

Conference on “Investment in China and the WTO”

Major reforms of China’s Laws and Legal System in the run-up to her Accession to the World Trade Organisation

Stephen Kai-yi Wong^{*}
Deputy Solicitor-General
Department of Justice
Furama Hotel, Central, Hong Kong
17 October 2001

(I) Background and Implications of China’s Accession to the WTO

China was one of the founding members of the General Agreement on Tariffs and Trade (“the GATT”) concluded in 1947. In 1950, China withdrew from the GATT but resumed its participation in 1984 as an observing member. In 1986, China formally applied to resume its membership of the GATT, which subsequently transformed into the World Trade Organisation (“the WTO”). Since 1995, China has stepped up its lobbying efforts. After 15 years of negotiation resulting in the conclusion of all agreements in Geneva in September this year, China is now on the home-straight for accession to the WTO to be confirmed at the forthcoming Ministerial Conference in Doha in November.

2. The accession to the WTO has clear advantages for China, for one it fits nicely into her plan of economic development. Although China has lifted more than 200 million people out of poverty in the past 20 years¹, a lot

^{*} The speaker is grateful to Ms Alice Choy, Senior Government Counsel of the Department of Justice, HKSAR for her assistance in the research.

¹ See speech by President Jiang Zemin at a luncheon meeting co-sponsored by US National Committee on US-China Relationships and US-China Business Council, on 8 September 2000 in New York (Full text available at www.uschina.org).

more is being done to further raise the general living standard. While the Tenth Five-Year Plan for Economic and Social Development is being drafted, the bold decision to develop the western regions certainly confirms the Administration's determination and helpfully provides the requisite groundwork and opportunities for further development. It is expected that the years ahead will be marked with efforts to ensure rapid growth, both in terms of trade volume and economic restructuring.

3. China's accession to the WTO is also welcomed by the world as a whole, in particular for the boost it lends to economic globalization. With the advancement of science and particularly information technology nowadays, the world has never been closer. Economic globalization is no longer an aspiration in the pursuit, but a reality in transnational development in the civilized world.

(II) Programme of Legal System Reform in China on Accession to the WTO

4. At the interview by a Hong Kong magazine², Mr Gao Changli (高昌禮部長), ex-minister of the Ministry of Justice said that China's accession to the WTO will have impact to the legal reform of China in the following areas:

(1) *Revision and Review of Legislation*

China will have to accelerate the pace of revising and formulating all economic laws and regulations according to the WTO rules to bring them into line with the operations of the international market economies and with international conventions and common international practices, with a view to maintaining the market order and fair competition; protecting intellectual property rights; establishing a modern enterprise system; and protecting trade.

(2) *Improvement in the Enforcement of Administrative Law*

When China becomes a WTO member, its economy will have to operate according to the common rules universally observed by all members. This will necessarily requires the

² An interview of Mr Gao Changli by "China Law", reproduced in China Law (中國法律) October, 2000, p.55-58.

administrative law enforcement departments of China to reform and adjust their functions and procedure.

(3) *Reform of the Judicial System*

To comply with the requirements and obligations of the WTO and its agreements and to ensure that adjudications will be made by courts in line with the obligations of the WTO, China will have to initiate and promote further reform of its judicial system.

5. Mr Zhang Yuqing (張玉卿司長), Director of Treaty and Law Department of the Ministry of Foreign Trade and Economic Co-operation (MOFTEC) reported in May this year³ that since the end of 1999, the Chinese Government has made an overall arrangement as to the repeal of, amendments to and retention of laws and regulations in force on foreign trade and economic co-operation and a plan has been made as well to draft new laws and regulations in this area.

6. According to Mr Zhang, as of the end of January 2001, 1413 documents had been identified, comprising 6 laws, 164 administrative regulations (including 110 internal documents), 887 ministerial rulings (including 195 internal documents), 191 bilateral agreements on economy and trade, 72 bilateral agreements on investment protection and 93 agreements on the avoidance of double taxation.

7. At the same time, MOFTEC has classified, studied and compared these documents in accordance with the WTO rules. Except bilateral agreements and trade, investment protection and the avoidance of double taxation:

- (i) 573 documents are to be repealed, including 114 administrative regulations and 459 ministerial rulings;
- (ii) 364 documents are to be retained, including 1 law, 25 administrative regulations and 338 ministerial rulings (including 84 internal documents); and

³ At the Conference "Round-table Discussion on China's WTO Accession by International WTO Experts" held in Shanghai on 18-19 May 2001.

- (iii) 120 documents are to be amended, including 5 laws, 25 administrative regulations and 90 ministerial rulings.

8. According to Mr Zhang, clearance work of local laws and regulations on foreign trade commenced in early 2001.

9. Taking Shanghai as an example, Mr Tang Minghao (唐明皓處長), Director-General of Economic Laws Department, Law Commission of the Municipal Government of Shanghai (上海市政府法制辦經濟法規處) reported in May this year⁴ that Shanghai has already started the clearance and amendment work of local laws and regulations. So far it has been decided that 23 pieces of laws and regulations have to be abolished in order to comply with the WTO rules and agreements.

(III) Legal Reform in Different Aspects of the Legal System in China in compliance with the principles and obligations under the WTO

10. To comply with the principles and obligations under the WTO Agreements, China is now undergoing a large scale legal reform. I will now examine in greater details the progress of the legal reform in the following important aspects of the legal system in China :

- (1) legislative process, administrative system and laws;
- (2) judicial reform and court system;
- (3) rights of parties in civil and administrative procedures;
- (4) legal service;
- (5) legal education;
- (6) alternative dispute resolution: arbitration;
- (7) laws on intellectual property; and
- (8) laws governing foreign direct investment.

⁴ Ibid.

(III. 1) Reform of the Legislative Process, Administrative System and Laws

(III.1.1) *Legislative Process*

11. The GATT⁵ requires that :

“Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article [which requires prompt publication to enable acquaintance of traders].”

12. Such requirement of “transparency” of the publication of the laws and regulations in China has direct impact on the reform of its administrative system.

13. Under Articles 52, 62, 70 and 77 of the newly promulgated *Law on Legislation of the PRC (中華人民共和國立法法)*⁶, laws, administrative rules and regulations, local regulations and autonomous regulations and specific rules of autonomous regions and departmental regulations promulgated by different administrative organs⁷ shall be published timely in designated gazettes and newspapers in circulation across the nation.

14. However, apart from laws, administrative rules and regulations and departmental regulations, there exists a large amount of “*internal regulations (內部規定)*” with restricted circulation within the governments. Such internal regulations do not have legal effect but set out provisions regulating different aspects of the administrative procedures for different matters.⁸

15. To ensure conformity with the WTO requirement, it is anticipated that such practice of “*internal regulations*” will also be brought in line with the transparency principle.

⁵ Article X 3(a)

⁶ Adopted at the 3rd Session of the 9th NPC on 15 March 2000, effective as of 1 July 2000.

⁷ The administrative organs include : ministries and commissions of the State Council, the People’s Bank of China, the Audit Office and directly affiliated organs with administrative functions, people’s governments of provinces, autonomous regions, municipalities directly under the Central Government and larger cities.

⁸ The existence of such practice was commented by Mr Li Shixi (李適時副主任), Deputy Director of the Legislative Affairs Office of the State Council (國務院法制辦) at a conference held in Shanghai on WTO in May 2001. See also note 3, ante.

(III. 1.2) *Administrative Approval System* (行政審批制度)

16. Another aspect of reform relates to the *administrative approval system* (行政審批制度) which has been in operation in China for a long time.

17. It has been commented that the legal basis for approval under the system is not open and the standards of approval are not clear.⁹ The approval coverage is too wide and the items requiring approval are too minute and the procedure involved is too complicated.

18. To conform to the “transparency” principle of the WTO, it is reported¹⁰ that in recent years, the central government and many local governments have commenced reform of the “approval” system. MOFTEC and some other departments have also put related laws, regulations and other legal bases for administrative approval on their websites for the reference of foreign investors.

19. Another administrative reform takes the form of separating the administrative functions of the governments from the mere management of enterprises (政企分家). For matters that are not the business of governments which invariably relate more to the internal management of the enterprises, many local governments have relinquished the “approval” requirements and delegated the necessary administrative work to “intermediary” organizations.

(III. 1.3) *Examples of Initiatives of Administrative Reforms in China*

20. On 13 February 1999, the People’s Government of Shenzhen City issued the *Regulations on the Reform of the Approval System* (深圳市審批制度改革若干規定), abolishing the approval requirement for 436 items, accounting for 42.4% of the 1091 items before the reform.

21. Beijing and Ningbo (寧波市) also put forward the objectives of reducing the items for approval by over 40%.

22. After reform, the government departments of Beijing have

⁹ See the article by Zhang Xingxiang and Chen Xiaolei, “Chinese Government Reforms of the Administrative Approval System to Meet Challenges by Entry into WTO” *China Law* (中國法律) October 2000, pp.103-105.

¹⁰ Ibid.

preserved only 850 items of the 1304 items requiring approval. Ningbo City has preserved only 227 of the 647 items requiring approval, and only 668 of 1289 items requiring verification (核准).

23. Apart from abolishing and streamlining the procedure for approval, many cities in China have taken steps to standardize the approval procedures. Many provinces and municipalities have also organized joint offices to carry out the requisite approval.

24. For instance, Baotou City (包頭市) of Inner Mongolia has coordinated 21 government departments, including the city administration for industry and commerce, property management bureau, health bureau, foreign trade and economic cooperation bureau and fire prevention office etc, to offer streamlined, one-stop joint services for obtaining centralized approval to investors.

(III. 1.4) Reform of the Administrative Law

25. The GATT¹¹ requires that:

“Each contracting party shall maintain, or institute as soon as practical, 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.....”

26. The promulgation of the *Administrative Procedure Law of the PRC* (中華人民共和國行政訴訟法) in April 1989¹² marked the beginning of the establishment of a complete administrative review system in China.

27. Following that, the State Council promulgated the *Regulations on Administrative Review* (行政復議條例) in 1990, which was revised in June 1994. It was considered a landmark in the formulation of a comprehensive

¹¹ Article X 3(b)

¹² Adopted at the 2nd Meeting of the Standing Committee of the 7th NPC on 4 April 1989, effective as of 1 October 1990.

Chinese administrative review system.

28. An independent set of law, namely, *the Law of the PRC on Administrative Review* (*中華人民共和國行政復議法*) was promulgated in 1999¹³ to replace the 1990 *Regulations on Administrative Review*.

29. Under the newly promulgated *Law on Administrative Review*, an applicant may apply for the review of the legality of an administrative act, which was not hitherto provided in the 1990 *Regulations on Administrative Review*.

30. Article 7 of the *Law on Administrative Review* provides that if an applicant considers that the specified administrative provisions upon which the administrative organs take as the basis of a specific administrative act are in violation of existing laws, he may apply not only for a review of the administrative act itself, but also for a review of those specified administrative provisions.

31. Under the *Law on Administrative Review*, the number of specific acts which may be appealed against has also been extended. The *Law* also provides that in the process of the administrative review, the applicant does not have to bear the burden of proof.

32. Article 23 of the *Law on Administrative Review* provides that after receiving the application for review, the defending administrative organ shall submit a written reply, explaining the basis on which it carried out the specific administrative act.

33. In addition, the applicant's right of discovery is secured in that the applicant is allowed to have access to the evidence and other relevant materials supporting the specific administrative act submitted by the defending administrative organ.

34. In order to prevent the defending administrative organ from delaying the disclosure of the relevant evidence and materials, Article 28(4) provides that if the defending administrative organ refuses to submit its written reply, the relevant evidence or materials within the specified time limit, the administrative act shall automatically be considered nullified.

¹³ Adopted at the 9th Session of the 9th NPC on 29 April 1999, effective as of 1 October 1999.

35. It is quite clear that the *Law on administrative Review* lays further foundation for China to ensure that judicial review of administrative acts of government is in line with the WTO requirements.

(III. 2) Reform of the Judiciary and Court System

36. Article III(a) of the GATT requires that each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and ruling pertaining to different aspects of trade activities.

37. Inevitably, the abolition of out-dated laws, amendments to and promulgation of laws and regulations in compliance with the WTO requirements will have direct impact on the judicial system.

38. During a conference on WTO held in Shanghai in May this year¹⁴, Mr Wan Exiang (萬鄂湘副院長), Vice President of the Supreme People's Court commented that in view of China's accession to the WTO, the judicial system of China has to conduct reforms in the following areas:

(III. 2.1) The "Retrial" System

- (a) It is paramount to establish the authority of the judiciary under the existing legal system;
- (b) Chapter 16 of the *Civil Procedure Law of the PRC* (《中華人民共和國民事訴訟法》¹⁵) ("*Civil Procedure Law*") provides for the procedure for "Trial Supervision (審判監察)".

Under Article 177 of the *Civil Procedure Law*, if the president of a people's court at any level finds a definite error in a legally effective judgment and deems it necessary to have the case retried, he shall refer it to the "judicial committee" for discussion and decision. Parties to an action can also apply for such retrial under Article 178.

However, the *Civil Procedure Law* does not set out any criteria or guidelines for referring cases or applying for retrial under

¹⁴ See note 3, ante.

¹⁵ Adopted at the 4th Session of the 7th NPC on 9 April 1991, effective as of the same date.

Articles 177-178, thus leading to arbitrariness and uncertainty in the binding effect of the final judgments made by the people's courts.

According to Mr Wen, there happened to be a case where 12 retrials had been made.

Mr Wen revealed that the Supreme People's Court will be issuing a judicial interpretation to set out clear guidelines and principles regulating retrials under Chapter 16 of the *Civil Procedure Law*.

(III. 2.2) *Transparency Requirement*

The "transparency" requirement of the WTO also applies to the judiciary, namely that it requires all trials to be conducted in public and all judgments be pronounced in public.

(III. 2.3) *Improving the Quality of Written Judgments*

It is anticipated that after the accession to the WTO, the people's courts will have to handle an increasing number of cases involving foreign elements. The standard of the written judgments of the people's courts will have to meet international standard. Therefore, it is expected that the quality of written judgments will be improved.

(III. 2.4) *Restructuring the Court System*

- (a) The Supreme People's Court has started to restructure the court system since August 2000¹⁶.
- (b) Under the restructure, a "Case Filing Department (立案庭)" responsible for acceptance of case filing has been established, as well as a "Trial Supervision Department (审判监督庭)" which is responsible for trial supervision.
- (c) These two new departments together with the original "Enforcement Department" are now in charge of filing cases,

¹⁶ See Legal Daily (法制日报) 9 August 2000.

trial & enforcement and trial supervision independently, replacing the previous system where the “Trial Department” assumed all three functions of filing, trying a case and supervising the trial.

- (d) The reform helps to ensure that the judicial functions of the people’s court will be exercised independently.
- (e) In addition, four civil trial courts have been established to try civil cases, economic cases, intellectual property cases and transportation cases. A new civil court under the Supreme People’s Court will also be set up to specialize in adjudicating maritime and foreign-related cases.

(III. 2.5) *Review of Judicial Interpretations*

To ensure that the judicial interpretations issued by the Supreme People’s Court are in line with WTO requirements, the Supreme People’s Court has already commenced the review of the existing judicial interpretations and efforts have been made to ensure that all judicial interpretations are published.

(III. 3) *Rights of the Parties in Civil and Administrative Procedures*

39. The obligations under the WTO Agreements also set out clearly the rights of the parties in civil and administrative procedures.

40. It is provided in Article 42 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) that:

- (a) defendants in civil, judicial procedure shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claim;
- (b) parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearance;
- (c) all parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence.

41. Article 43 of the TRIPS further sets out clear requirements regarding evidence:

“The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support his claims, and has specified evidence relevant to substantiate his claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party.”

42. Such requirements under the TRIPS have an impact on the civil and administrative procedures in China. In this regard the *Civil Procedure Law* and the relevant administrative laws will have to be examined with a view to ensuring compliance with the above rights specified in the TRIPS.

(III. 4) Impact on the Legal Service in China

(III. 4.1) WTO Requirements on Legal Service

43. As the legal system of China will undergo comprehensive reform, China’s accession to the WTO will definitely have direct impact on the legal service in China.

44. Under the GATS, the term “services” refers to a wide range of service sectors except services supplied in the exercise of governmental authority, including advertising, banking, communications, construction, legal and accounting services.

45. After accession to the WTO, China has to comply with the following obligations under the GATS¹⁷:

- (i) “specific obligation of market access¹⁸” which can be broadly defined as the admission of foreign service suppliers to practise law locally; and
- (ii) “specific obligation of national treatment¹⁹” which requires each member to grant the same rights and privileges to the

¹⁷ Article I, GATS

¹⁸ Article XVI, GATS

¹⁹ Article XVII, GATS

foreign service suppliers as are enjoyed by the local service suppliers.

46. Before examining what reform will have to be made to the legal service in China, I will briefly summarize the regulatory framework of the practice of law in China.

(III. 4.2) *Regulatory Framework of the Practice of Law in China*

47. *Practice of Chinese Law*

*The Lawyers Law of the PRC (中華人民共和國律師法)*²⁰ sets out the scheme under which Chinese nationals can qualify as lawyers. However, there is at present no separate scheme for lawyers of other jurisdictions to gain admission and to practise law in the Mainland China.

48. *Practice of Foreign Law*

Foreign lawyers who wish to practise foreign law in China are subject to a set of rules stipulated under the *Provisional Regulations on Establishing Offices Within the Territory of China by Foreign Law Firms (關於外國律師事務所在中國境內設立辦事處的暫行規則)*.²¹

49. Under the *Provisional Regulations*, a foreign law firm may set up an office in the Mainland upon approval by the Ministry of Justice and upon registration with the State Administration of Industry and Commerce. An office of a foreign law firm may be established for an initial period of 5 years which may be extended upon approval. The scope of practice of an office of a foreign law firm is, however, restricted.

50. An office of a foreign law firm and its staff are not allowed to engage in legal matters of PRC law or to interpret PRC law for their clients. Furthermore, an office of a foreign law firm is prohibited from employing PRC lawyers.

²⁰ Adopted at the 9th Meeting of the Standing Committee of the 8th NPC on 15 May 1996, effective as of 1 January 1997.

²¹ Promulgated by the Ministry of Justice and the State Administration of Industry and Commerce on 26 May 1992.

(III. 4.3) *Reform of the Legal Service in China*

51. In the professional services sector, China currently tightly restricts the operation of foreign law firms and accounting firms. In the Sino-US bilateral agreement, China has provided a broad range of commitments on legal, accountancy, taxation, management consultancy, architecture, engineering, urban planning, medical and dental, and computer and related services. After accession to the WTO, China will permit foreign majority control except for practising Chinese law in the legal service. Foreign law firms will be allowed to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs. The geographic and quantitative limitations of establishing only one representative office in China will be eliminated within one year after China's accession to the WTO.

(III. 4.4) *Possible Amendments to the Relevant Laws Relating the Provision of Legal Service in China*

52. China is currently finalising the drafting of new regulations on the operation of foreign law firms. Given the intention of the relevant authorities, it is anticipated that the following approaches would be adopted towards liberalization:-

- (i) The rules governing the granting of licences would be more open, transparent, reasonable and objective so that foreign law firms would be in a better position to assess their position before making any plans to set up offices in the Mainland;
- (ii) The number of licences to be granted would be increased but kept under control and assessed according to the needs of the particular city;
- (iii) Rules governing the operation of these firms would be relaxed to allow the hiring of paralegals or consultants who are PRC lawyers;
- (iv) The regulation restricting a foreign law firm to set up only one office would be relaxed to allow the establishment of more than one office in the cities of the Mainland; and

- (v) Local law firms in the Mainland would be allowed to form associated firms/entities with foreign law firms to provide more comprehensive legal services for their clients.

(III. 4.5) *Recognition of Qualifications of Foreign Lawyers*

53. Should China become a member of the WTO, she will also discharge the obligations under the GATS to liberalize trade barriers in services save where the exceptions apply.

54. In the long run, to comply with the spirit of the GATS, the Mainland authorities will have to give serious consideration to the general obligation of mutual recognition so that qualifications of foreign lawyers obtained in their home jurisdictions would be recognized in total or in part in the Mainland.

(III. 4.6) *Opportunities and challenges for Hong Kong's Legal Profession*

55. Given Hong Kong's competitive edge in services industry, we in Hong Kong should benefit considerably from China's liberalization of its huge services market. Market liberalization will bring about more business and trade opportunities. It is expected that with our geographic proximity to the Chinese market, our knowledge and experience of the Chinese market gained through years of established business contact in the Mainland, our historical and cultural ties, our language, our world-class business and financial services and excellent infrastructure, Hong Kong will have even more opportunities to play out its gateway and middleman roles as well as to participate directly in the economic development of China upon her accession to the WTO.

56. However, with the introduction of the "Uniform National Judicial Examination (全國統一司法考試)"²² for judges, procurators and lawyers, the first examination of which is scheduled to take place early next year, the "National Qualification Examination for Lawyers" will be replaced. It is still not clear if Hong Kong lawyers will be allowed to sit for the examination and obtain the qualification for practising as PRC lawyers in the Mainland.

²² Notice issued by the Supreme People's Court, Supreme People's Procuratorate and the Ministry of Justice on 15 July 2001.

(III. 5) Impact on Legal Education

57. In a conference²³ held in Hong Kong September this year, scholars from the Mainland have analysed the impact of the WTO on legal education in China. It has been suggested²⁴ that the following conditions should be taken into account in the restructuring of legal education in the Mainland:

- (1) Requirement to adjust the curriculum and research to cover topics of the WTO;
- (2) Introduction of lectures on framework of the WTO Agreements and the amendments to existing administrative laws and regulations;
- (3) Discussion on the different principles under the WTO Agreements and the reform to judicial work and legislative work in China;
- (4) Broadening the research on different theories of “international law” relating to the WTO; and
- (5) Introduction of lectures on practical levels e.g. legal profession, arbitration and notary work, etc.

(III. 6) Alternative Dispute Resolution: Arbitration

58. China’s accession to the WTO will necessarily increase the volume of inter-national and inter-regional trade and hence inevitably increase the number of trade disputes simultaneously. As court processes are always lengthy and costly, arbitration will certainly become more and more commonly adopted as an alternative dispute resolution mechanism.

59. The conduct of arbitration in China in respect of economic disputes is regulated by the *Arbitration Law of the PRC* (*中華人民共和國仲裁法*)²⁵. Article 2 of the *Arbitration Law* provides that disputes over contracts and disputes over property rights and interests between citizens, legal persons and

²³ “Conference on China’s Accession to World Trade Organization: Implication for Legal Education and Training in Hong Kong” co-organized by the Department of Justice and the Legal Education Trust Fund, held on 20 September 2001 in Hong Kong.

²⁴ “An analysis of the Five Areas of Impact to Legal Education in China after Accession to the WTO” delivered by Professor Li Changdao at the conference.

²⁵ Adopted at the 9th Meeting of the Standing Committee of the 8th NPC on 31 August 1994, effective as of 1 September 1995.

other organizations may be submitted to arbitration.

60. Article 15 of the *Arbitration Law* provides that the China Arbitration Association (中國仲裁協會) shall make arbitration rules in accordance with the *Arbitration Law* and the *Civil Procedure Law*. The first set of “*Arbitration Rules*” was formulated and implemented in 1995, which was subsequently amended in 1998.

(III. 6.1) *Amendments to the Arbitration Rules*

61. In the light of China’s accession to the WTO and its obligation to comply with the WTO agreements, the *Arbitration Rules* were further amended in October 2000 with the following major features :

- (1) the scope of cases accepted by China International Economic and Trade Arbitration Commission (CIETAC) under the *Arbitration Law* was broadened to include “*other domestic disputes*” agreed upon by the parties to be subject to arbitration by the arbitration commission (當事人協議由仲裁委員會仲裁的其他國內爭議”);
- (2) The fee for arbitration is reduced; and
- (3) The speed of the conduct of arbitration is accelerated.

62. The acceptance of “*domestic disputes*” by the arbitration committee in addition to international or foreign related disputes may be regarded as an effort to comply with the “*National Treatment*” principle of WTO Agreements.

63. It has been commented²⁶ that the *Arbitration Law* will have to be further reviewed to ensure compliance with the WTO principles. For example, the recognition of “ad hoc arbitration” conducted in China and the recognition of the right of foreign arbitrators to have access to the arbitration service market in China.

64. While it is anticipated that China will make full efforts to reform its judicial system so that Article X of the GATT will be complied with (i.e. to ensure the maintenance of judicial tribunals or procedures for the prompt review

²⁶ See “Reform of Chinese Arbitration System after the WTO” by John Mo, *China Law (中國法律)* December 2000, pp.83-86.

of administrative actions), it is conceivable that lawyers and businessmen would consider or prefer the alternative route to effect dispute resolution by way of arbitration.

(III. 6.2) *Opportunities for Hong Kong in Disputes Resolution*

65. According to Article 145 of the *General Principles of Civil Law* and Article 126 of the *Contract Law* of China, parties to a foreign-related contract may choose the applicable law for the settlement of contractual disputes. Generally speaking, parties to most foreign-related contracts, (other than contracts to be fulfilled in the territory of the PRC on Chinese-foreign equity joint ventures, on Chinese-foreign co-operative joint ventures and on Chinese-foreign cooperation in exploring and exploiting natural resources) may choose laws of other countries and regions (including Hong Kong law) as the applicable law to the settlement of contractual disputes. In addition, under Article 244 of the *Civil Procedure Law*, parties to a dispute over a contract concluded with a foreign element, or over property rights and interests involving a foreign element may, through written agreement, choose the court of the jurisdiction which has practical connections with the contract to settle their disputes. It follows that if any dispute has practical connections with Hong Kong, the parties involved may choose the exclusive jurisdiction of Hong Kong courts for the solution of disputes. The place where a contract is signed can be regarded as a signal of practical connection concerning the contract.

66. Article 15 of the *Law on Chinese-foreign Equity Joint Venture Enterprises* and Article 26 of the *Law on Chinese-foreign Co-operative Joint Venture Enterprises* provide that disputes arising between the parties to an equity co-operative joint venture, where the board of directors has failed to settle through consultation, may, upon agreement of the parties, be settled through arbitration by an arbitration agency of China or through arbitration by another arbitral organ (including arbitral organs of Hong Kong).

67. Where parties to a foreign-related contract intend to choose foreign law as the applicable law, and where such parties or the relevant Sino-foreign equity/cooperative joint ventures intend to choose a foreign arbitral institution or a foreign court as the exclusive institution of competent jurisdiction for the resolution of contractual disputes, this would increase the foreign investors' confidence in investing in China, relieve some of the pressure that the Chinese courts might face at the early stage of China's accession to WTO and will provide opportunities for Hong Kong lawyers. The Secretary of Justice, Ms.

Elsie Leung has recently²⁷ suggested that such parties or such joint ventures should be encouraged to negotiate and execute their contracts in Hong Kong, choose the law of Hong Kong as the applicable law and the court or the arbitral institutions of Hong Kong as the forum for dispute resolution.

68. The proposal is considered as feasible. Firstly, foreign businessmen will find it appealing. It is internationally recognized that the legal system of Hong Kong is comparatively sound. It adopts the common law, with which foreign businessmen in general are familiar. Arbitral awards obtained in Hong Kong are enforceable in the Mainland through the recently amended *Arbitration Ordinance*, and in other member states through the New York Convention.

69. Secondly, the proposal is beneficial to China. Should foreign businessmen insist on using foreign law as the applicable law and a foreign court as the venue for resolution of disputes, the Chinese parties may as well choose the courts and the laws of Hong Kong as the applicable law. Hong Kong lawyers should be willing to transfer their expertise to their colleagues in the Mainland and help develop the legal professions of both places.

70. The proposal when implemented will be most beneficial to Hong Kong. Apart from bringing new opportunities to Hong Kong lawyers, the proposal will strengthen the status of Hong Kong as an international financial and service centre providing strong support to foreign businessmen investing in the China market. The proposal is beneficial to solicitors as well as barristers who, particularly the more junior ones, will have greater opportunities to provide their professional services.

(III. 7) Changes to the Law on Intellectual Property

71. On China's accession to the WTO, China has to review the laws on intellectual property to see if they comply with obligations set out in the TRIPS.

²⁷ See Opening Address by Ms Elsie Leung, JP, Secretary for Justice, HKSAR, at the Conference on China's Accession to WTO : Implications for Legal Education and Training in Hong Kong on 20 September 2001. See also note 23, ante.

(III. 7.1) *Patent Law*

72. *The Patent Law of the PRC* (*中華人民共和國專利法*) was first introduced in 1984 and was subsequently revised in 1992.²⁸ It was revised for the second time in August 2000.²⁹

73. To bring the *Patent Law* in line with the provisions of the TRIPS, the following major amendments³⁰ were introduced in the second revision:

- (1) To enhance the protection of patent right in China as set out in Article 28 of the TRIPS, “offering for sale” of a patent by a third party without the patent right owner’s consent is prohibited;
- (2) The use and sale of products which infringe patent rights by bona fide third parties are now recognized as acts of infringement. Prior to this amendment, use by bona fide third parties was an exception to infringement. This amendment was made to comply with Article 57 of the TRIPS;
- (3) Patent owners are allowed to apply to courts for an order to stop the infringing act before formal judicial proceeding is initiated. This amendment was made to comply with Article 41 of the TRIPS, which provides for the use of “expeditious remedy to prevent infringement” before commencement of legal proceedings;
- (4) The people’s court, instead of the Review Committee of the State Intellectual Property Rights Office (*國家知識產權局覆審委員會*) shall give final ruling on the review and nullification of utility models, industrial designs or patents.

This amendment was made to comply with Article 32 of the

²⁸ Adopted at the 4th Meeting of the Standing Committee of the 6th NPC on 12 March 1984; the revision was adopted at the 27th Meeting of the Standing Committee of the 7th NPC on 4 September 1992.

²⁹ The 2nd revision was adopted at the 17th Meeting of the Standing Committee of the 9th NPC on 25 August 2000 and came into effect on 1 July 2001.

³⁰ A summary of the major amendments was prepared by Ms Wen Xikai(文希凱), Deputy Secretary General of the Law and Treaty Department of the State Intellectual Property Office of the PRC in an article in *China Law* (*中國法律*), October 2000, pp.20-22.

TRIPS, which provides that there shall be made “an available opportunity for judicial review of any decision to revoke or forfeit a patent”; and

- (5) Changes were made to simplify and improve the procedures of patent examination and approval to bring them in line with the requirement of the TRIPS so that such procedures would be fair and reasonable and not be too complicated or costly.

(III. 7.2) Copyright Law 著作權法

74. The *Copyright Law of the PRC* (中華人民共和國著作權法)³¹ was promulgated in 1991 which provides a legal framework for the protection of the creation of a work or copyright.

75. To ensure the implementation of international copyright treaties in China, the State Council issued the *Regulations on the Implementation of International Copyright* (實施國際著作權條約的規定) on 30 September 1992.

76. The *Regulations for the Protection of Computer Software* (計算機軟件保護條例) were also promulgated by the State Council for the protection of computer software. It came into effect in October 1991.

(III. 7.3) Trademark Law 商標法

77. The protection of trademark in China is regulated by the *Trademark Law of the PRC* (中華人民共和國商標法). It was adopted³² in August 1982 and was amended in February 1993.

(III. 7.4) Other Protection of Intellectual Property Rights

78. In July 1995, the State Council issued the *Regulations on Customs Protection of Intellectual Property Rights* (中華人民共和國知識產權海關保護條例). Under the *Regulations*, the Chinese Customs is empowered to investigate and handle goods which infringe intellectual property rights when the rights holder applies to put the case on record at the Chinese Customs.

³¹ Adopted at the 15th Meeting of the Standing Committee of the 7th NPC on 7 September 1990, effective as of 1 June 1991.

³² Adopted at the 24th Meeting of the Standing Committee of the 5th NCP on 23 August 1982.

79. The new *Criminal Law of the PRC* which came into effect on 1 October 1997 introduces a crime of “*infringement of intellectual property right*”, thus making infringement act of intellectual property rights punishable both under civil and criminal laws.

80. The legal framework of intellectual property right protection in China is now generally compatible with the requirements of the TRIPS. However, efforts will have to be made to review the laws and regulations on intellectual property to ensure full conformity with the WTO requirements.

(III. 8) Major Changes to Laws Governing Foreign Direct Investment in China

(III. 8.1) Amendments to the main laws and implementation provisions on Foreign Direct Investment

81. Under the Mainland laws, foreign direct investment is mainly governed by the following pieces of legislation :

- (i) the *Law of the PRC on Sino-Foreign Equity Joint Venture Enterprises* (*中華人民共和國中外合資經營企業法*)³³;
- (ii) the *Law of the PRC on Sino-Foreign Co-operative Joint Venture Enterprises* (*中華人民共和國中外合作經營企業法*)³⁴; and
- (iii) the *Wholly Foreign-owned Enterprises Law* (*中華人民共和國外資企業法*)³⁵.

82. Under the “Agreement on Trade-Related Investment Measures” (TRIMS) (與貿易有關的投資措施協議)³⁶ under the WTO, it is provided that contracting states shall not :

- (i) limit import through requirements for foreign exchange balancing;
- (ii) impose whatever limits upon the enterprises that they should only

³³ Adopted at the 2nd Session of the 5th NPC in July 1979, revised and promulgated at the 3rd Session of the 7th NPC on 4 April 1990, effective as of the same date.

³⁴ Adopted and promulgated at the 1st Session of the 7th NPC on 13 April 1988, effective as of the same date.

³⁵ Adopted and promulgated at the 4th Session of the 6th NPC on 12 April 1986, effective as of the same date.

³⁶ Article 2 of the TRIMS

purchase and use products manufactured or supplied by local resources; and

- (iii) impose limits on the export of the products of the foreign investment enterprises in terms of quantities, value or shares.

83. Contrary to the provisions of the TRIMS, the old laws of foreign investment require that :

- (i) the foreign enterprises shall maintain a balance between the foreign exchange spending on import and the foreign exchange income³⁷;
- (ii) the enterprises should give priority to Chinese products for procurement market³⁸; and
- (iii) the foreign enterprises must export their products in full or in majority³⁹.

84. In October 2000, amendments to the *Law of the PRC on Sino-Foreign Co-operative Joint Venture Enterprises* and the *Wholly Foreign-owned Enterprises Law* were approved and adopted⁴⁰. In March 2001, the *Law of the PRC on Sino Foreign Equity Joint Venture* was also revised⁴¹.

85. The effect of the amendments of the three laws was that the old provisions limiting import through foreign exchange balancing, limiting the purchase of Chinese products and the restriction in exporting the products have all been lifted.

86. In April 2001, amendments were also adopted by the State Council to the *Implementation Provisions on the Law of the PRC on Wholly Foreign-owned Enterprises* (中華人民共和國外資企業法實施細則) (the “*Implementation Provisions on WFOE*”).

³⁷ Article 20 of the *Law of the PRC on Sino-Foreign Co-operative Joint Venture Enterprises Law* and Article 18(3) of the *Wholly Foreign-owned Enterprises Law*

³⁸ Article 9(2) of the *Law of the PRC on Sino-Foreign Equity Joint Venture Enterprises* and Article 15 of the *Wholly Foreign-owned Enterprises Law*

³⁹ Article 3(1) of the *Wholly Foreign-owned Enterprises Law*

⁴⁰ The amendments were adopted at the 18th Meeting of the Standing Committee of the 9th NPC.

⁴¹ The revision was adopted at the 4th Meeting of the 9th NPC held on 14 March 2001.

87. Under the amended *Implementation Provisions on WFOE*, the old provisions limiting import through foreign exchange balancing, limiting the purchase of Chinese products and the restriction in exporting the products have all been lifted.

88. Before amendment, Article 3 of the *Implementation Provisions on WFOE* provides that the WFOEs had to be either technologically advanced enterprises or export-oriented with at least 50% of the value of its total product output. The *Implementation Provisions on WFOE* has now been amended so that a newly formed WFOE need not necessarily satisfy either of these two criteria. It is sufficient if the WFOE *benefits the development of the PRC national economy* and be *capable of achieving significant economic results*, although the establishment of technologically advanced enterprises or export-oriented enterprises is still particularly encouraged.

89. In August this year, *the Implementation Provisions of the Law of the PRC on Sino-Foreign Equity Joint Venture Enterprises (中華人民共和國中外合資經營企業法實施條例)*⁴² (the “*Implementation Provisions on SFEJVE*”) were also amended by the State Council.

90. In answering the queries on the background of the amendments to *Implementation Provisions on SFEJVE*, the spokesmen of the Ministry of Foreign Trade and Economic Co-operation and the Legal Affairs Office of the State Council⁴³ advised that most of the amendments were made in order to comply with the principle of “*National Treatment*” under the WTO.

91. Under the amended *Implementation Provisions on SFEJVE*, the joint venture enterprises now:

- (i) have the discretion to purchase machineries, raw materials, fuel, transport utilities and office appliances etc. either in China or abroad⁴⁴;
- (ii) have the discretion to export their products in whole or in part⁴⁵;

⁴² Promulgated by the State Council on 20 September 1983, amended on 21 December 1987.

⁴³ See Legal Daily (法制日報), 3 August 2001.

⁴⁴ Article 51 of the amended *Implementation Provisions on SFEJVE*

⁴⁵ Article 53 of the amended *Implementation Provisions on SFEJVE*

- (iii) enjoy the same treatment as enjoyed by local enterprises in the price of the materials purchased in China and other service charges⁴⁶.

92. The amended *Implementation Provisions on SFEJVE* also streamlined the procedure for the setting up of sino-foreign equity enterprises. Under Article 7 of the amended provisions, the registration for application can now be submitted by the equity parties to the joint venture in their joint names. The Chinese party is no longer required to submit a proposal and a feasibility report beforehand for the preliminary approval of the relevant authority before the formal application can be submitted.

93. The amended provisions also deleted the requirement that the joint venture enterprise shall be under the supervision of a supervising authority (主管部門) which will provide guidance, assistance and supervision to the joint venture enterprises. This amendment aims to ensure the autonomy of the joint venture enterprises and that the government will not interfere with the daily operation and management of the enterprises.

(III. 8.2) *Impact of the Important Changes to the Laws Governing Foreign Direct Investment in China*

94. The amendments to the relevant laws governing foreign direct investment serve to ensure that the Mainland laws governing foreign direct investment comply with the important principles under the WTO Agreements such as the “*National Treatment*” principle.

95. The amendments also have the effect of reducing the intervention of the government authorities in the set up and the operation of the joint venture or foreign enterprises to make it more in line with international trade practice.

96. It is commented that the identification of the areas where government interference should become unnecessary as well as the “hand over” of such areas to the market private sector will serve to disentangle the government from trade activities and ultimately facilitate the process of China’s transformation into a market economy⁴⁷.

⁴⁶ Article 56 of the amended *Implementation Provisions on SFEJVE*

⁴⁷ Martin G Hu, “WTO’s Impact on the Rule of Law in China”, *The Rule of Law : Perspectives from the Pacific Rim*, Mansfield Centre for Pacific Affairs 2000, pp.101-105.

97. Foreign investors can now be sure that when they set up enterprises in China, they will be treated on the same footing as local enterprises.

(IV) Major Driving Forces

(IV. 1) Compliance with the Principle of “Transparency”

98. The principle of “*Transparency*” is spelled out in many of the agreements of the WTO. Examples include :

(1) *Article X of the GATT*, which requires that:

- (i) Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the different specified matters shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

(2) *Article III of the GATS*, which requires that:

- (i) Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of the agreement;
 - (ii) Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, law, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under the agreement;
 - (iii) Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request on all such matters.
-

Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO.

(3) *Article 63 of the TRIPS*, which requires that:

- (i) Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of the agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them;
- (ii) Members shall notify the Council for TRIPS of the relevant laws and regulations in order to assist that Council in its review of the operation of the agreement;
- (iii) Each Member shall be prepared to supply, in response to a written request from another Member, the requested information. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

99. These Articles in the WTO Agreements impose high standard of compliance concerning the “transparency” of the laws and information regarding the obligations under the Agreements of the WTO.

100. To comply with the WTO requirement that the laws and policies regulating foreign trade and economic activities will be “transparent” enough for the perusal and information of its members, Mr Long Yongtu (龍永圖副部

長), Deputy Minister of Foreign Trade and Economic Co-operation (中國對外貿易經濟合作部) said that the Chinese Government will appoint consultants on laws and regulations for foreign trade and economic activities as well as reform measures to offer accurate, reliable legal information to WTO members, enterprises and individuals.⁴⁸

101. On another occasion⁴⁹, Mr Long confirmed that steps are also being taken to establish a new office or agency from which any individual or enterprise may request information regarding existing and proposed PRC laws, regulations and other measures in relation to the implementation of the WTO Agreements. Replies to such enquires by individuals or enterprises must be provided to them within 30 to 45 days.

102. Mr Long also confirmed that the government is in the course of establishing an official journal in which other WTO members, individuals and enterprises, can obtain current information regarding existing and proposed PRC laws, regulations and other measures in relation to the implementation of the WTO Agreements. The Protocol Of Accession that China must sign and agree to prior to accession to the WTO mandates the creation of such a journal.⁵⁰ Where laws and regulations are being proposed, a reasonable period will be provided for interested parties to comment on the proposals.⁵¹

103. According to a commentator⁵², to further comply with WTO requirements, China is also in the process of establishing a quasi-judicial body to hear complaints of administrative misconduct by PRC governmental agencies in connection with the “..implementation of laws, regulations, judicial decisions and administrative rulings of general application..”⁵³ relating to “import and export licenses, application of measures for safeguard or balance-

⁴⁸ See “Further Improvement of China’s Legal Environment for Foreign Trade and Economic Activities” by Cao Qihong, *China Law (中國法律)* February, 2001, pp.54-55.

⁴⁹ Speech by Mr Long Yongtu at a Conference held in Hong Kong entitled “Conference on Investment Policy in China 2000 (2000 中國投資政策研討會)” in December 2000; see also the report in “World Trade Organization Focus”, *Journal of Shanghai Institute of Foreign Trade* No.3 2001,p.29.

⁵⁰ Protocol On China, Paragraph 2(C)2, World Trade Organization (Geneva:1997), p.3

⁵¹ Ibid.

⁵² See an article by Sean Leonard, “WTO-What’s the Hold-Up?”, *China Law and Practice* April 2001 pp.53-56.

⁵³ Protocol On China, Paragraph 2(D) 1, World Trade Organization (Geneva:1997), p.4

of-payments purposes or to protect against unfair trade, and any other measures within the scope of the WTO Agreement⁵⁴, as well as those referred to in the TRIPs and GATS.⁵⁵ Decisions of this new tribunal shall be appealable as of right to a judicial body.⁵⁶

104. With the introduction of these measures, investors can have access to the laws and regulations and all other information concerning foreign trade in China.

(IV. 2) *Compliance with the “Fair Competition” Principle : Anti-dumping Legislation*

105. Article VI of the GATT defines “Dumping” as “Products of one country are being introduced into the commerce of another country at less than the normal value of the products”.

106. Acts of dumping are inconsistent with “fair competition” and hence “anti-dumping” measures are provided in the GATT. In compliance with this requirement of the GATT, China has accelerated its place in anti-dumping legislation.

107. On 25 March 1997, the State Council promulgated the *Anti-dumping and Anti-subsidy Regulations of the PRC* (*中華人民共和國反傾銷和反補貼條例*), which became the first anti-dumping law in China.

108. The *Regulations* provide for the definition of dumping, anti-dumping investigations, anti-dumping measures and anti-subsidy provisions etc, which are in line with international rules.

(V) *Opening Up of Government Procurement Market*

109. In the WTO negotiations, the Chinese Government has promised to open its government procurement market no later than 2020.⁵⁷ However, China has not yet committed itself to the “Agreement on Government Procurement” which is one of Plurilateral Trade Agreements under Annex IV to

⁵⁴ Ibid., Para 2(D)2, p.4

⁵⁵ Ibid., Para 2(D)3, p.4

⁵⁶ Ibid., Para 2(D)4, p.4

⁵⁷ China Finance and Economy Newspaper (*中國財經*) February 2001

the Agreement Establishing the WTO. There is also at present no legal provision requiring China to open its government procurement market.⁵⁸ The main purpose for formulating a unified national *Government Procurement Law*, is to establish a *competitive, transparent and non-discriminatory* government procurement system, thus increasing the service efficiency of public funds and promoting the efficiency of government administration and public services.⁵⁹

110. The Chinese government is now also in the course drafting a uniform *Government Procurement Law of the People's Republic of China* (中華人民共和國政府採購法). This piece of important legislation was drafted by the NPC Finance & Economy Committee as specified by the Ninth NPC legislative plan as Class I legislative project. The preliminary draft of the *Law* was delivered in October 2000 by the Drafting Committee. The revised draft will be worked out and delivered to the Standing Committee of the National People's Congress for review before the end of 2001.⁶⁰

(VI) Catalyst to Legal Reform in China

111. The world is setting its eyes closely on the progress and pace of the legal reform in China. We have already seen that China is undergoing an unprecedented change and reform in its legal system in preparation for her imminent accession to the WTO.

112. Apart from the changes in the legal system, we also witness a change in the functions of the government, displaying a high degree of transparency in legislation, law enforcement and the activities of the executive branches.

113. In a sense, the legal reform in preparation for the accession to the WTO forms part of the transformation from a "centrally planned economy" to a "market economy".

114. It has been commented⁶¹ that in an economy where the government plans everything, produces everything, takes everything, and distributes

⁵⁸ See "Government Procurement and its Legislation in China" by Yu An, *China Law* (中國法律) April, 2001. p.74.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ See note 47, ante.

everything, there is indeed no need to draw the legal boundary between the governing and the governed, not only from the perspective of the government, but also from that of the governed. However, the external market forces to be introduced into China upon accession to the WTO will surely accelerate China's legal reform.

115. Undoubtedly, China is now an inalienable part of the world economy. China's accession to the WTO would not only bring about her integration to the market economy of the world, but also provide an invaluable opportunity to reform her systems to meet the requirements of a market economy of world standard.