Article

Mission (Im)Possible? Could the WTO Save Chinese Courts?

Chien-Huei Wu*

ABSTRACT

This article examines China's WTO obligation to provide an independent and impartial judicial review. It starts with the analysis of the legal text and the existent jurisprudence in the WTO law. After this analysis, I find that the existent WTO law and jurisprudence does not offer clear guidance with regard to this obligation. I then argue in this article that international and regional standards of independence and impartiality of courts can offer insight for the interpretation of this obligation. Various case laws laid down by European Court of Human Rights are also relevant. After ascertaining the criteria to be applied, I then examine the existent progress made by China in order to fulfill its WTO obligation, focusing mainly on the administration of justice; the interaction between legislative interpretation and judicial interpretation; the adjudicative committee; and the case guidance system. I then conclude the existent practices in Chinese courts will not be able to pass the scrutiny of the Panel and the Appellate Body of the WTO, and point to some fundamental problems in relation to Chinese courts.

Keywords: *WTO, Judicial Independence, Impartiality, Judicial Review*

---

* Ph D Candidate European University Institute (EUI) at Florence. E-mail: chien-huei.wu @eui.eu. An earlier draft was presented in 2007 Joint Meeting of the Law and Society Association and the Research Committee on Sociology of Law (ISA), in Berlin. The author wishes to thank participants in 4114 session. The author also wishes to thank Professor Ernst-Ulrich Petersmann for his valuable comments on the earlier draft and for his continuous encouragement. Further, the author is greatly appreciative of the valuable comments and suggestions of anonymous reviewers. Nevertheless, any error remains my own. Before this acknowledgement becomes too long, I also want to thank Professor Tzong-Li Hsu and Chang-Fa Lo for their benevolence both in my studies and in my difficult decision of future career. Being a Doctoral student, and at the same time, a father, a son and a husband is never an easy thing. I want to express my deepest gratitude for my parents, my love to my son and my daughter, and most importantly, my gratefulness to the endless companion and support of my wife.

CONTENTS

I. INTRODUCTION

China's accession to the World Trade Organization (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 with regard to the independent judicial review. 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 the WTO law and to Chinese legal system.

With regard the WTO law, this "independent judicial review" obligation prescribed in the *Protocol on the Accession of People's Republic of China to the WTO* (hereinafter 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, the 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] It is claimed that "the WTO Agreement is 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, shortly

---

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* DEEPAK BHATTASALI ET AL., *Impacts and Policy Implications of WTO Accession for China*, *in* CHINA AND THE WTO: ACCESSION, POLICY REFORM, AND POVERTY REDUCTION STRATEGIES 1 (Deepak Bhattasali et al. eds., 2004).

2. ERNST-ULRICH PETERSMANN, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, *in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 32-33 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006). 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 the 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. ERNST-ULRICH PETERSMANN, DISPUTE PREVENTION, DISPUTE SETTLEMENT AND JUSTICE IN INTERNATIONAL ECONOMIC LAW (Forthcoming).

after China's entry into the WTO, the vice-president of the Supreme People's Court delivered a speech on "China and the rule of law," stating 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 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 fulfill its WTO obligation. It is pointed out that 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 Dispute Settlement Mechanism in the WTO for legal redress, presents a great pressure for China and forces it to implement meaningful reform to establish an independent judicial review.[5] In other words, the binding nature of this WTO obligation and the potential sanction for non-compliance compel China to take more seriously its legal obligation of the independent judicial review and to effectively enforce it.

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

> "[A]ccording 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."

---

4. Jianming Cao, *China and the Rule of Law*, 16 TEMP. INT'L & COMP. L.J. 379, 379 (2002). For updated review of the socialist rule of law with Chinese characteristics, *see*, Jiefin Lee, *Socialist Rule of Law with Chinese Characteristics*, 43 ISSUES & STUDIES 115 (2007).

5. Veron M. Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 120-25 (2004).

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 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 paper aims to examine efforts so far made in relation to China's "independent judicial review" obligation, and to ascertain the compatibility with the WTO requirements. However, it should be noted that this paper does not engage to carry out empirical studies. Progress in relation to "independent 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 paper will not touch upon whether "an independent and impartial tribunal" in accordance with the WTO requirements meets the needs of China's developments. This paper chooses to focus on the conformity of Chinese judicial system with its WTO obligation, as this obligation has already been made. Following this introductory Section, Section II will discuss firstly the role of domestic judicial review in the WTO law, and then examines China's "independent judicial review" obligation. As the existent WTO jurisprudence does not offer a clear answer of what "an independence judicial review" should be, this paper, in Section III, further refers to global and regional standards of "judicial independence"[6] in order to clearly define the nature and scope of this obligation. Section IV will firstly review some major effort in relation to the fulfillment of this obligation, and then goes on to explore what interpretative approach should be taken for this "independent judicial review" obligation, and whether the existing judicial system can pass the scrutiny. A short concluding remark will be provided in the final Section.

6. Various approaches are offered to clarify the concept of "judicial independence." For an empirical study of this topic, *see, e.g.*, BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik G. Jensen & Thomas C. Heller eds., 2003). For an interdisciplinary study, *see, e.g.*, JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002); INDEPENDENCE, ACCOUNTABILITY, AND THE JUDICIARY (Guy Canivet et al. eds., 2006). *See also* studies on judicial independence in the post-communist countries in JUDICIAL INTEGRITY (Andras Sajo ed., 2004).

II. CHINA'S OBLIGATION TO PROVIDE AN INDEPENDENT JUDICIAL REVIEW

A. *Domestic Judicial Review in the WTO Law*

Prior to the establishment of the WTO, it had already been proposed to strengthen domestic enforcements of the GATT rules.[7] During the negotiation process of the Uruguay Round, Switzerland submitted a communication, addressing domestic implementation, to the Negotiation Group on Dispute Settlement.[8] 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, to selectively 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 approached 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."[9]

This proposal intended to widen the scope of the subject matter which was entitled to the procedural protection. It extended the scope of the original GATT 1947 wording "administrative action relating to customs

---

7. *See, e.g.*, ERNST-ULRICH 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* THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1991).

8. GATT Document, MTN.GNG/NG13/W/36 (Jan. 18, 1990), at 4.

9. *Id*.

matters" with more precise and clearer terminology and in a more comprehensive manner. In this proposal, Switzerland argued that Article X:3(b) of the GATT 1947 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 General Agreement on Tariffs and Trade, including non-tariff barriers.[10]

It is submitted that Switzerland's proposal, with the aim to strengthening domestic implementation of international trade rules and to providing effective judicial protection of individuals, had been, to a large extent, adopted in the following negotiation process and had been included into the Uruguay Round Multilateral Trade Agreements.[11] 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.[12]

B. *China's Accession Protocol to the WTO*

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 judicial review. 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

10. *Id.*
11. PETERSMANN, *supra* note 7, at 244.
12. *Id.* at 194.

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 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. But before proceeding to examining these elements, it is feasible to explore the objective and purpose of this obligation. Why is an independent judicial review desirable for WTO members when negotiating for China's accession?[13] The Working Party Report does not provide a clue as it, in Section III.4 (tilted "Judicial Review"), merely reiterates that some members of the Working Party wished independent tribunals to be established.[14] The necessity and justification for such independent tribunals is not fully explained. It is nevertheless clear that members of the Working Party were attached to importance of 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.

With regard to China's "independent 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 made clear that all these three elements, i.e., tribunals, contacts points, and procedures, should be covered in China's implementation 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.[15] Besides, in Article X:3(c) of the GATT,

13. 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 (Central European University Press 2001).

14. Report of Working Party on the Accession of China (hereinafter *Report on the Accession of China*), WT/ACC/CHN/49 (Oct. 1, 2001), paras. 76-77.

15. With regard to the definition of "tribunals," the European Court of Justice has laid down a

it is nevertheless prescribed that existent procedures in force on the date of GATT 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 on the date of the GATT are objective and impartial, it is not required to substitute or eliminate these existing procedures. As the second sentence of the Section 2(D)(1) of China's Accession Protocol clearly stipulates, tribunals in China should be "independent of the agency entrusted with administrative enforcement." 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 the GATS). Nevertheless, such leeway is not available for China.[16]

---

variety of case laws 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 Mijnbedris, 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.

16. Julia Yin Qin, *"WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System*, 37 J.W.T. 483, 495-496 (2003). 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 (hereinafter *Viet Nam's Working Party Report*), WT/ ACC/VNM/48 (Oct. 27, 2006), paras. 235, 243, 409, 430 and 433. In addition, the Protocol of the Accession of the Socialist Republic of Viet Nam to the World Trade Organization is actually a standardized document, just as other accession protocols do. WT/L/662 (Nov. 15, 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 … [S]uch 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 so as to be consistent with the existent requirements covered in the WTO Agreement. The requirement of being "impartial and independent from the agency entrust 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

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." To some extent, the scope of the application is clearly 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 TRIPS Agreement. Yet, it is rather unclear. In addition, as clearly provided in the Working Party Report, the scope of administrative actions in terms of Section 2(D) of the Accession Protocol should also 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."[17] Consequently, such administrative actions should be subject to the prompt review of independent tribunals. The subject matters which Section 2(D) covers are apparently wider that 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 holds:

"If, for instance, the restraint was addressed to a *specific company* or applied to a *specific shipment*, it would not have 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."[18] This view is upheld by the Appellate Body.[19] 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.

---

fact follows the practice of China's Accession Protocol. Given the wider scope and more stringent requirement provided in China's Accession Protocol, the paper thus argues the obligation to provide an independent and impartial judicial review as included in China's Accession Protocol constitutes a "WTO-plus" obligation.

17. Report of Working Party on the Accession of China (hereinafter *Report on the Accession of China*), WT/ACC/CHN/49 (Oct. 1, 2001), para. 79.

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

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

The Accession Protocol also lays down several institutional requirements governing the designation of this "independent judicial review." For example, the right to appeal shall be without penalty;[20] the decision of the appeal should be given to the appellant with reasons provided in writing;[21] the right for further appeals should also be informed;[22] and the tribunal shall have no substantial interests of the outcome of the decision.[23] 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.[24]

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 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 offense. "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 payment of normal court costs and lawyers' fees shall not be considered to be 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

20. China's Accession Protocol, Article 2(D)(2).
21. *Id.*
22. *Id.*
23. China's Accession Protocol, Article 2(D)(1).
24. For the WTO-plus obligations in relation to China's accession to the WTO, *see, e.g.*, Qin, *supra* note 16.

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 Section 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 criterions 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 to effectively 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." Having 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, the panel addresses the term "impartial" in *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*. Although it is related 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 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 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,"[25] and whether any interested party takes advantage in this process to "obtain confidential information to which they have no right."[26]

However, the above somehow "textual" analysis seems not to provide a clear picture and satisfactory answer of what the "independent 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 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 so as to correctly 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 ("US – Gasoline")*, clearly holds that the WTO Agreements are "not to be read in clinical isolation from public international law."[27]

In US – Gasoline, the Appellate Body refers to Article 31 of the Vienna Convention on the Law of Treaties (the VCLT) for "general rule of interpretation." According to the Appellate Body, this general rule of interpretation has attained the status of a rule of customary or general international law.[28] The Appellate Body further notes that, the general rule of interpretation with its status of a rule of customary or general international

25. 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 Feb. 16, 2001, para. 11.99.

26. *Id*. para. 11.100.

27. Appellate Body report, *United States – Standards for Reformulated and Conventional Gasoline* ("*U.S. – Gasoline*"), WT/DS2/AB/R, adopted Apr. 29, 1996, at 17. Besides, as the preamble of Vienna Convention on the Law of Treaties 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 of Human Rights, to which China may (and may not) be a contracting party or not. The author owes this point to Professor Petersmann.

28. In footnote 34 of the report, the Appellate Body cites a number of judgments delivered by International Court of Justice, European Court of Human Right, and Inter-American Court of Human Rights to justify this argument. Besides, the Appellate Body also refers to relevant literature to support it interpretation. WT/DS2/AB/R, footnote 34.

law, forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the *DSU*[29] to apply when clarifying provisions covered in the WTO Agreements. The Appellate Body then concludes that the direction dictated by Article 3.2 of the *DSU* recognize that the WTO Agreements are "not to be read in clinical isolation from public international law."

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 VCLT 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." 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."[30]

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

29. Article 3.2 of the DSU provides: [T]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and *to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.* Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements (emphasis added).

30. 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 Nov. 21, 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.

covered agreements in light of public international law.[31]

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")*,[32] 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 the VLCT[33] opines that its task is to "is to interpret the language of the chapeau [of Article XX of the GATT 1994], seeking additional interpretative guidance, as appropriate, from the general principles of international law."[34] 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 VCLT. 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 that "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."[35]

Lastly, one should also distinguish the difference between the

---

31. The author wishes to express his gratitude to the anonymous reviewer's comment on this insightful and philosophical interpretation issue. It also helps the author to closely bridge the second section and the third section.

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

33. Article 31(3)(c) of the VCLT 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."

34. *Id*. para. 158.

35. Panel report, *EC – Approval and Marketing of Biotech Products*, para. 7.70. According this holding, while the author acknowledges its potential weakness in introducing the jurisprudence in the European Court of Human Right in interpreting China's *WTO* obligation to provide an independent and impartial judicial review, it also arguable that those core human rights, right to a fair trial in this present case, as enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention of Human Rights) and its five protocols attain the status of general principles of international law. Further, even in terms of the cautious approach taken by the Panel on *EC – Approval and Marketing of Biotech Products*, those universal declarations, and those regional standards and instruments in which China participates, should be of great relevance in interpreting its own obligation, even in the realm of the WTO law.

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 the legal basis of the Panel/Appellate Body's ruling stems from and is limited to.

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 judicial review. 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 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 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. But before proceeding to examining these elements, it is feasible to explore the objective and purpose of this obligation. Why is an independent judicial review desirable for WTO members when negotiating for China's accession?[36] The Working Party Report does not provide a clue as it, in Section III.4 (tilted "Judicial Review"), merely reiterates that some members of the Working Party wished independent tribunals to be established.[37] The

36. *See* Open Society Institute, *supra* note 13.
37. *See* Report on the Accession of China, *supra* note 14.

necessity and justification for such independent tribunals is not fully explained. It is nevertheless clear that members of the Working Party were attached to importance of 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.

With regard to China's "independent 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 the 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 made clear that all these three elements, i.e., tribunals, contacts points, and procedures, should be covered in China's implementation measures for this obligation. Although tribunals are usually connected with procedures, however, as the 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.[38] Besides, in Article X:3(c) of the GATT, it is nevertheless prescribed that existent procedures in force on the date of the GATT 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 on the date of the GATT are objective and impartial, it is not required to substitute or eliminate these existing procedures. As the second sentence of the Section 2(D)(1) of China's Accession Protocol clearly stipulates, tribunals in China should be "independent of the agency entrusted with administrative enforcement." 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 the GATS). Nevertheless, such leeway is not available for China.[39]

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

38. *See* Vassen v. Mijnbedris, *supra* note 15.

39. *See* Qin, *supra* note 16. *See also* Viet Nam's Working Party Report, *supra* note 16. *See also* the Protocol of the Accession of Socialist Republic of Viet Nam to the World Trade Organization, *supra* note 16.

GATS and the relevant provisions of the TRIPS Agreement." To some extent, the scope of the application is clearly 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 addition, as clearly provided in the Working Party Report, the scope of administrative actions in terms of Section 2(D) of the Accession Protocol should also 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."[40] Consequently, such administrative actions should be subject to the prompt review of independent tribunals. The subject matters which Section 2(D) covers are apparently wider that 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 holds:

> "If, for instance, the restraint was addressed to a *specific company* or applied to a *specific shipment*, it would not have 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."[41] This view is upheld by the Appellate Body.[42] 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 judicial review." For example, the right to appeal shall be without penalty;[43] the decision of the appeal should be given to the appellant with reasons provided in writing;[44] the right for further appeals should also be informed;[45] and the

40. *See* Report on the Accession of China, *supra* note 14, at 79.
41. *See* United States' Panel Report – Restrictions on Imports, *supra* note 18.
42. *See* Appellate Body Report, *supra* note 19.
43. *See* China's Accession Protocol, *supra* note 20.
44. *Id.*

tribunal shall have no substantial interests of the outcome of the decision.[46] 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.[47]

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 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 offense. "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 payment of normal court costs and lawyers' fees shall not be considered to be 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 Section 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 criterions are

45. *Id.*
46. *See* China's Accession Protocol, *supra* note 23.
47. *See* Qin, *supra* note 16.

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 to effectively 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." Having 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, the panel addresses the term "impartial" in *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*. Although it is related 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 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 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,"[48] and whether any interested party takes advantage in this process to "obtain confidential information to which they have no right."[49]

However, the above somehow "textual" analysis seems not to provide a

48. *See* Argentina – Hides and Leather, *supra* note 25.
49. *Id*. para. 11.100.

clear picture and satisfactory answer of what the "independent 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 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 so as to correctly 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 ("US – Gasoline")*, clearly holds that the WTO Agreements are "not to be read in clinical isolation from public international law."[50]

In *US – Gasoline*, the Appellate Body refers to Article 31 of the Vienna Convention on the Law of Treaties (the VCLT) for "general rule of interpretation." According to the Appellate Body, this general rule of interpretation has attained the status of a rule of customary or general international law.[51] The Appellate Body further notes that, the general rule of interpretation with its status of a rule of customary or general international law, forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the *DSU*[52] to apply when clarifying provisions covered in the WTO Agreements. The Appellate Body then concludes that the direction dictated by Article 3.2 of the *DSU* recognize that the WTO Agreements are "not to be read in clinical isolation from public international law."

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 VCLT provides that "[A] treaty shall

50. *See* U.S. – Gasoline, *supra* note 27.

51. In footnote 34 of the report, the Appellate Body cites a number of judgments delivered by International Court of Justice, European Court of Human Right, and Inter-American Court of Human Rights to justify this argument. Besides, the Appellate Body also refers to relevant literature to support it interpretation. WT/DS2/AB/R, footnote 34.

52. Article 3.2 of the DSU provides: [T]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and *to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.* Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements (emphasis added).

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."[53]

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.[54]

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")*,[55] 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 the VLCT[56] opines that its task is to "is to interpret the language of the chapeau [of Article XX of the GATT 1994], seeking additional interpretative guidance, as appropriate, from the general principles of international law."[57] 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 VCLT. 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

53. *See* EC – Approval and Marketing of Biotech Products, *supra* note 30.

54. The author wishes to express his gratitude to the anonymous reviewer's comment on this insightful and philosophical interpretation issue. It also helps the author to closely bridge the second section and the third section.

55. *See* US – Shrimps, *supra* note 32.

56. Article 31(3)(c) of the VCLT 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."

57. *Id.* para. 158.

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 that "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."[58]

Lastly, one should also distinguish the difference 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 the legal basis of the Panel/Appellate Body's ruling stems from and is limited to.

C. *The Possibility of A Complaint in the WTO and Approach for the Interpretation of WTO-plus Obligation*

Before proceeding to the discussion of the standard of review to be employed in the WTO Panel/Appellate Body, it should be clarified the possibility of a complaint in the WTO with regard to this obligation, and the potential approach taken by the WTO Panel/Appellate Body on this WTO-plus obligation. 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, it is reasonable to expect that a complaint in relation to the impartiality and independence of courts is likely to come.

Besides, in the WTO jurisprudence, there are also complaints in relation

58. *See* Panel report, EC – Approval and Marketing of Biotech Products, *supra* note 35.

to particular judgments of domestic courts.[59] Although complaints with regard to substantive obligations should be dealt with independently from the claim based upon the violation of "independence" and "impartiality" of judicial review,[60] it is highly possible that the claim based upon the violation of the general obligation with regard to the independence and impartiality of Chinese courts comes along with the claim upon the violation of particular obligations or commitments.

Furthermore, in *China – Measures Affecting Imports of Automobile Parts ("China – Automobile Parts")*,[61] obligations and commitments provided in the China's Accession Protocol are referred to by the complainants.[62] 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 – Measures Affecting the Protection and Enforcement of Intellectual Property Rights ("China – Intellectual Property Rights")*.[63] These jurisprudential developments indicate that not only the

59. 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 precisely "a conclusion by a court on the basis of 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 Feb. 1, 2002, paras. 203-232.

60. The relationship between substantive obligation and Article X was firstly touched upon in *European Communities – Regime for the Importation, Sale and Distribution of Bananas.* The Appellate Body, when addressing Article X:3(a), the Appellate Body holds in *European Communities – Regime for the Importation, Sale and Distribution of 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 Sept. 25, 1997, para. 200. In *European Communities – Measures Affecting the Importation of Certain Poultry Products*, 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 July 23, 1998, para. 115.

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

62. 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 (Sept. 18, 2006), at 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 – Tax Refunds*), *see* WTO document, WT/DS358/13(July 13, 2007), WT/DS359/13 (July 13, 2007).

63. WTO document, WT/DS362/1 (Apr. 16, 2007), para. 1(2); WT/DS/362/7 (Aug. 21, 2007),

result of a particular judgment of national courts is subject to the review of the WTO Panel/Appellate Body, but judicial interpretations by Chinese Supreme People's Courts, a particular designation where the judicial interpretations enjoy the legal status of Chinese national law, are also to be scrutinized by the WTO Panel/Appellate Body. It is thus reasonable to expect that the complaint with regard to the independence and impartiality of Chinese courts is soon to come.

Lastly, regarding the interpretative approach taken by the WTO Panel/Appellate Body on this obligation,[64] it should be firstly pointed to the importance of the Article 31 of the VCLT, in particular "good faith." This approach is consistent with the established jurisprudence of the WTO Panel/Appellate Body. Further, the Panel on *China – Automobile 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.[65] 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."[66]

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 – Automobile Parts* basically follows the existent practice of the WTO

---

paras. 1(2), 1(3). The Panel for *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights* has been established on Sept. 25, 2007.

64. For different approaches to interpret China's "WTO-plus" obligation, *see, e.g*., Dongli 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*, 40 J.W.T. 137 (2006). *See also*, Thomas Weishing Huang, *Taiwan's Protocol 16 Special Safeguard and Anti-dumping Enforcement on Imports from China*, 41 J.W.T. 371 (2002). 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.

65. Panel Report on *China – Automobile*, WT/DS339/R, WT/DS340/R, WT/DS342/R (July 18, 2008), para. 7.740.

66. *Id*. para. 7.741.

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 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.[67]

III. GLOBAL AND REGIONAL STANDARDS IN RELATION TO 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 to further 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, consequently China's WTO obligation in relation to "independent judicial review." As previously noted, these two concepts are interrelated, and some jurisprudence has the tendency to examine these two concepts together.[68] 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, 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.

---

67. The author is deeply appreciative of the anonymous reviewer's comment in relation to the impetrative approach. Also owing to the availability of the Panel report on *China – Automobile Parts*, the author is thus is a better position to reflect this interpretative issue. The reviewer's comment helps the author to closely link the second and third section, and to strengthen my argument on the relevance of global and regional standards of judicial independence and impartiality in interpreting China's WTO obligation to provide an independent and impartial judicial review.

68. *See, e.g.*, *Findlay v. the United Kingdom*, para. 73.

A. *Independence*

1. *Institutional Independence*

The *Basic Principles on the Independence of Judiciary* (hereinafter the UN Principles)[69] 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.[70] 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*[71] (hereinafter the Council of Europe Recommendation). It is provided that, apart from the guarantee of Convention for the Protection of Human Rights and Fundamental Freedoms, the independence of judges should also be explicitly guaranteed in national constitutional principles.[72]

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, judiciary should have jurisdiction over all judicial issues, and it is the judiciary who determines whether a case falls within its competence as defined by law.[73] Besides, the finality of judicial decisions should be respected; they can not be revised by other branches.[74] The *Draft Universal Declaration on the Independence of Judiciary* (hereinafter "the Draft Declaration")[75] 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.[76]

---

69. 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 Aug. 26, to Sept. 6, 1985 and endorsed by General Assembly resolution 40/32 of Nov. 29, 1985 and 40/146 of Dec. 13, 1985.

70. The UN Principles, Principle 1.

71. 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 Oct. 13, 1994 at 518th of the Minister's Deputies.

72. The Council of Europe Recommendation, Paragraph 2(a).

73. The UN Principles, Principle 3.

74. The UN Principles, Principle 4.

75. Draft Universal Declaration on the Independence of Judiciary, also known as Singhvi Declaration.

76. 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),

Therefore, displacement of the jurisdiction, previously vested in the ordinary courts, by ad hoc tribunals are not permissible.[77] 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*[78] (hereinafter "*the African Union Principles and Guidelines*") deal with this 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)[79], 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.

The finality of judicial decisions should also be ensured so as 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.[80] That is, the juridical validity of judicial decisions and their status as *res judiciata* should not subject to actions of other branches, no matter whether such actions change or confirm the

---

provides that "the judiciary has the jurisdiction, directly or by way of review, over all issues of a justiciable nature."

77. *Id.*

78. 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 July 4-12, 2003.

79. 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.

80. 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.

judicial decisions concerned.[81] Legislative intervention with the aim to bringing about 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 European Court of Human Rights has dealt with both the jurisdiction and finality issues. In *Papageorgiou v. Greece*,[82] the Court was requested to declare that Greece infringed Article 6(1) of the European Convention of 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*,[83] 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."[84] 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."[85] The Court then examined the case at dispute, where it ruled that with the passage of 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.[86] 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, Andredis

---

81. INTERNATIONAL COMMISSION OF JURISTS (ED.), INTERNATIONAL PRINCIPLES ON THE INDEPENDENCE AND ACCOUNTABILITY OF JUDGES, LAWYERS AND PROSECUTORS: A PRACTITIONERS' GUIDE 23 (International Commission of Jurists. 2004).

82. *Papageorgiou v. Greece*, ECtHR judgment of Oct. 22, 1997, Series of 1997-VI.

83. *Stran Greek Refineries and Stratis Andreadis v. Greece*, ECtHR judgment of Dec. 9, 1994, Series of A, no. 335-A.

84. *Papageorgiou v. Greece*, para. 37.

85. *Id*. para. 37.

86. *Id.* paras. 38-40.

concluded a construction contract with the Greek government, which was then a military regime. Stran Greek Refineries, Andredis 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 both in the arbitration and civil judicial procedures. Both proceedings, to a substantial extent, were found against the state.[87] 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 April 21, 1967 and July 24, 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 April 21, 1967 and July 24, 1974, ratified by statute and terminated by virtue of Law no. 141/1975, are now proclaimed time-barred.
> 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.[88] However, the plenary

87. *Id.* paras. 6-18.
88. *Id.* para. 21.

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,"[89] and that "[T]he 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."[90] Basing on this reasoning, the Court of Cassation held Article 12 of Law no. 1701/1987 constitutional, and ruled against the applicant.

Before the European Court of Human Rights, 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.[91] 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 the 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.[92] 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 the imminent outcome of proceedings in which it was a party was favourable to it"[93] 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 European Court of Human Rights has also touched upon this. In *Findlay v. the United Kingdom*,[94] 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.[95] Besides, members of the court martial were subordinate in rank to the

89. *Id.* para. 22.
90. *Id.*
91. *Id.* para. 42.
92. *Id.* para. 43
93. *Id.* para. 50.
94. *Findlay v. the United Kingdom*, ECtHR judgment of February 1997, Series 1997-I.
95. *Id.* para. 74.

convening officer.[96] Above all, the convening officer had the power, in certain circumstances, to dissolve the court martial both before and during the proceeding. The convening officer even acted as a "confirming officer;" without his ratification the decision of the court martial could not be effective.[97] 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]."[98] 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 both from 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 reason."[99] In decision-making, a judge should be able to pronounce its decision freely. No mater 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.[100] 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.[101]

Individual independence is also closely related to the administration of justice.[102] As pointed out, the institutional independence and the individual independence may not be always complementary to each other.[103] The

96. *Id.* para. 75.
97. *Id.* paras. 75, 77.
98. *Id.* para. 77.
99. The UN Principles, Principle 2.
100. The Draft Universal Declaration, Article 3.
101. The Council of Europe Recommendation, Paragraph 2(d).
102. 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.
103. Adam Winkler & James Zagel, *The Independence of Judges*, 46 MER. L. REV. 795, 798 (1992).

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 Statue for Judges and Explanatory Memorandum*.[104] 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.[105] 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*,[106] the European Court of Human rights was called upon to rule whether a housing and planning inspector constitutes "an independent and 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."[107] 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*[108] that, in determining whether a tribunal 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.[109] 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.[110] To ensure its objectivity, as previously

104. European Charter on the statue for judges and Explanatory Memorandum (DAJ/DOC (98)).
105. Article 1.3 of European Charter on the statue for judges and Explanatory Memorandum.
106. *Bryan v. the United Kingdom*, ECtHR judgment of Nov. 22, 1995, Series of A, no. 335-A.
107. *Id*. para. 37.
108. *Incal v. Turkey*, ECtHR judgment of June 9, 1998, Series 1998-IV.
109. *Id*. para. 71.
110. UN Principle 13; Principle Article 4(o) of The Principles and Guidelines on the Right to Fair

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 judicial review should be provided against these decisions.[111]

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 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 aforementioned 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 on the basis of 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 Article 2(d) of the *Council of European Recommendation*, 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.[112] It also prescribed three aspects for the determination of the impartiality of judiciary: equal position to act in the proceeding; the judge' expression of an opinion, and the existence of his/her own priority.[113] Concrete examples are also provided to demonstrate the undermining of the impartiality of the judiciary.[114] Above all, the *Bangalore Principles of Judicial Conduct*[115] stipulate, in great 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

---

Trial and Legal Assistance in Africa.

111. Principle 19-20; UN Principles, Article 3 of Principle 4 of Recommendation.

112. African Union Principles and Guidelines, Article 5(a).

113. African Union Principles and Guidelines, Article 5(c).

114. African Union Principles and Guidelines, Article 5(d).

115. 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, Nov. 25-26, 2002.

deciding the cases impartially.[116]

The European Court of Human Rights has also dealt with the impartiality of judiciary in a number of cases. The Court held, in *Castillo v. Spain*,[117] 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"[118]; the objective test is to ascertain "whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect."[119] The personal impartiality of a particular judge in presumed unless proof to the contrary is demonstrated.[120] With regard to the objective test, the Court held that confidence of the impartiality of the courts must "inspire in the public."[121] "Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw."[122] 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."[123]

These two tests have been repeatedly referred to in the jurisprudence of European Court of Human Rights. The Court in this litigated case referred to its previous case-law, *Incal v. Turkey*, where the Court has held that "[A]s 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."[124] Besides, this view is also re-affirmed in *Findlay v. the United Kingdom*.[125] In sum, as the subjective impartiality is normally presumed, unless proved to be the contrary, the operative part of

116. Draft Bangalore Principles of Judicial Conduct, Value 2.
117. *Castillo v. Spain*. ECtHR judgment of Oct. 28, 1998, Reports 1998-VIII.
118. *Id*. para. 43.
119. *Id*. para. 43.
120. *Id*. para. 44.
121. *Id*. para. 46.
122. *Id*.
123. *Id*.
124. *Incal v. Turkey*, para. 65. For earlier cases, *see, e.g*., *Pullar v. the United Kingdom*, where the Court, in paragraph 30, holds 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 Feb. 24, 1993, Series A no. 255-A).
125. *Findlay v. the United Kingdom*, esp. para. 73.

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 the determining the existence of the "objectively justified fear of impartiality".

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 Courts,[126] 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; (7) the internal and external supervision for the People's Courts; and (8) continuing reform to the court system.

In the reform program, the objective to 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 preserves, in its judicial system, the characteristic of socialist democracy. Such statements illustrate the political environment in which 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.[127]

---

126. 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?showsingle=38564 (last visited July 14, 2007).

127. For an updated review of China's progress in judicial reform and comments, *see* Benjamin

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 Supreme People's Court will issue regulations related to the case guidance system, outlining the designation of standards and procedures for selecting guiding cases and the methods for issuing guidance rules. This is aimed to unify legal applicable standards, to guide the work of lower courts, and to enrich and develop legal theories and other uses (Article 13). The procedures for the Supreme People's Court to issue judicial interpretations should be reformed so as 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 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 for 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

---

L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1 (2007).

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 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.[128]

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.[129] Four among these interpretations are of greater significance and worth of further elaboration, namely, *Regulations on Several Problems in the Trial of Trade-Related Administrative Litigation Cases; Regulations on the Application of Law in the Trial of Anti-Dumping Administrative Litigation Cases; Regulations 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*

128. One of the reviewer's comments relates to my over-concern about the adjudicative committee and case guidance system, and points to the *Interpretation No. 86* of the Constitutional Court in Taiwan to reconcile the potential conflicts. While the author fully agrees that, if potential interpretation space is allowed for the individual judge hearing the case, individual judicial independence can be to some degree maintained. Nevertheless, it relates to another issue which this paper 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 paper. 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.

129. Judicial interpretation is a peculiar practice in Chinese judicial system. It serves as guidance to the lower court, and is legal binding in nature. *See generally*, NANPING LIU, OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA (Sweet & Maxwell Asia; Sweet & Maxwell. 1997). *See also* Nanping Liu, *An Ignored Source of Chinese Law: the Gazette of Supreme People's Court*, 5 CONN. J OF INT'L L. 271 (1989); Nanping Liu, *Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of Supreme People's Court*, 5 J. OF CHIN. L. 107 (1991).

Intellectual Property.

Regulations 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 U.S. 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." Prior to the request for consultation of the U.S, the Supreme

People's Court, on April 5, 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 so as to include advertising for the sale of copyright-infringing product. It also 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 legislations 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 to "effectively and correctively" apply the relevant legislations. It is expected, by 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 the 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 issuance and 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 July 1, 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,[130] the Chinese Communist Party is not referred to in this act. Besides, judges are obliged to impartially decide a case based on facts and in accordance with the law.[131] 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.[132] 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 achieved in a collective sense. It explains why it is so difficult, if not impossible, to bring about individual independence in Chinese judicial system.[133]

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 November 4, 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,[134] manner,[135] to specific issues concerning adjudicating a case, such as jurisdiction,[136] trial hearing,[137] mediation,[138] and how to hand down a verdict.[139] 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 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"

130. Law on Judges of People's Republic of China (hereinafter Law on Judges), Article 11.
131. Law on Judges, Article 7(2).
132. Law on Judges, Article 9(1)(vi).
133. KEYUAN ZOU, CHINA'S LEGAL REFORM 150 (Martinus Nijhoff Publishers 2006).
134. Code of Conduct of Judges (in Trial Implementation, herinafter Code of Conduct of Judges), Article 6.
135. Code of Conduct of Judges, Article 7.
136. Code of Conduct of Judges, Chapter II.
137. Code of Conduct of Judges, Chapter III.
138. Code of Conduct of Judges, Chapter IV.
139. Code of Conduct of Judges, Chapter V.

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,[140] issued on January 11, 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 U.S. 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 to better 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 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

140. Fafa Nr. 1 (Jan. 11, 2007), http://www.chinacourt.org/flwk/show1.php?file_id=115565 (last visited June 9, 2007).

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 better interpretation of the law in order to improve the socialist legal system, it was decided, in that resolution, that:

(a) 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.

(b) 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.[141]

To be sure, one can not 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 People's Supreme 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 People's Supreme Court hand down judicial interpretations. However, it seems not to be the case. Some literature even argues that the People's Supreme Court has continuously gone beyond its limits since the Standing Committee has hardly made interpretations except the exceptional Hong Kong Basic Law cases.[142]

---

141. An unofficial English version can be downloaded at http://www.novexcn.com/interp_of_law.html (last visited July 14, 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 forth paragraph deals with the interpretation of local regulations.

142. LIU, *supra* note 129, at 59-62. Further initiatives have been taken to clarify the allocation of jurisdiction and strengthen legislative interpretation 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.*

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 trail proceedings. As previously noted, the European Court of Human Rights 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"[143] 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 so as 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 even more manifest. The argument the Greek government took may also be employed by Chinese People's 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 to authoritatively interpret the constitution and laws are explicitly recognized by the Constitution. However, as made clearly by the Court, this argument is not valid. It should also be noted that the WTO obligation to provide an independent and impartial judicial review is an international obligation, which China can not 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.

3. *Adjudicative Committee*

One of the important features of Chinese judicial system is the existence of adjudicative committee,[144] of which the legal basis is founded on the authorization of *Organic Law of People's Courts*. The main task of

143. *Stran Greek Refineries and Stratis Andreadis v. Greece*, para. 50.

144. 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* Weifang He, *Two Problems of the Administration of Justice in China*, 6 CHINA SOCIAL SCIENCE 117 (1997); Weifang He, *Some Comments on the Adjudicative Committees*, 1 BEIJING UNI. L. REV. 365 (2002); Suli Zhu, *Examination and Reflection on the Adjudicative Committee in Chinese Local Courts*, 1 BEIJING UNI. L. REV. 320 (1998). 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 visited Nov. 29, 2007).

adjudicative committee is to "sum up judicial experience and to discuss important or difficult cases and other issues related to the judicial work."[145] 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.[146]

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 on the basis of 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 European Court of Human Rights has repeatedly pointed out, the independence of tribunals should be sufficient 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 judicial review" in China's Accession Protocol is to better 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 People's Supreme Court in

145. Organic Law of People's Court of the People's Republic of China, Article 11.

146. RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 76-77 (Kluwer Law International 1997).

relation to the protection of trade-related 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 People's Supreme Court dominates the competence of judicial interpretation. Lower courts should thus abide by the judicial interpretation issue by the People's Supreme Court. However, as this paper emphatically argues, a centralized judicial interpretation dominated by the People's Supreme Court will not bring about real independent and impartial judges in China. Lower judges should be encouraged and obliged to apply the law in accordance with their own reading and interpretation. Not those of the People's Supreme Court.

4. *Case Guidance System*

One major competence of Supreme People's Court conferred by the Constitution is to supervise lower courts.[147] 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 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 relies from the Supreme People's Court, lower courts are obligated 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 along 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 them. The answer as to the independence of those judges sitting before litigants is apparently not, as

147. Constitution of People's Republic of China, Article 127(2).

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 can not be mapped as a whole if there are no numerous tiny pieces of every single judge. One should not always perceive the judiciary collectively as an entire entity. Various independents 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.

V. CONCLUDING REMARK

This paper examines the scope and nature of China's WTO obligation to provide an independent 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. Section 2(D) of China's Accession Protocol lays down more stringent requirements in relation to the "prompt review" of administrative actions. The scope is also wider than existent provisions in the WTO Agreements. This paper 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 paper then discusses various global and regional standards in relation of independence and impartiality, and also explores the jurisprudence laid down by the European Court of Human Rights. Based on these standards and jurisprudence, laid down by on the WTO and other international legal instruments, and international tribunals, this paper then presents the efforts and progress that China has so far made for the implementation of this "independent 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 can not 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 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 concluding remark, it is also feasible to point out some fundamental issues, which are not dealt with in this paper. Due to the approach taken in this paper, it does not cover issues of the separation of powers, and it does not touch upon in great detail the relationship between Chinese courts and People's Congress and Chinese Communist Party. If one wishes to explore how to establish an independent judicial review, which this paper does not opt to, 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.

REFERENCES

Bhattasali, D. et al. (2004). 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* (p. 1-18). A World Bank Publication.

Brown, R. C. (1997). *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics*. Kluwer Law International.

Burbank, S. B. & Friedman, B. (Eds.). (2002). *Judicial Independence at the Crossroads: An Interdisciplinary Approach*. Sage Publication, Inc.

Canivet, G. et al. (Eds.). (2006). *Independence, Accountability, and the Judiciary*. Biicl.

Cao, J. (2002). China and the Rule of Law. *Temple International and Comparative Law Journal*, 16, 379.

He, W. (1997). Two Problems of the Administration of Justice in China. *China Social Science*, 6, 117.

He, W. (2002). Some Comments on the Adjudicative Committees. *Beijing University Law Review* (in Chinese), 1, 365.

Huang, D. (2006). Legal Interpretation of Paragraph 242 of the Report of the Working Party on the Accession of China under the World Trade Organization Legal Framework. *Journal of World Trade*, 40, 137.

Huang, T. W. (2002). Taiwan's Protocol 16 Special Safeguard and Anti-dumping Enforcement on Imports from China. *Journal of World Trade*, 41, 371.

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

Jensen, E. G. & Helle, T. C. (Eds.). (2003). *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*. Stanford Law and Politics.

Lee, J. (2007). Socialist Rule of Law with Chinese Characteristics. *Issues & Studies*, 43, 115.

Liebman, B. L. (2007). China's Courts: Restricted Reform. *Columbia Journal of Asian Law*, 21, 1.

Liu, N. (1989). An Ignored Source of Chinese Law: the Gazette of Supreme People's Court. *Connecticut Journal of International Law*, 5, 271.

Liu, N. (1991). Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of Supreme People's Court. *Journal of Chinese Law*, 5, 107.

Liu, N. (1997). *Opinions of the Supreme People's Court: Judicial Interpretation in China*. Sweet & Maxwell Asia; Sweet & Maxwell.

Open Society Institute (2001). *Monitoring the EU Accession Process: Judicial Independence*. Central European University Press.

Petersmann, E.-U. (1991). Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal System. In E.-U. Petersmann & M. Hilf (Eds.) *The New GATT Round of Multilateral Trade Negotiations: legal and economic problems*. Springer.

Petersmann, E.-U. (2006). Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism. In C. Joerges & E.-U. Petersmann (Eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (pp. 5-58). Hart Publishing.

Petersmann, E.-U. (Forthcoming). *Dispute Prevention, Dispute Settlement and Justice in International Economic Law*.

Qin, J. Y. (2003). "WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System. *Journal of World Trade*, 37, 495-496.

Sajo, A. (Ed.). (2004). *Judicial Integrity*. Brill Academic Publisers.

Winkler, A. & Zagel, J. (1992). The Independence of Judges. *Mercer Law Review*, 46, 795-834.

Zhu, S. (1998). Examination and Reflection on the Adjudicative Committee in Chinese Local Courts. *Beijing University Law Review*, 1, 320.

Zou, K. (2006). *China's Legal Reform*. Martinus Nijhoff Publishers.