unforeseen developments. Some explanation, though not adequate and reasoned enough, is provided in the SETC report on the determination of injury. The SETC asserts that a comprehensive and stringent safeguard measure with great magnitude against steel products imposed by the United States is unforeseeable even if it was aware of the safeguard investigation conducted by the United States. The chain reactions, resulting in safeguard measures by other members, and their impact on the increase in steel export to China are also unforeseeable.¹⁵⁹ On the one hand, China seems to confuse ‘unforeseen developments’ with ‘unforeseeable developments’. Its explanation in the final injury report tries to justify these developments as ‘unforeseeable’ instead of ‘unforeseen’. On the other hand, China did not address the issue of ‘logical connection’ as dictated by the requirement of ‘as a result’. More specifically, China failed to provide an adequate and reasoned explanation on the logical connection between its incurring of the WTO treaty obligation, including tariffs concessions, the alleged unforeseen developments, increased import and serious injury or threat of serious injury to its domestic industries. Furthermore, in the co-issued report by the MOFCOM and the SETC, the issue of unforeseen developments is dealt with only after the determination of increased imports, serious injury and causation is made. This implies that China just singles out several events to be ‘unforeseen developments’. Therefore, there is no examination in relation to the requirement of ‘logical connection.’

ii Causation

In relation to causation, while China argues in *US – Steel Safeguards* that the causal link between increased imports and serious injury is ‘a genuine and substantial

¹⁵⁹ *Ibid*, chapter 3.

relationship of cause and effect'. This causal link requires a coincidence between increased imports and serious injury that is followed by the analysis of non-attribution. The same examination based on these criteria does not exist in China's final report on steel safeguard measures. Several issues are relevant here. When determining the coincidence between increased imports and serious injury, China includes the investigation period from 1997 to the first quarter of 2002. This methodology is problematic since China did not accede to the WTO until 11 December 2001. China tries to justify its finding on the increased imports and subsequently the causal link between increased imports and serious injury by emphasizing even sharper increase in imports exists from 2001 to the first quarter of 2002.¹⁶⁰ However, this does not cure it of its methodological defect on its finding of the coincidence between increased imports and serious injury during the period from 1997 to 11 December 2001. Assuming that China's claim that safeguard measures against steel products imposed by the United States and the EU constitute unforeseen developments sustains, coincidence between increased imports and serious injury should thus be established during the period starting from these unforeseen developments. More importantly, China does not exclude these alleged increased imports before its accession when conducting its causation analysis. While China states that such factors as domestic consumption, intra-industry competition, and technological innovation have no causal link with serious injury to domestic industry, which appear to be a non-attribution analysis, the pre-existent injury prior to its accession to the WTO is not excluded. This also corresponds to Taiwan's argument in relation to the proportionality of safeguard measures. China's safeguard measures should not be aimed at remedying all injury to its domestic industry; instead, the safeguard measures can be imposed to the extent to remedy the serious injury caused by increased imports because of the unforeseen developments, namely, steel safeguard measures imposed by the U.S and the E.U.

In light of Taiwan's argument in *US – Steel Safeguards*, the same terminology of 'substantial cause' employed by China in its final report is of great significance.¹⁶¹

¹⁶⁰ See, e.g. Final Report by MOFTEC and SETC, paras. 68-70.

¹⁶¹ The term of 'substantial cause' is not used in ASG. For a critic of these terminology, see, Huang,

This is not surprising to note since China's trade remedy regulatory regime is highly influenced, if not designed, by the United States. In this vein, Taiwan's argument that the 'substantial cause' test is not WTO-inconsistent suits perfectly in China's safeguard measures. While the Panel does not require the increased imports to be the only factor causing serious injury to domestic industry, it nevertheless stresses the relative significance of increased import as compared to other factors as a whole. A reasoned and adequate explanation should be offered on this point. China, in its final report claims that increased imports is the 'substantial cause' of serious injury to domestic industry. At the same time, it also points to the increased productivity in domestic industry as another factor causing injury to domestic industry.¹⁶² Nevertheless, China slightly notes that, owing to the increase of domestic consumption and decrease of productivity in 2001, the adverse effect of the increased productivity of domestic industry is lessened.¹⁶³ This explanation is far from being reasoned and adequate.

iii Definition of Domestic Industry

In relation to the definition of domestic industry, taking into account of Taiwan's argument in *US – Steel Safeguards*, it is interesting to note that the same terminology of 'major proportion' of domestic industry is also used by China. The final report states that the SETC conducts an investigation among domestic producers, whose production constitutes the major proportion of total volume of domestic production and can thus represent domestic industry.¹⁶⁴ Nevertheless, China does provide further information about these producers, in particular the percentage of their production. It is thus difficult to ascertain whether these producers constitute a major proportion of total volume of domestic production and whether these producers can represent domestic industry. As Taiwan argues in *US – Steel Safeguards*, the determination of domestic industry is among 'all pertinent issues of fact and law', as set out in Article 3.1 of the ASG, an adequate and reasoned finding on this issue should thus be included in the China's safeguard investigation report. China's failure to provide an

supra note 108, at 344-345.

¹⁶² *Ibid*, paras. 67,107,148,188,230.

¹⁶³ *Ibid*.

¹⁶⁴ Final report, paras. 50, 91,132,171,214.

adequate and reasoned explanation on its definition of ‘domestic industry’ breaches its WTO obligation under the ASG.

B. TAIWAN’S TRADE DEFENCE MEASURES AGAINST CHINESE PRODUCTS

1. SAFEGUARD MEASURES

a. General Regulatory Framework

When pursuing its membership in the GATT, Taiwan substantially reformed its trade regulatory regime. One of the most significant efforts is the enactment of *Foreign Trade Act* in 1993, which lays down the regulatory framework of Taiwan foreign trade regime. Since its first enactment in 1993, this *Foreign Trade Act* has been subsequently amended in 1997, 1999, 2002, and 2007. According to Article 18 of the last amended *Foreign Trade Act*, safeguard measures are termed as ‘import relief, (*jinkou jiuji*)’. It is provided that, in case of the increase in imports, and thereby causing or threatening to cause serious injury to the domestic industry which produces like or directly competitive products, the said industry, its responsible authority or its associations, or related organizations can apply for the investigation for the injury and for import relief.¹⁶⁵ Little hint is provided in this provision. Whether ‘unforeseen developments’ are a condition for the imposition of safeguard measures is not dealt with; nor is the quantity of increased imports and the extent of this increase. Further guidance is needed.

Article 18(3) of the *Foreign Trade Act* then authorizes Ministry of Economic Affairs (the MOEA) to draft an implementing regulation governing this injury investigation and corresponding import relief. With this authorization, a regulation, entitled *Regulation on Import Relief*, was issued by the MOEA in 1995 further to define regulatory framework of safeguard measures. Rules governing the conditions for the imposition of safeguard measures and the investigation procedures are also provided in more detail. This *Regulation on Import Relief* has also been often revised. The most significant revision of this safeguard regulation relates to a parallel domestic special safeguard measures and textile safeguard measures, as provided in Article 16

¹⁶⁵ *Foreign Trade Act* (Taiwan), Art. 18.1.

of China's Accession Protocol and Chinese textile safeguard measures under paragraph 242 of China's Working Party Report. Chapter 4bis regulates special safeguard measures against Chinese products other than textile product and chapter 4ter regulates special safeguard measures against Chinese textile products.

b. Safeguard Investigations on Certain Towelling Products

On 24 August 2005, Yunlin County Towelling Producers' Technology Development Association (the YCTPA, the petitioner) applied for a safeguard measure investigation against Chinese towelling products. While the International Trade Commission of the MOEA (the ITC of the MOEA) denied the request for provisional safeguard measures, it continued along its investigation, and found market disruption, because of increased imports of Chinese towelling products, to the Taiwanese domestic producers of like or directly competitive products.¹⁶⁶ Before finishing its final report, the ITC carried out several on-site investigations to domestic producers. It also held serious of public hearings where delegates of Chinese towelling industry were present.¹⁶⁷ This was the first time that Chinese producers participated in Taiwan's investigation proceedings of trade defence measures. During its investigation, the ITC also found evidence of dumping by Chinese towelling products, and thus referred to Ministry of Finance (the MOF) for anti-dumping investigation as required by Article 28 of this *Regulation on Import Relief*.¹⁶⁸ Consequently, a concurrently anti-dumping investigation was initiated by the MOF. In the end, anti-dumping measures, instead of safeguard measures, were imposed against Chinese towelling products.¹⁶⁹

Apart from its symbolic significance, this safeguard measure investigation is of great legal importance in several aspects. Firstly, this investigation points to the

¹⁶⁶ Final report on injury investigation of import relief measures against Chinese toweling products (ITC, 17 March 2006) p. 1.

¹⁶⁷ *Ibid*, p. 3-4.

¹⁶⁸ See *infra*. Subsection (b) anti-dumping measures, text to n. 179, ff.

¹⁶⁹ Taiwan's choice of anti-dumping measures instead of safeguard measures can be contrasted with China's preference on safeguard measures over anti-dumping measures. In the case of safeguard measures against Chinese products, China's Accession Protocol provides a less stringent condition for their imposition. It is thus difficult to understand why Taiwan's agency chose to impose anti-dumping measures with the objection of petitioners in safeguard measures investigation. Moreover, there is no petitioner in the anti-dumping investigation. The MOF self-initiated the anti-dumping investigation.

unsettled relationship between the ASG, and Article 16 of China's Accession Protocol and paragraph 242 of China's Working Party Report. Besides, explanation provided in the final report in relation to market disruption, including increased imports, material injury to domestic industry and the causal link between them, should also be carefully examined in light of their WTO-consistency.

i Legal Status of Article 16 of China's Accession Protocol and
Paragraph 242 of China's Working Party Report

Existent WTO rules on safeguard measures are mainly laid down in Article XIX of the GATT 1994, and the ASG. As Article 16 of China's Accession Protocol and paragraph 242 of its Working Party Report provide additional rules on the imposition of safeguard measures against Chinese products. How to interpret these rules in the context of existent WTO agreements should thus be addressed.

Article 16.1 of China's Accession Protocol provides, 'in cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution'. If a mutual agreement on Chinese products being the cause for market disruption and corresponding solutions is reached after the consultation, China is obliged to take the agreed action in order to remedy the market disruption.¹⁷⁰ If a mutual agreement is not available within 60 days after the request for consultation, the affected member may withdraw concession or limit the imports only to the extent necessary to prevent or remedy the market disruption.¹⁷¹ Market disruption is found to exist, under Article 16.4, in the case of 'imports of an article, like or directly competitive with an article produced by the domestic industry, [being] increasing rapidly, either absolutely or relatively, to be a significant cause of material injury, or threat of material injury to the domestic industry.' Other procedural requirements, such as notification to the Committee on Safeguards,¹⁷²

¹⁷⁰ China's Accession Protocol, Art. 16.2.

¹⁷¹ China's Accession Protocol, Art. 16.3.

¹⁷² See, *e.g.*, China's Accession Protocol, Art. 16.1, last sentence, Art. 16.2, last sentence.

decision-making based on objective factors,¹⁷³ public notice and opportunities to comment,¹⁷⁴ proportionality of safeguard measures,¹⁷⁵ are also provided in relation to the imposition of product-specific safeguard measures against Chinese products. In critical circumstances, provisional safeguard measures may also be taken under this product-specific safeguard measure mechanism.¹⁷⁶

The first issue that should be addressed is the applicability of those conditions set out in the WTO agreements, notably the requirement of ‘unforeseen developments.’ As noted in the Section II of this Chapter, it is the settled jurisprudence of the WTO Panel/Appellate Body that the requirement of ‘unforeseen developments’, as set out in Article XVI: 1(a) of the GATT 1994 constitutes a part of conditions that WTO members should fulfil with when imposing safeguard measures. Nevertheless, it is not clear as to whether this requirement of ‘unforeseen developments’ is also applicable in the case of product-specific safeguard measures against Chinese products. It may be argued that Article XIX of the GATT 1994 and/or the ASG serve as a context for the interpretation this product-specific safeguard measure mechanism. Thus, this product-specific safeguard mechanism should be interpreted, to the most possible extent, in a manner compatible with existent WTO rules on safeguard. In other words, it should be read as in line with, instead of a deviation from, existent WTO agreements. The requirement of ‘unforeseen developments’ should be applicable when appropriate. Nevertheless, the interpretation seems not to fit with the ‘objective and purpose’ of this product-specific safeguard mechanism, being intended to lower the threshold for the imposition of safeguard measures against Chinese products. The effectiveness of this product-specific mechanism will be undermined if other conditions laid down in the existent WTO agreements are simultaneously applicable. In addition, as an author correctly points out, it is precisely because increased imports into territories of other member are foreseeable that the working party on China’s accession to the WTO drafted this product-specific safeguard mechanism. Compromising this product-specific mechanism with the requirement of ‘unforeseen

¹⁷³ China’s Accession Protocol, Art. 16.4, second sentence.

¹⁷⁴ China’s Accession Protocol, Art. 16.5.

¹⁷⁵ China’s Accession Protocol, Art. 16.6.

¹⁷⁶ China’s Accession Protocol, Art. 16.7

developments' is to 'force Members to forget what they clearly foresaw and create unnecessary legal fiction to circumvent the non-applicable standard of unforeseen developments.'¹⁷⁷

In addition, as the instant investigation concerns Chinese towelling products, it also triggers another special safeguard mechanism last until 31 December 2008 against Chinese textiles, as provided for in paragraph 242 of China's Working Party Report. This paragraph is referred to in paragraph 342 of the Working Party Report, and subsequently, through Article 1.2, incorporated into China's Accession Protocol. Paragraph 242 is designed for prevention or remedying market disruption caused by Chinese textile and apparel products. It covers those textiles and apparel products covered by the Agreement of Textile and Clothing as of the date Agreement entered into force. In the case that a WTO member believes that, due to market disruption, Chinese textile and apparel products are threatening to 'impede the orderly development of trade in these products', the affected Member can request for consultation with a view to easing or avoiding the market disruption.¹⁷⁸ At the request of consultation, a factual statement of reason and justification on its request should be provided, in particular, data in relation to the existence or threat of market disruption and the role of Chinese products in that disruption.¹⁷⁹ Upon the receipt of request, China shall restrict its exports of products concerned to a level 'no greater than 7.5 per cent (6 per cent for wool product categories) above the amount entered during the first 12 months of the most recent 14 months preceding the month in which the request for consultations was made'¹⁸⁰ If a mutual agreement cannot be reached within 90 days as set out in subparagraph (b) of 242, requesting Member may continue the limit, i.e., quantitative restrictions, whereas the consolation should also continue.¹⁸¹ Besides, Measure under this paragraph and under Article 16 of China's Accession Protocol cannot be applied to the same product at the same time.¹⁸²

¹⁷⁷ TW Huang, 'Taiwan's Protocol 16 Special Safeguard and Anti-dumping Enforcement on Imports from China' (2002) 41 *Journal of World Trade* 371, 390.

¹⁷⁸ China Working Party Report, para 242 (a), first sentence.

¹⁷⁹ China Working Party Report, para. 242 (a), last sentence.

¹⁸⁰ Paragraph 242 (c) of China Working Party Report.

¹⁸¹ Paragraph 242 (d) of China Working Party Report.

¹⁸² Paragraph 242 (g) of China Working Party Report.

Paragraph 242 of China's Working Party Report adds more complexities to Taiwan's safeguard investigation against Chinese towelling products. While paragraph 242(g) prohibits the concurrent imposition of safeguard measures against Chinese textile and apparel products both under Article 16 of China's Accession Protocol and under paragraph 242 of China's Working Party Report, it provides no guidance on the relationship between these two special safeguard measures. One may be tempted to argue that, the rule of *lex specialis* applies here.¹⁸³ In this instance, paragraph 242 of China's Working Party Report is designated to safeguard measures against Chinese textile and apparel products in particular. In this case, paragraph 242 should be thus applicable, the application of Article 16 of China's Accession Protocol being excluded. Nevertheless, this reading may be problematic. Firstly, paragraph 242 (g) reads as follows: 'measures could not be applied to the same product at the same time under this provision and the provisions of Article 16 of the Protocol.' As this subparagraph (g) is situated in the context of special safeguard measures against Chinese textile and apparel products, 'the product' therein is thus referred to as those products covered by the ATC as of the date that the WTO Agreement entered into force. Thus, it suggests that textile and apparel products may also be subject to the special safeguard measures as provide in Article 16 of China's Accession Protocol. Besides, the procedure, remedy and most importantly the phasing out period of these two safeguard measures are different. Since special safeguard measures against Chinese textile and apparel products under paragraph 242 of China's Working Party Report expires on 31 December 2008, the *lex specialis* approach may come to a conclusion that special safeguard measures against Chinese product as provided for in Article 16 of China's Accession Protocol cannot be applicable to Chinese textile and apparel products.¹⁸⁴ This interpretation runs counter to the legal text of paragraph 242 of China's Working Party Report.

¹⁸³ See *e.g.*, D Huang, 'Legal Interpretation of Paragraph 242 of the Report of the Working Party on the Accession of China under the World Trade Organization Legal Framework' (2006) 40 *Journal of World Trade* 137, 147-148. While Huang does not explicitly refer to *lex specialis*, he argues that textile and apparel products are singled out as a special category.

¹⁸⁴ Huang argues that after the expiry of paragraph, special safeguard measures provided for in Article 16 of China's Accession Protocol. Read otherwise, it would be 'abusive' application of safeguard measures against Chinese products. *Ibid.*

In the instant safeguard investigation against Chinese towelling products, the legal basis in domestic for safeguard measures against Chinese products in general and Chinese textile products also differs. Nevertheless, the ITC barely touches upon the issues of legal basis and applicability of other requirements provided in existent WTO agreements in relation to the imposition of safeguard measures. In the final report, the ITC finds its legal basis domestically stemmed from chapter 4bis, import relief against products from China. It also refers to Article 16.4 of China's Accession Protocol for the determination of 'market disruption'.¹⁸⁵ The ITC does not provide further explanation in relation to its determination of legal basis. Nevertheless, one may guess that procedural requirement laid down by paragraph 242 of China's Working Party Report prevents the ITC from adopting a special safeguard measures under this paragraph against Chinese towelling product, as the ITC would have been obliged to request for consultation with China in this regard. As for requirements provided by GATT XIX and ASG, the ITC does not spend much effort as well. Taken the requirement of 'unforeseen development', while it is argued by Chinese producers that this requirement should also be applied to the instant investigation, the ITC rejects this argument by a brief note. The ITC states that the requirement of 'unforeseen development' is not referred to in Article 16 of China's Accession Protocol, and that practices by other WTO Members also support this interpretation.¹⁸⁶ This requirement is thus not relevant in the instant case. While the ITC's decision on the legal basis and applicability of the requirement of 'unforeseen developments' may be acceptable, its reasoned is nevertheless insufficient and flawed.

ii Market Disruption

In respect of the substantive issue, emphasis should be placed on the definition of 'market disruption.' As noted above, Article 16.4 of China's Accession Protocol provides guidance for the determination of market disruption. Nevertheless, divergent views arise as to whether market disruption exists if and *only* if 'imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, to be a significant cause of material

¹⁸⁵ Final report on injury, p. 2.

¹⁸⁶ Final report on injury, p. 18.

injury, or threat of material injury to the domestic industry.’ The ITC apparently equates market disruption with the previously mentioned criteria provided for in Article 16.4, as it explicitly refers to these criteria for its definition of ‘market disruption.’¹⁸⁷ However, this interpretation is not unquestionable as the legal text reads ‘market disruption shall exist *whenever* imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, to be a significant cause of material injury, or threat of material injury to the domestic industry.’ As suggested, while rapidly increased Chinese imports causing or threatening to cause material injury to the domestic industry are definitely market disruption, market disruption is not exclusively defined by it.¹⁸⁸

Even taking the ITC’s interpretation, one should also caution against the usage of ‘material injury’ in this special safeguard mechanism. ‘Material injury’ is not the criterion prescribed in GATT XIX and ASG, but in GATT VI and ADA instead. While there are not clear-cut standards for ‘material injury,’ it is nevertheless settled that ‘material injury’ sets a lower bar for injury determination than ‘serious injury.’ Besides, Article 16 covers both like products and directly competitive products, which is in line with GATT XIX and ASG. The imported article is not limited to a product like the product produced by domestic industry; an article directly competitive with the domestic product can also be taken into account in the injury determination. Finally, Article 16.4 regulates the causal link with the threshold of ‘a significant cause of material injury, or threat of material injury to the domestic industry.’ As noted in Section II of this Chapter, it is settled in the WTO jurisprudence that, in safeguard measure investigation, the increased imports need not to be the only cause contributing to serious injury to domestic industry. In Members’ practice, ‘a

¹⁸⁷ Final Injury Report on the Safeguard Measure Investigation on Chinese Toweling Products (the ITC of the MOEA, 29 August 2006, hereinafter ‘Safeguard Final Injury Report’), available at <http://portal.moeaitc.gov.tw/icweb/webform/wFrmWebDownload.aspx?kind=report&id=247> (last accessed 20/05/2008). This interpretation is in line with other Members’ practice, see. e.g. USITC Report on Steel Wire Garment Hangers From China, Inv. No. TA-421-3 (07/29/2003), available at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2002/421_garment_hangers/safeguard.htm (last accessed 11/04/2008).

¹⁸⁸ Huang, ‘Taiwan’s Protocol 16 Special Safeguard and Anti-dumping Enforcement on Imports from China’, above n 177, at 390.

significant cause' is normally defined as, in respect of a material injury or threat thereof, an important cause that need not be equal to, or more important than, any other cause of the material injury or threat.¹⁸⁹ In sum, compared to the existent WTO rules on safeguard measures, the special safeguard mechanism provided for in Article 16 of China's Accession Protocol is looser in the extent of injury but wider in the coverage of products concerned; the requirement of causal link is nevertheless unclear.

Examining the explanation provided in the ITC's final report in light of the forgoing analysis, one is safe to say that the ITC pays little attention to these elements, and their deviation from existent WTO rules. The ITC notes that, since the liberalization of its market on towelling products to Chinese products in 2002, Chinese products accounted for 69.3% of its market share at the time of its investigation in 2005. The market share of Taiwanese towelling products decreased from 16.6% to 8.2%, while the market share of towelling products from other origins decrease from 83.4% to 22.5% during the period of 2001 to the first three quarter of 2005.¹⁹⁰ Based on this, the ITC finds the rapid increase of Chinese imports on towelling products.

While there is an evidently rapid increase of imports of Chinese towelling products, material injury to domestic industry is not so evident, in particular in terms of the decrease of market share of Taiwanese towelling products. Besides, as Chinese producers argue, the decrease of market share of Taiwanese towelling products result from the transformation and upgrading of Taiwanese industrial structure. Taiwanese towelling industry has moved out to China or Viet Nam, a large proportion to Chinese towelling products sold back to Taiwan are actually made by Taiwan-invested enterprises in China. The material injury in Taiwan's towelling industry does not exist.¹⁹¹ The ITC fails to rebut this argument in a satisfactory and convincing manner. Besides, taking into account the fact that Chinese towelling products are aimed at

¹⁸⁹ See, *e.g.*, Section 421(c)(2) of the US Trade Act of 1974; Section 30.2 of the Canadian International Tribunal Act.

¹⁹⁰ Safeguard Final Injury Report, at 9-10.

¹⁹¹ Safeguard Final Injury Report, at 19. See further in the next subsection, anti-dumping investigation against Chinese products.

mainly low-price market, and the fact that the average price of Taiwanese towelling product increase, the determination of material injury in Taiwanese towelling industry seems not so well reasoned. In addition, the ITC does not deal the causal link in terms of ‘significant cause,’ even though its determination on the causation may be supported as Chinese towelling products have to a significant extent replaced the towelling products of other origins since entering into the Taiwanese market.

2. ANTI-DUMPING MEASURES

a. General Regulatory Framework

Taiwan’s anti-dumping regulatory regime was first laid down in 1967, albeit loosely drafted, in its Customs Act. Later, a more detailed implementing rule, *Regulation on Anti-Dumping Duties and Countervailing Duties*, was issued by Ministry of Finance (MOF) under the authorization of the *Customs Act* in 1984. Since Taiwan’s application for its membership of the GATT in the earlier 1990s, the *Customs Act* was substantially amended. The last revision of this act was in January 2008. The existent *Customs Act*, in chapter 4, regulates anti-dumping duties, countervailing duties and safeguard measures.

Article 68 authorizes the imposition of anti-dumping duties in cases that imported goods are found to be imported at a price less than the normal value of its like product, thereby causing injury to domestic industry.¹⁹² ‘Normal value’ is defined in the second paragraph as ‘the comparable domestic selling price in the country of exportation or origin in the ordinary course of trade.’ This paragraph further elaborates that, in the absence of such a domestic selling price, the comparable selling price exported to an appropriate third country, or the constructed price can be used for the determination of normal value. The following Article 69, in the first paragraph, defines the term ‘causing injury to domestic industry’ as ‘material injury’, ‘threat of material injury to the industry’, or ‘material retardation of the establishment of such an industry’ in Taiwan. Article 69(4) authorizes the BOF to issue regulations

¹⁹² Further guidance on the definition of ‘like products’ is provided in Article 5 of *Anti-Dumping and Countervailing Duties*. Nevertheless, conflicts arise in relation to the scope of domestic products between *Foreign Trade Act* and *Customs Act*. *Foreign Trade Act* refers to ‘domestically produced products competing with the said (imported) goods’ whereas *Customs Act* uses the term ‘like products’.

governing the qualification of applicants, application contents, investigations, determination, public comments, and relevant procedures after the approval of the Executive Yuan, the highest administrative organ in Taiwan. Besides, in article 72, it provides the possibility to increase duty rate, adopt tariff quota, or to impose additional duties the case where import relief or special safeguard measures are adopted in accordance with Article 18 of the *Foreign Trade Act*.¹⁹³

As noted above, this *Foreign Trade Act*, firstly legislated in 1993, is a package for Taiwan's bid for GATT membership. As a consequence of this enactment, and in view of the Anti-Dumping Code after the Tokyo Round, the *Regulation on Anti-Dumping Duties and Countervailing Duties* was thus amended and further defined in 1994. It clarified petitions, investigation procedures, and the time limit for the investigations. On 19 December 2001, the eve before Taiwan's accession to the WTO, this regulation was once again amended to ensure its WTO-compatibility, notably the ADA and ASCM. It includes the requirements of, *inter alia*, consultation with exporting countries, public notice and comments, disclosure of information to interested parties, and overall evaluation of domestic industry, including public interest.

Article 19 of the *Foreign Trade Act* regulates trade remedies against dumping and subsidies, providing that anti-dumping duties and countervailing duties may be imposed by Ministry of Finance after the investigation of MOEA where material injury to domestic industry is verified. This article loosely prescribes the condition for the imposition of anti-dumping duties: the existence of dumping, material injury or threat thereof to domestic industry or substantial hindrance to its establishment, causation.¹⁹⁴ The injury investigation is carried out by the ITC under MOEA, while

¹⁹³ See further subsection (b), text to n. 197, ff.

¹⁹⁴ Article 19 of the *Foreign Trade Act* deviates significantly from the WTO rules on anti-dumping and anti-subsidy measures. The official English translation of this article reads, 'in the event that a foreign country exports any goods to this country by way of subsidizing or dumping thereby causing or threatening to cause substantial injury to domestically produced products competing with the said goods or creating substantial hindrance to the establishment of the domestic industry concerned, and the injury has been verified after investigation by the MOEA, the Ministry of Finance may impose, by law, countervailing or anti-dumping duties.' Firstly, the provision does not mention like products; it refers to domestic products competing with the exported products instead. In contrast to Article 18 of the same Act, which regulates safeguard measures, it term 'like or directly competitive products' is employed. As is clarified by the Appellate Body in *Korea — Alcoholic Beverages*, 'Like' products are a

the final anti-dumping determination and the decision of anti-dumping measures are carried out by MOF. With a view to avoiding the conflict and disparity between determinations conducted by these agencies, especially the injury determinations Article 14 of the *Implementation Rules of the Foreign Trade Act* instructs the injury investigating authority to make the determination of material injury, threat of material injury, or material retardation to the establishment of domestic industry based on the same criteria as the MOF does under Article 69 of the Customs Act in relation to its injury determination in anti-dumping and countervailing duties. Nevertheless, this provision is of little significance as the injury determination, even in the case of anti-dumping and anti-subsidy investigation, is carried out by the ITC under MOEA, the MOF is obliged to accept the determination made the ITC, and is in no position to alter this determination.

In respect of judicial/administrative review, the *Foreign Trade Act* or *Customs Act* does not specifically in this regard. Therefore, administrative review and judicial review can be referred to the general legal framework governing administrative review and judicial review laid down by *Administrative Litigation Act* and the accompanying legislation. The petitioner referred the MOEA's decision not to impose additional duties on Chinese products, and to consider other possible provisional safeguard measures to the Administrative Appeal Review Committee in the Executive. With regard to the MOEA's decision not to impose additional duties on Chinese products, the appeal is dismissed by the Administrative Appeal Review Committee of the Executive Yuan on procedural grounds because the attorney in this appeal fails to provide an authentic written form of authorization within the expiry of the period for amendment.¹⁹⁵ With regard to the ITC's decision to consider other possible

subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'. The notion of like products must be construed narrowly but the category of directly competitive or substitutable products is broader.' (WT/DS75/AB/R, WT/DS84/AB/R, para. 118). The act fails to clearly distinguish different requirements laid down by ADA (and SCMA) and ASG in relation to the scope of products under consideration. Besides, Article 19 dictates the finding of 'injury' to be verified by MOEA; nevertheless, material injury to domestic industry, threat of material injury to domestic industry and the material retardation to its establishment are all conditions eligible for the imposition of anti-dumping measures. Article 19 is still unclear as to the scope of 'injury' determination to be carried out by MOEA, notwithstanding the clarification of Article 14 of *Implementation Rules of the Foreign Trade Act*.

¹⁹⁵ <http://www.ey.gov.tw/ct.asp?xItem=25877&ctNode=1096&mp=1> (last accessed 14/04/2008).

provisional safeguard measures, the Administrative Appeal Review Committee of the Executive Yuan held that, as it is a decision of the ITC, it falls into the jurisdiction of the Administrative Appeal Review Committee of the MOEA. The Administrative Appeal Review Committee of the Executive Yuan thus refers this decision to the Administrative Appeal Review Committee of the MOEA. However, according to the Administrative Appeal Committee of the MOEA, in its decision to consider other possible provisional measures, the ITC merely refers to those available measures provided for in Article 4¹⁹⁶ of the *Regulation on Import Relief*. It is intended to notice the petitioner that the ITC duly received the petitioner's request to impose other possible provisional safeguard measures, and that the ITC would consider possible measures provided for by relevant rules. This is not an administrative action (Verwaltungsakte), which may be subject to administrative review. The Administrative Appeal Review Committee of the MOEA thus dismisses the appeal.

b. Definitive Anti-Dumping Measures on Certain Towelling Products

Under Article 2 of *Regulation on Anti-dumping Duties and Countervailing Duties*, the competence authority can self-initiate an anti-dumping investigation even in the absence of petition. During its safeguard measure investigation, the ITC under the MOEA, as required by Article 28 of *Regulation on Import Relief*,¹⁹⁷ referred to MOF on 3 January 2006 for anti-dumping investigation as the ITC found that, according to its data collected, there was evidence of dumping by Chinese towelling producers.¹⁹⁸ Based on this referral, the MOF self-initiated its anti-dumping investigation against Chinese towelling products on 1 March 2006. The BOF subsequently referred to the ITC in the MOEA for the injury investigation under

¹⁹⁶ Article 41 of the Regulation on Import Relief provides, 'for those import relief cases in which the existence of injury or threat thereof has been established pursuant to these Rules, the Ministry of Economic Affairs may adopt the following relief measures: 1.adjusting the tariffs, 2.imposing import quotas,3.providing financing guarantee, subsidy for technological research and development, assistance for changing the line of business, professional training or other adjustment measures or assistance'.

¹⁹⁷ Article 28 of *Regulation on Import Relief* provides that in cases that MOEA, during its injury investigation, find that subsidization or dumping as provided for under Article 67 or Article 68 of the Customs Act is involved, it shall promptly notify the MOF and the petitioner. See further subsection (b), text to n. 197, ff.

¹⁹⁸ Final Report on Anti-dumping Investigation on Chinese Towelling Products (the BOF, 24 July 2006, declassified version, hereinafter the 'Anti-dumping Final Report'), p. 1, available at <http://doca.mof.gov.tw/ct.asp?xItem=31384&ctNode=60&mp=1> (last visited 07/04/2008).

anti-dumping proceedings. A preliminary determination on injury to domestic towelling industry was made and notified to the MOF by the ITC under the MOEA on 22 March 2006; based on this injury determination, provisional anti-dumping duties were imposed against Chinese products on 1 June 2006. On-site investigations to two Chinese producers were carried out during 13 June 2006 to 22 June 2006.¹⁹⁹ The final report on anti-dumping investigation was released on 28 July 2006.²⁰⁰ Based on the finding of dumping, the BOF referred to the ITC for the final determination of material injury to domestic industry. The final report on material injury to domestic industry was released on 29 August 2006. Consequently, the BOF on 19 September 2006 decided to impose definitive anti-dumping duties upon Chinese towelling products, except those products by the six producers accepting price-undertaking.²⁰¹

i Non-market Economy

The first issue to be examined in this anti-dumping investigation is Taiwan's decision in relation to China's status of non-market economy. Before China's Accession to the WTO, legal basis for non-market economy derives mainly from AD Article VI:1 of GATT. Moreover, Section 15 of China's Accession Protocol provides additional rules for other Member to treat China as a non-market economy. Section 15(a) provides that a member, when conducting an anti-dumping investigation against Chinese products, can use either prices or costs provided by Chinese producers or base on a methodology not strictly based on comparison with prices or costs in China. In the case that producers under investigation cannot clearly show that market economy conditions in relation to manufacture, production and sale of the product prevail, Members may use a methodology not strictly based on comparison with prices or costs in China.²⁰² According to this provision, Chinese producers bear the burden proof of showing that their business practices are in accordance with market economy conditions. Otherwise, members may be free to adopt a methodology which is not strictly based on comparison with prices or costs in China. Market economic

¹⁹⁹ *Ibid*, at 2.

²⁰⁰ *Ibid*, at 2-3.

²⁰¹ Notice of MOF, Taicai guanzhi No. 09505505100 (19 September 2006), available at <http://www.mof.gov.tw/fp.asp?xItem=32014&ctNode=656> (last accessed 13/04/2008).

²⁰² China's Accession Protocol, Art. 15(a)(ii).

status may be granted to China or a particular industry or sector if Members are of the view that China has satisfied the requirements for market economy according to their national law.²⁰³

Before this investigation, Taiwan's foreign trade regulatory regime provides nothing about non-market economy. After the initiation of this anti-dumping investigation, the MOF on 29 May 2006 issued its criteria for the determination of a non-market economy. With the same notice, it was decided that China should be viewed as a non-market economy.²⁰⁴ The standard set out by BOF for the determination of the non-market economy status of a country during its anti-dumping investigation covers the following factors':

- (1) The flexibility of foreign exchange;
- (2) The extent under which collective bargaining is practiced;
- (3) The extent that foreign investment is restricted in joint ventures or local investment;
- (4) State ownership or control of factors of production;
- (5) State control of resources;
- (6) The extent to which price and production is determined by enterprises;
- (7) The extent of legal protection of business operations;
- (8) The conformity of business accounting practices to international standards.

Based upon those criteria, the BOF then states that China should be treated as a non-market economy in light of the following factors: China's strict controls of its foreign exchange and financial policy and national resource; maintenance of macro-economic control; state intervention in the operation of state owned enterprises, notably the state owned banks; lack of significant progress in liberalization of production factors and its bankruptcy regime; and a large number of restrictions on imports, exports and foreign investments.²⁰⁵ Thus, when conducting anti-dumping

²⁰³ China's Accession Protocol, Art. 15(d).

²⁰⁴ BOF notice, No. Taicai guanzhi 09505502880, (29 May 2006), available at <http://www.mof.gov.tw/ct.asp?xItem=30158&ctNode=656&mp=1> (last accessed 11/04/2008).

²⁰⁵ *Ibid.*

investigations against Chinese products, an analogue country should be chosen for the determination of normal value according to the market scale and economic/social development of third countries.

Factors referred to in this determination of China's non-market economy status in Taiwan's domestic legal system are mostly irrelevant in this towelling investigation, as those factors are of little importance to Chinese towelling industry. Specific links between those factors and Chinese towelling industry have not been provided. While the ITC examines whether market economy treatment for individual producers to be granted, little has been said as to its negative decision. The ITC states that these two produces requesting market economy treatment did not provide evidence to prove their prices and costs are not affected by China's non-market economy, since they accept price-undertaking and thus refuse on-site investigations.²⁰⁶

ii Self-elicited Injury, Injury, Causation

After the final determination of dumping, the BOF refers to the ITC in MOEA to conduct further investigation on material injury to domestic industry. Some issues should be discussed in relation to injury determination.

Firstly, the organizational arrangement may be problematic. While it is not against the WTO rules to issue separate reports by different agencies in one single anti-dumping investigation, this may add inconsistency and incoherence to the final *reports* of these agencies. In this instant case, the initiation of investigation resulted from the referral of the ITC of the MOEA. In the absence of petitioners, the MOF decided to self-initiate the anti-dumping investigation, and subsequently referred back to the ITC for the injury investigation. The impartiality and objectivity of the ITC may be questionable. Besides, the reason why the BOF chose to self-initiate the anti-dumping investigation is not clearly explained. The BOF did not even participate in the injury hearing of anti-dumping investigation by the ITC of the MOEA, which attracted server criticism by one of the participants arguing for the imposition of anti-dumping duties.²⁰⁷ Furthermore, the ITC notes in its final report that, given that

²⁰⁶ Anti-Dumping Final Report, at 6-7.

²⁰⁷ Record of the hearing on injury to domestic industry in anti-dumping investigation, (21 August

the scope of products under investigation (alleged dumped imports and like products), domestic industry, and the criteria for both anti-dumping and special safeguard investigations are identical, it bases its finding of material injury in domestic injury mainly on the data and information collected in the special safeguard investigation.²⁰⁸ The ITC fails to distinguish these two investigations notwithstanding the difference of scope of products under consideration. The special safeguard measures cover ‘like products’ and ‘directly competitive products’ whereas the anti-dumping measures cover only ‘like products.’

Secondly, a very interesting point to note is that one major Chinese producer, Yuanfu Fangzhi Co. Ltd., is a Taiwan-invested enterprise, previously located in the same region as petitioners in the special safeguard investigation, before it decided to uproot its main sectors to China. While products by this producer can be certainly treated as Chinese products under the Agreement of Rules on Origin as the ITC notes in response to the arguments of Chinese producers, it adds difficulties for the assessment of injury. As argued by Taiwan Chungda Co., Ltd, the Taiwanese investor of Yuanfu Fangzhi, in the injury hearing of anti-dumping investigation that injury to Taiwanese towelling industry is not caused by Chinese products. Instead, the injury of Taiwan’s domestic towelling industry existed before importation of Chinese products.²⁰⁹

The argument of Chunda Co., Ltd, has two implications. As far as this anti-dumping investigation is concerned, this argument points to the ambiguity in determining the scope of domestic industry. Article 4.1 of ADA authorizes competent authorities to exclude domestic producers from the definition of domestic industry when ‘producers are related to the exporters or importers or are themselves importers of the alleged dumped product.’ Footnote 11 to the ADA provides further guidance for the interpretation of ‘related’ producers to be excluded from domestic industry.

2006), p. 12. available at http://portal.moeaitc.gov.tw/Portal/Knowledge/Knowledge_01.aspx?docid=4426&doctype1=1 (last accessed 20/05/2008, hereinafter the ‘Hearing Record’).

²⁰⁸ Final Injury Report on Anti-dumping Investigation on Chinese Toweling Products, (the ITC of the MOEA, 17 March 2006, hereinafter the ‘Anti-dumping Final Injury Report’), p. 8. available at <http://portal.moeaitc.gov.tw/icweb/webform/wFrmWebDownload.aspx?kind=report&id=245> (last accessed 20/05/2008).

²⁰⁹ The Hearing Record, at 17-18.

Producers may be deemed related to exporters or importers only if these producer fall into one of the three categories: (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person. Otherwise, there must be grounds for the competent authorities to believe or to suspect the producers concerned, consequently of their relationship, to behave differently from non-related producers. The final report of injury determination refers to Article 5.2 of *Regulation on Anti-Dumping and Countervailing Duties* for the definition of domestic industry, which similarly provides the exclusion of related producers. Nevertheless, the ITC does not clarify whether these related producers are excluded.

Putting this argument into a broader context, one may be faced with the difficulties in balancing divergent values and interests. While outsourcing certain sectors of domestic industry may enhance their competitiveness, it may bring about other social problems, notably the unemployment. While existent domestic industry may benefit from stricter enforcement of trade defence measures, in the case of Taiwan, which largely outsource its labour intensive sectors to China, it may run counter to its public interest as a whole. Even in terms of industrial development policies, conflicts arise between different sectors of domestic industry.

iv Administrative Review/Judicial Review

In this instance, the YCTPA referred the final decision of the BOF in the anti-dumping investigation, including choice of analogue country and the determination of dumping margin, anti-dumping measures and the acceptance of price-undertaking to the Administrative Appeal Review Committee in the Executive Yuan for administrative review. Nevertheless, this appeal was rejected based on the lack of standing. The Administrative Appeal Review Committee held that, the decision of the BOF is aimed at imposing anti-dumping measures against Taiwanese importers or agents and Chinese producers or exporters of the products concerned. As the YCTPA is an association not engaged in economic activities, and it is not even the petitioner in this investigation, the rights and legal interests of the YCTPA are thus not affected in this decision. Based on this reasoning, the Administrative Appeal

Review Committee then concludes that the YCTPA is not ‘an interested party’ in terms of the first sentence Article 1.1²¹⁰ and Article 18²¹¹ of *Administrative Appeal Act*, and that the appeal should be rejected.²¹²

The decision of the Administrative Appeal Review Committee is inconceivable. It is blind to the whole investigation proceedings when it notes that the YCTPA is not an interested party as defined in the first sentence Article 1.1 and Article 18 of *Administrative Appeal Act* since its rights and legal interests are not affected. The YCTPA is an association composed of Taiwanese towelling producers, whose rights and legal interests this anti-dumping investigation aims to protect. The objective and purpose of the *Regulation on Anti-Dumping and Countervailing Duties* is to prevent and remedy the injury of domestic industry. In this case, the YCTPA constitutes the major proportion of domestic industry, which can be clearly seen by the final report by the BOF and the ITC of the MOEA. More precisely, Article 10 of this regulation defines the interested party in four categories, one of which is the domestic producers of like products and the associations of commerce, industry, or agriculture mainly composed of these producers. Moreover, this anti-dumping investigation results from a concurrent special safeguard investigation, where the YCTPA is the petitioner. In light of the self-initiation of anti-dumping investigation by the BOF in absence of petitioner, and with the objection of the YCTPA, it is beyond the expectation of the YCTPA if it is excluded from an interested party on the ground that the BOF self-initiated this anti-dumping investigation.

C. SHORT CONCLUSION

This section examines trade dispute resolution between Taiwan and China at the national level, focusing on the trade defence regulatory regime. I emphasize the obligation to provide an adequate and reasoned explanation when a Member adopts a

²¹⁰ The first sentence of Article 1.1 provides, ‘anyone whose right or interest was unlawfully or improperly injured by a central or local government agency’s administrative action is entitled to file an administrative appeal according to this Act.’

²¹¹ Article 18 of Administrative Appeal Act provides, ‘any individual, legal entity or organization or anyone whom an administrative action is issued to as well as a third party with interest at stake may file an administrative appeal.’

²¹² Available at <http://www.ey.gov.tw/ct.asp?xItem=31140&ctNode=1096&mp=1> (last accessed 14/04/2008).

trade defence measure. I use China's anti-dumping and safeguard measures against Taiwanese steel products, and Taiwan's anti-dumping and product-specific safeguard measures against Chinese towelling products as a case study in order to explore their interaction in these investigation proceedings and to examine the WTO-consistency of their trade defence measures. I emphasize the obligation to provide an adequate and reasoned explanation on their decision. Firstly, Chinese anti-dumping and safeguard measures against Taiwanese steel products can be linked to the *US – Steel Safeguards* at WTO level. I argue that Taiwan's third party participation in the *US – Steel Safeguards* can be seen indirectly as a posture to argue with China against the WTO-incompatibility of Chinese anti-dumping and safeguard measures on Taiwanese products. Besides, although the possibility of administrative review/judicial review is provided in China's trade defence regulatory regime, it is hardly used. In a case relating Taiwanese products, the decision of the Administrative Review Committee in China is not public available. This may constitute a violation of China's obligation to provide an independent and impartial judicial review, as embodies in Article 2 of China's Accession Protocol. In respect of Taiwan's anti-dumping and product-specific safeguard measures against Chinese towelling products, I analyze the complexities between Article 16 of China's Accession Protocol, paragraph 242 of China's Working Party Report and the existent WTO rules. The numerous 'WTO-plus' obligations add ambiguities to the interpretation of the obligation covered in China's Accession Protocol. In terms of the administrative review of Taiwan's decisions on anti-dumping and safeguard measures, the definition of 'interested parties' plays a crucial role. I argue that the decision of the Administrative Review Committee to reject the appeal of the YCTPA is unfounded. A technical and clinical interpretation of 'interested parties' and subsequently the exclusion of the YCTPA as an interested party again refers back to the fundamental question: how should one perceive the role of the review body and the nature of rights and interests of individual economic actors.

IV. CONCLUSION

This chapter examines the trade dispute resolution between China and Taiwan. It covers the WTO dispute settlement mechanism and the domestic trade dispute resolution. As there has not been any direct complaint against each other, I choose to explore their interaction in the WTO dispute settlement mechanism through the lens of Taiwan's third party intervention in complaints brought about by and against China. Therefore, I firstly investigate WTO law and practice in relation to third party participation in the WTO Dispute Settlement Mechanism. Based on this, I examine complaints brought about by and against China. I also try to delineate the link between the WTO Dispute Settlement Mechanism and the domestic trade resolution regime. As China is one of the complaining members in *US – Steel Safeguards* where Taiwan intervenes as a third party, and China initiated parallel safeguard and anti-dumping investigation against Taiwanese steel products, the *US – Steel Safeguards* proves itself the best example to examine both their interaction in the WTO Dispute Settlement Mechanism and its impact on domestic trade dispute resolution regime. Moreover, I examine also Taiwanese trade defence measures against Chinese towelling products where both anti-dumping investigation and product-specific safeguard investigation were carried out. This illustrates the complexities added by China's 'WTO-plus' obligations. I also examine the domestic administrative/judicial review on these trade defence measures points the significance to take China's obligation to provide an independent and impartial judicial review. I also argue that the technical interpretation of 'interested parties' adopted by the Administrative Review Committee in Taiwan and subsequently the exclusion of the petitioner as an interested party is groundless. The Administrative Review Committee fails to correct perceive their role as a review body and the rights and interests enjoy by the petitioner. Overall, insofar as the existent practice between Taiwan and China is concerned, their interaction both under the WTO framework and under domestic regulatory regime has had a great progress. Nevertheless, it does not necessarily mean that Taiwan's approach of third party participation in the WTO Dispute Settlement Mechanism is an effective one, albeit a steady and cautious one. Besides, the newly signed agreements between Taiwan and China provide a primitive dispute resolution

mechanism which is mainly based on 'prompt negotiation.' This may suggest a direct complaint between Taiwan and China in the WTO Dispute Settlement Mechanism is not foreseeable in the near future. Domestically, with the change of political climate, whether trade defence measures against each other would decrease is still yet to see.

**CHAPTER VIII ONE COUNTRY, TWO SYSTEMS, AND THREE MEMBERSHIPS:
TRADE DISPUTE RESOLUTION BETWEEN CHINA AND HONG KONG,
CHINA AND MACAU, CHINA**

I. INTRODUCTION

As People's Republic of China resumed its exercise of sovereignty over Hong Kong in 1997, and subsequently over Macau in 1999, the idea of 'One Country, Two Systems' advocated by Deng Xiao-ping has been applied to these two areas. China amended its constitution to provide the legal basis for the establishment of the Special Administrative Region (the SAR) and thus made the Hong Kong Special Administrative Region (the HKSAR) and the Macau Special Administrative Region (the Macau SAR) possible. Hong Kong Basic Law (the HKBL) and Macau Basic Law (the MABL) were promulgated by National People's Congress in order to ensure the high degree of autonomy of these two SARs to remain unchanged in fifty years. These two Basic Laws are not only national laws of China, but they are also mini-constitutions of these two SARs.

The diversity of legal cultures in these three areas provides a variety of materials for comparative lawyers. Hong Kong, as a former British colony, has been deeply influenced by the common law tradition while Macau, albeit to a lesser extent, has been influenced by the Portuguese legal order. Apart from these two legal traditions, China's legal system, the so-called 'socialist rule of law with Chinese characteristics', presents a genre of its own. The confrontation of different legal cultures in these three areas yields great particularity.

On the other hand, interaction of these three areas is of no less interest to international trade lawyers. As Hong Kong (with the official name of Hong Kong, China) and Macau (with the official name of Macau, China) are full members of the WTO as China is, and their autonomy in external trade areas are ensured by the two Basic Laws and the Sino-British and Sin-Portuguese Joint Declarations, their interaction in the WTO forum appears unique. In addition, China signed the Closer Economic Partnership Arrangement (CEPA) with Hong Kong, China on 29 June 2003, and subsequently with Macau, China on 17 October 2003. These two CEPAs can be

seen as a Free Trade Agreement without the name. Legal and economic integration through the WTO and the CEPAs between China and its two SARs offers a lot for international trade lawyers to explore.

This Chapter chooses to focus on trade dispute resolution mechanisms between China and its two SARs. The term ‘trade dispute resolution mechanisms’ referred to here may include domestic courts under the constitutional/national law framework as well as dispute settlement mechanisms provided in the CEPA and the WTO. This Chapter thus aims to examine whether and how the Court of Final Appeal in these two SARs can guard their economic autonomy, and explore whether and how different legal cultures influence and determine (potential) approaches taken. With regard to the perspective of international trade law, this Chapter will focus on the potential use, though nearly impossible, of the WTO forum, as well as dispute settlement mechanisms provided in these two CEPAs.

Both section II and section III begin with a general introduction illustrating the judicial review in China and its two SARs, and the background knowledge of these three memberships in the WTO. Following this introductory background, they will continue to examine specific issues related to trade dispute resolution. Vertical and horizontal interaction between the Standing Committee of the National People’s Congress and the two SARs is examined under the constitutional/national law framework. Vertical interaction includes the interpretation competence of the Basic Law of the Standing Committee and the allocation of competence, while horizontal interaction focuses on the competition of competence. With regard to the international trade law framework, both trade dispute settlement mechanisms in the WTO and the CEPAs will be analyzed. A short concluding remark will then be offered in the final section of this Chapter.

II. CONSTITUTIONAL/NATIONAL LAW FRAMEWORK

A. DIVERSITY OF LEGAL CULTURES

As mentioned in the introductory section, China and its two SARs present a vast diversity of legal cultures. To examine this diversity in detail certainly goes beyond

the coverage of this Chapter. However, some background knowledge will be helpful, and can enhance a better understanding of the following discussion. As this Chapter concerns mainly trade dispute resolution, it will thus focus on judicial review in China and its two SARs. However, judicial review in China should also be dealt together with an examination of the competence of the National People's Congress and its Standing Committee. Although the National People's Congress and its Standing Committee are legislative organs by nature, they exercise the competence of reviewing the constitutionality of Chinese laws and regulations. Besides, these organs are in charge of the interpretation of Basic Laws. It is thus feasible to consider these two organs when dealing with trade dispute resolution in these three areas. Therefore, this section will firstly examine the interaction between Supreme People's Court and the National People's Congress and its Standing Committee. It will then examine how the Court of Final Appeal in Hong Kong, China and Macau, China exercise their competence of judicial review, which lay a sound basis for the following subsection, which examines the interaction between the Standing Committee and these two Courts of Final Appeal.

1. LEGISLATIVE INTERPRETATION/JUDICIAL INTERPRETATION: THE RELATIONSHIP BETWEEN THE SUPREME PEOPLE'S COURT AND THE NATIONAL PEOPLE'S CONGRESS AND ITS STANDING COMMITTEE

The 1982 Constitution¹ assigns the competence to interpret national legislation and the constitution itself to the National People's Congress, whereas the Organic Law of Supreme People's Court authorizes the Supreme People's Court to deliver judicial interpretations on questions concerning specific application of laws and decrees in judicial proceedings for practical reasons. Hence, how to allocate the jurisdiction concerning the interpretation of national laws, or even the constitution, turns out to be a key issue. On 10 June 1981, the Standing Committee of the Fifth National People's Congress adopted a resolution governing the improvement of the interpretations of laws. Even though the 1982 Constitution had not yet been revised at that time, this resolution lays down the basic principle of allocation of competence

¹ For the evolution of Chinese constitution, see *generally* D Tsai, *Constitution* (Law Press China, Beijing 2004) 7-96.

between Supreme People's Court and National People's Congress, and remains valid even after the revision of 1982 Constitution. As the Standing Committee recognized a necessity to provide more legislation and better interpretations of laws in order to improve the socialist legal system, it was thus decided that:

(1) In cases where the limits of articles of laws and decrees need to be further defined or additional stipulations need to be made, the Standing Committee of the National People's Congress shall provide interpretations or make stipulations by means of decrees.

(2) Interpretation of questions involving the specific application of laws and decrees in court trials shall be provided by the Supreme People's Court. Interpretation of questions involving the specific application of laws and decrees in the procuratorial work of the procuratorates shall be provided by the Supreme People's Procuratorate. If the interpretations provided by the Supreme People's Court and the Supreme People's Procuratorate are at variance with each other in principle, they shall be submitted to the Standing committee of the National People's Congress for interpretation or decision.²

To be sure, one cannot decipher any clear line between 'further definition', 'additional stipulation' and 'the specific application of laws and decrees.' As prescribed in the second paragraph of this resolution, the Supreme People's Court can only give judicial interpretations when the specific application of laws and decrees in court trials is needed. In other words, only when these two conditions, namely, 'the specific application of laws and decrees' and 'in court trials', are satisfied can the Supreme People's Court hand down judicial interpretations. However, it seems not to be the case. Some literature even argues that the Supreme People's Court has continuously gone beyond its limits since the Standing Committee has hardly made interpretations except the exceptional Hong Kong Basic Law cases.³

A further step clearly to define the allocation of competence between National People's Congress and Supreme People's Court is the enactment of *Law on*

² An unofficial English version can be downloaded at http://www.novexc.com/interp_of_law.html (last accessed 25/06/2007). The resolution covers four paragraphs. The third paragraph deals with those interpretations which fall beyond the scope of judicial and procuratorial affairs while the fourth paragraph deals with the interpretation of local regulations.

³ N Liu, *Opinions of the Supreme People's Court: Judicial Interpretation in China* (Sweet & Maxwell Asia; Sweet & Maxwell, Hong Kong; London 1997) 59-62. However, on 29 August 2002, the Standing Committee of the NPC issued a legislative interpretation with regard to the definition of Article 313 of China's Criminal Law. Yet, the practice of legislative interpretation remains rare.

*Legislation*⁴ on 7 January 2000. *Law on Legislation* aims mainly to standardize the legislative process, which lays down procedural requirements for central, provincial and regional legislation. However, the competence of interpretation and review of laws and decrees is also dealt with therein. Similar to the existent resolution, it is provided that the competence to interpret national laws should be vested in the National People's Congress. Wherever '(a) the specific meaning of a provision of such legislation requires further clarification or (b) a new situation arises after enactment of such legislation, thereby requiring clarification of the basis of its application,'⁵ the National People's Congress or its Standing Committee should deliver legislative interpretations either spontaneously or upon the request of the State Council, the Central Military Committee, the Supreme People's Court, People's Supreme Procuratorate, special committees of NPCSC, and the Standing Committee of Local People's Congress.⁶ Legislative interpretations delivered by National People's Congress or its Standing Committee enjoy the same binding effect of statutes.⁷ Besides, in order to ensure the legal hierarchy of the Constitution, national legislation and provincial decrees, *Law on Legislation* also authorizes the National People's Congress, its Standing Committee as well as the Local People's Congress to amend or repeal contradicting legislation or decrees.⁸ Article 90 further provides that the State Council, the Central Military Committee, the Supreme People's Court, the People's Supreme Procuratorate, special committees of NPCSC, and the Standing Committee of Local People's Congress can make a request for constitutional review. Social groups, enterprises or non-enterprise institutions or citizens can also make a written proposal for such review.

Law on Legislation aims to remedy the conflicts and incoherence among various central and local legislation, autonomous decrees, special decrees, and administrative decrees. With a review mechanism, a clear legal hierarchy may be thus established, and the ever-worsening local protectionism may be corrected. Another observation

⁴ An official English version is available at http://www.novexc.com/legislat_law_00.html (last visited 25/06/2007).

⁵ Law on Legislation, Art. 41..

⁶ Law on Legislation, Art. 43..

⁷ Law on Legislation, 47.

⁸ Law on Legislation, Art. 89.

would be that the National People's Congress and its Standing Committee have felt uneasy about the encroachment of judicial organs. Consequently, some kind of fighting back should be done. The passage of *Law on Legislation* can be also viewed as a gesture of the Standing Committee's response toward the public demand for stronger constitutional review mechanism.⁹

Another effort to clarify the relationship between judicial interpretations and legislative interpretations and to ensure a coherent legal hierarchy is the adoption of the two working procedures on 19 December 2005: *Working Procedures Governing Notification and Review of Administrative Regulations, Regional Laws, Autonomous Decrees and Special Decrees, Regulations of Special Economic Zones* and *Working Procedures Governing Notification and Review of Judicial Interpretations*.

Three types of review are provided in the newly adopted working procedures governing the notification and review of law and decrees. Either the Standing Committee can review relevant regulations and decrees either spontaneously or upon the request of governmental agencies, citizens or legal persons. Whenever the Standing Committee finds a contradiction between different legal sources existing, it should invite relevant governmental branches to harmonize these conflicting legal texts, and to ask them to enact a new decree. Otherwise, the Standing Committee can repeal conflicting decrees by itself. Besides, in the working procedures governing the notification and review of judicial interpretations, it is also stipulated that the Supreme People's Court should notify its judicial interpretations within 30 days after the issuance. Similar review mechanisms are also applicable to judicial interpretations. Hence, governmental agencies or social groups, enterprises or non-enterprise institutions or citizens may also make a request for such review for judicial interpretations.

⁹ For constitutional review in China, see generally Z Wang, *Constitutional Review in China* (Tsinghua University Press, Beijing 2004).

2. THE FORMATION AND LEGAL STATUS OF JUDICIAL INTERPRETATIONS

In order to present a clear picture of how the Supreme People's Court interacts with the National People's Congress and its Standing Committee, it is also essential further to explore how these judicial interpretations are delivered and what legal status they enjoy. One of the most important features of Chinese judicial system is the existence of adjudicative committees, of which the legal basis can be found in the *Organic Law of People's Courts*. The main task of adjudicative committees is to 'sum up judicial experiences and to discuss important or difficult cases and other issues related to judicial work'.¹⁰ As the constitution requires the People's Supreme Court to supervise lower courts,¹¹ the adjudication committee of the Supreme People's Court uses this competence of 'summing up judicial experiences and discussing important or difficult cases and other issues relating to judicial work' to issue a variety of 'decisions'. These decisions range from opinions, legal instructions to official replies to lower courts. These decisions take the form of official opinions (*dafu*), letters (*fuhan* or *han*), notices (*tongzhi* or *tonggao*), explanations (*jieda* or *jieshi*), official answers (*pifu* or *dafu*), or conference summaries (*jiyao*). As observed, some of the decisions are merely related to judicial administrative affairs, whereas some fall squarely within the scope of judicial interpretations as defined in the previous mentioned resolution.¹² Since 1985, the Supreme People's Court has also continuously published some of its decisions which it deems as of significant legal importance in the Gazette. Cases reported in the Gazette should be 'mature' enough for the Court to give its own opinion on this issue, and should be 'representative' enough to warrant such publicity or uniformity.¹³ With regard to the legal effects of these decisions, the Supreme People's Court declared that they were meant to serve merely as the guidance to lower courts and should not be cited as legal authority in

¹⁰ Organic law of People's Court (China), Art. 11.

¹¹ Constitution (China), Art. 127 (2).

¹² RC Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (Kluwer Law International, The Hague ; Boston 1997) 75-78.

¹³ N Liu, 'Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of Supreme People's Court' (1991) 5 Journal of Chinese Law 107, 116.

judgments.¹⁴ It is nevertheless argued that these cases reported in the Gazette have functionally worked as precedents in Chinese legal systems.¹⁵

However, since 1997 after the passage of the *Stipulation Concerning the Duty of Judicial Interpretation in Supreme People's Court*,¹⁶ the legal status of judicial interpretations has been officially acknowledged and recognized. It is provided in the stipulation that judicial interpretations done by the Supreme People's Court, in the three forms of reply (*pifu*), explanation (*jieshi*), and regulation (*guiding*) in accordance of the generality as well as specificity,¹⁷ enjoy the same binding effects as national legislation.¹⁸ When referred to in the judgments, judicial interpretations should be cited after the relevant laws.¹⁹

Paradoxically, it appears difficult for the Supreme People's Court to justify its decision of conferring the same legal effect as national laws to judicial decisions. Although the stipulation tries to derive the legal basis from the resolution concerning the improvement of judicial interpretations of laws and from the *Organic Law of People's Court*, nevertheless, these two authorities provide no foundation for the justification of this claim, since the Supreme People's Court is merely assigned partial competence of judicial interpretations incumbent in adjudication. Even in the case of judicial interpretation in specific application of laws during the process of adjudicating a case, this specific judicial interpretation will not turn itself into a legal instrument having the same binding effects of laws. In this line, it is a forthright step for the Supreme People's Court to define, by itself, the legal status of its judicial interpretations.²⁰ Besides, it is also worthy of exploring furthermore whether the

¹⁴ People's Supreme Court's Reply on People's Courts Using Standardized Legal Documents When Making Judgments, available at <http://www.cecc.gov/pages/newLaws/standardLegalDocs.php> (last accessed 25/06/2007).

¹⁵ Liu, above n. 13, at 118-122. For further discussion of the importance of the guidance reported in the Gazette, see also N Liu, 'An Ignored Source of Chinese Law: the Gazette of Supreme People's Court' (1989) 5 Connecticut Journal of International Law 271.

¹⁶ The legal text is available at <http://www.court.gov.cn/lawdata/explain/main/200304040012.htm> (last accessed 25/06/2007).

¹⁷ The Stipulation Concerning the Duty of Judicial Interpretation in People's Supreme Court (the *Stipulation*), Art. 9.

¹⁸ The *Stipulation*, Art. 4.

¹⁹ The *Stipulation*, Art. 14.

²⁰ An interesting comparison is the *Judicial Yuan Interpretation* No185 of Constitutional Court in Taiwan, where the constitutional court declares its interpretations enjoy the same legal hierarchy as the Constitution. An English version is available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_

Supreme People's Court could derive its competence of constitutional interpretation based on the same approach.²¹

3. JUDICIAL REVIEW IN HONG KONG, CHINA

It is observed that Hong Kong commenced its journey of constitutional reform with the conclusion of Sino-British Declaration in 1984. The passage of Bill of Rights in 1991 and the entry into force of Hong Kong Basic Law are referred to as two constitutional revolutions and a shift in *Grundnorm*.²² Bill of Rights was introduced into Hong Kong and the Ordinance of Bills of Rights was enacted in 1991. It incorporated the main provisions of the International Covenant on Civil and Political Rights (ICCPR) which had already been applied by the United Kingdom to Hong Kong as a source of international law since 1976. This Ordinance explicitly repealed all pre-existing conflicting legislation and the Letters Patent had been amended with the aim to giving the primacy of the ICCPR over future ordinances of the colonial legislature.²³

As was held by the Court of Appeal in 1994:

The Letters Patent entrench the Bill of Rights by prohibiting any legislative inroad into the International Covenant on Civil and Political Rights as applied to Hong Kong. The Bill is the embodiment of the covenant as applied here. Any legislative inroad into the Bill is therefore, unconstitutional, and will be struck down by the courts as the guardians of the constitution.²⁴

Bill of Rights had conferred the Hong Kong citizens with constitutional protection of human rights and it had provided the judiciary a good standard as well as legal basis to invalidate conflicting local legislation. It is submitted that at the point of the reversion to Chinese rule in 1997, Hong Kong judiciary had developed a well-functioning and experienced judicial review mechanism to control the

01.asp?expno=185 (last accessed 29/10/2007).

²¹ Litigation based on constitutional rights and constitutional arguments has been occasionally reported in Chinese courts. For the Literature in English, *see* S Balme, 'The Judicialisation of Politics and the Politicisation of Judiciary in China (1978-2005)' (2005) 5 *Global Jurist*, available at <http://www.bepress.com/gj/frontiers/vol5/iss1/art1> (last accessed 15 May 2007).

²² AH Chen, 'The Interpretation of the Basic Law -Common Law and Mainland Chinese Perspectives' (2000) 30 *Hong Kong Law Journal* 380, 418.

²³ *Ibid.*

²⁴ *R v Chan Chak Fan* [1994] 3 H.K.C 145, 153.

constitutionality of legislation based on the principle of rationality and proportionality. Besides, Hong Kong judiciary had adopted a generous and purposive constitutional approach with regard to the interpretation of human rights.²⁵

However, such approach employed by Hong Kong courts was soon challenged when China resumed its sovereignty. It is submitted there exists unsolvable conflicts between British liberalism and Chinese Socialism.²⁶ Specifically, such conflicts can be identified as the separation between interpretation and adjudication in Hong Kong Basic Law,²⁷ which manages to bridge the two legal systems. Nevertheless, the intermingling of two legal systems in the Basic Law has brought about conflicting understandings of legal terms such as 'judicial independence', 'interpretation', and 'adjudication'.²⁸ As previously noted, in Chinese legal system, the National People's Congress and its Standing Committee dominate the competence of interpretation. Only some proportion of interpretative competence related to the specific application of laws in judicial proceedings is assigned to judicial organs. Chinese legal system considers interpretation and adjudication to be severable whereas the British legal system holds the contrary. Therefore, how Hong Kong judiciary adjudicates with limited interpretative competence of the Hong Kong Basic Law turns out to be the crucial issue. Worries have also been voiced in light of the intervention of the Standing Committee by exercising its competence of the interpretation of Basic Law. This may menace the finality of judgments of the Court of Final Appeal in Hong Kong.²⁹

With regard to judicial review, in the sense to invalidate local legislation based on Hong Kong Basic Law, there is no clear prescription in the Basic Law. However, it is argued that Hong Kong Basic Law is meant to serve as the mini-constitution, to

²⁵ Chen, above n. 22, at 419.

²⁶ M Hills, 'The Rule of Law and Democracy in Hong Kong - Comparative analysis of British Liberalism and Chinese Socialism', (1994) 1 E Law, available at http://www.murdoch.edu.au/elaw/indices/title/mhills_abstract.html (last accessed 25/06/2007).

²⁷ MLE Estanislao, 'Right of Final Adjudication in Hong Kong: Establishing Procedures of Constitutional Interpretation' (2000) 1 Asian - Pacific Law & Policy Journal 10 (case note), 12.

²⁸ AD Jordan, 'Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region' (1997) 30 Cornell International Law Journal 335, 339-341, 353-354, 358-359.

²⁹ See *e.g.*, F Lin, 'The Constitutional Crisis of Hong Kong - Is it Over?' (2000) 9 Pacific Rim Law and Policy Journal 281; B Tai, 'Is "Final" Really Final?' (2002) 32 Hong Kong Law Journal 35.

maintain its supremacy in Hong Kong, and to provide effective judicial protection of human rights. If Hong Kong judiciary cannot invalidate local legislation based on Basic Law, such objectives cannot be materialized.³⁰ Furthermore, this argument can also find its support from the prescription of Basic law, which provides that the judicial system previously practised in Hong Kong shall be maintained except for those consequent changes upon the establishment of the Court of Final Appeal.³¹ It can be reasonably assumed that judicial review should be maintained since there was no indication for the change on this point. In addition, judicial review is valued as the one of the most important features of the rule of law in Hong Kong, without which 'judicial system previously practised in Hong Kong,' can never make itself a whole.

In the judicial practices of Hong Kong Courts, the Court of Appeal derived its competence of review the constitutionality of local legislation in *HKSAR v Ma Wai-kwan*.³² This decision has remained unchallenged in subsequent litigations and has paved its way to the controversial *Ng Ka Ling*,³³ the right of abode case. Even though the Interpretation delivered by the Standing Committee reads Article 24(2) (iii) of Basic Law differently, it has not touched upon the competence of judicial review in Hong Kong courts.³⁴

4. JUDICIAL REVIEW IN MACAU, CHINA

Compared to the case of Hong Kong, the picture of judicial review in Macau is quite another. It can be partly attributed to the dictatorship of Portugal which lasted until 1974. Besides, it can also be attributed to different approaches toward the colonial ruling between the United Kingdom and Portugal.³⁵ In the 1976 Constitution, a mixed judicial review was introduced into Portuguese legal system. The same kind of judicial review system was extended to Macau by incorporating the 1976 Constitution into the Organic Statute of Macau through an explicit reference in the

³⁰ AH Chen, 'The Basic Law and the Protection of Property Rights' (1993) 23 Hong Kong Law Journal 31, 50-55.

³¹ HKBL, Art. 19(2), 81(2).

³² *HKSAR v Ma Wai-kwan* [1997] 2 HKC 315 at 351.

³³ *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 (CFA).

³⁴ Chen, above n 22, at 425.

³⁵ See generally MK Chan, 'Different Roads toward Home: the Retrocession of Hong Kong and Macau to Chinese Sovereignty' (2003) 12 Journal of Contemporary China 493.

Organic Statute.³⁶ This Organic Statute served as a kind of mini-constitution until the handover. Since Portuguese constitution was incorporated by reference into the Organic Statute, and most Portuguese laws and decrees were also applicable in Macau, judiciary in Macau constituted a ‘sub-judiciary district’ of Portugal's judicial framework. All cases appealed from the Macau courts were heard in an appellate court in Lisbon.³⁷ The Portuguese constitution, established in 1976 and amended in 1982, provides a mixed judicial review mechanism, where an unconstitutional law may be challenged preventively by the Constitutional Court or in a case or controversy in which any court may refuse to apply this law as long as it finds it unconstitutional.³⁸ Therefore, during this period, although the competence of judicial review was conferred, the judiciary in Macau didn’t enjoy the competence of the final adjudication. Besides, with the authorization of the 1989 constitutional amendment, Macau was able to establish a judicial system suitable for its own. As provided in Article 11 of Lei n.º 112/91, *Lei de Bases da Organização Judiciária de Macau*,³⁹ Macau Higher Court is the final appellate court in Macau. Nevertheless, this provision does not prejudice the jurisdiction of Supreme Court, Supreme Administrative Court, and Constitutional Court.

Compared to judiciary in Hong Kong, judiciary in Macau, before the reversion, had much more limited experiences in judicial review. As observed, the judicial independence in Macau was far weaker to safeguard itself from the intervention of Central Authority.⁴⁰ Following the model of Hong Kong Basic Law, Macau Basic Law was promulgated to ensure the ‘One Country, Two Systems’ policy and the promise of ‘unchanged in fifty years.’ Macau Basic Law also lays down the constitutional framework of Macau Special Administrative Region. A separate judicial organ was established, vested with judicial power as well as the final

³⁶ The Estatuto Orgânico de Macau (Organic Statute of Macau), Art. 2, available at <http://www.imprensa.macao.gov.mo/bo/i/76/09/eo/pt/default.asp> (Last accessed 25/06/2007).

³⁷ JR Krebs, 'One Country, Three Systems? Judicial Review in Macau after Ng Ga Ling'10 Pacific Rim Law and Policy Journal 111, 134.

³⁸ *Ibid.*, at 136.

³⁹ Available at <http://www.imprensa.macao.gov.mo/bo/i/91/36/leiar112.asp> (last accessed 25/06/2007).

⁴⁰ FM Luke, 'The Imminent Threat of China's Intervention in Macau's Autonomy: Using Hong Kong's Past to Secure Macau's Future' (2000) 15 American University International Law Review 717, 745-747.

adjudication. Whether judicial review can survive the handover is not certain from the legal text. While the Hong Kong Basic Law prescribes that the judicial system previously practised in Hong Kong shall be maintained to carry the entirety of judicial practices over the transitional process, such arrangement is not present in the Macau Basic Law. Instead, Macau Basic Law provides that the structure, powers and functions as well as operation of the courts of the Macao Special Administrative Region shall be prescribed by law.⁴¹ Before handover, the judicial review system was extended to Macau by reference of the constitution in Organic Statute. Without explicit reference in the Basic Law, it would be difficult for the judiciary in Macau to review the legislative measures after handover, as it is not possible for an organic law of Macau judiciary to refer to judicial review in China since such mechanism does not exist in China. Although Lei n.º 9/1999, *Lei de Bases da Organização Judiciária* (Law of Judicial Organ)⁴², in article 16, lays down basic principles concerning the interpretations of Macau Basic Law, the competence of invalidating local legislation has not been referred to.

As argued by one author, courts in Macau do not have jurisdiction over acts of state, as dictated by the Macau Basic Law. Besides, based on article 19 (1) of the *Lei de Bases da Organização Judiciária*, courts in Macau also have no jurisdiction over ‘political actions,’ including free trade policies. Furthermore, courts in Macau SAR do not enjoy the competence to invalidate local legislation, as judicial practices before the handover did not cover this competence, since the constitutional review was dominated by Portuguese constitutional court.⁴³ Some of this argument should be rejected. Article 19 (1) provides that the exercise of political functions, action or inaction, does not fall into the jurisdiction of administrative, fiscal, and customs litigations. The reference to this provision for the legal basis for the ‘political questions’ doctrine is problematic: the objective of this article is to allocate the jurisdiction in Macau judiciary, as can be seen in the paragraph 3 and 4, which

⁴¹ MABL, Art. 84.

⁴² Lei N. 9/1999, *Lei de Bases da Organização Judiciária* (The Statute of Judicial Organ), available at <http://www.imprensa.macao.gov.mo/bo/i/1999/01/lei09.asp> (last accessed 25/06/2007).

⁴³ Y Wang, 'An Analysis on the Act of State and Political Question in the Basic Law of Hong Kong and Macau' (2005) 30 *Journal of Macau Studies* 25, 25-26.

provide the exclusion of criminal procedures and private disputes from the jurisdiction of administrative courts. It does not necessary mean that the exercise of political function cannot be reviewed by other courts. Besides, courts in Macau before the handover might refuse to apply local legislation despite of the incompetence to declare them invalid. The argument that courts in Macau SAR should have no competence of judicial review, in terms of invalidating local legislation, is thus problematic. However, notwithstanding various weaknesses of this argument, it reflects the vulnerability of judiciary in Macau. The Macau Basic Law is a born-defect, while jurisdiction of Macau judiciary may also be removed by the amendment of *Lei de Bases da Organização Judiciária*.

B. THE INTERACTION BETWEEN CENTRAL AUTHORITY AND THE SARs.

Three interconnected issues should be carefully examined when dealing with trade dispute resolution mechanisms, under the constitutional/national law framework, between China and its two SARs: the relationship between the Standing Committee and the two Courts of Final Appeal, the allocation of competence, and the competition of jurisdiction. The first two can be perceived as a vertical interaction between Central Authority (the Standing Committee) and the two SARs (the Court of Final Appeal), while the last can be classified as a horizontal interaction between various judiciary among China and these two SARs.

1. VERTICAL INTERACTION

a. CFA/Standing Committee

As previously noted, the National People's Congress and its Standing Committee dominate the interpretative competence of Chinese constitution and national legislation. Chinese courts may exercise the competence of 'judicial interpretation' related to specific application of laws when adjudicating cases. This approach of separating interpretation and adjudication is also taken in the Hong Kong Basic Law and Macau Basic Law. As mentioned above, such approach is seen as an effort to bridge the Chinese legal system and the existent legal systems in Hong Kong and

Macau. However, this approach points to the irresolvable conflicts between Chinese legal system and Hong Kong legal system.⁴⁴

Article 158 of Hong Kong Basic Law and Article 143 of Macau Basic Law, define the interpretative competence of these two Basic Laws. These two articles are basically identical. Both articles, in the first paragraph, provide that the power of interpretation of the Basic Law shall be vested in the Standing Committee of the National People's Congress. The fourth paragraph of both articles lays down the procedures for the interpretation of these two Basic Laws. Before delivering its interpretations, the Standing Committee of National People's Congress should consult the corresponding Basic Law Committee. It is however provided, in the second paragraph of both articles that, the Standing Committee 'shall' authorize courts of these two SARs to interpret, on their own, those provisions of the Basic law which fall within the scope of their autonomy. Nonetheless, how this authorization of interpretation should be carried out is not clear from its legal text. Although the English translation of the Hong Kong Basic Law chooses to use the term 'shall' instead of 'may', such difference is not visible in the authentic Chinese legal text. The Chinese version of the Basic Laws simply refers to the verb 'authorize,' without clarifying the Standing Committee 'shall' or 'may' authorize courts in the SARs to interpret these provisions. Besides, the competence of courts in these SARs to interpret the Basic law is incumbent on the adjudication of cases. This does not constitute a real condition for courts in these two SARs as the adjudication and interpretation had walked side by side in their judicial practices before the reversion. It should be, however noted that the two Basic Laws do not clearly define the scope of autonomy. In other words, the autonomy competence or the exclusive competence of these two SARs is not provided in the Basic Laws.

The major controversy comes from paragraph 3 of these two articles, which provides that, even though courts in these two SARs may interpret other provisions of the Basic Law, which go beyond the limit of their autonomy, courts in these two

⁴⁴ For the conflicting legal cultures between China and Hong Kong, *see*, AH Chen, 'Interaction of Legal Systems in Hong Kong and Mainland' in AH Chen (ed) *The World of Legal Theory* (University of Politics and Law Press Beijing 2002) 396-415.

SARs may refer to the Standing Committee for the interpretation of the Basic Law in these cases where: (a) the subject matter concerns affairs which are the responsibility of the Central People's Government, or concerns the relationship between the Central Authorities and the Region, and (b) the interpretation affects the judgments. However, when the cases are not appealable, courts are obliged to refer to the Standing Committee for the interpretation on relevant provisions before delivering their own judgments.

The conflict reading of this provision has brought about the controversial right of abode case, which is generally referred as the first constitutional crisis in Hong Kong SAR. The Court establishes a two-step test to determine the condition of the referral. The first step is to define whether the legal provisions before the courts fall into the scope of the excluded provisions, namely, those concerning (a) affairs which are the responsibility of Central People's Government (b) the relationship between Central Authorities and HKSAR (the classification condition.) The second step is to determine whether an interpretation done by the Standing Committee would affect the judgment of the case and therefore, would be necessary (the necessity condition). Besides, the Court emphasizes that *it is for the Court of Final Appeal and for it alone* to decide whether these two conditions have been satisfied.⁴⁵ The Court then concludes that the two conditions are not satisfied and therefore, a referral is not required.

However, this provocative approach is not supported by the Standing Committee. The Standing Committee, in the preamble of its *Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*,⁴⁶ states that Article 22(4) and 24(2)(iii) of Basic law are responsibility of Central Government and concern the relationship between Central Authorities and the

⁴⁵ *Na Kg Ling*, above n. 33, at 342 (emphasis added).

⁴⁶ Available at http://www.info.gov.hk/basic_law/fulltext/ (last accessed 25/06/2007).

Region, the Court of Final Appeal in Hong Kong, whose judgments are not appealable, is required to request for an interpretation from the Standing Committee.⁴⁷

After the interpretation was handed down, series of cases were still going on. The Court of Final Appeal, in *Lau Kong Yung*,⁴⁸ had to determine the scope the Court was bound by the *Interpretation* and the requirement, if any, for the Standing Committee to deliver its interpretation on Hong Kong Basic Law. In this case, the Court explicitly declared it would revisit the test laid down in *Ng Ka Ling* some time.⁴⁹ Those who embraced and applaud for *Ng Ka Ling* were disappointed as the Court, in *Lau Kong Yung*, perceived the Basic Law more a national legislation than the mini-constitution of HKSAR. The Court thus arrived at the conclusion that the Standing Committee has plenary competence to interpret Basic Law.

b. Exclusive Competence/Residual Competence

The question who decides whether these two conditions for the referral are satisfied is closely related to the allocation of competence. Although the Courts of Final Appeal can arguably determine on its own the ‘necessity condition’ of such referral, whether the court can define the ‘classification condition’ alone deserves further examination. Such claim appears even more difficult to justify since no explicitly prescription concerning exclusive competence of the SARs is provided in the Basic Laws. However, it does not suggest that the view that these two SARs have no exclusive competence has been settled. As will be argued in this section, the two Basic Laws do deal with the issue of the allocation of competence, even though the scope of exclusive competence is not well defined. Not only the Central Authority but also the two SARs enjoy some exclusive competence. Nevertheless, the exclusive competence of these two SARs is not secured, since the Standing Committee, by exercising the competence of interpretation, might substantially reformulate the allocation of competence between the Central Authority and the two SARs. With regard to the exclusive competence, the clearest examples are those of foreign affairs

⁴⁷ See preamble of the *Interpretation*.

⁴⁸ *Lau Kong Yung & others v. Director of Immigration*, [1999] 3 HKLARD 778.

⁴⁹ *Ibid.*, at 800.

and defence.⁵⁰ It is explicitly prescribed that the Central Authority is responsible for the foreign affairs and defence. However, it is rather confusing, as the Basic Laws also provide that the SARs can conduct relevant ‘external affairs’ on their own with the authorization of Central Authority.⁵¹ The line between ‘foreign affairs’ and ‘external affairs’ seems not so clear. Nevertheless, since these two SARs may conduct relevant external affairs only on the condition that they are authorized by the Central Authority, it seems unquestionable that both foreign affairs and external affairs cannot be considered the exclusive competence of these two SARs. In addition, the Basic Laws explicitly remove the jurisdiction of judiciary in these two SARs over ‘acts of state such as defence and foreign affairs’⁵², even though what falls into the scope of acts of state is also not clear, and much depends on the interpretation of Standing Committee.

That being said, the removal of all competence of external relations from the exclusive competence of these two SARs is also problematic, or even to assign it to the Central Authority. With regard to the exclusive competence of these two SARs, although the Basic Laws do not explicitly provide which competence falls within the exclusive competence of the SARs, they do refer to the terms of ‘within the limits of autonomy’⁵³ and ‘outside the limits of autonomy’⁵⁴. It implies the existence of exclusive competence of these two SARs. While the autonomy does not necessarily equal to exclusive competence, autonomy can be best safeguarded by a clear definition and exercise of exclusive competence. In addition, in light of the purpose and objective of the Basic Laws, to ensure the high degree of autonomy, exclusive competence seems indispensable for these two SARs. In this vein, it can be deciphered that various subject matters have been assigned as the exclusive competence of the SARs by the Basic Law in a suggestive manner. A good example is the maintenance of public order in these two SARs. In contrast to the defence, Article 14(2) of the two Basic Laws provides that the government of SAR is responsible for

⁵⁰ HKBL, Art. 13(1), 14(1), MABL, Art. 13(1), 14(1).

⁵¹ HKBL, Art. 13(3); MABL, Art. 13(3)

⁵² HKBL, Art. 19 (3)

⁵³ HKBL, Art. 158(2); MABL, Art. 143(2).

⁵⁴ HKBL, Art. 18(3); MABL, Art. 18(3).

the maintenance of public order. The third paragraph of the same article of Hong Kong Basic Law provides that military force stationed in Hong Kong shall not interfere in local affairs of this region, and that only upon the request of the government of HKSAR may the military force assist the maintenance of public order. By contrasting the maintenance of public order with defence, it is thus made clear that the maintenance of public order constitutes the exclusive competence of SARs, where the stationed military force, the Central Authority, shall not intervene. Taxation and monetary system is another good example. It is also clearly provided that the Central Authority shall not levy taxes in these two SARs⁵⁵, and that these two SARs shall maintain independent taxation systems.⁵⁶ With regard to the monetary competence, it is again explicitly provided that the authority to issue Hong Kong Dollar and Macau Pataca is vested in the governments of the SARs.⁵⁷

After ascertaining the existence of the exclusive competence of these two SARs, it is then feasible and indispensable to examine whether all external relations fall into the exclusive competence of the Central Authority. The competence of Hong Kong, China and Macau, China, as separate customs territories, to participate in the international trading regime is not only ensured both by these two Basic Laws but also by the Sino-British and Sino-Portuguese Declarations.⁵⁸ Furthermore, the legal basis for these two SARs to participate in the WTO is laid down in paragraph 1 of Article XII of WTO, which reads as follows:

Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO.

The requirement for these two SARs, as separate customs territories, to participate in the WTO, is the possession of 'full autonomy in the conduct of its external commercial relations and of the other matters provided for in this [WTO] Agreement and the Multilateral Trade Agreements'. Full autonomy here may be here read as a synonym of exclusive competence, where the Central Authority shall not intervene. It is

⁵⁵ HKBL, Art. 106(3); MABL, Art. 104(3).

⁵⁶ HKBL, Art. 108(1); MABL, Art. 106(1)

⁵⁷ HKBL, Art. 112(2); MABL, Art. 108(2)

⁵⁸ HKBL, Art. 116; MABL, Art. 112.

also against the purpose and objective of Sino-British and Sino-Portuguese Declarations to assign the whole foreign affairs into the exclusive competence of the Central Authority, at least in terms of external commercial relation. A different interpretation will undermine the autonomy of these two SAR as separate customs territories, and threaten the basis for them to participate in the WTO. This runs counter to the purpose and objective of the two above-mentioned declarations, and the two Basic Laws. In order to ensure the ability of these two SARs' participation in the WTO, external commercial should be read as the exclusive competence of these two SARs.

In the same vein, the characterization of external commercial relations as the exclusive competence of these two SARs may also prevent the direct or indirect intervention of Central Authority through administrative measures.⁵⁹ Besides, external commercial relations would consequently not fall into the scope of 'acts of state', where the Court of Final Appeal has no jurisdiction. In addition, external commercial relations, with this reading, fall clearly beyond the scope of excluded provisions. The referral of the Court of Final Appeal, when adjudicating, to the Standing Committee is thus not obligatory. This ensures the finality of the decisions of the Court of Final Appeal in external commercial relations. Nevertheless, it should be pointed out that the jurisprudence of the Court of Final Appeal may still be affected by the Standing Committee through the interpretation of these two Basic Laws.

The residual competence is another major issue of the allocation of competence. It is argued that residual competence should be vested in the Central Authority as both two Basic Laws, in Article 2, provide that the exercise of high degree of autonomy in these two SARs is authorized by the National People's Congress. Since the autonomy is authorized by the Central Authority through the Standing Committee, the competence

⁵⁹ This view of prevention from intervention of the Central Authority into the autonomy or exclusive competence of the SARs is also shared by some Chinese lawyers. See *e.g.*, Z Wang, *The Relationship between Central Authority and the Special Administrative Regions: An Analysis of Legal Structure* (Tsinghua University Press, Beijing 2002) 118-119. Wang argues that 'a high degree of autonomy' means: (a) the Central Authority shall not intervene the sphere of autonomy of the SARs; (b) decisions taken by the SARs within the limits of their autonomy are 'final', whereby the approval of the Central Authorities are not necessary; (c) the SARs enjoy discretionary power in decision-making within their autonomy; and (d) governments in the SARs, in exercising their competence within the limit of autonomy can freely choose measures they deem appropriate.

not clearly assigned should be therefore, reserved by the Central Authority.⁶⁰ However, this argument is unfounded. In examining this issue, one has correctly to define the nature of these two Basic Laws. Although these two Basic Laws are undoubtedly national legislation enacted by National People's Congress, they are also constitutional instruments of these two SARs, aiming to ensure their high degree of autonomy unchanged in fifty years. These two Basic Laws can be, in some sense, perceived as the contracts between Central Authority and these two SARs. Therefore, it is against the purpose and objective of these two Basic Laws to interpret, with sole reference to Article 2 of the Basic Laws, that the residual competence is reserved in Central Authority. To put it precisely, this issue relates to the competing value between 'one country' and 'two systems'. In other words, in order correctly to define the residual competence, whether the objective and purpose of these two Basic Laws emphasizes more on 'one country' or on 'two systems' should be firstly answered. One may be tempted to answer that they are equally valued in the Basic Law. Nevertheless, this does not offer much help as these two values conflict and compete with each other. Between the conflicting and competing values, the term 'a high degree of autonomy' is telling here. A high degree of autonomy is the key to link 'one country' and 'two systems'. In light of this high degree of autonomy, the residual competence should be thus interpreted as vested in these two SARs in order to maximize and effectuate their high degree of autonomy.

2. HORIZONTAL INTERACTION: COMPETITION OF JURISDICTION

Another issue related to trade disputes between China and its two SARs, under the constitutional/national law framework, is the competition of jurisdiction. Prior to the reversion, the competition of jurisdiction among China, Hong Kong, and Macau is dealt with by the rules of private international law. After the establishment of these two SARs, these rules are not applicable since China and its two SARs are of the same country. However, the closer economic relationship and the following trade disputes have demanded a set of clear rules governing the competition of jurisdiction,

⁶⁰ *Ibid.*, at 173-176.

since the quality and training of judges in these three areas differs a lot, and may eventually influence the decision of a dispute.

The competition of jurisdiction may exist in both criminal proceedings and civil procedures. With regard to trade disputes, the intellectual property rights serve as the best example, as both criminal and civil procedures are provided in the TRIPs Agreement. As Chinese criminal law does not apply to Hong Kong and Macau, cross-boarder intellectual property criminal offenses may be charged in any jurisdiction. Consequently, the assignment the jurisdiction of these cases mainly determines their results.⁶¹ Civil procedures share the same, if not more serious, problems of competition of jurisdiction. With the ever-closer economic interdependence between China and its two SARs, and ever-growing transnational litigations, private economic actors are conscious of the competition of courts and choice of the laws, as these decisions are often of great economic significance. As noted above, the judiciary in China, Hong Kong, China and Macau, China differs much from one another. Litigation procedures before the courts in Hong Kong, China are much better developed and advanced than those in China and in Macau, China. A better strategy for litigants may be to refer disputes to courts in Hong Kong, China, and subsequently to enforce the judgments in China after the recognition of these judgments.

With regard to the institutional design for the addressing the issue of the competition of jurisdiction, it is normally settled through rules of private international law. However, this approach is apparently not acceptable to China, as both Hong Kong, China and Macau, China are two special administrative regions of China. Private international law has no role in this aspect. In practices, this issue is normally settled after agreements are reached between the Supreme People's Court and Department of Justice in Hong Kong, China and Macau, China. The Supreme People's Court would then deliver guidance and interpretations, governing the competence of jurisdiction (sometimes the recognition of judgments included),

⁶¹ The importance of this issue is exemplified in Zhang Zhiciang case. The final judgment of Chinese criminal court is capital punishment, whereas there does not exist capital punishment in HKSAR. If this case were tried in HKSAR, the decision would be completely different, *ibid*, at 296-302.

whereas the two special administrative regions would enact local legislation, prescribing the same content.

III. THE WTO/CEPA FRAMEWORK: ONE COUNTRY, TWO SYSTEMS, THREE MEMBERSHIPS

Trade disputes resolution between China and its two SARs may also be examined from another perspective, namely, the perspective of international trade law. As separate customs territories, Hong Kong, China and Macau, China enjoy full memberships in the WTO. With the signature of the CEPAs, trade dispute resolution between China and its two SARs may also be examined under the CEPA framework. Therefore, this section will firstly analyze the legal status of the CEPAs under the WTO Agreement, covering the negotiating history, main content and their compatibility with WTO law on free trade agreements. It will then examines the dispute settlement mechanism provided in the CEPAs, and explore the possibility of complaints in the WTO dispute settlement mechanism.

A. LEGAL STATUS OF CEPA UNDER WTO LAW

1. THE NEGOTIATION HISTORY

As characterized by the contracting parties in their joint notification to the Committee on Regional Trade Agreements, the Closer Economic Partnership Arrangement between China and Hong Kong, China ‘establishes a free-trade area within the meaning of Article XXIV of the GATT 1994 and provides for the liberalization of trade in services within the meaning of Article V of the GATS.’⁶² It is the first free trade agreement (FTA) signed both by China and by Hong Kong, China.⁶³ This model was soon copied by Macau, China. The Closer Economic Partnership Arrangement between China and Macau, China was consequently signed on 17 October 2003, entering into effect on 1 January 2004.⁶⁴ The CEPA between China and Macau, China is also the free FTA ever signed by Macau, China.⁶⁵

⁶² WT/REG162/N1, S/C/N/264 (12 January 2004).

⁶³ WT/REG162/M/1 (21 March 2005), paras 4, 6.

⁶⁴ WT/REG163/N1, S/C/N/265 (12 January 2004).

⁶⁵ WT/REG162/M/1 (21 March 2005), para. 6.

As the economy of Hong Kong, China has long relied much on its role as a 'middleman' between China and the 'outside' economy, its economic growth was influenced when China started its 'open-up' policy in 1980's. The fear that its economic growth would be further undermined was deepened by China's accession to the WTO, as Hong Kong, China might not be able to enjoy preferential treatments from China since it would contradict the MFN principle. A WTO-consistent Free Trade Agreement between China and Hong Kong, China was thus proposed by Hong Kong General Chamber of Commerce.⁶⁶ After a written request and meeting with the Chief Executive on 22 November 2001, this proposal for the FTA was carried out after consensus was obtained between the HKSAR and Central Government. Consultations with regard to the coverage of this FTA, and its form lasted around 18 months, when the final agreement on the main parts of the CEPA was reached in late June 2003.⁶⁷

However, it should be noted that a 'Free Trade Agreement,' which carries sovereignty implications as it is normally signed by two states, appeared unacceptable to China. The term 'arrangement' was thus introduced to differentiate from other Free Trade Agreements. After the CEPA between China and Hong Kong, China was successfully carried out, this model was introduced to Macau, China, and most provisions in the China-Macau, China CEPA are nearly identical with those provided in China-Hong Kong, China CEPA. The coverage of the two CEPAs has been gradually expanded; four supplements are subsequently added to the original texts. As claimed, since 1 January 2006 with the entering into force of Supplement II, China applied zero tariffs to all imported goods from Hong Kong, China and Macau, China as long as the requirements of rules of origin laid down in the CEPAs were satisfied. In 2004, when the CEPAs firstly came into force, 95 and 94 percent of imported goods, in value terms, into China from Hong Kong, China and Macao, China,

⁶⁶ This is also an illustrative example of the influences of private enterprises in initiating and shaping the contents of an FTA.

⁶⁷ HS Gao, 'The Closer Economic Partnership Arrangement (CEPA) between Mainland China and Hong Kong ?Legal and Economic Analyses' in PJ Davidson (ed) *Trading Arrangements in the Pacific Rim: ASEAN and APEC* (Oxford University Press, New York 2004), available at <http://ssrn.com/paper=752785> (last accessed 12/10/07), at 1. See also, W Wang, 'Regional Integration: Comparative Experiences: A Lawful Free Trade Agreement under "One Country, Two Customs Territories' (2004) 10 *Law and Business Review of the America* 647.

respectively enjoyed zero tariffs.⁶⁸ It was also claimed by parties to these two CEPAs that, those imported goods which did not enjoyed zero-tariff treatment are mainly due to the exclusion of ‘imported goods’ under the CEPA because of China’s laws/regulations and its international obligations, and the unavailability of rules of origin under the existent tariff lines.⁶⁹

2. ONE MAIN TEXT, SIX ANNEXES,⁷⁰ AND FIVE SUPPLEMENTS⁷¹

In both CEPAs, there are 23 articles in the main text, accompanied by six annexes. Annex 1 provides the schedule for the zero-tariff treatment on imported goods from Hong Kong, China and Macau, China. The procedures for the producers in Hong Kong, China and Macau, China to include their products into the zero-tariff schedules are also therein dealt with. Annex 2 governs the rules of origin in respect of trade in goods. Apart from goods wholly obtained in either party, goods undergone ‘substantial transformation’ can also be qualified as goods originating from the contracting parties, as set out by rules of origin laid down in this annex. Article 3 and 5 of Annex 2 define, respectively the term of ‘wholly obtained’ in either party, and of ‘substantial transformation’. Annex 3 lays down the procedures for the issuing and verification of certificates of origin. Annex 4 provides specific commitments with regard to the liberalization of trade in services; Annex 5 defines the term ‘service supplier’ as set out in the CEPA, and clarifies who is entitled to the benefit of market access in services trade. As the services professions constitute the major element of Hong Kong, China’s economy, and Hong Kong, China attaches more importance to the services trade during the negotiation, it is thus essential to lay down detailed rules governing the eligibility of being a service supplier as set out in the CEPA. Lastly,

⁶⁸ WT/REG162/M/1 (21 March 2005), para. 9, WT/REG163/M/1 (21 March 2005), para. 10.

⁶⁹ WT/REG162-3/7 (30 May 2006).

⁷⁰ The main text of the two CEPA have been notified to the CRTA, where these six annexes are available at <http://www.tid.gov.hk/english/cepa/legaltext/fulltext.html> (Hong Kong, China CEPA, last accessed 14/10/2007), and, for Macau, China CEPA at http://www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_CEPA_CEPA_I&locale=en_US(last accessed 14/10/2007).

⁷¹ See WT/REG162/1/Add.1-3, WT/REG163/1/Add.1-3 for the Supplement I - III. The Supplement IV is available at <http://www.tid.gov.hk/english/cepa/legaltext/cepa5.html> (China-Hong Kong, China CEPA, China, last accessed 12/10/07),http://www.economia.gov.mo/public/docs/CEPA_CEPA_V/index/tc/supl4attch0c.pdf (China-Macau, China CEPA, last accessed 12/10/07).

Annex 6 stipulates scope and measures to be taken in the field of trade and investment facilitation.

With regard to the coverage, as indicated above, the CEPA covers three elements, trade in goods, trade in services, and trade and investment facilitation, to which the six annexes duly correspond. As Hong Kong, China and Macau, China are both free ports, only China has to adjust for the zero-tariff treatment on imported goods, while Hong Kong, China and Macau, China are merely required to remain their zero-tariff policy. Contracting parties to the two CEPAs undertake not to take anti-dumping and anti-subsidy measures.⁷² However, since Hong Kong, China and Macau, China have never taken any of these two measures, and Hong Kong, China even does have anti-dumping and anti-subsidy legislation, it is thus clear that this obligation is designated only to China. Nevertheless, due to the small trade volume of imported goods from Hong Kong, China and Macau, China, this article is of more symbolic significance than economic importance. Both Article 9 of the two CEPAs deal with safeguard measures. As noted above, transitional product-specific safeguard measures, and safeguard measures in Textile products have been made not applicable between these contracting parties. When taking safeguard measures, China, Hong Kong, China and Macau, China should therefore, refer back to the existing SCM Agreement. Nevertheless, the safeguard provisions in the CEPAs lay down different rules, which, according to some members deviate from the existing SCM Agreement.⁷³ What is nevertheless of greater interest to the author is the reference, in this article, of consultation mechanism as set out in Article 19 of these two CEPAs. When preferential treatments or concessions are suspended due to the ‘sharp increase’ of imported products, the affected party should, upon request, promptly commence the consultations mechanisms as provided in Article 19 with the aim to reaching a mutually satisfactory agreement. This is the sole provision in the CEPA which

⁷² The CEPA, Art. 7, 8.

⁷³ Concerns have been voiced during the process of the examination in the CRTA. It is pointed out that the safeguard provision as set out in the CEPA derogates considerably from the WTO Safeguard Agreement. However, in response to these doubts, Hong Kong, China reiterates its long-established free trade policy and states that there are not rules governing global safeguard measure in Hong Kong, China, and that it has never adopted any safeguard measures in the past.. Therefore, this safeguard measure provided in the CEPA appears to design mainly for China, which is nevertheless unlikely to use it. See, WT/REG162/6 (13 March 2006), p 3.

explicitly refers to the consultation procedures in case of trade disputes. It should be however, reiterated that due to the afore-mentioned reasons, the small trade volume is unlikely to cause or threaten to cause ‘serious injury’ to Chinese domestic industry. Article 10 governs general rules of origin, which are further elaborated in the afore-mentioned Annex 2, in order to determine whether imported goods are eligible for the preferential treatments.

In respect of trade in services, Article 11 deals the market access, which is supported by Annex 4. Another key issue in services trade, the scope and requirement of ‘service suppliers’ is defined in the subsequent article, and further elaborated in Annex 5. The following three articles govern the cooperation in financial sector in tourism, and mutual recognition of professional qualifications. Chinese tourists to Hong Kong, China and especially to Macau, China contribute a lot to the economic growth in these two separate customs territories. The cooperation in financial sectors, namely, banking, insurance and securities, is of great importance in the policy aspect, as financial professions in Hong Kong, China may be of great help to Chinese financial reform, and contribute to the competitiveness of financial sectors in China. On the other hand, funding coming from China may also contribute to the prosperity of the financial market in Hong Kong, China. With regard to the qualification, contracting parties opt to ‘mutual recognition’ approach, and it is too unpractical to imagine such a thing as ‘common rules on professional qualifications’ due to their disparity of development and quality in these three areas.

Article 16 and 17 govern the trade and investment facilitation. Greater transparency, standard conformity and enhanced information exchange are ‘measures’ to be taken for this end. The scope of cooperation is defined in Article 17, namely ‘trade and investment promotion; customs clearance facilitation; commodities inspection, inspection and quarantine of animals and plants, food safety, sanitary quarantine, certification, accreditation and standardization management; Electronic business; transparency in laws and regulations; cooperation of small and medium sized enterprises; and industries cooperation’. However, other field not covered can be included through consultation between the contracting parties.

Lastly, with the signature of the CEPA between Hong Kong, China and China on 20 June 2003, this model was immediately copied by Macau, China. The CEPA between Macau, China and China was signed on 17 October 2003. Both CEPAs were put into force on 1 January 2004. Since the signatures of the original CEPAs, five supplements have so far been signed between China and Hong Kong, China and Macau, China in 2004, 2005, 2006, 2007 and 2008. These five supplements relate mainly further liberalization and market access in Chinese market. Besides, the definition of service suppliers and rules of origin are also amended.

3. THE COMPATIBILITY OF CEPA WITH WTO RULES ON FTA

Procedural and Substantial requirements governing the compatibility of Free Trade Agreements with WTO rules are laid down in Article XXIV of GATT 1994 and Article V of GATS. The Appellate Body has also dealt with this issue in *Turkey – Restrictions on Imports of Textile and Clothing Products*,⁷⁴ where Hong Kong, China intervened as a third party. Apart from the so-called ‘neutrality’ requirement, which requires that the effects of Free Trade Agreements not to be more trade restrictive, overall, than were previous trade policies of the contracting parties.⁷⁵ Two elements should be further elaborated here: the procedural requirement; and ‘substantially all the trade’/‘substantial sectoral coverage.’

With regard to the procedural requirement, as mentioned above, both CEPAs have been notified to the Committee on Regional Trade Agreements, and examination has been conducted in the Committee. Although substantial decision with regard to the compatibility of these two CEPAs with Article XXIV of GATT 1994 and Article

⁷⁴ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textile)*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345.

⁷⁵ The Appellate Body Report addresses this requirement in paragraph 58, and lays down two conditions, which should be fulfilled, so that the regional trade agreement can pass the scrutiny. In the words of the Appellate Body, ‘[F]irst, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue’. Appellate Body Report, *Turkey – Textiles*, para. 58. Another relevant issue here is whether the rules of origin as set out in the CEPA constitute ‘more trade restrictive’ measures.

V of GATS Procedural has not been made, the procedural requirements have been met.

In respect of the coverage of the trade in goods/services, the Appellate Body slightly addresses this issue. According to the Appellate Body, ‘substantially all the trade’ is not the same as *all* the trade and a ‘substantially all the trade’ is something considerably more than merely *some* of the trade’,⁷⁶ it seems to offer too much guidance as the line between ‘some’, ‘substantially all’, and ‘all’ has never been clear. As argued, the main text of CEPA and its six annex has already covered 90 percent of total exported trade to China from Hong Kong, China, and has fully liberalized five sectors (construction and related engineering service; distribution services; financial services; tourism and travel related services; and transport services), and partially liberalized two sectors (business services and communication services). Besides, no mode of service supply is a priori excluded. Consequently, those commitments made in the CEPA, read together with China’s accession commitments, cover ‘substantially all the trade’ and have ‘substantial sectoral coverage’⁷⁷. However, this view is not shared by some members of the WTO. For example, the EC has repeatedly emphasized its position that the CEPA cannot be qualified as covering ‘substantial all the trade’. As claimed, the CEPA is ‘more as a framework agreement to provide future liberalization than an actual liberalization agreement.’⁷⁸

B. DISPUTE RESOLUTION IN THE CLOSER ECONOMIC PARTNERSHIP ARRANGEMENT

With regard to trade dispute resolution mechanism under the CEPA framework, both CEPAs, in Article 19, provide nearly identical provisions governing institutional arrangements. It is provided that a Joint Steering Committee, comprising senior representatives or officials of both China and Hong Kong, China and Macau, China should be established. Under this Steering Committee, liaison offices should be established in both the Central Authority and the governments of these two SARs. Working groups may also be set up under this Steering Committee. Subsequently,

⁷⁶ Appellate Report, *Turkey – Textiles*, para. 48 (emphasis original).

⁷⁷ Gao, above n. 67, at 4-5.

⁷⁸ WT/REG162/M3 (15 May 2006), para 12.

three working groups, Working Groups on Trade in Goods, Trade in Service, Trade and Investments Facilitation were established at the first Steering Meeting.

Paragraph 3 of this Article provides the functions of the Steering Committee, which reads:

The functions of the Steering Committee include:

1. Supervising the implementation of the 'CEPA';
2. Interpreting the provisions of the 'CEPA';
3. Resolving disputes that may arise during the implementation of the 'CEPA';
4. Drafting additions and amendments to the content of the 'CEPA';
5. Providing steer on the work of the working groups;
6. Dealing with any other business relating to the implementation of the 'CEPA.'

This provision aims to define the competence of the Steering Committee. It covers the interpretation and implementation, further additions and amendments, the supervision of the working groups. The Steering Committee is also responsible for the disputes resolution. However, the legal text is from clear in this aspect. As indicated by the submission of the Hong Kong General Chamber of Commerce on 25 July 2003, where it presented 51 questions related to the CEPA, the functions of the Steering Committee were questioned in terms of its working procedures, private participation in this Steering Committee, and the substantive content of the dispute resolution mechanism, such as enforcement and appeal, and should be further clarified.⁷⁹ In August 2003, the government of HKSAR released a preliminary response with regard to other aspects of the implementation of the CEPA. However, those questions related to the competence, working procedures and substantial content of the dispute resolution have so far not been answered.⁸⁰

⁷⁹ 51 Questions about CEPA, submitted by the General Chamber of Commerce of Hong Kong, available at http://www.chamber.org.hk/memberarea/chamber_view/policy_statement_template.asp?id=839 (last accessed 25/06/2007).

⁸⁰ Chamber's Question on CEPA: A Preliminary Update, available at http://www.chamber.org.hk/wto/content/cepa_papers_rta_main.asp (last accessed 25/06/2007).

The fifth paragraph of the same Article lays down the procedural rules governing the interpretation and implementation of the CEPAs. As prescribed, with regard to problems resulting from the interpretation and implementation of the CEPAs, two sides (China and Hong, China, or China and Macau, China) shall resolve these problems ‘through consultation in the spirit of friendship and cooperation’. Based on this spirit, the Steering Committee shall thus make its decisions by consensus. In the notification to the Committee on Regional Trade Agreement, a passage by the Contracting Parties in respect of the dispute resolution procedures is particularly telling:

The two sides have set up a Joint Steering Committee to, among others, supervise the implementation of the CEPA, interpret the provisions of the CEPA, and resolve disputes that may arise during the implementation of the CEPA. The two sides will resolve any problems arising from the interpretation or implementation of the CEPA through consultation in the spirit of friendship and cooperation. The Joint Steering Committee will make its decisions by consensus.⁸¹

This passage clarifies the contracting parties’ perception and characterization of the dispute resolution mechanism provided in the CEPA. It is indeed very primitive. As pointed out by a commentator, the dispute resolution mechanism provided in the CEPA is too simple: it does not provided practices generally employed in bilateral or regional Free Trade Agreements; neither does it provide formalities and working procedures to settle disputes. It is thus argued that these characteristics suggest that these CEPA differ from Free Trade Agreements. The CEPAs are more an arrangement within a country to facilitate internal trade than bilateral or regional Free Trade Agreements.⁸² These two CEPAs may be deemed as policy instruments in nature, which aim to provide preferential treatments to Hong Kong, China and Macau, China. It is thus understandable that the dispute resolution mechanism set out in these two CEPAs is essentially political and diplomatic.⁸³

⁸¹ WT/REG/162/3(25 January 2005), p. 5; WT/REG163/3 (28 January 2005), p. 5.

⁸² J Fan, *et al.* (eds), *Commentary on the Mainland and Macau Closer Economic Partnership Arrangement (CEPA)* (Law College of Macau University Macau 2005) 240.

⁸³ L Chen and Y Zhao, 'A Study on the Dispute Resolution Mechanism in Region Trade Agreements: Article 19 of CEPA' in G Wang (ed) *A Research on the Economic Arrangement among the Cross-Strait Four Areas* (Beijing University Press, Beijing 2006) 253.

While this argument may be true, to some degree, this informal dispute resolution mechanism constitutes one of the major defects of these two CEPAs. Although China and Hong Kong, China and Macau, China are politically of the same sovereignty, there certainly exist conflicts of economic interests among these three areas. The dispute resolution mechanism set out in the CEPAs cannot offer a secured protection of their interests, as the commercial disputes between China and Hong Kong, China and Macau, China, in light of the conflicting economic interests, are inevitable.⁸⁴

The unavailability of private participation in this dispute resolution mechanism is another major defect. As this dispute resolution mechanism is solely dealt with through the channel of governmental consultation, no opportunity is provided for private economic actors to participate. Private actors can only influence their governmental decision-making through lobbying and various informal petitions. The same concern has also been voiced, as previously noted, in the submission of the General Chamber of Commerce of Hong Kong.

Strictly speaking, this consensual consultation in the spirit of friendship and cooperation is a trade dispute resolution mechanism in its very thin form. It nevertheless, to some extent, reflects the real perception between China and its two SARs in this issue. Disputes, if any, between China and Hong Kong, China and Macau, China should not be resolved in an adversary manner, where one side complains against the other, since it does not fit China's understanding of 'One China, Two Systems', with 'One China' being emphasized. This informal dispute resolution mechanism seems the best alternative. So far, to the author's understanding, no case has been referred to this Steering Committee. One might argue that this suggests a more formalized trade dispute resolution mechanism is unnecessary. However, a better interpretation of this is: this ill-designated dispute resolution mechanism has been discouraging disputes from being referred to it. This prevents commercial disputes between China and Hong Kong, China and Macau, China from being resolved effectively. Economic interests of private economic actors cannot effectively

⁸⁴ *Ibid.*, at 253-54.

be ensured, either. However, there is no sign for further reform for this dispute resolution mechanism.

This supposition can be supported by the contracting parties' response to the question whether any arbitration has been foreseen in case of the unavailability of consensus, during the process of examination in the Committee on Regional Trade Agreement. It is reiterated by China and Macau, China that, 'under Article 19.3 of CEPA, one of the functions of the Steering Committee is to resolve disputes that may arise during the implementation of the CEPA. Both parties believe that any problems arising from the interpretation or implementation of CEPA will be resolved through consultation in the spirit of friendship and cooperation as well as under the principle of mutual benefits.'⁸⁵

Lastly, looking upon the dispute resolution mechanism provided in Article 19, from another perspective, presents a completely different picture. Dispute prevention through consultations between contracting parties in the Steering Committee, and subsequently continuous amendments and supplements to the original main text proves itself an effective alternative for a judicialized dispute resolution mechanism. Rules of origin and the definition of 'service suppliers,' as laid down in the CEPA are generally regarded as potential disputes between the contracting parties. However, these rules have been continuously revised to include a wider scope of tariff-lines, and to cover different service sectors.⁸⁶ This might also explain and justify the contracting parties' reluctance to transform the existent dispute resolution mechanism into a more judicialized model.

C. DISPUTE RESOLUTION THROUGH THE WTO DISPUTE SETTLEMENT MECHANISM

The compulsory jurisdiction and permanent Appellate Body are two major characteristics of the WTO dispute settlement mechanism. In purely legal terms, as

⁸⁵ WT/REG163/5 (24 May 2005), p. 3.

⁸⁶ This approach mirrors China's approach in the Doha Round Negotiation on Rules. As a major 'victim' of the trade defence measures, in particular anti-dumping duties, due to its non-market economy status prescribed in the accession protocol, China aims at reshaping the anti-dumping agreement to prevent Chinese industries from being too vulnerable to anti-dumping investigations. *See*, W-M Choi, 'People's Republic of China's Proposals for Anti-Dumping in the WTO/DDA Rules Negotiation' (2007) 2 Asian Journal of WTO & International Health Law and Policy 25.

two full memberships in the WTO, Hong Kong, China and Macau, China may avail themselves of this dispute settlement mechanism. After the Panel proceedings, the trade disputes between China and Hong Kong, China and Macau, China may also be resorted to the Appellate Body. However, it is unlikely, or even impossible, to see a case brought about by one against another under this dispute settlement mechanism.⁸⁷ This view is also shared by some Hong Kong scholarship.⁸⁸

IV. SHORT CONCLUSION

This Chapter examines trade disputes resolution mechanisms between China and its two SARs under two frameworks: the constitutional/national law framework and the WTO/CEPA framework. The interaction of China and its two SARs are unique in terms of both their domestic constitutional structure, and the international trading regime. The second section of this Chapter begins with the general introduction of judicial review in these three areas, and examines vertical and horizontal interaction between China and its two SARs. Emphasis is actually placed on the interaction between China and Hong Kong SAR. It may be understandable and justifiable as courts in Hong Kong have more experiences in judicial review. The effort to characterize the free trade policy as 'political action' and subsequently to remove the jurisdiction of judiciary in Macau on this subject evidences the constraints on Macau courts. It also presents the weaknesses of judicial review in Macau. The third section of this Chapter first presents the legal bases, accession history of Hong Kong, China and Macau, China. It also examines the trade policy and practice of these members in the GATT and WTO. This section then explores the nature of the CEPA under the WTO rules and examines existent trade dispute mechanisms in both the WTO and the CEPAs. It points out the unlikeness of these three memberships to avail themselves of the WTO dispute settlement mechanism, and illustrates major defects of the dispute resolution mechanism in the two CEPAs, and finally explains why a judicialized

⁸⁷ Another relevant issue is the potential use of this dispute settlement mechanism between China and Taiwan, see *e.g.*, Q Kong, 'Can the WTO Dispute Settlement Mechanism Resolve the Trade Disputes Between China and Taiwan?' (2002) 5 *Journal of International Economic Law* 747; JS Mo, 'Settlement of Disputes between Mainland China and the Separate Territory of Taiwan within the WTO' (2003) 2 *Chinese Journal of International Law* 145.

⁸⁸ See *e.g.*, Gao, above n. 67, at 7.

dispute settlement mechanism under the CEPA framework is not preferable to the contracting parties.

CHAPTER IX NEITHER NATIONAL NOR INTERNATIONAL: TRADE DISPUTE RESOLUTION BETWEEN TAIWAN AND HONG KONG, CHINA AND MACAU, CHINA: THE HAUNTED ‘CHINA FACTORS’

I. INTRODUCTION

This Chapter aims to examine and explore the trade dispute resolution among the three WTO separate-customs-territory members: Taiwan and Hong Kong, China and Macau, China. More precisely, it focuses on Taiwan in relation to Hong Kong, China and Macau, China, which are members of the WTO, but at the same time, Special Administrative Regions (SARs) of China.¹ Therefore, while the interaction between Taiwan and Hong Kong, China and Macau, China may be subject to WTO law, ‘China factors’ nevertheless also play a pivotal role in this subject matter.

In this vein, this Chapter will firstly review the negotiation on the freedom of the air (or the flight rights, or traffic rights) between Taiwan and Hong Kong, China with the aim to illustrating how ‘China factors’ affect the progress and result of this negotiation. By this example, it reminds the readers that, when examining economic integration and trade dispute resolution among these three memberships in relation to, *inter alia*, the choices of forum and their approaches, one should not neglect the ‘invisible hand’ of China Central Authority. Besides, this example echoes the three-links issue as elaborated in Chapter VIII, and helps to clarify the role of Hong Kong, China and Macau, China in the cross-strait trade relations.

Following this example, this Chapter, in section III explores the (ir)relevance and (in)significance of the WTO Dispute Settlement Mechanism. Given the status of free ports, the role of an ‘intermediary’ and the main transshipment ports for goods between Taiwan and China prior to the signature of the Taiwan-China direct transportation agreements, it is unlikely that either Taiwan or Hong Kong, China and Macau, China refer to the WTO forum. However, it does not suggest trade dispute between Taiwan and Hong Kong, China and Macau, China does not exist. This section points to an

¹ In this Chapter, there may be several confusing terminological issues. To avoid this confusion, ‘Hong Kong’ will be used when I try to refer to it as a geographic indication with neutral political connotation. The ‘HKSAR’ is to be employed when emphasis is placed upon Hong Kong being a special administrative region of China, while ‘Hong Kong, China’ will be used when I focus on its external autonomy in economic and commercial affairs and its WTO membership.

alternative dispute resolution – arbitration, and explains why arbitration is appealing to these three memberships, or more precisely, to private individuals and enterprises thereof. This section then investigates their domestic legal framework and jurisprudence in relation to the mutual recognition of arbitration awards/judgments, and finally revisits the role of China on this issue. A short conclusion summarizing this Chapter will be provided in Section IV

II. THE HAUNTED CHINA FACTORS: TAIWAN-HONG KONG, CHINA NEGOTIATION ON THE FREEDOM OF THE AIR AS AN EXAMPLE

As noted in Chapter VIII, the constitutional design of Hong Kong Special Administrative Region (the HKSAR) is governed by its mini-constitution, the Hong Kong Basic Law (the HKBL). The most significant event in Hong Kong's constitutional development is undoubtedly its return to China. As a conventional practice, the agreement on flight rights between Hong Kong and Taiwan lasts for five years. Setting the handover as a time-point, one can separate the negotiation of Taiwan and Hong Kong into three phases: pre-handover, transition period and after the handover. In 2002, when their agreement on flight rights expired, Hong Kong has already been part of China whereas the ruling party in Taiwan was the pro-independence party, the Democratic Progress Party. This added much complexity to the negotiation process. This post-handover negotiation in 2002 projected the prospective three-link negotiation. It was also during this negotiation that the influence of China Central Authority became even clearer. Therefore, this section will focus on this negotiation while the negotiation in the pre-handover and transition phases will be briefly considered.

A. PRE-HANDOVER

The initiation of flights between Taiwan and British Hong Kong dated back to 1957, few years after the official diplomatic relation between Taiwan and the United Kingdom was cut in 1950. Due to the absence of official diplomatic relation, the negotiation of aviation pact between Taiwan and British Hong Kong was carried out by their major, and the only at that time, airplane companies: Cathay Pacific Airways

and China Airlines.² In other words, the negotiation was delegated to the flight operators. The agreement was private commercial contract in nature in order to avoid the issues of sovereign power or public authority. After the agreement was done, the agreement concerned should be reported to and approved by their respective flight regulatory agencies. Namely, the public authority stayed behind and was not visible during the negotiation process.³

B. TRANSITION PERIOD

Taiwan launched its ‘open-sky’ policy in 1987. Its state-owned airline had been gradually privatized and some other airline companies were allowed to enter into the market. Notwithstanding its liberalization policy in aviation service, the fact that China Airlines and Cathay Pacific Airways dominated the market remained unchanged until 1995. When the agreement on the flight rights between Hong Kong and Taiwan expired on 29 April 1995, the new agreement, if the conventional practice of five years’ term was followed, would cross the transition period. Since this agreement would cover post-handover period, the deal between Hong Kong and Taiwan should thus be subject to the approval of China Central Authority, or precisely speaking Sino-British Joint Liaison Group at that time.⁴

On the other hand, with China’s resumption of sovereign power on Hong Kong, and subsequently the coming into being of the HKSAR, Taiwan would have to decide the status of the HHSAR since the direct transportation between Taiwan and China was prohibited before the signature of Taiwan-China direct transportation agreements on 4 November 2008.⁵ To this end, the *Statute on the Relations of Hong Kong and*

² It should be noted that China Airlines is the airline operated in Republic of China, the official title of Taiwan, while China Airways is the airline operated in People’s Republic of China.

³ B-S Qiu, *A Study on the Negotiation of Freedom of the Air between Taiwan and Hong Kong* (National Chung Hsing University 2003) 55.

⁴ According to Article 4 of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong (Sino-British Joint Declaration), a Sino-British Joint Liaison Group should be established to ensure the smooth transfer of Hong Kong. Annex II to the Declaration provides the legal basis and guidelines for the working procedure of the Joint Liaison Group. Wherever an issue is related to the transitional period, it may be referred to this Joint Liaison Group for consultation and discussion. A failure in this procedure might lead to China’s refusal to recognize its validity after China’s resumption of the sovereignty of Hong Kong. The reform of the Legislative Council introduced by Chris Patten, the 28th and last Governor of Hong Kong.

⁵ *Statute Governing the Relations of People in Taiwan Area and Mainland Area*, Art. 28~31.

*Macau (the Statute)*⁶ was enacted in 1997 in order to regulate differently the relations between Taiwan and Hong Kong and Macau after their handover. According to this *Statute*, air and sea transportation between Taiwan and Hong Kong and Macau is possible even after their return to China as special administrative regions.⁷ The flight between Taiwan and British Hong Kong is defined as international route, whereas, after the handover it is deemed as a special route neither international nor domestic.

In this context, Taiwan aimed to enter into a pact effective through the transition period, namely from 1995 to 2000. In addition, other competitors should be allowed to enter into the market of civil aviation services between Taiwan and Hong Kong. Since China Airlines should be no longer the only operator therein, the delegation for the negotiation should include other airlines companies. Thus, during this negotiation, it was Taipei Airline Association (the TAA), composing China Airlines and other airlines companies, delegated to negotiate the flights rights. In contrast to Taiwan, Cathay Pacific Airways was in charge of this negotiation in the beginning.

Nevertheless, 'China factors' eventually became clear in the later stage of this negotiation. Corresponding to Taiwan, the civil aviation services market in Hong Kong was also forced to be liberalized, notably, to Chinese airlines companies.⁸ The China National Aviation Corporation, a wholly state-owned enterprise at that time, was registered in Hong Kong in 1995 in order to be eligible for the allocation of flight rights between Taiwan and Hong Kong. As this pact would go through 1997, the handover, the approval of China Central Authority was indispensable. When the stance of China became clear, Cathay Pacific Airways found the trend to open the market to other competitors irresistible and inevitable. Cathay Pacific Airways then proposed that Hong Kong Dragon Airlines to be the additional flyer between Taiwan

⁶ An English translation available at <http://www.mac.gov.tw/english/index1-e.htm> (last accessed 16/07/2008).

⁷ The *Statute*, Art. 24~27.

⁸ At this stage, apart from Cathay Pacific, there were some other airlines who might participate in the allocation of flights rights between Taiwan and Hong Kong: Hong Kong Dragon Airlines, Air Hong Kong, and China National Aviation Corporation. Although Hong Kong Dragon Airlines was originally owned by China International Trust and Investment Company, a state-owned investment company, Cathay Pacific became the major shareholder at the time of negotiation. Air Hong Kong, due to its financial crisis, became a subsidiary company of Cathay Pacific after Cathay Pacific took 75% of its share in 1994 and the rest 25% in 2002.

and Hong Kong. This proposal was rejected by China. As an alternative, Cathay Pacific Airways offered to sell its share to the China National Aviation Corporation so that China National Aviation Corporation might indirectly benefit from the liberalization of civil aviation service between Taiwan and Hong Kong.⁹ In this way, the deal that Cathay Pacific Airways and Hong Kong Dragon Airlines operate the flight between Taiwan and Hong Kong was settled.

With regard to the formality of the agreement, it was intended by Taiwan to be signed by association to association. With the opposition of China, it remained to be commercial pact between airline companies and airline companies. The result turned out to be a commercial pact signed by China Airline and Cathay Pacific; the other was signed by Hong Kong Dragon Airline and Evergreen Air, the new operator in Taiwan. With the extension of the 1990 agreement for seven times, the 1995 round negotiation on the flight right was finally settled in April 1996.¹⁰

C. POST-HANDOVER AND DPP AS RULING PARTY IN TAIWAN

During this first post-handover negotiation, Taiwan's relations with the HKSAR had also been subject to the new regulatory regime as set out in the *Statute* enacted in 1997. Some experiences might have already been learned. However, a new factor complicated this first post-handover negotiation: the pro-independence party won the presidential election in Taiwan in 2000. It was the first time that China had to negotiate with the DPP. Further, this negotiation was seen as a signal to test the political climate between Taiwan and China, and might be used as a precedent for the

⁹ Qiu, above n 3, at 86-92.

¹⁰ During the course of this negotiation, a negotiation between Taiwan and Macau was also undergoing. The pattern of the negotiation between Taiwan and Hong Kong was followed. Namely, Taiwan delegated the authority to the TAA while Air Macau was in charge of this negotiation. The flight between Taiwan and Macau was an alternative to that between Taiwan and Hong Kong. In case that the negotiation between Taiwan and Hong Kong could not successfully be concluded, Taiwan might be faced with the difficulties that there were no flight between Taiwan and China and suffered from a great loss of economic interests. Therefore, when the negotiation between Taiwan and Hong Kong seemed not so promising, Taiwan conducted a parallel negotiation with Macau. The agreement on the flight rights between Taiwan and Macau was done on 1 December 1995. Undoubtedly, Taiwan had to deal with China who sat behind Macau, since the agreement of traffic rights would cross the transition period, 20 December 1999. Nevertheless, one of the factors blocking the negotiation between Taiwan and Hong Kong was the attitude of Chris Patten, the Governor of the Colony at that time. Due to many conflicts between him and China, notably the reform of the Legislative Council, Patten was reluctant to make a deal cross the handover, which would force him to deal directly with China.

three-link negotiation. In respect of Hong Kong, the mixture of being a special administrative region of China, and at the same time, a member in the WTO with the official name of ‘Hong Kong, China’ was amplified. At this stage, the Hong Kong Basic Law (the HKBL) had entered into force for nearly three years. The interaction between China and Hong Kong should thus be governed by the HKBL. Similarly, some patterns might have also already been gradually developed. In the context of this new regulatory framework, a careful legal analysis of both the HKBL and the *Statute* governing the civil aviation is essential and beneficial. Therefore, this subsection will start with an analysis of the legal framework on the civil aviation transportation in these two jurisdictions, and then examine the interaction of Taiwan, China and Hong Kong, China during this negotiation.

a. *Statute on the Relations of Hong Kong and Macau*

Section 4 of the *Statute* lays down the regulatory framework of the transportation and shipping between Taiwan and Hong Kong, covering the vessels and civil aircrafts. Concerning the civil aviation, while it may be subject to restrictions or prohibition in circumstances of threat to national security, civil aircrafts registered in Taiwan or Hong Kong are generally allowed to fly between Taiwan and Hong with the permission from the Ministry of Transportation and Communications (the MOTC).¹¹ Besides, foreign-registered civil aircraft may also fly between the Taiwan and Hong Kong in accordance with air traffic rights exchanges and by reference to international air traffic conventions.¹²

b. *Hong Kong Basic Law*

Section 4 of the HKBL regulates the civil aviation of the HKSAR. In order to maintain the status of the HKSAR as a centre of international and regional aviation,¹³ the pre-existent regulatory regime of the civil aviation management should be continued. The HKSAR should also keep its own aircraft register system. Nonetheless, these practices should be in conformity with laws and regulations of China’s Central

¹¹ The *Statute*, Art. 26.1.

¹² The *Statute*, Art. 27.1

¹³ HKBL, Art. 128.

Authority concerning nationality marks and registration marks of aircrafts.¹⁴ The second paragraph of the same article then dictates the special permission of China's Central Authority in respect of access of foreign state aircraft to the HKSAR.¹⁵ Article 130 provides that the HKSAR is responsible on its own 'for matters of routine business and technical management of civil aviation'. Arrangements should be made after the consultation between China Central Authority and the HKSAR in respect of the air service between the HKSAR and other parts of China.¹⁶ Then the HKBL assigns the competence to the China Central Authority on agreements relating to air services (a) between other parts of the People's Republic of China and other states and regions with stops at the HKSAR' and (b) 'the HSAR and other states and regions with stops at other parts of the People's Republic of China'.¹⁷ These two categories of air services agreements should be concluded by the Chinese Central Authority. In other words, when any part of China is at stake, be it the final destination or a temporary stop, Chinese Central Authority is competent for the conclusion of an agreement while interests of the HKSAR should be taken into consideration and the HKSAR can also be included as members of Chinese delegation.¹⁸

Two articles are most relevant here. Article 133 (1) provides that, acting under the specific authorization of China Central Authority, the HKSAR may:

- (1) renew or amend air service agreements and arrangements previously in force;
- (2) negotiate and conclude new air service agreements providing routes for airlines incorporated in the Hong Kong Special Administrative Region and having their principal place of business in Hong Kong and providing rights for over-flights and technical stops; and
- (3) negotiate and conclude provisional arrangements with foreign states or regions with which no air service agreements have been concluded.

Article 134 prescribes that China Central Authority should give the HKSAR the authority to designate such airlines, to negotiate and conclude relevant

¹⁴ HKBL, Art. 129(1). Article 135 also provides that 'Airlines incorporated and having their principal place of business in Hong Kong and businesses related to civil aviation functioning there

¹⁵ Regarding the issue of state aircraft, China Airlines decided not to carry Taiwan's national flag in order to avoid the potential sovereignty controversies in 1992.

¹⁶ HKBL, Art. 131.

¹⁷ HKBL, Art. 132 (1).

¹⁸ HKBL, Art. 132 (2), (3).

arrangements for the implementation of those air services agreements and provisional arrangements as referred to in Article 133.¹⁹ Authority should also be given to issue licenses to airlines incorporated in the HKSAR with principal place of business therein, and to issue permits to foreign airlines for services other than those to, from or through the mainland of China.²⁰

To sum up, regardless of the authority given to the HKSAR to regulate its own licensing and permit regime and to negotiate and conclude relevant arrangements as referred to in Article 133 of the HKBL, a specific authorization is necessary when the HKSAR the renewal, amending, negotiation or conclusion of air service agreements or arrangements is at stake. This means that China Central Authority can veto any deal done by Taiwan and Hong Kong. Without the approval of China, the air service agreement between Taiwan and Hong Kong can never be effectuated.

c. Negotiation Process

When the 1996 air service agreement expired on 30 June 2001, it was immediately extended for six months, until 31 December 2001. This was mainly because China had to take more time to observe and ascertain the attitudes and approaches taken by the pro-independence party. Besides, this negotiation was immediately before the eve of China and Taiwan's accession to the WTO. The linkage between the three direct-link issue and this air service negotiation was thus inevitable. In fact, it was also hoped in Taiwan, at that time, that after its accession to the WTO, its trade relations with could be normalized and governed by the WTO framework. The three-link issue was then the most important topic. Nevertheless, as noted in Chapter VI, the direct transportation agreements between Taiwan and China was signed on 4 November 2008 after the philo-China President came to power.

However, Taiwan's synergic strategy brought about the first controversy: who should be in charge of this negotiation. As Hong Kong and Macau was returned to China in 1997 and 1999, affairs related to these two SARs are assigned to the competence of the Mainland Affairs Council (the MAC). Therefore, the MAC made

¹⁹ HKBL, Art. 133(1), (3)

²⁰ HKBL, Art. 133(2), (4)

clear that it would dominate this round of negotiation. The perspective three-link issue and national security are major arguments of the MAC. Besides, Taiwan aimed to change the previous negotiation model, namely, airline to airline and Cathay Pacific Airways to the TAA, with the formality of commercial agreements. Taiwan demanded the negotiation should be government to government, and the formality should include the main legal text and annexes generally employed by other international agreements of freedom of the air. This proposal was obvious unacceptable to China and was soon rejected. Nonetheless, the HKSAR signalled that the Civil Aviation Agency (the CAA) of Taiwan could participate in the negotiation as a consultant. However, the MAC did not accept this proposal. Thus, the 1996 air service agreement was again extended for six months, until 30 June 2002.

After the second-time extension of the 1996 air service agreement, the MAC softened: it denounced its government-to-government position, but asked instead that the agreement should be signed by the governmental official of the CAA. But this proposal was still unacceptable to the HKSAR. Instead, the HKSAR offered that the TAA acted as the main negotiator and the official of the CAA in Taiwan could participate as a consultant. In addition, the HKSAR maintained that, if a new agreement could not be reached before 30 June 2002, the 1996 air service agreement might not be extended. In other words, the flight between Taiwan and the HKSAR might be suspended.

With the threat of suspension of the flight between Taiwan and the HKSAR, the two parties finally entered into substantial negotiation. Taiwan then proposed that the agreement should be permanently valid in the formality of main text with annexes. But the HKSAR maintained that the conventional practice should be carried on. No consensus was reached. On 24 May in Taipei, Taiwan gave up its prior position and accepted the agreement to be in the formality of rights and obligation listed in the agreement. The HKSAR then welcomed this position and agreed that the TAA to be the signatory of Taiwan, while the Cathay Pacific and Hong Kong Dragon Airline were to be the signatories of the HKSAR.

On 29 June 2002, one day before the expiry of the twice-extended air service agreement, a new agreement was settled. At the final stage of this negotiation, in Taiwan's side, only the official of the MAC, the CAA and the Secretary General of the TAA remained on the table. Actually, the government officials dominated this final stage of negotiation. In contrast, the representatives of the airline companies remained to be the main negotiators.

While the final deal was signed by the Secretary General of the TAA, it was indicated that the signature was 'signed under the instruction', which suggested the presence of public authority in Taiwan. This agreement goes beyond a commercial pact, using the title of 'Arrangement Concerning the Transportation between Taiwan and Hong Kong.' It also includes the wording of freedom of the air, exchange of traffic rights. This may be seen a step forward between the inter-governmental interaction between Taiwan and the HKSAR, as well the China Central Authority standing behind the HKSAR. Finally, it should also be noted that this 2002 arrangements expired in 2007, but still in the status of extension.²¹ This again points to the linkage between the air service between Taiwan and Hong and the three-link issue between Taiwan and China. As the philo-China party won the presidential election in 2008, direct air and marine transportation agreements between Taiwan and China were signed on 4 November 2008. This development affects and undermines the role of Hong Kong, China as intermediary in the field of cross-strait trade. Besides, these new direct transportation agreements may turn back to affect the course of the negotiation between Taiwan and Hong Kong.

D. PIERCING THE VEIL: THE ROLE OF CHINA

With China's resumption of the sovereignty of Hong Kong in 1997, the negotiation of the flight rights between Taiwan and Hong Kong is virtually dominated by China. The coming into power of the pro-independence DPP in 2000 added complexities to this issue. While Taiwan aimed to 'upgrade' the negotiation to intergovernmental level, the HKSAR and China insisted it to be commercial pacts

²¹ In addition to the air service agreements between Taiwan and Hong Kong, the air service agreement between Taiwan and Macau expired in 2005 and has been repeatedly extended.

between airline and airline. The HKSAR and China tried to prevent the image of two equal governmental entities since China has long regarded Taiwan as its local province. This negotiation might project the perspective three-link negotiation. In fact, it also reveals different approaches adopted and maintained by Taiwan, Hong Kong, China and China in the WTO forum. A direct intergovernmental confrontation between Taiwan and China is the last thing that China wants.

Nevertheless, it does not mean that the interests of the HKSAR and China are always correlative. As Cathay Pacific Airways is mainly a British-invested company, its dominant position in the air transport services market in Hong Kong would inevitably be challenged as the British government left in 1997. China-invested airlines are expected to benefit from this air service market between Taiwan and Hong Kong. Furthermore, China-funded airlines may be more competitive and benefit more in this market than Cathay Pacific Airways. For example, the Hong Kong Dragon Airline is allowed to transit in Hong Kong and to continue to fly into mainland China by changing the code of the airline, since, as a conventional practice in the international civil aviation, the change of flight code signifies the change of route. It is thus not a direct flight between Taiwan and Mainland China, whereas this practice makes the Hong Kong Dragon Airline much more competitive.²² Moreover, with the philo-China Ma administration came to power in 2008 in Taiwan, economic relations between Taiwan and China highly accelerate. Hong Kong's status of intermediary and its economic benefit from this status is threatened. In response to this development, the Chief Executive of HKSAR, when welcoming the visit of the President of Strait Exchange Foundation in Taiwan, Chiang Pin-kung, proposed to deepen the economic and trade relations between the HKSAR and Taiwan.²³ Therefore, one should not fail to see the relevance of Taiwan-China relations in examining the interaction between Taiwan and Hong Kong, China. A warmer political climate between Taiwan and China may turn back to feed a closer economic tie between Taiwan and Hong Kong, China.

²² This practice is also seen as 'quasi-direct flight' between Taiwan and China.

²³ AFP, 'Hong Kong, Taiwan Leaders Agree to Strengthen Economic Ties', 19 July 2008, available at <http://ph.news.yahoo.com/afp/20080718/tbs-hongkong-taiwan-politics-economy-710a28b.html> (last accessed 20/07/2008).

Finally, when talking about the economic integration in the greater China, or pan-Chinese area, Macau is usually the missing point. It is mainly because of the economic and industrial structure of Macau, which consists in mainly its gambling services and other related tourism services. However, Macau can also be chosen as a competitor to Hong Kong. When the negotiation of the air service agreement between Taiwan and Hong Kong in 1995 was unpromising, a deal on the traffic rights between Taiwan and Macau were settled in October 1995. Flights between Taiwan and Macau can go ‘directly’ into mainland China after a temporary stop in Macau with the same flight through a mere change of the flight code. This quasi-direct flight model was actually borrowed by the final deal of 1996 air services agreement between Taiwan and Hong Kong. The quasi-direct flight in the Taiwan-Macau air services agreement predates that in the Taiwan-Hong Kong agreement. In this sense, Macau, as a special administrative region of China and at the same time, a WTO member, is competing with its counterpart, Hong Kong. To sum up, when thinking about the economic integration and trade dispute resolution among the Four WTO Members, one may be tempted to deem China and its two SARs as a whole, failing to appreciate the potential competition and conflict between China and its two SARs, or even between the two SARs. This also points to the multifaceted nature of Hong Kong and Macau: a SAR of China, but at the same time a full member in the WTO.

III. TRADE DISPUTE RESOLUTION BETWEEN TAIWAN AND HONG KONG, CHINA AND MACAU, CHINA

As dictated by the HKBL and MABL, Hong Kong and Macau, even after their return back to China, should maintain their status as a free port. With respect to trade in goods, Hong Kong, China and Macau, China mainly maintain a zero-tariff policy, which virtually prevents disputes concerning customs issues. At the same time, Taiwan relies upon Hong Kong, China and Macau, China as an intermediary for its trade and investments into China. It is thus unlikely that Taiwan singles out Hong Kong, China or Macau, China as a main respondent in the intergovernmental WTO forum, even if trade disputes relating to these two members do arise. Nevertheless, a close economic relation between Taiwan and Hong Kong, China and Macau, China

inevitably brings about disputes, in particular between Taiwan and Hong Kong, China. Since the governmental initiative may not be available, disputes should thus be resolved through the private approach. Namely, private enterprises and individuals may have to resolve their disputes through domestic courts or international/national arbitration. In this vein, this section firstly examine the (in)significance and (ir)relevance of the WTO forum due to the free-port status and zero-tariff policy maintained by Hong Kong, China and Macau, China as well as the particular relationship between Taiwan and Hong Kong, China and Macau, China. I then investigate the domestic law and regulation in these three memberships and explore how and why other forums, namely, domestic courts and arbitration procedures are preferable to private enterprises or individuals to resolve their private disputes. Specifically, I argue that, due to their political context, arbitration procedures turn out to be a better alternative for Taiwan, Hong Kong, China and Macau, China to respond to their needs deriving from commercial transactions.

A. THE INSIGNIFICANCE OF WTO FORUM

From an institutional perspective, these three WTO members have full memberships in the WTO, and enjoy the same rights and obligations as other sovereign State members. Therefore, they may refer to the WTO Dispute Settlement Mechanism against one another if they so wish. Nevertheless, as will be shown below, they avoid the WTO forum and opt for other venues as a conventional practice. This can be partly explained by the free-port status and zero-tariff policy of Hong Kong, China and Macau, China. Their reliance on each other also contributes to their reluctance for recourse for the WTO forum. As far as the flight between Taiwan and Hong Kong, China and Macau, China is concerned, it is not only Taiwan that relies upon the latter two, but the latter also rely upon Taiwan for the economic interests brought about during the transit and transshipment therein. Further, political consideration also prevents these three memberships going for the WTO forum. As noted in above, the least thing China likes to see is the intergovernmental contact between Taiwan and Hong Kong, China and Macau, China. China's position also

prevents these three members, notably, Hong Kong, China and Macau, China, bringing about a complaint in the WTO against one another.

As stated by the representative of Hong Kong, China during its trade policy review in 2006,

Hong Kong, China maintained a long-established policy of free and open trade and investment. The cornerstone of Hong Kong, China's economy rested on free enterprise, free trade and free markets. There were no barriers to trade: no tariffs, no quotas, no exceptions, no restrictions on inward or outward investments, no foreign exchange controls, and no nationality restrictions on corporate or sectoral ownership.²⁴

The same applies to Macau, China. According to the Trade Policy Report prepared by the Secretariat of the WTO, Macau, China, being a small and open economy, attaches great importance to international trade and 'continues to maintain the objectives of structural diversification and a market-driven, *laissez-faire* and rules-based trade policy. As one of the most liberal economies in the world that has applied tariffs of zero on all imports, Macao, China is supportive of the multilateral trading system.'²⁵ Zero-tariff policy is adopted and maintained by Macau, China in respect of imports.

Given the long-established policy of free trade and zero-tariff on imports, it is unlikely that Taiwan might recourse to the WTO forum concerning customs matters against Hong Kong, China and Macau, China. That being said, with the entering into force of the Closer Economic Partnership Arrangements between China and its two SARs, rule of origin in Hong Kong, China and Macau, China have changed. Taiwan voiced its concerns on this issue, emphasizing the regulatory environment of Macau, China not to be more restrictive to third countries than before the formation of CEPA.²⁶

In addition, in respect of the flight between Taiwan and Macau, China, Taiwan indicated that there are more than 1.4 million Taiwanese visitors to Macau, China and

²⁴ WTO Document, WT/TPR/M/173 (16 February 2007), para. 6.

²⁵ WTO Document, WT/TPR/S/Rev.1 (13 March 2007), p. 21-22.

²⁶ WTO Document, WT/TPR/M/181 (12 June 2007), para. 54. Regarding the potential challenge on the WTO-incompatibility of the rules of origin included in the CEPAs, see. HS Gao, 'The Closer Economic Partnership Arrangement (CEPA) between Mainland China and Hong Kong ?Legal and Economic Analyses' in PJ Davidson (ed) *Trading Arrangements in the Pacific Rim: ASEAN and APEC* (Oxford University Press, New York 2004), available at SSRN: <http://ssrn.com/abstract=752785>, at 7.

through Macau, China in transit into China. Since Macao, China is an important market to develop transport and tourism services, fair and equal treatment should thus be granted to Taiwan's airlines making such transit.²⁷ While Taiwan voiced its concerns during the Trade Policy Review, the WTO rules offer little help in this regard. Whereas both Taiwan and Macau, China are contracting parties to the Agreement on Trade in Civil Aircraft, this agreement regulates mainly the trade of the following products: civil aircrafts; civil aircraft engines and their parts and components; any other parts, components, and sub-assemblies of civil aircraft; and all ground flight simulators and their parts and components. Therefore, the Agreement on Trade in Civil Aircraft is of little relevance in the transit issue. Further, the transit issue is not subject to the regulation of the GATS either since, in respect of air transport services, paragraph 2 of the Annex on Air Transport Services explicitly excludes, except as provided in paragraph 3, the application of the GATS on traffic rights issues or services directly related to traffic rights.

Even if there may be potential inconsistency with WTO law, it is still unlikely, if not impossible, for Taiwan to file a complaint against Hong Kong, China or Macau, China. These two memberships have long played the role of intermediary between Taiwan and China. They are economically complementary. Taiwan relies upon Hong Kong, China and Macau, China for their role of an intermediary. Hong Kong, China and Macau, China need the economic interests brought by Taiwan's transit or transshipment. As repeatedly noted in this dissertation, before the philo-China President came into power on 20 May 2008, Taiwan maintained a trade policy that requires a transshipment of through Hong Kong, China and Macau, China is obligatory. As China has become Taiwan's exporting destination, out of economic concerns, Taiwan has no strong incentive to refer trade disputes to the WTO Dispute Settlement Mechanism. On the other hand, Taiwan's trade relation with Hong Kong, China and Macau, China is mainly governed by the *Statute*. While restriction and limitation may be imposed, Taiwan trade policy and practice toward Hong Kong, China and Macau, China is generally in line with the spirit of WTO law. It is thus unlikely that Hong

²⁷ WTO Document, WT/TPR/M/181 (12 June 2007), para. 54.

Kong, China or Macau, China would challenge trade measures adopted or maintained by Taiwan in the WTO Dispute Settlement Mechanism.

Further, as a conventional practice, Hong Kong, China and Macau, China rarely refer to this Dispute Settlement Mechanism except the *Turkey — Restrictions on Imports of Textile and Clothing Products (Turkey – Textile)*²⁸. In that case, while Hong Kong, China requested for consultation with Turkey, it eventually did not request the establishment of a panel. Instead, it participated as a third party in the *Turkey – Textile* complained by India.²⁹ With regard to Macau, China, its recourse to the Dispute Settlement Mechanism is even rarer. According to the Trade Policy Review Report prepared by the Secretariat, ‘Macau, China has never had a trade dispute with Members or non-members of the WTO.’³⁰ It is also interesting to note that China participated as a third party in the *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, whereas Macau, China did not.³¹ However, Macau, China is negotiating the United States in relation to the compensation for the withdrawal from its concessions on gambling service.³²

Over all, Hong Kong, China and Macau, China do not actively participate in the WTO Dispute Settlement Mechanism. In light of the conventional practice of Hong Kong, China and Macau, China, one is safe to say that they tend not refer to the WTO Dispute Settlement Mechanism in case of trade disputes. In addition, the longstanding attitude of China on the flight negotiation between Taiwan and Hong Kong, China

²⁸ WTO Document, WT/DS29/1 (15 February 1996).

²⁹ Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, modified by Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363. Apart from this *Turkey – Textile* case, Hong Kong, China also participates as a third party in some other panels, e.g., *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (‘Zeroing’)* and *European Communities – Selected Customs Matters*. It is also interesting to note that, in these two complaints, Taiwan, China and Hong Kong, China all participate as a third party. In addition, the attitude of Hong Kong, China can be contrasted to its approach in the GATT era. Hong Kong had acted as a complainant in several panels. See, *infra*, Chapter I, Section II (D).

³⁰ WTO Document, WT/TPR/S/Rev.1 (13 March 2007), p. 25.

³¹ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, modified by Appellate Body Report, WT/DS285/AB/R.

³² Reuters, *UPDATE 1-Antigua Seeks WTO Arbitration in US Gambling Dispute*, 31 January 2008. available at <http://uk.reuters.com/article/mediaNews/idUKL3174965820080131> (last accessed 21/07/2008)

and Macau, China, is to avoid intergovernmental contact or negotiation. In light of these factors, a complaint from Hong Kong, China or Macau, China against Taiwan is unlikely to come.

B. DOMESTIC COURTS OR ARBITRATION AS ALTERNATIVE VENUES

The above subsection explains why Taiwan and Hong Kong, China and Macau, China tend not to refer to the WTO Dispute Settlement Mechanism. It is mainly because trade policy and practice adopted and maintained by Taiwan and Hong Kong, China and Macau, China is generally compatible with WTO law. Besides, the role of Hong Kong, China and Macau, China being as an intermediary between Taiwan and China curtails potential recourse to the WTO Dispute Settlement Mechanism. Further, China's political position also prevents Hong Kong, China and Macau, China from resorting to WTO Dispute Settlement Mechanism. Nevertheless, commercial or trade disputes between private parties among these three memberships do not dissolve merely because the governments choose not to resolve these disputes in the intergovernmental WTO forum. While there may be only a few trade disputes derived from governmental measures, commercial or trade disputes between private parties abound. These private disputes should thus be resolved in different forum, either in domestic courts or in arbitration procedures.

As the arbitration procedure, regardless of its judicial enforcement procedure at the latter stage, involves less sovereign issues, it becomes more attractive to private parties. Besides, the arbitration procedure seems to suit better the needs of private parties. Further, private parties may also refer to arbitration in jurisdiction other than Taiwan and Hong Kong, China and Macau, China through their acceptance of jurisdiction. This strengthens the preference of private parties, especially multi-national companies, to arbitration procedures. Nonetheless, since this thesis focuses on the dispute resolution of the Four WTO Members, arbitration done in other jurisdiction may not be of great relevance and is not the main concern of this thesis. This Chapter thus limits itself to arbitration procedures located in these three memberships, namely, Taiwan and Hong Kong, China and Macau, China. Arbitration done in other jurisdictions, including possible international arbitral tribunals, through

the clause of acceptance of jurisdiction will not be dealt with. Instead, I will focus on judicial and arbitral procedures in Taiwan, Hong Kong, China and Macau, China. However, this relates to a persisting controversy: the recognition and enforceability of civil judgments and arbitral awards. As is pointed out, the ultimate authority for arbitration procedures is that they are recognized and supported by national legislative and judicial processes³³

Since there is no intergovernmental agreement governing this issue, it is left to domestic law/regulation and judicial practice. It is thus essential to examine domestic legal framework and jurisprudence in relation to the recognition and enforceability of civil judgments and arbitral awards done in these three memberships. Bearing this in mind, the following subsection will examine the complexities and diversities of their domestic law/regulation and judicial practice, and explore the relevance of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) on this issue.

C. DOMESTIC LEGAL FRAMEWORK AND JURISPRUDENCE

As noted above, in this subsection, I will investigate the domestic law/regulation and judicial practice in Taiwan, Hong Kong, China and Macau, China each by each. The analysis will begin with the legal framework, followed by the jurisprudence of the domestic courts. I will also explore the influence of China and the relevance of New York Convention in this regards.

1. TAIWAN'S DOMESTIC LEGAL FRAMEWORK AND JURISPRUDENCE IN RELATION TO HONG KONG, CHINA AND MACAU, CHINA

a. Taiwan's Law and Regulation in relation to Hong Kong, China and Macau, China

Taiwan maintains a contradictory and ambiguous regulatory regime on affairs of Hong Kong and Macau.³⁴ Since their return to China, they have been part of,

³³ R Wai, 'Transnational Liftoff and Juridical Touchdown: the Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 Columbia Journal of Transnational Law 209, 267.

³⁴ This is also true for China's foreign trade regulatory regime. China's *Foreign Trade Law* is applies to *mutatis mutandis* to trade related to Taiwan and its SARs (Art. 69).

regardless of the designation of Special Administrative Regions, China. The *Statute Governing Relations between People in Taiwan Area and Mainland Area* is nevertheless not applicable to Hong Kong and Macau. A different regulatory regime is laid down by the *Statute Governing Relations with Hong Kong and Macau* (the *Statute*), enacted and promulgated on 12 April 1997. This *Statute* is aimed to regulate and promote trade, economic, cultural and other relations with Hong Kong and Macau.³⁵ In cases where this *Statute* does not regulate the relevant matters concerned, other relevant laws and regulations apply. However, provisions of the *Statute Governing Relations between People in Taiwan Area and Mainland Area* are not applicable except where explicitly specified otherwise.³⁶ In principle, Taiwan deems Hong Kong and Macau as different entities from China and provides a different regulatory regime in this regard.

Apart from the transportation and shipment mentioned in Section II, the *Statute* also regulates differently in relation to economic and trade exchanges. Trade between Taiwan and Hong Kong and Macau can be conducted directly although necessary restrictions may be imposed when major interests of Taiwan are threatened due to circumstantial changes.³⁷ Goods imported or carried into Taiwan from Hong Kong and Macau should be deemed as imported items, while goods exported to Hong Kong and Macau should be deemed as exported goods.³⁸ Customs matters, including inspection, quarantine, and taxation should be carried out with relevant import/export laws and regulations, such as *Foreign Trade Act* and *Customs Act*.³⁹

Similar to its regulatory regime on trade and economic relations with Hong Kong and Macau, Taiwan maintains a different procedure governing the recognition of civil judgments and arbitral awards done by Hong Kong, China and Macau, China. In

³⁵ The *Statute*, Art. 1.1.

³⁶ The *Statute*, Art. 1.2.

³⁷ The *Statute*, Art. 35.1.

³⁸ A resolution by the criminal tribunals of the Supreme Court further clarifies this issue. According to this resolution, as Hong Kong, being a separate customs territory, is a member of the WTO. The application of the *Statute Governing the Relations between People in the Taiwan Area and Mainland Area* to Hong Kong is exclude even its return to China. Trade between Taiwan and Hong Kong and Macau can thus directly conducted as Hong Kong and Macau are deemed as third destinations other than China. See, the 3rd Resolution of Criminal Tribunals of the Supreme Court (11 May 2004), available at <http://jirs.judicial.gov.tw/Index.htm> (last accessed 26/07/2008).

³⁹ The *Statute*, Art. 35.2, 35.3.

Chapter III of the *Statute*, it lays down the basic framework for civil matters between Taiwan and Hong Kong, China and Macau, China. In terms of private international law, the *Law Governing the Choice of Law in Civil Cases Involving Foreign Elements* should apply *mutatis mutandis* to those civil cases relating to Hong Kong, China and Macau, China.⁴⁰ In Article 42, the *Statute* specifies the procedure applicable in relation to civil judgments and arbitral awards made in Hong Kong, China and Macau, China. The general procedure governing the recognition and enforceability of foreign civil judgments and arbitral awards should *mutatis mutandis* apply. This article refers back to the Article 402 of *Code of Civil Procedure*⁴¹ and Article 4bis of *Civil Enforcement Act*⁴² for the determination of validity, jurisdiction, and enforceability of civil judgments thereby. It also refers to Article 47-41 (Chapter VII foreign arbitral award) of the *Arbitration Act*.⁴³

Article 402 of the *Code of Civil Procedure* dictates a final and binding judgment rendered by a foreign court to be recognized except in case of any of the following four circumstances:

1. Where the foreign court lacks jurisdiction pursuant to the R.O.C. laws;
2. Where a default judgment is rendered against the losing defendant, except in the case where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under the R.O.C. laws;
3. Where the performance ordered by such judgment or its litigation procedure is contrary to R.O.C. public policy or morals;
4. Where there exists no mutual recognition between the foreign country and the R.O.C.⁴⁴

Apart from the recognition aspect, the *Act on Civil Enforcement*,⁴⁵ in Article 4bis provides that the enforceability of a foreign judgment may be granted only after

⁴⁰ The *Statute*, Art. 38.

⁴¹ An unofficial English version is available at <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT01.asp?lsid=FL001362> (last accessed 26/07/2008).

⁴² The legal text provides 'Article 4, paragraph 1' of the Civil Enforcement Act. Nevertheless, due to the amendment and revision of this Act, the relevant provision should be Article 4bis instead.

⁴³ The legal text provides 'Article 30 through 34 of the Commercial Arbitration Act.' For the same reason mentioned above, this Commercial Arbitration Act was revised and renamed as 'Arbitration Act' in 2002. The referred articles should thus be Article 47 to Article 51 of the *Arbitration Act*.

⁴⁴ Article 402.1 of the *Code of Civil Procedure*. Paragraph 2 of this Article then provides these four criteria apply *mutatis mutandis* to final and binding ruling, other than judgments, rendered by a foreign court.

⁴⁵ Available at <http://db.lawbank.com.tw/FLAW/FLAWDAT01.asp?lsid=FL001365> (in Chinese, last accessed 26/07/2008).

the court declares it enforceable in the formality of a judgment. This article then refers to the conditions as provided in Article 402 of *Code of Civil Procedure* for the court to grant the enforceability.⁴⁶ As Article 42 of the *Statute* refers to Article 402 of the *Code of Civil Procedure* and Article 4bis of the *Act on Civil Enforcement* for the determination of validity, jurisdiction, and enforceability, the *Statute* considers civil judgments done in Hong Kong and Macau more foreign civil judgments than Chinese civil judgments.⁴⁷

The most relevant condition is the mutual recognition. In the case of Taiwan and Hong Kong, China and Macau, China, since there is not, and may never be an agreement on the mutual recognition of civil judgments, controversies may arise thereby. Besides, it is not clear in relation to the formalities of the ‘mutual recognition’ referred to in this provision. In the absence of a formal agreement, is the court entitled to recognize a foreign ruling or judgment when the court believes, in so doing, to be in accordance with the spirit implicit reciprocity?

In respect of arbitration awards, Chapter VII of the *Arbitration Act*⁴⁸ outlines the framework for the recognition of a foreign arbitration award, including the definition of a foreign arbitral award and its enforceability after the recognition being granted by the court⁴⁹ and procedures to be followed for the application of its recognition⁵⁰. Article 49.1 then dictates the court to dismiss this application where the dispute is not arbitrable under the laws of Taiwan or its recognition or enforcement is contrary to the public order or good morals of Taiwan.⁵¹ The second paragraph of the same article then follows the same practice of the *Code of Civil Procedure*, but takes a lenient approach. It is provided that, ‘the court *may* issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the country where the arbitral award is made or whose laws govern the arbitral award does not

⁴⁶ In terms of this reference, it is held by the Taiwan Higher Court that, as Article 42 of the *Statute*

⁴⁷ Taiwan Higher Court, Shang zhi No. 136 (1999), available at <http://jirs.judicial.gov.tw/Index.htm> (last accessed 26/07/2008).

⁴⁸ An unofficial English version is available at <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT01.asp?lsid=FL010105> (last accessed 26/07/2008).

⁴⁹ The *Arbitration Act*, Art. 47.1.

⁵⁰ The *Arbitration Act*, Art. 48.

⁵¹ The *Arbitration Act*, Art. 49.1.

recognize arbitral awards of the Republic of China.’⁵² According to this provision, regardless of the absence of recognition of Taiwan’s arbitral award by foreign countries, the court may still approve the application and grant the recognition of the foreign arbitral award concerned. It is apparently out of the particular international situation of Taiwan where an agreement or arrangement on mutual recognition of arbitral awards is generally not available and not possible. Nonetheless, a rigid approach is not feasible given the commercial needs of transaction between private parties. It is thus again left to the courts to decide whether or not recognize arbitral awards made by Hong Kong, China and Macau, China.

b. Jurisprudence in the Taiwan’s Courts

As regards the recognition and enforcement of the civil judgments and arbitration award made in Hong Kong, China and Macau, China, Taiwan’s courts have consistently taken a lenient position. Although, as previously noted, the criterion of mutual recognition laid down by Article 402 of the *Code of Civil Procedure* may constitute an obstacle for Taiwan’s courts to grant recognition to the civil judgments and arbitral awards concerned, nevertheless, existent jurisprudence has proved otherwise.

The general position of Taiwan’s judicial attitude toward foreign civil judgments and arbitral awards dates back to 1980’s. In a case relating to an application for the recognition of the arbitral award made in the United Kingdom, the Higher Court in Taichung District rejects this application on the ground of the absence of British recognition of Taiwanese arbitral awards. It is argued that, being a contracting party to Geneva Convention on Arbitral Awards and the New York Convention, the United Kingdom generally recognizes arbitral awards made by contracting parties to these two Conventions. In respect of arbitral award made by non-contracting parties, while recognition is likely to be granted in accordance with the spirit of reciprocity, the diplomatic recognition of the non-contracting party concerned is also relevant. According to this argument, the court further argues that, given the absence of mutual recognition agreement between Taiwan and the United Kingdom, and the absence of

⁵² The *Arbitration Act*, Art. 49.2 (emphasis added).

British precedent on its recognition of Taiwanese arbitral awards, the application should thus be rejected.⁵³ Nevertheless, this argument is not supported by the Supreme Court. In repealing the ruling, the Supreme Court held that, wherever a country refuses to grant its recognition of arbitral award made in Taiwan, courts in Taiwan may dismiss the application for the recognition of arbitral award made in the country concerned, as provided in Article 32.2 of the *Statute on Commercial Arbitration*. (the predecessor of *Arbitration Act*). However, it does not necessarily mean that, only when a foreign court grants its recognition to Taiwan's arbitral awards in the first place can a Taiwanese court grant its recognition to the country concerned. Otherwise, it would be inconsistent with the spirit of comity and undermine the international judicial cooperation. Moreover, the relevant provision instructs the court that an application for the recognition *may*, but not *shall* be dismissed.⁵⁴

Later in an application relating to the recognition of an arbitral award made in British Hong Kong in 1992, the court took the same stance. The respondent argued that, while Taiwan's courts firstly recognized the arbitral awards made in Hong Kong in its earlier jurisprudence, the judiciary of British Hong Kong did not respond positively to this amicable attitude. The respondent then claimed that due to this development, Taiwan's judiciary should take a negative position in granting the recognition and enforceability of arbitral awards made in British Hong Kong. In addition, since its return to China, British rules governing the recognition of foreign arbitral awards were no long applicable in the HKSAR. According to the Article 269 of *Code of Civil Procedure of People's Republic of China*, arbitral awards made in a foreign country with which China does not sign a mutual reciprocal agreement shall not be recognized. Taiwan's arbitral awards can thus not be recognized in Hong Kong according to either the British rules or China's *Code of Civil Procedure*. In

⁵³ Taiwan Higher Court, Taichung District, Guomao kangzhi No. 1 (1986). The court also draws its conclusion from the fact that courts of the British Hong Kong does not recognize Taiwan's final and binding civil judgments, and thus concludes that the absence of the diplomatic recognition between Taiwan and the United Kingdom had prevented the British courts from recognizing and enforcing the arbitral awards made in Taiwan. This issue, for Hong Kong's recognition of Taiwan's civil judgments and arbitral award will be further elaborated in the following subsection.

⁵⁴ Taikang zhi No. 335 (7 August 1986), available at <http://jirs.judicial.gov.tw/Index.htm> (last accessed 26/06/2008).

responding to this argument, the court slightly notes that, in light of the trend of international commercial arbitration, it is feasible to grant its recognition to this arbitration award concerned.⁵⁵ In its appeal, the Higher Court firstly referred to the afore-mentioned holding of the Supreme Court and clarified that the arbitral award at dispute was done in 1992 when Hong Kong was still under the British rule. China's *Code of Civil Procedure* was thus irrelevant. However, the Higher Court still failed to provide a persuasive argument in relation to British refusal to recognize Taiwan's arbitral awards. Moreover, the appeal to the Supreme Court was dismissed on a procedural ground.⁵⁶ The Supreme Court thus did not express its view in this regard. Nonetheless, this argument became irrelevant owing to change of the attitude of the judiciary of the HKSAR, as will be shown in the following case.

In a case regarding to a divorcement in 2004, the Supreme Court declared that the mutual recognition in terms of Article 402(4) of *Code of Civil Procedure* of Taiwan does not refer to diplomatic or governmental recognition in terms of international law. It refers to the mutual reciprocity between courts in different jurisdictions in relation to the recognition of civil judgments. Wherever the judiciary in a country or jurisdiction does not expressly refuse to recognize the civil judgments of Taiwan, the courts in Taiwan should take an active and lenient approach on granting the recognition of civil judgments made by foreign courts. Then the court referred to *Chen Li Hung & others v. Ting Lei Miao & others*, where the Court of Final Appeal in the HKSAR, in 2000, explicitly recognized the validity of the civil ruling and judgments of Taiwan's courts. Based on these arguments, the court then withheld the decision of the lower court to recognize the divorcement judgment concerned.⁵⁷

⁵⁵ Taiwan Taipei District Court, Zhongsheng zhi No. 4 (30 November 1998), available at <http://jirs.judicial.gov.tw/Index.htm> (last accessed 26/07/2008). Interestingly, in this case, the applicant emphasized on the nature of commercial arbitration, being a resolution mechanism between private entities without the intervention of sovereign powers. By contrast, the respondent focused on the refusal to grant recognition both by British Hong Kong and the HKSAR, and insisted on the national sovereignty.

⁵⁶ Taikang zhi No. 186 (11 April 2002), available at http://www.arbitration.org.tw/content/b8_65.htm#65-1 (last accessed 26/06/2008).

⁵⁷ Taishang zhi No. 1943 (11 October 2004), available at <http://jirs.judicial.gov.tw/Index.htm> (last accessed 26/06/2008). The *Chen Li Hung & others v. Ting Lei Miao & others* will be examined in greater detail in the following subsection, *infra*, text to n. 68, ff.

2. HONG KONG, CHINA'S DOMESTIC REGULATION IN RELATION TO TAIWAN

a. Hong Kong, China's Law and Regulation in relation to Taiwan

The recognition and enforcement of foreign judgments in Hong Kong is governed by the statutory *Foreign Judgments (Reciprocal Enforcement) Ordinance* (Cap. 319)⁵⁸ and common law rule; in respect of the arbitral awards made in Taiwan, it is subject to the regulation of the *Arbitration Ordinance* (Cap. 341)⁵⁹. No special arrangement is made for Taiwan. These ordinances and common law rules may be applicable to the recognition and enforcement of foreign judgments and arbitral awards made in Taiwan, as appropriate.

The *Foreign Judgments (Reciprocal Enforcement) Ordinance*, in Section 3 empowers the Governor of the Council (now the Chief Executive), by order, to extend the application of this Ordinance to judgments given in the superior courts of any foreign country. The condition for this extension lies in the substantial reciprocity in respect of the recognition and enforcement of judgments given by superior courts in Hong Kong.⁶⁰ Once the Chief Executive extends the application of this Ordinance to that specific country, provisions provided in this Ordinance should be applicable to a judgment given by a superior court of that foreign country if the judgment is final and conclusive relating to a sum of money payable other than taxes or other charges of a like nature or a fine or other penalty.⁶¹ As instructed by this provision, a judgment shall not be registered if the judgment, at the date of the application, has been wholly satisfied or unenforceable by execution in the original court.⁶² Section 4 of the same ordinance then provides the procedures for a judgment creditor to apply to the Court of First Instance for the judgment concerned to be registered.⁶³ That being said, there has so far been no order by the Governor of the Council or the Chief Executive to

⁵⁸ Available at <http://www.legislation.gov.hk/eng/index.htm> (last accessed 03/08/2008).

⁵⁹ Available at <http://www.legislation.gov.hk/eng/index.htm> (last accessed 03/08/2008).

⁶⁰ *Foreign Judgments (Reciprocal Enforcement) Ordinance*, Sec. 3.1

⁶¹ *Foreign Judgments (Reciprocal Enforcement) Ordinance*, Sec. 3.2.

⁶² *Ibid.* See also relevant provisions as embodied in *Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance* (Cap. 46), available at <http://www.legislation.gov.hk/eng/index.htm> (last accessed 03/08/2008).

⁶³ *Foreign Judgments (Reciprocal Enforcement) Ordinance*, Sec. 3.1.

extend the application of this Ordinance to Taiwan's judgments. Consequently, a judgment creditor cannot apply to the Court of First Instance in the HKSAR for the registration of the judgment concerned. The recognition and enforcement of judgment made in Taiwan by virtue of the statutory regulation is not available.

In contrast to the judgments given by Taiwan's courts, arbitral award made in Taiwan may be recognized and enforceable in the *Arbitral Ordinance* (Cap 341, as amended in 23 June 2000). One of the major purposes of this revision is to adjust and rearrange the recognition and enforcement of arbitral awards made in China, which were previously governed by the New York Convention.⁶⁴ Since the HKSAR became a part of China, the New York Convention was no more applicable. In addition to arbitral awards done in China, those arbitral awards made in non-contracting parties to the New York Convention were also dealt with. In this *Arbitration Ordinance*, arbitral awards not made in the HKSAR is defined as three main categories: Chinese mainland awards,⁶⁵ Convention award,⁶⁶ and other awards. As Taiwan is not a contracting party to the New York Convention, arbitral award made in Taiwan should be governed by the general provision, namely, section 8 of the Ordinance. As provided, with the leave of the court or a judge of the court, an award, order or direction made or given, whether in or outside Hong Kong, in or in relation to arbitration proceedings is enforceable in the same way as a judgment, order or direction of the court that has the same effect.⁶⁷ The decisive point here is 'with the leave of the court or a judge of the court'. If the leave is given, the court can then enter into judgments in terms of the award, order or direction.⁶⁸ According to this provision, arbitral awards, order or

⁶⁴ On 21 April 1977, the application of the New York Convention was extend to Hong Kong through a declaration of the United Kingdom. As a result, the recognition and enforcement of arbitral awards between China and the British Hong Kong was governed by the New York Convention. See, AJ van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation, Deventer ; Boston 1981) 411. After the handover, an Arrangement on the Mutual Enforcement of Arbitral Awards between Mainland and the Hong Kong Special Administrative Region was signed 21 June 1999. In response to this arrangement, the *Arbitration Ordinance* was subsequently revised. The whole text of this arrangement is available at <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf> (last accessed 04/08/2008).

⁶⁵ The *Arbitration Ordinance*, Part IIIA.

⁶⁶ The *Arbitration Ordinance*, Part IV

⁶⁷ The *Arbitration Ordinance*, Sec. 2GG.

⁶⁸ The *Arbitration Ordinance*, Section 2GG, paragraph 1, second sentence.

direction made in Taiwan may be enforceable with the leave of the court, and at the same time subject to the control of the court of the HKSAR.

b. Jurisprudence in the Courts of Hong Kong, China

There were diverse views in relation to the recognition and enforcement of judgments and arbitral awards made in Taiwan. As previously noted, the enforcement of arbitral award and other relevant orders and directions are currently enforceable in Hong Kong, China with the leave of the court by virtue of Section 2GG of the *Arbitration Ordinance*. By contrast, the application of *Foreign Judgments (Reciprocal Recognition) Ordinance* is not extended to Taiwan given the absence of an agreement on the mutual recognition and enforcement of civil judgments between Taiwan and the HKSAR. The statutory regime laid down by this Ordinance is thus not possible. Besides, Taiwan's judgments were not recognized in the Colony during the era of British Hong Kong. It was thus unclear, at the point of handover, whether the courts in HKSAR, would recognize judgments made in Taiwan.

The Court of Final Appeal (the CFA) of the HKSAR clarified this point in 2000. In *Chen Li Hung & others v. Ting Lei Miao & others*,⁶⁹ the CFA explicitly recognizes the validity and effect of Taiwan's civil judgments. The plaintiff Chen was adjudged bankrupt in one Taiwanese district court, and trustees in bankruptcy were appointed by a court order. The trustees sue, in the name of Chen, the defendant Ting and others, who are the wife and son of Chen, for those assents, registered under the name of the defendants, located in Hong Kong in the Court of First Instance (the CFI). The trustees of bankruptcy claim that those assets registered under the name of the defendants constitute an act of trust and thus belong to Ting. After serving his term of imprisonment in Taiwan, Chen came back to Hong Kong and requested to be joined in the lawsuit, claiming that it was himself, instead of the trustees, who should give instruction to the counsel.⁷⁰

The CFI ruled against the plaintiffs, holding that a bankruptcy order delivered by a Taiwanese court should not be recognized in the courts of Hong Kong.

⁶⁹ *Chen Li Hung & others v. Ting Lei Miao & others* [2000] 1 HKLRD 252 (CFA).

⁷⁰ *Ibid.*, at 252.

Consequently, this order cannot extend its legal extent to those assets located in Hong Kong.⁷¹ The trustees appealed. The Court of Appeal reversed and ruled in favour of the trustees. This case then came to the CFA, where the appeal was dismissed. In the view of the CFA, two issues stood before them: whether a Taiwanese bankruptcy order extended to Chen's assets located in Hong Kong; and, if so, whether the bankruptcy order concerned to be given effect by the courts of the HKSAR.

With regard to the first question, the CFA referred to Dicey and Morris on 'Conflicts of Laws,' and declared that the trustees are in capacity to sue in their own name to recover the debt in Hong Kong if they, under the law by which the bankruptcy order was delivered, have such right. According to the CFA, it is not in dispute that 'every step which they have taken in Hong Kong, is in conformity with directions obtained by them from the bankruptcy court in Taiwan.'⁷²

The CFA then turns to the second question: whether the bankruptcy concerned should be given effects by courts of the HKSAR. The CFA answered this question affirmatively based on four arguments. Firstly, the CFA referred to the speech of Lord Wilberforce in *Carl Zeiss Stiftung v. Ratber & Keeler Ltd* (No. 2) in 1967, saying that 'non-recognition cannot be pressed to its ultimate logical limit', and that 'where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned[.....], the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question.'⁷³ The CFA then compared the 'rebellion' case which Lord Wilberforce cited in the present case, a bankruptcy order by a 'usurper' court. The CFA found that nothing prevents the court to recognize a bankruptcy order made by a Taiwanese court.

The CFA then referred to Grotius' statement in 'De Jure Belli ac Pacis', Book 1, Chapter IV, Section XV, discussing the power of a usurper. According to Grotius, the binding force of the acts of a usurper government lies in the fact that one, under the

⁷¹ *Ibid.*, at 256.

⁷² *Ibid.*, at 258.

⁷³ *Ibid.*, at 259.

ruling of a usurper, would prefer that ‘measures promulgated by [the usurper] should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts.’⁷⁴ The CFA actually regarded the bankruptcy order done at issue to be an order done by a usurper court. Regardless of being a usurper, the bankruptcy order should have the binding force in order to avoid the utter confusion.

The CFA then continued on its argument that a sovereign should be more benevolent towards its people in usurped territories than those of other non-recognized foreign countries. Citing the ‘*Rules of Supreme People’s Court concerning the Recognition by the People’s Court of Civil Judgments Delivered in Taiwan*’ as a proof, the CFA held that, protection of rights and interests of litigants in civil proceedings by recognizing civil judgments made in Taiwan is consistent with Taiwan’s status as a part of People’s Republic of China. The CFA further added that the validity of a judicial act should be recognized by other courts (courts in the HKSAR in the present case) in spite of the unlawfulness of the appointment of the judge or its authority stemming from an unlawful government.⁷⁵

Finally, the CFA turned to the ‘public policy’ argument. According to the CFA, whether the recognition of the validity and effect of a bankruptcy order delivered by a Taiwanese court can be rephrased as ‘whether the recognition of the rights of the trustees in bankruptcy to sue in Hong Kong would be inimical to the interests of the sovereign power.’⁷⁶ The CFA then answered this question negatively, and found the recognition of the present bankruptcy order not to be against the public policy.

The CFA summarily laid down its criteria to recognize the civil judgments of an ‘unrecognized court’, including the court ‘under the control of a usurper government’ as claimed:

- (i) the rights covered by those orders are private rights;

⁷⁴ *Ibid.*, at 260.

⁷⁵ *Ibid.*, at 261.

⁷⁶ *Ibid.*, at 262.

(ii) giving effect to such orders accords with the interests of justice, the dictates of common sense and the needs of law and order; and;

(iii) giving them effect would not be inimical to the sovereign's interests or otherwise contrary to public policy.⁷⁷

Applying these criteria to the present case, the CFA thus ruled the bankruptcy order concerned to be recognized in the courts of the HKSAR.

While one may argue that courts in the HKSAR take a more lenient attitude on the recognition and enforcement of Taiwanese judgments, it should nevertheless be pointed to the importance of the arrangement between Taiwan and China on the recognition of civil judgments. This arrangement prompted the CFA of the HKSAR to recognize the effects and validity of Taiwanese courts. In addition, if one takes a closer look at the substantial content of the arguments, it would difficult to claim that the CFA actually takes a lenient attitude. While the decision to recognize civil judgments done in Taiwan should be applauded, those arguments based on political benevolence of the central government to civil judgments done by its usurper's courts are actually groundless and irritating. The conclusion of the CFA that the recognition of Taiwanese civil judgments would not undermine the interests of sovereign power indicates its great attachment to the importance of sovereign power. The CFA's emphasis of national sovereignty, just as Taiwan's insistence on national security, endangers itself into power-struggling and thus loses its impartiality and legitimacy. This approach offers little help to the settlement of economic and trade disputes arising from everyday commercial transactions.

3. MACAU, CHINA'S DOMESTIC REGULATION IN RELATION TO TAIWAN

Several regulations lay down the regulatory regime on the recognition and enforcement of foreign civil judgments and arbitral awards.

Firstly, the *Civil Code of Macau*⁷⁸ in its Book I (Parte Geral), Title I, Chapter III regulates the rights of non-residents and the conflicts of laws. The essential element

⁷⁷ *Ibid*, at 263.

⁷⁸ Código Civil, Decreto-Lei n.º 39/99/M (3 August 1999), B.O. n.º 40/1999, I Série, 1.º Suplemento, 1794.

here is the differentiation based upon residence instead of nationality. This is aimed to suit the needs of ‘One country, Two Systems.’⁷⁹ Macau’s *Civil Procedure Code*,⁸⁰ in Article 680, regulates the enforceability of civil judgments made outside the MASAR. In the first paragraph, civil judgments and arbitral awards done outside Macau may be enforceable after reviewed and confirmed by the competent tribunals of the MASAR, except as provided otherwise in international conventions or international agreements on judicial cooperation applicable thereto. In the meantime, there is no agreement on mutual recognition and enforcement of civil agreements or arbitral awards between Taiwan and Macau. Therefore, the enforceability of civil judgments and arbitral awards done in Taiwan is subject to the review and confirmation of competent tribunals of the MASAR.

The *Civil Procedure Code*, in Book V(Dos Processos Especiais), Title XIV, lays down procedure and criteria for this review and confirmation. Article 1199 (1) firstly prescribes that, except as provided otherwise in international conventions or international agreements on judicial cooperation applicable to the MASAR, civil judgments and arbitral awards on private rights done in any State or territory outside the MASAR may have legal binding effects after review and confirmed by the competent tribunals. Article 1200(a) lays down the criteria for the competent tribunals to review and confirm those civil concerned. These criteria are applicable to arbitral awards, as appropriate. The most relevant here is the requirement of public order. Namely, the civil judgment subject to review and confirm bears no content that is manifestly incompatible to public order of the MASAR.

In respect of arbitral awards, by virtue of the Decree N.º 188/99,⁸¹ the application of the New York Convention was extended to the Portuguese Macau. After China resumed its sovereignty on Macau, the Chief-Executive by Aviso do Chefe do Executivo n.º 3/2007, extended the application of the New York Convention of the

⁷⁹ RMM Ramos, 'The Private International Law of the New Special Administrative Region of Macau of the People's Republic of China' (1999-2000) 60 Louisiana Law Review 1281, 1282.

⁸⁰ Código de Processo Civil, Decreto-Lei n.º 55/99/M (8 October 1999), B.O. n.º 40/1999, I Série, Suplemento, 3670.

⁸¹ Decreto do Presidente da República n.º 188/99 (22 October 1999), BO N.º 49/1999, 6017. This decision was done after an affirmative resolution of Legislative Council of Macau, Resolution n.º 36/99 (26 July 1999), BO N.º 30/1999, 1779.

MASAR subject to those applicable to People's Republic of China. Domestically, the *Code on Approval of a Specific Regime on External Commercial Arbitration*,⁸² in Article 35 and 36 also regulate the legal effects of arbitral awards done outside the MASAR. Article 35.1 provides that, without prejudice to the application of this article and Article 36, any arbitral award, irrespective of the State or *territory* where it is done, should be recognized and enforced. Article 36 then lays down the criteria for the competent tribunal to refuse to recognize or enforce the arbitral award concerned. The refusal to recognize or enforce an arbitral award can be made with the request and contention of any party to the arbitral award concerned to be flawed. The competent tribunal can also refuse to recognize or enforce an arbitral award if it finds that (i) the subject matter is not arbitrable according to the law of the MASAR; (ii) that it would be against the public order of the MASAR to recognize or enforce the arbitral award concerned; or (iii) that the State or territory where the arbitral award is made would refuse or enforce arbitral awards done in the MASAR. Again, the most relevant criterion here is the public order.

Then one would have to reflect whether to recognize or enforce a civil judgment or an arbitral award made in Taiwan, if using its official title of Republic of China' would be against the public order of the MASAR. The CFA of the HKSAR answers this negatively. It is still uncertain how courts of the MASAR define and perceive public order in this regard, since, to the best knowledge of the author, no request for review and confirmation of civil judgments and arbitral awards done in Taiwan has been reported so far.⁸³

⁸² Aprova um Regime Específico para a Arbitragem Comercial Externa, Decreto-Lei n.º 55/98/M (23/11/1998) B.O. n.º 47/1998, I Série,1499.

⁸³ One point deserves noting here is a case relating the refusal to grant the recognition of a civil judgment done in the HKSAR. This case relates to a decision for a mother by blood to adopt her daughter legally. The Court of Appeal in MASAR denies granting its recognition of this civil judgment done in the HKSAR since it is against the public order of the MASAR, since a mother by blood and a mother by adoption are two clearly differentiated concepts in legal system of the MASAR and should not be blurred. Case 102/2006 (25 May 2006), available at <http://www.court.gov.mo/decision/ctsuidetail.asp?seqno=1439&courtid=TSI> (last accessed 10/12/2008).

4. SOVEREIGN INTERESTS, NATIONAL SECURITY AND PUBLIC ORDER

This section examines the domestic regulation of Taiwan, Hong Kong, China and Macau, Chin. It focuses on Taiwan's domestic regulation in relation to Hong Kong, China and Macau, China, and vice versa. Jurisprudence of domestic courts is also dealt with. I then analyze how mutual recognition of civil judgments and arbitral awards are conducted by these three memberships. I find that, in terms of the statutory designation, Taiwan and Hong Kong, China take a more lenient approach on arbitral awards than civil judgments. This is mainly because the nature of arbitration procedures, namely, to meet needs arising from commercial transactions. With regard to civil judgments, courts in Taiwan and the HKSAR arrive at the conclusion to recognize civil judgments of each other based on different arguments. Taiwan's courts emphasize on the importance of 'comity' whereas courts on the HKSAR attach to the protection of private rights and interests of litigants. Relevant provisions of the MASAR then focus on public order. In terms of the relevance of the New York Convention, this section notes that both this convention is applicable to the HKSAR and MASAR. Domestic legal framework explicitly regulates the recognition and enforcement of the Convention awards. Nevertheless, this offers little help in dealing the recognition and enforcement of arbitral awards done in Taiwan, since Taiwan is not a contracting party to the New York Convention. The recognition of civil judgments and arbitral awards should be governed by the general rules where public policy and public order play a significant role.

I also argue that owing to the free-port status and zero-tariff policy maintained by Hong Kong, China and Macau, China, trade disputes between Taiwan and Hong Kong, China and Macau, China is unlikely to occur in the WTO Dispute Settlement Mechanism. Besides, Taiwan reliance on Hong Kong, China and Macau, China for the transshipment of goods and passengers prior its direct transportation agreements with China also prevents Taiwan from going for the WTO forum. The attitude of China Central Authority also helps to curtail this possibility. I then argue that domestic courts and arbitration procedures turn out to be a good alternative for the settlement of disputes arising from commercial transactions. While private individuals

and enterprises can choose to work with their governments in the WTO Dispute Settlement Mechanism, they may well opt for the domestic courts and arbitration procedures. The reluctance of governments of these three memberships to go for the WTO forum induces/forces private individuals and enterprises to resort to a private international law approach.⁸⁴ Namely, they choose the domestic courts and arbitration procedures and seek recognition and enforcement in another jurisdiction. The private international law approach appear more appealing to private individuals and enterprises in these three memberships. This again points to the nature and limits of the intergovernmental WTO Dispute Settlement Mechanism. While international economic actors may request or press their governments to go for the WTO forum, a direct access is not possible for private individuals and enterprises. When the governments are determined not to opt for this approach, other forum must be made available for the absorption of economic and trade disputes arising from commercial transactions.

Lastly, one point needs further clarification. In deciding whether or not to recognize a civil judgment or arbitral award done in Taiwan, courts of the HKSAR should ascertain whether this recognition would be against the sovereign interests of People's Republic of China and thus against the public order therein. This argument to some degree resembles Taiwanese courts' argument on national security. Sovereign interests, national security and public order are all an indeterminate concept subject to dispute. Thus, what these concepts denote relies mainly upon what the judge perceive them. One can easily refer to these ideas and thus refuse the recognition and enforcement of civil judgments and arbitral awards. This nevertheless neglects the needs arising from everyday economic activities and commercial transactions. While the author disagrees the wording of the CFA, by naming Taiwan as a usurper, its attachment to the protection of private interests bears its merit. Where one may not

⁸⁴ A pertinent issue in this private international law approach relates to domestic public policy. As argued, one of the characteristics of traditional private international law is that courts refuse to enforce any foreign law or judgment that is repugnant to domestic public policy. Wai, above n. 33, at 243. See also, R Wai, 'Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation through Plural Legal Regime' in C Joerges and EU Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, Oxford and Portland, Oregon 2006) 229-262.

easily denounce national interests, national security, and public order as empty words, their importance should never be overestimated, especially in relation to the protection and enforcement of private rights. This reminds again the role of judicial governance in the protection of rights and interests of individual economic actors.

IV. CONCLUSION

This Chapter examines the trade dispute resolution mechanism between Taiwan, Hong Kong, China and Macau, China. It firstly uses the negotiation on traffic rights between Taiwan and Hong Kong to illustrate the role of China in this subject matter. It also clarifies that the economic interests of Hong Kong, China and China Central Authority, or of even of Macau, China may sometimes differ. Besides, whereas it is true that Hong Kong, China and Macau, China act as a intermediary between Taiwan and China, and help to ease potential political conflicts, the change of political climate between Taiwan and China would turn back to feed the economic ties between Taiwan and Hong Kong, China and Macau, China. This Chapter then examines the relevance or irrelevance of WTO forum in dealing trade dispute between Taiwan and Hong Kong, China and Macau, China. I argue that, even though they enjoy full rights and obligations under the covered agreements, they would not go for the WTO Dispute Settlement Mechanism. Domestic court or arbitral procedure may be an alternative for them. I then examine their domestic regulation and jurisprudence relating to recognition and enforcement of civil judgments and arbitral awards. I find that comity, sovereignty interests, public order and private rights are of most significance. Since the concept of sovereign interests and public order bear no concrete elements, it is thus mainly dependent on the judge's perception on these ideas and on the role of the judge.

CHAPTER X CONCLUSION: THE PROSPECTS OF LEGAL/ECONOMIC INTEGRATION AMONG THE FOUR WTO MEMBERS

I. INTRODUCTION

The main objective of this dissertation is to examine and explore the role of trade dispute resolution among the Four WTO Members: China, Taiwan, Hong Kong, China and Macau, China. I repeatedly emphasize the importance of trade dispute settlement mechanism for economic and potentially legal integration among these four memberships. In this concluding Chapter, I will firstly summarize my main arguments and findings in the previous Chapters. Based on these arguments and findings, I will examine the unpromising future of the cross-strait common market endorsed by the current President in Taiwan.

This policy is actually developed by his vice-President, who was formerly the Primer Minister, Minister of Economic Affairs, and Director-General of the Board of Foreign Trade. It is clear that this policy is developed based on Hsiao's experience and expertise as a trade minister and negotiator. According to Hsiao, his idea about cross-strait market is modelled from the European experience. In this concluding Chapter, it is thus feasible to explore a bit further the prospects of this cross-strait common market. This concluding Chapter aims to ascertain and evaluate the relevance of WTO discipline and EU models in this proposed cross-strait common market.

Therefore, this concluding Chapter is arranged as follows: it will start with a summary of major arguments and main findings in the previous Chapters. It will then present the idea of this cross-strait common market. Following these factual description, I will provide my personal evaluation and comments on this proposal in light of the WTO discipline and EU model. Although these comments may be still premature, they offer a better opportunity for those interested in this subject to engaged further researches and studies.

II. MAJOR ARGUMENTS AND MAIN FINDINGS IN PREVIOUS CHAPTERS

Chapter I is the introductory Chapter of this dissertation. It examines different legal bases for the Four WTO Members to accede to the GATT and the WTO. Hong Kong, China and Macau, China became Contracting Parties to the GATT under the sponsorship of the United Kingdom and Portugal in accordance with the XXVI: 5(c). Taiwan and China acceded to the WTO according to Article XII of the WTO Agreement. Taiwan acceded to the WTO as a separate customs territory while China acceded to it as a state. The constitutional feature of the GATT/WTO that allows a separate customs territory to accede to it presents a unique landscape in the WTO where China, Taiwan, Hong Kong, China and Macau, China enjoy full membership. This Chapter argues that China's accession to the WTO can serve as a vehicle to accelerate its legal and economic reform. It points to the importance of various rule-of-law obligations as provided in China's Accession Protocol, in particular the obligation to provide an independent and impartial judicial review. This introductory Chapter also explores the constitutional significance of the WTO membership to Taiwan. It is a network for Taiwan to substantiate its economic development, a forum to present itself as an independent actor in the international plane, and a channel to normalize the cross-strait trade relation and contribute to peace and security between Taiwan and China. It also argues that, given the membership of Taiwan and China in the WTO, WTO law and disciplines may contribute to the constitutionalization of trade relations between China and Taiwan, and enhance the rationality of decision-making in foreign trade relations. It emphasizes the role of the WTO dispute settlement mechanism and the role of domestic court to ensure faithful implementation of their WTO obligation. This Chapter also examines the trade policies maintained in Hong Kong, China and Macau, China. It argues that WTO memberships of Hong Kong, China and Macau, China help to ensure the economic and legal autonomy of these two Special Administrative Regions (the SARs).

In Chapter II, I explore the research question of this dissertation and clarify the need for effective judicial protection of external trade measures among the Four WTO Members. Chapter II begins with factual analysis to illustrate the ever-closer

economic interdependence among the Four WTO Members and emphasizes the importance of judicial protection. Here judicial protection covers the intergovernmental WTO Dispute Settlement Mechanism and domestic judicial review. It firstly briefly elaborates the importance of the WTO Dispute Settlement Mechanism in the WTO Agreement and points to the major difference from its GATT processor, and then explores the role of domestic judicial review in the WTO legal system. In this respect, it firstly points to the trend to strengthen domestic judicial review during the Uruguay Round Negotiation. It further examines domestic implementation acts and relevant jurisprudence of the courts of two major players of the WTO, namely, the United States and the European Community. By these analyses, I find that, regardless of the aim and effort to strengthening domestic judicial review of the Uruguay Round Negotiation, application and enforcement of the WTO Agreement in domestic courts are still subject to various constraints. It is partly because political branches deliberately prevent the WTO rules from being directly applied in domestic courts and from being directly relied upon by individuals. It is also because domestic courts tend to take a self-restraint approach in external trade measures. In this context, I argue that a further strengthened domestic judicial review is desirable for three reasons. Firstly, I address judicial legitimacy in stepping into the field of foreign trade relations. Further, a strengthened domestic judicial review can enhance the consistency and coherence between national legal order and international trade obligations. It also contributes to the protection of rights and interests of individual economic actors under the WTO Agreement. Based on this, a two-level judicial review in the WTO legal system may be available. I then emphasize the particular significance of effective judicial protection among the Four WTO Members. I argue that effective judicial review can help to ensure rational decision-making. It also helps to preserve the economic autonomy of Hong Kong, China and Macau, China. Besides, effective judicial review ensures the compliance to the WTO rules both in Taiwan and in China. In addition, an independent and impartial judicial review is an essential vehicle to protect the right to trade as prescribed in China's Accession Protocol. Finally, I points to the importance of the WTO Dispute Settlement Mechanism to the Four WTO Members, in particular to Taiwan and China.

Chapter III aims to develop my own methodological approach to deal with the research question of this dissertation. It firstly provides the factual basis to illustrate the economic interdependence among the Four WTO Members. China is the biggest trading partner of the other three memberships: Taiwan, Hong Kong, China and Macau, China. After this factual basis, this Chapter then examines major debates relating to the WTO, namely, legitimacy, constitutionalism and human rights. It also explores the role of judicial governance and individual economic actors in this world trading system. Based on these debates, I argue that a constitutional approach to WTO law is essential and indispensable for the resolution of trade disputes among the Four WTO Members. I defend my stance based on three arguments. Firstly, I points to the constitutional significance of the WTO membership as a pre-commitment to these Four WTO Members. The WTO accession is a pre-commitment to China for widening and deepening economic and legal reforms, and thus for promotion of rule of law in China. The WTO accession is a pre-commitment to Taiwan for the progressive liberalization of cross-strait trade in order to enhance economic and legal integration, to contribute to mutual understanding, and therefore, to ensure ‘perpetual cross-strait peace.’ The WTO memberships of Hong Kong, China and Macau, China are also pre-commitments of these two separate-customs-territory members for them to observe free trade rules/policies and thus to maintain their economic autonomy. Their memberships are also China’s pre-commitments to these two SARs in relation to their legal and economic autonomy to participate in the international trading system. Secondly, I argue that the right to trade prescribed in China’s accession protocol, free-port status and free trade policies dictated by the HKBL and the MABL justify my attachment to trading rights. Finally, this approach helps to depoliticize cross-strait trade and thus to ensure rational decision-making, especially through judicial governance among the Four WTO Members. To constitutionalize China’s foreign trade policy and subsequently, to constitutionalize its foreign policy through ‘governing with judges’ as well as ‘governing like judges’ will then make ‘perpetual cross-strait peace’ possible. Judiciary in Hong Kong, China and Macau, China is also the best guardian to safeguard economic autonomy in these two SARs, as courts are distant from political interference. As some members of the Legislative Council and

the Executive Chief are not directly elected and subject to intervention of Chinese Central Authority, the judiciary has apparently more legitimacy to act as a guardian for their legal and economic autonomy. In sum, Chapter III emphasizes the constitutional significance of the WTO memberships as pre-commitments to the Four WTO Members. I argue that a constitutional understanding of WTO law is essential and indispensable for their trade dispute resolution. Judicial governance in the external trade relations is feasible and desirable. A well-functioning dispute settlement mechanism is a central element for the economic integration among the Four WTO Members that eventually contribute to their mutual understanding and mutual trust.

Chapter IV examines various provisions in the WTO agreements governing domestic judicial review. It begins with Article X:3(b) of the GATT 1994 and those agreements annexed to this General Agreement. These provisions cover Article 13 of the Anti-Dumping Agreement, Article 23 of the Agreement on Subsidies and Countervailing Measures, and Article 11 of the Agreement on Customs Valuation. It then examines Article VI of the GATS and investigates Article 41 to Article 50 and Article 59 of the TRIPS Agreement. Finally, it deals with special designation embodied in Article 4 of the Agreement on Pre-shipment Inspection and Article XX:2 of the Government Procurement Agreement. The interpretation of these various provisions are based upon the rule of interpretation dictated by Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU). It also follows the practice of the WTO Panel/Appellate Body, namely, text, context, object and purpose. This Chapter also argues that an allocation of jurisdiction between the WTO Dispute Settlement Mechanism and domestic judicial review can be delineated. The WTO Dispute Settlement Mechanism is 'intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform'.¹ One should caution not to 'effectively convert every claim that

¹ Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295, para. 6.50.

an action is inconsistent with domestic law or practice into a claim under the WTO Agreement'² based on Article X:3(b) of the GATT 1994. This is also why the WTO Agreement attaches great importance to domestic judicial review as provided in these numerous provisions. Further, this Chapter clarifies the relationship between the obligation of judicial review and other substantial obligations under the WTO Agreement. This domestic review mechanism aims to control the manner of review administrative actions, rather than the substantive decisions of the review mechanism in question.

Chapter V examines the scope and nature of China's WTO obligation to provide an independent and impartial judicial review. It firstly recalls the trend of fortifying domestic judicial review during the Uruguay Round negotiation and then analyzes this obligation embodied in China's Accession Protocol. Article 2(D) of China's Accession Protocol lays down a more stringent requirement concerning the 'prompt review' of administrative actions. The scope is also wider than existent provisions in the WTO agreements. It then clarifies the possibility of a complaint relating to this obligation in the WTO Dispute Settlement Mechanism and the potential interpretative methods employed by the WTO Panel/Appellate Body upon this 'WTO-plus' obligation. Based on this, this Chapter investigates the existent WTO jurisprudence in order to clarify the criteria of 'independence' and 'impartiality' and finds that no sufficient and clear guidance is available. As informed by Article 3.2 of DSU, I argue that it is indispensable to examine international standards as well as jurisprudence concerned. Therefore, Chapter V discusses various global and regional standards in relation of independence and impartiality and explores the jurisprudence laid down by the European Court of Human Rights (the ECtHR). These global and regional standards on judicial independence and impartiality and the jurisprudence of ECtHR are of significance and relevance in interpreting this WTO obligation. Chapter V then investigates the effort and progress that China has so far made for the implementation of this WTO obligation and examines whether China judicial system can pass the scrutiny of the WTO Panel/Appellate Body in light of these global or regional instruments as well as the jurisprudence of the ECtHR. It finds that the administration

² *Ibid.*

of justice, the practices of legislative interpretation, adjudicative case guidance system cannot pass the scrutiny of the Panel/Appellate Body, if a case is brought into the WTO Dispute Settlement Mechanism. Besides, as doubts about the impartiality of the Chinese member of the Appellate Body was indicated by Taiwan during the selection process as well as the Dispute Settlement Body meeting, it points to an interesting question how a Chinese WTO 'judge' perceive the role of a 'judge' both in the WTO and in Chinese domestic courts.

Chapter VI aims to propose a better approach for Taiwan's courts to deal with cases relating China (trade) trade relations. It firstly examines the legal status of treaties and international agreements in Taiwan's national legal system. Based on this, it then explores the role of the WTO Agreement in Taiwan, focusing on the legal hierarchy, self-executing, and relevant jurisprudence. While there are some arguments based on WTO law in these cases, the courts do not clarify those issues. Chapter VI then investigates the regulatory regime on China trade, covering three levels: Article 11 of the Amendment to the Constitution, the *Statute Governing the Relationship between People in Taiwan Area and Mainland Area*, and other relevant administrative regulations. It illustrates the interrelation between trade in goods and trade in (financial) services. Due to the financial needs of Taiwanese investments in China, the 'liberalization' of Taiwanese banks into China seems inevitable and irresistible. It also deals with the most sensitive issues between Taiwan and China: the three-link issues. In parallel to this regulatory regime, a correlative development can be found in Taiwanese courts. Chapter VI then examines a series of cases in the Constitutional Court relating to China (trade) relations. It begins with the delimitation of national territory and the definition of 'treaty' as set out in Taiwan's constitution and the nature of agreements signed between Taiwan and China. Then it deals with restriction for Chinese nationals who are married with Taiwanese citizens on their re-entry into Taiwan and their right to hold public offices. Finally, it examines the 'state secrets privilege' as endorsed to the President by the Constitutional Court. Chapter VI further uses a case in Taipei Higher Administrative Court to illustrate the strength and weakness of the approach taken by the court. I argue that a constitutional approach is essential for Taiwanese courts to face with China (trade) relations. Taiwanese courts

should refrain from being tempted to refer to Article 11 of the Amendment and national security arguments. On the contrary, they are under their constitutional obligation to ensure both the WTO Treaty constitution and national constitution to be equally respected. In so doing, judicial governance in foreign (trade) relations with China can thus not only contribute to Taiwan's faithful implementation of international obligations under the WTO Treaty constitution, but also guarantee the right to work, freedom of profession and equal rights protection as enshrined in Taiwan's constitution.

Chapter VII examines the trade dispute resolution between China and Taiwan. It covers the WTO Dispute Settlement Mechanism and the domestic trade dispute resolution. As there has not been any direct complaint against each other, I choose to explore their interaction in the WTO Dispute Settlement Mechanism through the lens of Taiwan's third party participation in complaints brought about by and against China. At the national level, I focus on trade defence measures and the domestic judicial/administrative review of these measures. Therefore, I firstly investigate WTO law and practice in relation to third party participation. Based on this, I also try to delineate the link between the WTO Dispute Settlement Mechanism and the domestic trade resolution regime. As China is one of the complaining members in *US – Steel Safeguards* where Taiwan intervenes as a third party, and China initiated parallel safeguard and anti-dumping investigation against Taiwanese steel products, the *US – Steel Safeguards* proves itself the best example to examine both their interaction in the WTO Dispute Settlement Mechanism and its impact on domestic trade dispute resolution regime. In respect of Taiwan's third party participation in complaints brought about against China, I examine the existent practice of Taiwan, covering consultation phase to panel proceedings. A cautious and steady approach can be registered. At the national level, I examine China's anti-dumping and safeguard measures against Taiwanese steel products. The analysis is based upon Taiwan's arguments in *US – Steel Safeguards* and WTO rules. On the other hand, I also examine Taiwanese trade defence measures against Chinese towelling products, where both anti-dumping investigation and product-specific safeguard investigation were conducted. With regard to the administrative/judicial review, I argue that the

review body focuses on the issue of jurisdiction and standing as a correct understanding of the role of adjudicator and the nature of rights and interests of individual economic actors is missing. I also analyze the dispute resolution mechanism provided in those recent agreements signed between Taiwan and China on the direct transportation and food safety and argue that this indirect third party participation approach will continue in the WTO Dispute Settlement Mechanism, and that Taiwan's trade defence measures against Chinese products might decrease.

Chapter VIII examines trade disputes resolution mechanisms between China and its two SARs under two frameworks: the constitutional/national law framework and the WTO/CEPA framework. The interaction of China and its two SARs are unique in terms of both their domestic constitutional structure and the international trading regime. Chapter VIII begins with the general introduction of judicial review in these three areas, and examines vertical and horizontal interaction between China and its two SARs. Emphasis is actually placed on the interaction between China and Hong Kong SAR. It may be understandable and justifiable as courts in Hong Kong have more experiences in judicial review. The effort to characterize the free trade policy as 'political action' and subsequently to remove the jurisdiction of judiciary in Macau on this subject evidences the constraints on Macau courts. It also presents the weaknesses of judicial review in Macau. Chapter VIII then briefly recalls the legal bases, accession history of Hong Kong, China and Macau, China. It also examines the trade policy and practice of these members in the GATT and WTO. It then explores the nature of the CEPA under the WTO rules and examines existent trade dispute mechanisms in both the WTO and the CEPAs. It points out the unlikeness of these three memberships to avail themselves of the WTO dispute settlement mechanism and illustrates major defects of the dispute resolution mechanism in the two CEPAs. Chapter VIII finally explains why a judicialized dispute settlement mechanism under the CEPA framework is not preferable to the contracting parties.

Chapter IX aims to examine and explore the trade dispute resolution among the three WTO separate-customs-territory members: Taiwan and Hong Kong, China and Macau, China. More precisely, it focuses on Taiwan in relation to Hong Kong, China

and Macau, China, which are members of the WTO, but at the same time, SARs of China. Therefore, while the interaction between Taiwan and Hong Kong, China and Macau, China may be governed by WTO law, ‘China factors’ nevertheless also play a pivotal role in this subject matter. In this vein, Chapter IX firstly reviews the negotiation on the freedom of the air (or the flight right) between Taiwan and Hong Kong, China with the aim to illustrating how ‘China factors’ affect the progress and result of this negotiation. By this example, it reminds the reader that, when examining economic integration and trade dispute resolution among these three memberships in relation to, *inter alia*, the choice of forum and their approaches, one should not neglect the ‘invisible hand’ of China Central Authority. Besides, this example echoes the three-links issue as elaborated in Chapter VIII, and helps to clarify the role of Hong Kong, China and Macau, China in the cross-strait trade relations. Following this example, Chapter IX explores the (ir)relevance and (in)significance of the WTO Dispute Settlement Mechanism. Given the status of free ports, the role of an ‘intermediary’ and the main transshipment ports for goods between Taiwan and China prior to the signature of direct transportation agreement on 4 November 2008, it is unlikely that either Taiwan or Hong Kong, China and Macau, China refer to the WTO forum. However, it does not suggest trade disputes between Taiwan and Hong Kong, China and Macau, China do not exist. It points to the preference to domestic courts and arbitral procedures. Chapter IX then investigates their domestic legal framework and jurisprudence in relation to the mutual recognition of arbitration awards/judgments, and finally revisits the ideas of ‘sovereign interests’, ‘national security’, and ‘public order’.

III. A FUZZY PICTURE OF THE CROSS-STRAIT COMMON MARKET? THE RELEVANCE OF WTO DISCIPLINE AND THE EU MODEL

In this section, I will firstly outline this proposed cross-strait common market. Nevertheless, any form of a well-defined policy instrument is not available. The substantial content of this proposal is actually vague, if not empty. Thus, the analysis of this proposal will be mainly based on several speeches delivered by Hsiao, when he was still the chairman of the Cross-strait Common Market Foundation. As this

foundation was established by Hisao that is believed to mainly designate Ma's economic policy during the presidential campaign, these speeches to some extent reflect the picture of this cross-strait common market they have in mind. Besides, as the National Policy Foundation, a think-tank sponsored and chaired by Lien Chan, the former president of the Kuomintang (the KMT) and also former vice-president of Taiwan, is one of the major proponents of this cross-strait common market, relevant policy proposals advanced by this foundation will also be examined. I will also refer to those relevant economic policies provided in the White Paper on Economic Policy when they run for the presidential election. Nevertheless, as individual economic policy, such as the out-bound investment restrictions, financial service, charter flights, and three-link issues, has already been dealt with in the previous Chapters, I will not repeat myself in this concluding Chapter. I will focus on the overall framework of this cross-strait common market. Following the presentation of this cross-strait common market, I will examine and explore the relevance of the WTO discipline and EU model in this proposed cross-strait common market.

A. MAPPING THE FUZZY PICTURE OF THE CROSS-STRAIT COMMON MARKET

In 2000, Taiwan experienced its historic political change. The long-ruling Kuomintang lost the presidential election and became the opposition party, while the ruling party was the pro-independence Democratic Progress Party (the DPP). Before the KMT stepped down, the former President, Lee Teng-huei, dominated trade policy toward China.³ Restrictions on trade and investment with China were adopted and maintained according to the 'no haste, be patient' policy. In that election campaign, Lien Chan, who later succeeded Lee as the president of the KMT, ran the presidential election with Vincent Hsiao. After the failure of the election, Hsiao then founded the Cross-strait Common Market Foundation, acted as the chairman. He then participated in the BOAO Forum for Asia, organized by China since 2003 as the chairman of this foundation. The last time when he participated in this BOAO forum, albeit still as the chairman of the foundation, was in April 2008, when he was then already the vice-president elected. Since his establishment of the Cross-strait Common Market

³ It is also President Lee Teng-huei who advanced the discourse referring to the relation between Taiwan and China as 'a special relationship between State and State'.

Foundation, Hsiao delivered two speeches in American Enterprise Institute in Washington DC on 22 January 2001⁴ and in 17th Annual Joint Conference of the ROC-Australia and Australia-Taiwan Business Council on 11 September 2001.⁵ He also published an article explaining why he advocated the Cross-strait Common Market.⁶

While Hsiao acted as the major executor for the policy of ‘No Haste, Be Patient’ mandated by the former Lee Teng-huei, when Hsiao served his office of the Prime Minister. He had a different strategy and viewpoint as to how to secure the economic security of Taiwan. According to his, political interference of economic result by the regulatory policy of ‘No Haste, Be Patient’ can only produce short-term result. Eventually, economic activity should be guided by a system of rules in accordance with market principles.

Firstly, he points to the accession of both Taiwan and China in the WTO at the Doha Ministerial Meeting. He then puts Taiwan’s economic development into the context of globalization and regional integration. His experience of acting as the representative and participation in the APEC summit moves him to put the proposed cross-strait common market into the regional context of Asia Pacific Economic Cooperation (the APEC) and global WTO forum.⁷ It is reasonable and understandable since the APEC and the WTO are two major economic fora in which Taiwan enjoys a full membership.

Due to the regulatory policy of ‘No Haste, Be Patient’, followed by ‘Positive Openness with Effective Management’ adopted and maintained by the DDP, there existed an imbalance between political dialogue and economic exchange between Taiwan and China. It was normally referred to as ‘political chill/economic zeal.’ This

⁴ VW Hsiao, 'Toward the Creation of a Cross-Strait Common Market', Keynote speech in American Enterprise Institute in Washington D.C. (22 January 2001), available at <http://www.crossstrait.org/version3/index.html> (last accessed 12/08/2008).

⁵ VW Hsiao, 'A Cross-Straits Common Market – Working Together to Build Prosperity in the Asia-Pacific Region', speech in 17th Annual Joint Conference of the ROC-Australia and Australia-Taiwan Business Council in Taipei (11 September 2001), available at <http://www.crossstrait.org/version3/index.html> (last accessed 12/08/2008).

⁶ VW Hsiao, 'Why Do I Advocate a Cross-strait Common Market', available at <http://www.crossstrait.org/version3/index.html>. (last accessed 12/08/2008).

⁷ *Ibid.*

proposal thus aimed to resolve the contradiction between economic interdependence and political hostility and the challenge of the economic emergence of China in the context of globalization and regional integration. According to Hsiao, this Cross-strait Common Market is to be modelled from experiences of the European Union and should be in accordance with the WTO rules. It should start from lowering the tariffs, economic barriers and then come to political integration. He emphasizes on economic integration through market sharing in an open and natural manner. He points to three steps to realize this Cross-strait Common Market: normalization of cross-straits trade and economic relations; harmonization the economic systems on both sides and the establishment of a cross-strait free trade area (FTA); and finally a comprehensive economic integration for the realization of a Cross-strait Common Market.

In his proposal, Hsiao also refers to the so-called ‘consensus of 1992,’ of which the content is subject to dispute.⁸ As he says, ‘Taiwan and Mainland China should return to the 1992 consensus of ‘One China, separate interpretation.’ This can be the starting point for extenuating political differences and strengthening economic cooperation.’ The DDP and even the later stage of Lee’s presidential term deny the existence of such consensus. This consensus is generally interpreted as ‘one China, two interpretations.’ While China can interpret the one China as ‘People’s Republic of China’, Taiwan can interpret it as ‘Republic of China’, which is the official name of Taiwan. But this consensus was rejected by Lee when he defined the relationship between Taiwan and China as a special relationship between a State and a State. This two-state discourse denies that Taiwan and China belong to the same State, the one China. This consensus was further opposed by the DPP since the DPP adopts and maintains its policy to seek independence and works for its international space with the name of Taiwan. To the DPP, Taiwan is a State definitely different from China.

This made it impossible for the DPP to support this proposal of the Cross-strait Common Market. However, this consensus is exactly the condition for China to come back to the table with Taiwan. Negotiation between two sides can be conducted under

⁸ *Ibid.*

this 'consensus of 1992.' Thus, this proposed Cross-strait Common Market remained a 'Pie in the sky.' In 2005, the President of the opposition party, the KMT, Lien Chan went to China, albeit in the shadow of the Anti-Secession Act, and meet with the President of China, Hu Jintao. They released a joint declaration, including this proposed Cross-strait Common Market.⁹

When the current President in Taiwan, Ma ran for his election, he chose Hsiao as his vice-President. This Cross-strait Common Market was endorsed by Ma and encountered server attacks from the candidate of the DPP, Frank Hsieh. According to Hsieh, free movement of labours and goods are two fundamental freedoms of a common market. If the Cross-strait Common Market comes into being, the unemployment rate in Taiwan would get from bad to worse. Besides, as there has been an increasing concern of Chinese product safety and food safety, a common market without customs measures would induce a large quantity of problematic Chinese products into Taiwan's market.¹⁰ In response to these critics, the National Policy Foundation funded by Lien Chan tried to defend this proposal, arguing that, free movement of labours is not indispensable for the establishment of a Cross-strait Common Market. Even the South American Common Market (Mercado Común del Sur, or Mercosur) is a form of Regional Trade Agreement, regardless of its name of 'common market.' Thus, the Cross-strait Common Market does not necessarily include free movement of labours. Nonetheless, these defences actually confused and blurred the original proposal advocated by Hsiao. In terms of these defences, this Cross-strait Common Market can be 'a common market without common market,' which is actually contradictory with Hsiao's proposal. Besides, these defences focus on mainly economic interests of Chinese market access and cheap labour there, and thus fail to appreciate the importance of cross-strait peace and security to which Hsiao is highly attached.

⁹ The Lien-Hu joint declaration, (29 April 2005), available at <http://old.npf.org.tw/Symposium/s94/940615-3-NS.htm> (last accessed 12/08/2008).

¹⁰ A. Wu, 'Presidential Election Heats up with Hsieh, Ma Debating Policy at Forum', available at <http://taiwanjournal.nat.gov.tw/ct.asp?xItem=30575&CtNode=118> (last accessed 14/08/2008).

With the victory of Ma and Hsiao, this proposed Cross-strait Common Market seems to be in a better position to be realized. With the coming into power of Ma, Taiwan returned to the 'consensus of 1992'. The positions maintained both by Lee and the DPP were denounced. However, after their coming into power since 20 May 2008, little, if not none, has been discussed in relation to this Cross-strait Common Market. It could be explained by the fact that this proposal was advanced by Hsiao, a vice-President, who has no actual power in outlining the economic or China policy. Nevertheless, given that Ma just came to power since 20 May 2008, it is still too early to judge what this Cross-strait Common Market would turn out to be.¹¹

B. THE RELEVANCE OF THE WTO DISCIPLINE AND EU MODEL

In this subsection, I will examine and explore the relevance of the WTO discipline and the EU model in this proposed Cross-strait Common Market. As Hsiao outlines three stages in his blueprint for this Cross-strait Common Market, the following discussion will follow this three-stage pattern. In other words, I will firstly discuss his idea about the normalization of cross-strait trade, and then explore the possibility of free trade agreement between Taiwan and China, or even a regional trade agreement among these four WTO Members this dissertation deal with. These two stages will mainly governed by WTO law, especially when the free trade agreement is at stake. I will then discuss the third stage, the establishment of a common market. While the EU model is of great importance at this stage, WTO law governing the customs union is also relevant. In the end of this subsection, I will offer my overall comment and evaluation for this proposed Cross-strait Common Market.

¹¹ Up to date, another proposal was advanced by the President Ma Ying-jeou: Comprehensive Economic Cooperation Agreement (the CECA). Again, the substantive elements of the CECA is unclear. This proposal partly responds to the pressure posed by some enterprises calling for zero-tariff entry into Chinese market. The current Chairperson of the MAC, Lai Hsing-yuan argues that the proposed CECA differs from the FTA, CEPA (the arrangements signed between China and Hong Kong, China and Macau, China). Nevertheless, she fails to provide a clear picture on this issue. H-Y Lai, 'Strive to Survive: A Refined Perception on the Economic Agreements' (2009), available at <<http://www.mac.gov.tw/big5/cnews/ref980220.htm>> (last accessed 20/02/2009, in Chinese). Nonetheless, the former Taiwan's Ambassador to the WTO, Yen Ching-chang, argues that the CEPA containing market access provisions may be WTO-inconsistent. Central News Agency, 'Cross-strait Pacts May Violate WTO Rules: Taiwan's ex-Envoy' *Taipei News* (Taipei 12 January 2009), available at <http://www.bilaterals.org/article.php3?id_article=14190> (last accessed 20/02/2009).

1. NORMALIZATION OF THE CROSS-STRAIT TRADE

When Hsiao advanced his proposal of this Cross-strait Common Market, it was on the eve of the accession of Taiwan and China into the WTO. According to Hsiao, when Taiwan and China entered the WTO, trade relationship between each other should thus subject to the control of WTO law. He thus argues that Taiwan's trade measures should be 'normalized' through the elimination of those restrictions toward China trade. He focuses on the 'mutual trust' in normalizing the cross-strait by division of labour to enhance the economic development in both Taiwan and China. Besides, official channels or mechanisms should be established to contribute the 'mutual trust' through dialogue.

To Hsiao, mutual trust is indispensable. The same is to this author. As this dissertation repeatedly argues, the perpetual cross-strait peace and security should be established by the foundation of mutual trust and mutual understanding. Economic cooperation and integration is one of the importance vehicles. However, while Hsiao points to the significance of the WTO framework as the context of his proposed Cross-strait Common Market, he seems to miss the role of dispute resolution mechanism under the WTO framework, in particular the WTO dispute settlement mechanism. On the one hand, as I argue in Chapter VI, it is time for Taiwanese courts to face with numerous WTO-inconsistent restrictions adopted and maintained by Taiwan. The court should focus on the constitutional significance of Taiwan's WTO membership, and should try to constitutionalize Taiwan foreign (trade) relationship with China. On the other hand, I also emphasize the importance of the WTO Dispute Settlement Mechanism in resolving trade dispute between Taiwan and China. It is important to place one faith in humanity and to develop mutual trust. Nonetheless, an independent and impartial dispute resolution mechanism is essential when conflicts arise. This does not apply only to Taiwan although at the first glance it is Taiwan which maintains a number of WTO-incompatible trade restrictions against China. An independent and impartial judicial review is of even greater importance in shaping this Cross-strait Common Market.

As I keep arguing through this dissertation, it is individual economic actors the multilateral trading system aims to protect by providing predictability and security. This protection can be resorted in the WTO Dispute Settlement Mechanism; it can also be referred to in domestic courts. Apart from the WTO level, rights and interests of Taiwan's enterprises and individuals should also be protected in China. This points to the importance of China's WTO obligation to provide an independent and impartial judicial review. Thus, in designating a Cross-strait Common Market through the normalization of cross-strait trade relations, the judicialization and constitutionalization is of great significance. Unfortunately, little, if not none, has been said in Hsiao's proposal in this regard. Further, in his proposal, Hsiao attaches great importance to the negotiation through official channels and mechanisms. However, what negotiation implies to executive power. The legislative oversight and judicial review in his proposal is missing. Putting the cross-strait trade relationship solely upon the wisdom of politicians would induce more mutual harm than mutual trust among people in Taiwan and in China. As previous noted, the fatal point of Hsiao's proposal is his belief that economic cooperation and development can be conducted without dealing the issue of constitutionalization of foreign relation and rule of law, particularly judicial review.¹²

2. FREE TRADE AGREEMENT BETWEEN TAIWAN AND CHINA

In Hsiao's proposal, the second stage of the Cross-strait Common Market, Taiwan and China should negotiate for a Free Trade Agreement (FTA). The free trade agreement between Taiwan and China can be put into the context of the two Closer Economic Partnership Arrangements (CEPAs) signed by China and Hong Kong, China and Macau, China. One might point to a potential regional trade agreement among these four WTO Members.

However, in respect o the FTA between Taiwan and China, apart from the sovereignty issue,¹³ it has to meet with those requirements laid down by the WTO Agreement, in particular Article XXIV: 5 of GATT 1994 and Article V: 1 of GATS.

¹² This point will be further elaborated in subsection (d) overall evaluation and comments.

¹³ This issue will be dealt with later in subsection (d), text to n. 18, ff.

As noted in Chapter VIII, the two CEPAs signed between China and Hong Kong, China and Macau, China are questioned about their WTO-compatibilities since they do not satisfy the requirements laid down by Article XXIV: 5(b) of GATT 1994 and Article V: 1 of GATS. In other words, duties and measures adopted and maintained by these three memberships appear 'higher and more restrictive than the corresponding duties and other regulations of commerce' prior to the signatures of these two CEPAs. Besides, it is also argued that services subject to these two CEPAs do not have substantial sectoral coverage.

In light of those critics, even Taiwan and China can agree on the 'title' of this free trade agreement, be it CEPA or FTA, this agreement has to be WTO-consistent. As claimed by Hsiao, his proposed Cross-strait Common Market should be emphasized on market cooperation rather than open and free movement of production and resources.¹⁴ According to him, 'Taiwan is much smaller than China, yet enjoys a considerably higher level of development. If too great an emphasis were put on eliminating restrictions on the movement of production and resources, the result would adversely affect Taiwan's economy, thus weakening Taiwan's ability to contribute to the development of mainland China's economy.'¹⁵ His proposal here is nevertheless contradictory. On the one hand, he emphasizes on market sharing, but on the other hand, free movement of production and resources is not favourable. It is thus difficult to imagine a shared market with limited free movement of production and resources. Besides, if Taiwan and China are to sign a free trade agreement, they have to abide by the WTO rules in this regard. It cannot be an agreement only preferential to Taiwan; otherwise, it would be inconsistent with the Most-Favoured-Nation Principle. In other words, Taiwan cannot imagine a free trade agreement which it can benefit from China's market access without entering into commitments for economic integration.

¹⁴ Hsiao, *supra* note 2.

¹⁵ *Ibid.*

3. THE REALIZATION OF CROSS-STRAIT COMMON MARKET

According to Hsiao's proposal, when the economic integration between Taiwan and China has reached a certain point, they can embark a comprehensive economic integration. This Cross-strait Common Market can go beyond common market to monetary union.¹⁶ This is an ambitious proposal, but Hsiao elaborates this in two paragraphs. It has little to offer and much for critics. As previously noted, Hsiao says that the emphasis of the proposed Cross-strait Common Market should not be placed on the free movement of production and resource. It is actually difficult to imagine a common market without free movements of production and resources. Although the interpretation of EU model differs from one to another, none would deny that the free movements of goods, labour, services and capitals are among the core of the EU model. A common market without free movements of production and resource is not a common market by definition. Further, apart from the free movements of production and resource between Taiwan and China, domestically, free movement of production and resource does not even exist in China. In light of this, it would be a bit too far to think about common market between Taiwan and China.¹⁷

Secondly, if one designates this Cross-strait Common Market to include Hong Kong, China and Macau, China, there would be a big problem: the external tariffs. This applies to a Cross-strait Common Market limited to Taiwan and China. As Hong Kong, China and Macau, China currently maintain a zero-tariff policy owing to their free-port status, goods may enter into this Cross-strait Common Market and then freely circulate into Taiwan or China. Even one imagines the Cross-strait Common Market to be limited to Taiwan and China, the external tariffs issue persists as well as Taiwan's average tariffs is much lower than China's. It would take a long time to harmonize the external customs duties systems to which Hsiao also points.¹⁸

¹⁶ *Ibid.*

¹⁷ This again points to the importance of human rights and fundamental freedoms (or the minimum form of trading rights and independent and impartial judicial review as provided in China's Accession Protocol), as will be further elaborated in subsection (b), text to n. 24, ff.

¹⁸ *Ibid.*

4. OVERALL COMMENTS AND EVALUATION: UNPROMISING PROSPECTS

Although I have, from time to time pointed out some weaknesses of the proposed Cross-strait Common Market, they are not the major flaws of this proposed Cross-strait Common Market. The designation of this Cross-strait Common Market is based upon a misunderstanding and misperception of vehicles or mechanism underlying legal/economic integration among these four WTO Members: peace and security as enshrined in the model of European integration; security and predictability of the bilateral and/or multilateral trading system and that of the market place and its different operators.¹⁹ This proposal fails to appreciate the importance of constitutionalization and judicialization in international economic law and thus misplace the role of sovereignty in this proposed Cross-strait Common Market. Finally, I will suggest a regional free trade agreement among these four WTO Members a preferable alternative.

a. Peace and Security

The major aim of the European integration is to pursue and ensure the peace and security in Europe after two world wars. This spirit is best expressed in the preamble of the Treaty Establishing the Coal and Steel Community, where it, in the first preambular paragraph, provides that ‘world peace may be safeguarded only by creative efforts equal to the dangers which menace it.’²⁰ This objective is reaffirmed in the preamble of the Treaty establishing the European Economic Community, where it reads: ‘resolved to strengthen the safeguards of peace and liberty by establishing this combination of resources, and calling upon the other peoples of Europe who share their ideal to join in their efforts.’

¹⁹ See, Article 3.2 of DSU; Panel Report, *United States – Sections 301-310 of the Trade Act of 1974 (US – Section 301 Trade Act)*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815, para. 7.75.

²⁰ The preamble of the Treaty to Establish Coal and Steel Community reads as follows: considering that world peace may be safeguarded only by creative efforts equal to the dangers which menace it; convinced that the contribution which an organized and vital Europe can bring to civilization is indispensable to the maintenance of peaceful relations; conscious of the fact that Europe can be built only by concrete actions which create a real solidarity and by the establishment of common bases for economic development; desirous of assisting through the expansion of their basic production in raising the standard of living and in furthering the works of peace; resolved to substitute for historic rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts; and to lay the bases of institutions capable of giving direction to their future common destiny; have decided to create a European Coal and Steel Community and to this end have designated as plenipotentiaries.

In the proposed Cross-strait Common Market, peace and security between Taiwan and China is emphasised even though it has not attracted much attention. As is known, Taiwan and China is often referred to as an area potential military conflict. It is thus understandable that this Cross-strait Common Market attaches great importance to peace and security between Taiwan and China. At the first glance, it resembles the EU model in their effort to pursue peace and security. However, with further exploration, there is a decisive difference between the EU model and this proposed Cross-strait Common Market. Article 6 of the Treaty on European Union speaks of this difference.²¹ Article 6.1 of the TEU defines that ‘the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.’²² In the following paragraph, it is prescribed that ‘the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.’²³

It is thus made clear that, while the Cross-strait Common Market is to be modelled from the EU model, it is not in accordance with the spirit of the European integration even though both of them aim to preserve and ensure peace and security. The European Union is ‘founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’ while these elements are absent in the proposed Cross-strait Common Market. Namely, human rights and

²¹ In the Treaty of Lisbon, also known as the Reform Treaty, this Article is to be replaced by the following provisions: ‘1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.’ See Article 6, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, O.J. C 115 (9 May 2008).

²² TEU, Art. 6.1

²³ TEU, Art. 6.2..

fundamental freedoms have no space in this proposal. It should be thus stressed that the proposed Cross-strait Common Market is actually not modelling the experiences of European integration. Peace and Security cannot be ensured without the respect for human rights and fundamental freedoms, and the rule of law, which are not included in the proposal.²⁴

b. Security and Predictability in the Multilateral/Regional Trading System

Secondly, in terms of European legal and economic integration, the European Court of Justice (the ECJ) is generally referred to as the driving force which plays an indispensable role in this process. The ECJ does not only settle disputes between member states, but it also deals with disputes between EC institutions as well as complaints brought by the EC institutions against member states. Resort to the ECJ is also possible to any natural or legal person when a decision or a decision in the form a regulation addressed to that person or a decision addressed to another person is of direct and individual concern to that person.²⁵

This European experience echoes the arguments this dissertation keeps emphasizing. As I keep arguing through my dissertation, a dispute resolution mechanism is essential for legal and economic integration among these four WTO Members. In the proposed Cross-strait Common Market, there is not any form of dispute resolution mechanism, ranging from the thinnest form of consultation to the thickest form of court. The unavailability of dispute resolution mechanism in this proposed Cross-strait Common Market is fatal. As this dissertation argues, dispute resolution mechanism can be designated in three levels: national courts, the WTO Dispute Settlement Mechanism and a potential regional dispute resolution mechanism. In Chapter V, I emphasize the significance of China's WTO obligation to provide an independent and impartial judicial review. This dissertation has illustrated the role of the WTO Dispute Settlement in resolving the disputes between Taiwan and China. Further, it also examines the existent dispute resolution mechanism, albeit in a thin

²⁴ While these issues are difficult enough, liberty and democracy will add much complexity to this proposal.

²⁵ ECT, Art. 230(4).

form, provided in the CEPAs between China and Hong Kong, China and Macau, China. In order to facilitate legal and economic integration among these four WTO Members, a strengthened domestic judicial review and thicker form of regional dispute resolution through judicialization is essential and desirable. Both Taiwan and China are also encouraged to access themselves to the WTO Dispute Settlement Mechanism. Multilevel judicial governance is an essential and indispensable vehicle to ensure the security and predictability in the process of legal and economic integration among these four WTO Members.

Apart from the role of the ECJ in European integration, WTO law points to the same direction. Article 3.2 of the DSU spells out the importance the WTO Dispute Settlement Mechanism: a central element in providing security and predictability to the multilateral trading system. As previously noted, the ‘security and predictability’ therein referred to is further elaborated in *US – Section 301 Trade Act*. According to the Panel, the purpose of various disciplines under the GATT/WTO is ‘to produce certain market conditions which would allow this individual activity to flourish.’²⁶ In other words, the aim to provide security and predictability in multilateral trade system is to protect the individual operators as ‘the lack of security and predictability affects mostly these individual operators,’²⁷ since the ‘multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators.’²⁸

As international trade activities are eventually carried out by individual economic actors, including exporters, importers, service suppliers, and intellectual property rights holders, it is the rights of these individual economic actors in need of the protection of secure and predictable multilateral trading system. This security and predictability should also be read in conjunction with China’s WTO obligation to provide an independent and impartial judicial review. This obligation reinforces the existent provisions in the WTO agreements in relation domestic judicial review, and reiterates the importance of the dispute resolution mechanism in economic activities.

²⁶ Panel Report, *US – Section 301 Trade Act*, paras. 7.71-7.72.

²⁷ *Ibid.*, para. 7.76.

²⁸ *Ibid.*

By dictating China to provide an independent and impartial judicial review, it enhances the security and predictability of individual economic actors in their economic activities. This then refers back to the right to trade as provide in China's Accession Protocol. It is the trading rights of individual economic actors which an independent and impartial judicial review aims to protect. It thus again points to the weaknesses of the proposed Cross-strait Common Market, where free movement of production and resources are not included. The Cross-strait Common Market is designated for individual economic actors. On the one hand, it should promote free transactions of economic activities in this market. On the other hand, it should provide certain market conditions for these economic activities to flourish. A secure and predicable dispute resolution mechanism, in terms of domestic judicial review, the WTO Dispute Settlement Mechanism or a perspective regional court, is essential and indispensable.

c. Constitutionalization of External Trade Relations

In line with the emphasis on the importance of the role of dispute resolution mechanism and individual economic actors, the proposed Cross-strait Common Market should be examined in a broader context: the constitutionalization of external trade relations. This designation of this proposed Cross-strait Common Market relies much on Hsiao's belief on the 'wisdom of politicians' where constitutionalism has little space. This also explains why Hsiao fails to appreciate the importance of dispute settlement mechanism in his proposal. In this proposal, judicial review has no role to play in external trade relations, which runs counter to the trend of the ongoing constitutionalization of external trade relations and the normative necessity and feasibility further to constitutionalize these relations.

As argued in this dissertation, a constitutional approach toward external trade relation among these four WTO Members in essential and indispensable. It would contribute to legal and economic integration among these four memberships and ensure the peace and security as pursued by this proposal. While the proposed Cross-strait Common Market is aware of accessions of Taiwan and China into the WTO, it fails to appreciate the constitutional importance of the WTO memberships to

these four WTO Members, and thus constitute a fatal flaw of its designation. WTO law should not only normalize the cross-strait trade relations, but it should also constitutionalize cross-strait trade relations. This refers back to China's WTO obligation to provide an independent and impartial judicial review and the right to trade. The constitutionalization of China's external trade relations is not only important for China to widen and deepen its economic, legal and political reforms and thus lock in the progress so far made, but it is also indispensable to enhance the regional integration among the Four WTO Members and ensure the 'perpetual cross-strait peace.' The same applies to Taiwan. It should normalize and constitutionalize its trade relations with China. The imperative of constitutionalism, including check and balance and judicial review should be brought into the realm of cross-strait relations. Cross-strait relations should not be interpreted as a prerogative or privilege of the President where constitutionalism does not apply.

While Hsiao's proposed Cross-strait Common Market does not explicitly include Hong Kong, China and Macau, China, it is nevertheless clear that these two SARs was in his mind when he advanced his proposal since this proposal is situated at the context of the Pan-Chinese or Greater China economic area. This area is generally referred to as the Four WTO Members, and sometimes Singapore included. While it is understandable that Hsiao focuses mainly on Taiwan and China, Hong Kong, China and Macao, China is also of great importance in this regional integration. The WTO memberships serve as a constitutional safeguard for the legal and economic autonomy in these two SARs. Besides, the free and developed economic policies in these two SARs, especially the HKSAR acts as an incentive and an input for China to continue its economic, legal and political reform. The designation of a Cross-strait Common Market should provide certain economic conditions by certain human institutions. Among these human institutions, the right to trade and an independent and impartial judicial review are some of the indispensable elements. This again points to the importance of the legal and political objectives of the WTO, and thus exposes the weaknesses of the proposed Cross-strait Common Market. A Common Market without the constitutional safeguard of individual rights from the abuses of governmental powers can never be successful.

d. Sharing of Sovereignty and Imbalance of Political Power

What Hsiao refers to as ‘sharing of sovereignty’ is actually unclear. This idea can be traced back to the so-called 92 consensus between Taiwan and China. As noted above, this ‘consensus’ is subject to dispute in Taiwan. While the two former Presidents in Taiwan, Lee Teng-huei, who belonged to the KMT, and Chen Shui-bian, who belonged to the DPP both deny the existence of this consensus. The newly elected President in Taiwan recognizes such consensus while he contends that the ‘one China’ contained in this consensus refers to the Republic of China, the official name of Taiwan. The advanced idea of ‘sharing of sovereignty’ thus means that both Taiwan and China will not insist on the sovereignty issues. The exercise of sovereign powers can be shared by Taiwan and China.

However, his perception of ‘sharing of sovereignty’ is apparently different from the EU model. Moreover, the idea of ‘sharing of sovereignty’ does not exist in the experiences of European integration. As is generally understood, member states transfer their sovereign powers to the supranational European Community. The transfer of sovereign power is a vertical one, to a supranational organization. This much differs from what Hsiao says about ‘sharing of the sovereignty’, which is mainly a horizontal cooperation model. Further, all governmental powers both exercised by community institutions or national governments of member states are subject to judicial review of both the ECJ and national courts. This links to the importance of dispute resolution mechanisms.

This advanced idea of ‘sharing of sovereignty’ has some fatal defects. Firstly, it would be difficult to imagine that China would accept the sharing of its sovereignty with Taiwan. What China keeps repeating nonetheless is its sovereignty over Taiwan. What is of more importance, any form of governmental power should be subject to judicial review. This shared sovereignty is no exception. The absence of the dispute resolution in this proposed Cross-strait Common Market thus exposes its major weakness: the lack of guarantee of human rights and fundamental freedoms that are essential elements of the European experiences.

Finally, in terms of the regional integration among the Four WTO Members, the potential instability may result from their imbalance of political and economic powers. This again points to the paradoxical idea of ‘sharing of sovereignty’ when there exists such a huge difference on their economic and political power. China is now an economic, perhaps also political, giant, to which the other three memberships rely highly upon. China is now the biggest trading partner to the other three memberships. The designation for the potential regional economic integration among the Four WTO Members, including the proposed Cross-strait Common Market, should ensure rights and interests of the other three memberships not to be undermined. A well-functioning dispute settlement mechanism is essential and indispensable to safeguard these rights and interests.

IV. THE ROAD AHEAD

On 4 November 2008, Taiwan and China signed the direct transports agreements that eliminated one of the most important trade barriers between these two members. Nevertheless, by virtue of Article 95 of the *Statute Governing Relations between People of the Taiwan Area and Mainland Area*, these direct transports agreements are effectuated without the congressional approval. In thinking about the constitutionalization of trade relations between Taiwan and China, two major elements are essential. Apart from the judicial review that this Dissertation focuses on, the legislative oversight is also indispensable. The absence of congressional resolution again points to the need further to constitutionalize trade relations between Taiwan and China to resolve the legitimacy deficit in this regard. With the signature of direct transports agreements, the economic interdependence among these four WTO Members may accelerate. Nevertheless, it is still too early to tell to which direction the regional integration among the Four WTO Members would go. However, in designating the potential regional integration among, an effective dispute resolution is indispensable. This dispute resolution may be the WTO Dispute Settlement Mechanism, national courts, or a perspective regional court. If the European experiences can shed any light on this particular landscape, effective judicial protection of human rights and fundamental freedoms is the most important element.

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