

Five Years of China's WTO Membership

EU and US Perspectives on China's Compliance with Transparency Commitments and the Transitional Review Mechanism

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Abstract

China's accession to the WTO¹ represents a goal achieved after nearly fifteen years of exhausting negotiations. However, many legal, political and social problems have not yet been tackled in terms of achieving real implementation

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1. For an analysis of the transition from GATT to the WTO, Robert Hudec, *The GATT Legal System and World Trade Diplomacy*, Butterworth Legal Publishers, Salem, NH 1993; Giorgio Sacerdoti, 'La trasformazione del GATT nell'Organizzazione mondiale del commercio', (1995) *Diritto del commercio internazionale* at 73; Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, 1993, Butterworth Legal Publishers, Salem NH 1993; Gabrielle Marceau, 'Transition from GATT to the WTO: A Most Pragmatic Operation', (1995) 29 *Journal of World Trade* at 147; John H. Jackson, *World Trade and the Law of GATT*, Bobbs-Merrill, Indianapolis 1969; David Luff, *Le droit de l'Organisation mondiale du commerce. Analyse critique*, Bruylant, Bruxelles 2004, pp. 771-775. See also Paolo Picone and Aldo Ligustro, *Diritto dell'Organizzazione Mondiale del Commercio*, CEDAM, Padova, 2004; Giorgio Sacerdoti, 'Profili istituzionali dell'OMC e principi base degli accordi di settore', in Società Italiana di Diritto Internazionale, *Diritto e organizzazione del commercio internazionale dopo la creazione della Organizzazione mondiale del Commercio*, Editoriale Scientifica, Napoli 1998, pp. 1-20; Marcella Distefano, *Soluzione delle controversie nell'OMC e diritto internazionale*, CEDAM, Padova 2001; Giovanna Adinolfi, *L'Organizzazione mondiale del commercio. Profili istituzionali e normativi*, CEDAM, Padova 2001; Paolo Picone and Giorgio Sacerdoti, *Diritto internazionale dell'economia*, F. Angeli, Milano 1991; Gabriella Venturini, *L'accordo generale sulle tariffe doganali ed il commercio*, Giuffrè, Milano 2004; Piet Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, Oxford University Press, Oxford 2004.

of WTO provisions throughout the territory of the People's Republic of China. The Protocol requires a general and deep application of transparency, which will radically influence and change the Chinese legal system. There are a wide range of transparency related problems such as the formal publication of laws and regulations, procedural fairness in decision-making, the judicial review and the non-discrimination principle. The special "precautionary" instrument, the Transitional Review Mechanism (TRM), was included in the Protocol of China's Accession to the WTO, as requested by the US and supported by the EU. The TRM has the objective of monitoring and enforcement of implementation of WTO commitments, promoting transparency and the exchange of information in trade relations with China. Bilateral engagements and the multilateral forums are both essential to bring China into full compliance with its WTO commitments.

1. Introduction

China's accession into the World Trade Organization (WTO) represents a desirable outcome for the worldwide market. It is a milestone² not only for China (*zhongguo*), but for the entire global economy, and it is a goal achieved after nearly fifteen years of exhausting negotiations carrying many legal, political and social implications for all parties.³ China was finally able to convince WTO members that without China, the WTO is only partially a worldwide trade organization.⁴ The road to the signature of the final agreement of accession was long,⁵ but these difficulties pale in comparison to the problems that have not yet been tackled in terms of achieving real implementation of its

2. Robert Herzstein, 'Is China Ready for the WTO Rigors?', (1999) Publication of the Center for Security Policy, No. 99 F-33. Available: <<http://www.security-policy.org/papers/1999/99-F33.html>>.
3. See generally, Karen Halverson, 'China's WTO Accession: Economic, Legal, and Political Implications', (Spring 2004) 27 *Boston College International and Comparative Law Review*; Alan Alexandroff, 'Concluding China's Accession to the WTO: the U.S. Congress and Permanent Most Favored Nation Status for China', (1998-1999) 3 *UCLA Journal of International Law & Foreign Affairs* at 25.
4. 'WTO Ministerial Conference Approves China's Accession', World Trade Organization, Press Release, 10 November 2001. Available: <http://www.wto.org/english/news_e/pres01_e/pr252_e.htm> (last visited: 20-05-04). James Feinerman, 'China's Quest to Enter the GATT/WTO', (1996) 90 *American Society of International Law Procedure* at 402: 'PRC diplomats have been lobbying the GATT intensively since the early 1980s to gain admission'. See also Maria Weber, *Il miracolo cinese : perché bisogna prendere la Cina sul serio*, Il Mulino, Bologna 2003, pp. 83-84 ; Leila Choukroune, 'Chine et OMC: l'état de droit par l'ouverture au commerce international?', (2002) 6 *Revue de droit des affaires internationales* at 655.
5. Raj Bhala, 'Enter the Dragon: An Essay on China's WTO Accession Saga', (1999-2000) 15 *American University International Law Review* at 1471.

provisions throughout the territory of the People's Republic of China (PRC).⁶ China's accession surely presents the world trading system with opportunities, but also poses the challenge of integrating a market with strong structural, behavioural and cultural constraints.⁷

Prior to China's accession and in the subsequent debates on the implementation of China's WTO commitments, some have focused on the market access concessions, tariff reductions or on the liberalization requirements for the integration of China in the world trading system. A second group of scholars, researchers and analysts have placed more emphasis on transparency issues, such as legal and administrative policies that China must establish to ensure equitable and efficient resolution of commercial and trade disputes.⁸

While recognizing the key importance of all these issues, this piece will focus on the latter group, because these commitments will radically influence and change the Chinese legal system. Particular attention is given to the last four years of the review and evaluation of the Chinese legal reforms through the Transitional Review Mechanism (TRM),⁹ in view of complying with the WTO transparency commitments. China has to become increasingly aware of the new system to which it has become a member. This system implies state international liability in the event of non-compliance with its obligations, such as respecting transparency requirements and WTO legal and administrative policies.

In the opinion of the present author, the most relevant obstacle to an effective implementation of the WTO and bilateral agreements is the problem of 'internal barriers'¹⁰ that have distinctive features because of China's unique

6. Donald C. Clarke, 'China's Legal System and the WTO: Prospects for Compliance', (Winter 2003) 2 *Washington University Global Studies Law Review* at 97 (hereinafter Clarke).
7. Several members of the Committee decided to write analytical papers about China's accession. See John H. Jackson, 'The Institutional Ramifications of China's Accession to the WTO', in Frederick M. Abbott, *China in the World Trading System: Defining the Principles of Engagement*, Kluwer Law International, The Hague 1998. For an overview of other challenges for the WTO after ten years from its foundation, see generally Gabriella Venturini, Giuseppe Coscia and Michele Vellano, *Le nuove sfide per l'OMC a dieci anni dalla sua istituzione*, Giuffrè Editore, Milano 2005; see also Rufus Yerxa and Bruce Wilson (eds.), *Key Issues in the WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, Cambridge 2005.
8. United States Government Accountability Office (GAO), *Report to Congressional Committees: US-China Trade, Opportunities to Improve U.S Government Efforts to Ensure China's Compliance with World Trade Organization Commitments*, GAO-05-53, 6 October 2004, Washington DC 2004, p. 6. Available: <<http://www.gao.gov/new.items/d0553.pdf>>; Karen Halverson, 'China's WTO Accession: Economic, Legal, and Political Implications', *cit.* at 346; Jianguy Wang, 'The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development', (2004) *Singapore Journal of Legal Studies* at 374-389; Alan S. Alexandroff, 'The WTO's China Problem', (May 2000) 21 *Policy Options* 4 at 64. Available also: <<http://www.irpp.org/po/archive/may00/alexandr.pdf>>.
9. The Transitional Review Mechanism is a special multilateral mechanism for reviewing Chinese legal system, and it was included in the Protocol of China's accession to the WTO.
10. See generally Pitman B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture*, Routledge, London 2001.

historical background, including the communist period, long-standing imperial traditions¹¹ and feudalism. The lack of stable rules to define relations between the central authority and the increasingly powerful local entities undermines the good intentions of the Chinese central government.¹² China will not be able to resolve its internal limits and really fight against the local trade barriers without foreign co-operation and involvement. The final Protocol reflects the terms and conditions of the various Chinese bilateral agreements¹³ with the United States (US),¹⁴ the European Union (EU)¹⁵ and Canada.¹⁶ The EU and the US¹⁷ are taking on key roles in the implementation of the

11. Qingjiang Kong, 'China's WTO Accession: Commitments and Implications', (2000) *Journal of International Economic Law* at 658.
12. See generally Pitman B. Potter, 'China and the WTO: Tensions between Globalized Liberalism and Local Culture', (1999) 32, 3 *Canadian Business Law Journal*.
13. Fabio Spadi, 'L'evoluzione del protocollo di accessione della Repubblica Popolare Cinese all'Organizzazione mondiale del commercio', (2000) *Diritto del commercio internazionale* at 205–207.
14. Chinese-US negotiations finally came to an end in November 1999 with a bilateral agreement for China's accession. In 2000, China was recognized by the US Congress with a permanent normal trade status. See <http://www.ncfb.com/daily2001/June_11_17_2001/u.htm>. For an overview of the US-China policy for the accession of China to the WTO, see generally Alan Alexandroff, 'Concluding China's Accession to the WTO: the US Congress and Permanent Most Favored Nation Status for China', *cit.*; as regards the US relations with China during the Clinton and Bush administrations, see Maria Weber, *Il dragone e l'aquila. Cina e USA. La vera sfida*, EGEA, Milano 2005, pp. 59–84.
15. The bilateral EU-China agreement on WTO was signed in Beijing on 19 May 2000. For an overview of the results achieved by the EU in addition to the Sino-US accord, see the 'Sino-EU Agreement on China's Accession to the WTO: Results of the Bilateral Negotiations'. Available: <http://europa.eu.int/comm/trade/issues/bilateral/countries/china/index_en.htm>. For further analysis, see Nicolas Ligneul, 'La portée de l'accord bilatéral conclu entre l'Union Européenne et la Chine. Le 19 Mai 2000: entre bilatéralisme et multilatéralisme', (Juillet-Août 2000) *Revue de Marché Commun et de l'Union Européenne* at 436–440; Eberhard Sandschneider, 'China's Diplomatic Relations with the States of Europe', (March 2002) *The China Quarterly* at 33–44; Franco Algeri, *cit.* at 64; Markus Taube, 'Economic Relations between the PRC and the States of Europe', (March 2002) *The China Quarterly* at 79–105; Olivier Prost and Song Li Wei, 'China's Accession to the WTO: How will this Benefit European Undertakings?', (2000–2001) 24 *Fordham International Law Journal* at 554–559.
16. China and Canada signed in Toronto in November 1999 their bilateral agreement on China's accession into WTO as another step forward to the admission of China to the WTO. Canada was the 14th country to complete the WTO bilateral talks with China. See <<http://www1.chinadaily.com.cn/highlights/docs/2001-04-30/2963.html>>.
17. Congressional-Executive Commission on China, *2002 Annual Report*, One Hundred Seventh Congress, Second Session, 2nd October 2002, US Government Printing Office, Washington DC 2002, p. 49: 'The US-China Relations Act of 2000 requires the USTR to submit an annual report on China's compliance with its WTO commitments, including the findings of the Department of Commerce's compliance monitoring program. [...] the Senate Finance and House Ways and Means Committees have tasked the General Accounting Office (GAO) with a four years project to examine China-WTO implementation issues.' Available: <<http://www.cecc.gov/pages/annualRpt/2002annRptEng.pdf>>.

WTO agreement for China's accession, and their monitoring action will be essential to improve the PRC's internal juridical system. The increasing collaboration between China and the EU, and between China and the US, could be a potential solution for China's internal problems and a great opportunity for the European Union¹⁸ and the United States. The development of bilateral trade relations, the creation of programs with a view to exchange of expertise and know-how,¹⁹ and the dispatch of foreign officials to China and of Chinese officials to the EU-US would facilitate the fostering of reciprocal knowledge.²⁰ Bilateral engagements and the multilateral forums are both essential to bring China into full compliance with its WTO commitments.

2. Protocol of China's Accession to the WTO

2.1. Transparency Principles and Rule of Law

The WTO agreements, the Protocol of China's Accession to the WTO (Protocol)²¹ and all of China's accession documents²² include China's commit-

18. See José Manuel Barroso, 'The EU and China: Painting a Brighter Future Together', SPEECH/05/444, Chinese Academy of Social Sciences, Beijing, 15 July 2005. Available: <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/444&format=HTML&aged=0&language=en&guiLanguage=en>>; see also Olivier PROST and Song Li Wei, *cit.* at 554
19. Report from the Commission to the Council and the European Parliament on the Implementation of the Communication, *Building a Comprehensive Partnership with China*, COM (2000) 552 final, Brussels, 8 September 2000 at 2. Available: <http://europa.eu.int/comm/external_relations/china/com_98/index.htm>.
20. Commission Policy Paper for transmission to the Council and the European Parliament, *A Maturing Partnership – Shared Interests and Challenges in EU-China Relations*, COM (2003) 533 final, Brussels, 10 September 2003 at 14. Available: <http://europa.eu.int/comm/external_relations/china/com_03_533/com_533_en.pdf> See also Report from the Commission to the Council and the European Parliament on the Implementation of the Communication, *Building a Comprehensive Partnership with China*, *cit.* at 10.
21. WTO, Protocol of accession of the People's Republic of China to the WTO (hereinafter Protocol), Document WT/L/432. Available: <www.wto.org> In November 2001, during the fourth WTO ministerial conference in Doha, the text of the agreement for China's entry into the WTO was approved by consensus, so China has been an official member of the WTO since 11th December 2001. For a further description of the GATT/WTO negotiations, see Franco Algieri, 'EU Economic Relations with China: An Institutional Perspective', (March 2002) *The China Quarterly* at 73–77.
22. The China's WTO accession documents are: the Protocol of China's accession to the WTO (WT/L/432), the Working Party Report (WT/ACC/CHN/49) and the Annexes containing market access commitments (WT/ACC/CHN/49/Add.2). With reference to the Working Party Report, the commitments listed at paragraph 342 of the WPR are incorporated in paragraph 1.2 of the Protocol. All these documents are available through the searching tools of web-site: <www.wto.org>

ments²³ to such things as the rule of law²⁴ and the transparency principles.²⁵ Even though WTO agreements offer a wide range of principles, it is an incontestable truth that transparency²⁶ in all its shapes is one of the most prominent in reshaping and developing the rule of law.²⁷ There are a wide range of transparency related problems such as the formal publication of laws and regulations, procedural fairness in decision-making, the judicial review²⁸ and the non-discrimination principle.²⁹ The administration of the trade regime, which establishes the provisions of the WTO Agreement and the Protocol, would apply to the entire customs' territory of China without exception,³⁰ the necessity that local governments legislate and adapt their current laws in conformity with the obligations undertaken by China's central government³¹ and

23. For an organic commentary of the commitments, see generally United States Government Accountability Office (GAO), *Report to Congressional Committees: World Trade Organization, Analysis of China's Commitments to Other Members*, GAO-03-4, 3 October 2002, Washington DC 2002. Available: <<http://www.gao.gov/cgi-bin/getrpt?GAO-03-4>>; see also Thomas Rumbaugh and Nicolas Blancher, *China: International Trade and WTO Accession*, WP/04/36, IMF Working Paper, 1 March 2004, Washington DC 2004 at 7–8. Available: <<http://www.imf.org/external/pubs/ft/wp/2004/wp0436.pdf>>.
24. Protocol, I, 2, A, 2.
25. Protocol, I, 2, C. For an analysis of the transparency requirements in the WTO, see Paolo Picone and Aldo Ligustro, *cit.*, pp. 380–381.
26. With reference to the transparency requirements and China, see generally, Sylvia Ostry, 'China and WTO: the Transparency Issue', (1998) 3, 1 *UCLA Journal of International Law & Foreign Affairs*; Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao*, Stanford University Press, Stanford, California, 1999, pp. 315–317; Leila Choukroune, 'Chine et OMC: L'état de droit par l'ouverture au commerce international?', *cit.* at 666–668; Leila Choukroune, 'L'internationalisation du droit chinois des affaires: une première évaluation des conséquences juridiques de l'accèsion de la Chine à l'OMC', (2003) 5 *Revue de droit des affaires internationales* at 513–520.
27. Sarah Biddulph, 'China's Accession to the WTO: Legal System Transparency and Administrative Reform', in Sylvia Ostry, Alan S. Alexandroff, Rafael Gomez, *China and the Long March to Global Trade*, Routledge, London, 2002, pp. 154–191.
28. Protocol, I, 2, D.
29. Protocol, I, 3. The independent system of judicial review and the non-discrimination principle will not be discussed in this paper. As to the issue of the independent system of judicial review, see Ulric Killion, 'Post-WTO China and Independent Judicial Review', (Spring 2004), 26 *Houston Journal of International Law* at 527–546; Veron Mei-Ying Hung, 'China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform', (2004) 52 *American Journal of Comparative Law* at 77–132; Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao*, *cit.*, pp. 250–297 in particular pp. 294–295; Jerome A. Cohen, 'Reforming China's Civil Procedure: Judging the Courts', (1997) 45 *American Journal of Comparative Law* at 793–804; Hikota Koguchi, 'Some Observations about Judicial Independence in Post-Mao China', (1987) 7 *Boston College Third World Law Journal* at 195–214; Jerome A. Cohen, 'The Chinese Communist Party and 'Judicial Independence': 1949–1959', (March 1969) 82 *Harvard Law Review* 5 at 967–1006. With reference to the non-discrimination principle, see among others Paolo Picone and Aldo Ligustro, *cit.*, pp. 101–102.
30. Protocol, I, 2, A, 1.
31. Protocol, I, 2, A, 3.

the implementation of a mechanism applicable at the national level in case of a non-uniform application of the trade regime.³² A thorough analysis of how laws are applied, implemented and administered would show that, behind the formality, the Chinese legal system adopts 'head rules', which are the framework for general rules that do not provide the necessary elements to administer these regulations.³³ Although the situation has improved since China's WTO accession, it has not reached the reasonable manner demanded by the application and administration of all the laws. This problem is apparent in the laws and regulations promulgated by the central government, and is especially present in the local rules, at the sub-national level in general.³⁴ From a legal point of view, the regional governments should normally comply with the central regulations, but they seem unwilling to accept the standards.³⁵ They feel threatened by demands for transparency that would prevent them from controlling and influencing business deals. Some Chinese leaders are still opposing the reforms implicit in the WTO rules, because under these regulations their discretionary power risks being reduced definitively and brought under the rule of law.³⁶ China was not fitted with the tradition, culture and legal institutions essential to hold back its own officials. It is fundamental to examine the impact of the WTO accession on China's legal reform in the context of the 'rule of law'. Some authors have stressed that the rule of law does not play a leading role in China,³⁷ because it is a nearly novel concept for Chinese policy makers. In fact, it really seems that the 'rule by law' or the 'rule through law' prevails despite all the efforts to improve the legal basis. The 'rule of law' principle has not yet absorbed into the Chinese mentality. This may not be possible in the short term, particularly if one takes into consideration the existing protectionism and favouritism, which can contravene the non-discrimination principle. Ulric Killion recognizes the possible existence of 'both a distinctive Chinese rule of law and judicial review.'³⁸ [...] There is rule of law

32. Protocol, I, 2, A, 4.

33. Sylvia Ostry, 'China and WTO: the Transparency Issue', *cit.* at 24; Sarah Biddulph, 'The Legal Structure of Decision Making in Chinese Police Enforcement Powers: Some Preliminary Issues', in Veronica Taylor (ed), *Asian Law Through Australian Eyes*, Lawbook Co., Sidney 1997, p. 207.

34. Peter Howard Corne, 'Lateral Movements: Legal Flexibility and Foreign Investment Regulation in China', (1995) 27 *Case Western Reserve Journal of International Law* at 248.

35. Also the Chinese central government could be reluctant to accept the standards, see James Feinerman, 'Chinese Participation in International Legal Order: Rogue Elephant or Team Player', (March 1995) 141 *The China Quarterly, Special Issue: China's Legal Reforms* at 189, with reference to the 'dilemma of either conforming to accepted standards or arguing for a reinterpretation of international law' the author stressed that 'every state acts in what it considers to be its *national interest*, [but] China's concept of it is perhaps unusually broad' [*emphasis added*].

36. Robert Herzstein, 'Is China Ready to WTO Rigors?', *cit.*

37. Sujian Guo, 'Post-Mao China: the Rule of Law?', (November-December 1999) *Issues and Studies* 6 at 80-86.

38. Ulric Killion, 'Post-WTO China and Independent Judicial Review', *cit.* at 551

in China – perhaps at the outer periphery of Western ideal rule of law – but nonetheless it is rule of law. [...] It is a Chinese variant of the Western rule of law that continues to evolve'.³⁹ Jianguy Wang, in the light of the WTO requirements, distinguishes between the 'thin' and the 'thick' theory of rule of law,⁴⁰ such as the parallel distinction between 'formal' and 'substantive' conceptions. According to him, the 'thin' model is the best option for China, because it is based on the principle that actually in China it is not feasible to achieve the perfect legal system for which the supporters of the 'thick' theory strive.⁴¹ First, it is necessary to build up the requisite institutions and only after there is predictability can we look for the substantive application through the 'thick' theory.⁴²

2.2. Uniform Administration Rule

In the PRC, legislative authority is unitary and hierarchical. Although the provincial and local governments only have to pass laws coherent with the national ones and 'the higher bodies have the authority to disallow conflicting rules, [however] national supervision has little effect on the numerous provincial and local rules created each year'.⁴³ Art. 57 of the PRC Constitution states that 'the National People's Congress of the People's Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress'. The unified power is exercised by the National People's Congress (NPC),⁴⁴ by the Local People's Congresses at dif-

39. *Ibid.*

40. For a deeper description of the 'thick' and 'thin' theory of the rule of law in China, see Jianguy Wang, 'The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development', *cit.* at 348; Randall Peerenboom, 'Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China', (2001) 19 *Berkeley Journal of International Law* at 264; Randall Peerenboom, 'Social Networks, Civil Society, Democracy and Rule of Law: A New Conceptual Framework', UCLA, School of Law Research Paper No. 03-1 at 16-19 in Chair Hahm, Chaibong Hahm and Daniel Bell (eds.), *The Politics of Relationality: Civil Society, Economics, and Law in East Asia*, Rowan & Littlefield, Los Angeles (CA) 2003. Available: <<http://ssrn.com/abstract=372680>>; see generally Randall Peerenboom, *Asian Discourses of Rule of Law of China*, Routledge Curzon, Los Angeles, CA, 2004.

41. Pitman B. Potter, 'The Legal Implications of China's Accession to the WTO', (September 2001) *The China Quarterly* at 601.

42. See Jianguy Wang, 'The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development', *cit.* at 349.

43. Mark A. Groombridge and Claude E. Barfield, *Tiger by the Tail: China and the World Trade Organization*, AET Press, Washington DC 1999, p. 63 (hereinafter Groombridge and Barfield); Federico R. Antonelli, 'La Legge sulla Legislazione ed il problema delle fonti del diritto cinese', (Aprile - Giugno 2004) XXXII, 2 *Mondo Cinese* 119 at 24.

44. For an historical overview of the NPC and its structure, see generally Michael W. Dowdle, 'The Constitutional Development and Operations of the National People's Congress', (Spring 1997) 11 *Columbia Journal of Asian Law* 1 at 1-126.

ferent levels,⁴⁵ and by its Standing Committee.⁴⁶ The Standing Committee controls the legislative agenda for a longer period each year than the NPC, because it assumes the legislative responsibilities when the NPC is not in session.⁴⁷ The NPC can revise the Constitution⁴⁸ and adopt basic laws;⁴⁹ the Standing Committee has the formal power to interpret the Constitution, supervise its enforcement⁵⁰ and invalidate 'those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations'.⁵¹ In theory, as established by the Chinese Constitution, the NPC is the highest organ of the government power in China, but traditionally the NPC could not rule against the leadership's whims.⁵² At the beginning of the 1990s, the NPC's role had started to gradually change, because of the 'leadership efforts [...] to unify the legislative system to prevent conflicts of law and to improve the overall quality of the legislation.'⁵³ The Legislation Law of 2000⁵⁴ and the creation of a special legislative panel with the responsibility of reviewing legislation and regulations for consistency with the Constitution⁵⁵ are other important stepping-stones towards the long-term programmatic reform of the administrative law. Under supervision of the NPC⁵⁶ and of the Standing Committee,⁵⁷ the State Council exercises the power to create ministries and commissions involved in the drafting of administrative measures and in laws for economic reform. Therefore, the State Council's department in charge of the foreign trade and economic relations rules foreign trade in China. The new Ministry

45. PRC Constitution Art. 2.

46. For a further analysis of the structure of Chinese governmental bodies, see Christopher Duncan, 'Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions after Accession', (2002–2003) 18 *American University International Law Review* at 414–415.

47. Congressional-Executive Commission on China, *2003 Annual Report*, One Hundred Eighth Congress First Session, 2nd October 2003, US Government Printing Office, Washington DC 2003, p. 57 Available: <<http://www.cecc.gov/pages/annualRpt/2003annRpt.pdf>>.

48. PRC Constitution Art. 62 (1).

49. PRC Constitution Art. 62 (3).

50. PRC Constitution Art. 67 (1).

51. PRC Constitution Art. 67 (8).

52. Congressional-Executive Commission on China, *2003 Annual Report*, *cit.*, p. 57.

53. *Ibid.*

54. Law of the PRC on Legislation Law adopted on 15 March 2000. For an analysis of the Legislation Law, see Federico R. Antonelli, 'La Legge sulla Legislazione ed il problema delle fonti del diritto cinese', *cit.* at 25 and at 27–30.

55. Congressional-Executive Commission on China, *2004 Annual Report*, One Hundred Eighth Congress, Second Session, 5th October 2004, US Government Printing Office, Washington DC 2004, p. 68. Available: <<http://www.cecc.gov/pages/annualRpt/annualRpt04/CECCannRpt2004.pdf>>.

56. PRC Constitution Art. 92.

57. PRC Constitution Art. 67 (7).

of Commerce (MOFCOM), created after the merger between the Ministry of the Foreign Trade and Economic Cooperation (MOFTEC) and the State Economic and Trade Commission (SETC), is responsible for implementing the Foreign Trade Law which regulates several trade matters, in particular those related to WTO requirements.

Protocol, I, 2, A, 2 reflects the provisions of art. X (3) of GATT⁵⁸ and establishes that:

‘China shall apply and administer in a *uniform, impartial and reasonable manner* all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights (‘TRIPS’) or the control of foreign exchange.’⁵⁹

Protocol, I, 2, A, 3 purports:

‘China’s local regulations, rules and other measures of local governments at the sub-national level shall conform to the obligations undertaken in the WTO Agreement and this Protocol’

Also at Paragraph 73 of Working Party Report on the Accession of China, it is stated that:

‘the provisions of the WTO Agreement, including the Draft Protocol, would be applied uniformly throughout its customs territory, including in SEZs and other areas where special regimes for tariffs, taxes and regulations were established and at all the levels of government.’⁶⁰

Art. XXIV (12) requires that each contracting party has to take ‘necessary measures’ to ensure observance of the GATT by regional and local governments and authorities.⁶¹

If China wants to achieve real integration into the WTO, while at the same time proceeding towards sustainable growth, China is obliged to go through

58. See also the statement of art. VI of GATS.

59. Protocol, I, 2, A, 1.

60. Working Party Report on the Accession of China, *Report of the Working Party on the Accession of China*, 1 October 2001, WT/ACC/CHN/49.

61. This provision has been amplified by the ‘Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994’ annexed to the Uruguay Round. Compliance with GATT rules is expected from the signatory states, and it is surely in great part a matter of internal administration. Available: <http://www.wto.org/english/docs_e/legal_e/10-24.pdf>.

an extensive reform of its administrative law system.⁶² China has a strongly centralized legal and regulatory system. Even though, hypothetically, these standards have been harmonized in a formal way, in reality there is still the necessity of cooperation at sub-national levels of state and society to overcome the internal barriers.⁶³ In fact, the processes of implementation, monitoring and enforcement for a nation such as China must take place within the context of domestic political and economic institutions.⁶⁴ This context is defined as 'fragmented authoritarianism'⁶⁵ or as 'a multi-layered complexity.'⁶⁶ According to Kenneth Lieberthal, there are 'numerous reporting lines throughout the system, through the party, through the government, to the territorial organs, and so forth.'⁶⁷ All these interpositions make it more difficult for China to respect these obligations and have a strong effect on the compliance of the WTO's accession rules. Incidentally, the Chinese Government has clearly vowed to respect the agreement, to keep its promises and to cooperate with the other WTO Members' wishes.⁶⁸

Other authors have also given particular importance to the necessity of formal harmonization of China's laws and regulations.⁶⁹ A new WTO Member State should comply with formal harmonization.⁷⁰ New regulations must take place,⁷¹ a number of laws and regulations should be revised, obsolete laws contradictory to WTO rules should be eliminated⁷² and harmonized standards

62. Sylvia Ostry introduces Sarah Biddulph, 'Legal System Transparency and Administrative Reform', Summary of the Fourth Meeting for the China-WTO Accession Project, Washington DC, March 5-6, 1998 at 23. Available: <<http://www.utoronto.ca/cis/washington.pdf>>; see more recently, Sarah Biddulph, 'The Production of Legal Norms: A Case Study of Administrative Detention', (2003) 20 *UCLA Pacific Basin Law Journal* at 269.
63. Congressional-Executive Commission on China, *2004 Annual Report*, cit., p. 83.
64. Paul Thiers, 'Challenges for WTO Implementation: Lessons from China's Deep Integration into an International Trade Regime', (2002) 32, 11 *Journal of Contemporary China* at 414.
65. Kenneth Lieberthal, *Governing China: From Revolution through Reform*, W.W. Norton & Co., New York, 2004, p. 169.
66. Sarah Biddulph, 'Through a Glass Darkly: China, Transparency and the WTO', (2001) 3 *Australian Journal of Asian Law* at 59-95; Sylvia Ostry, 'China and WTO: the Transparency Issue', cit. at 12.
67. Kenneth Lieberthal, cit.
68. Paragraph 70 of the Working Party Report on the Accession of China, *Report of the Working Party on the Accession of China*, cit.
69. Groombridge and Barfield, cit. at 63; see also Peter Howard Corne, 'Lateral Movements: Legal Flexibility and Foreign Investment Regulation in China', cit. at 248.
70. Paolo Picone and Aldo Ligustro, cit., pp. 381-383.
71. Lihu Chen and Yun Gu, 'China's Safeguard Measures under the New WTO Framework', (2001-2002) 25 *Fordham International Law Journal* at 1172 and 1177, arguing that among these laws, the PRC Regulation on Safeguard Measures is one of the most relevant in China's trade regime and its enactment could be considered as a step forward to comply with WTO rules.
72. *Ibid*; see also Lei Wang and Shengxing Yu, 'China's New Anti-dumping Regulations: Improve-

must be implemented.⁷³ In short, a thorough integration is necessary. China began this colossal task before the accession.⁷⁴ During its four years of membership, the Chinese Government has made great progress.⁷⁵ In fact, the NPC has institutionalized the creation of specialized committees involved in peculiar areas of law.⁷⁶ Both the NPC and the Standing Committee have increased the number of officials who are more competent and specialized than before.⁷⁷ These officials can draft higher quality legislation and better supervise the enforcement of NPC laws,⁷⁸ but this supervision should not replace WTO Members' external monitoring to ensure that any lower-profile measures do not become standard bureaucratic practice.⁷⁹ The NPC has also strengthened its professional competence entrusting outside experts or distinguished scholars with mandates to draft the new legislations.⁸⁰ The Chinese laws are often

- ments to Comply with the World Trade Organization Rules', (2002) 36, 5 *Journal of World Trade* at 903–904.
73. United States Trade Representative, *2005 Report to Congress on China's WTO Compliance*, 11 December 2005, Washington DC 2005, p. 3. Available: <http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/asset_upload_file293_8580.pdf>; Hu Shengtao, 'Foreign Investment in China – Post WTO', Speech at the 'In House Congress Beijing 2002', Beijing, China. See <www.strategy4china.com/moftecspeech.html> (last visited: 24–02–06). Ms. Hu Shengtao, former deputy division director of the Department of Treaty & Law at MOFTEC, actually serving as Second Secretary (Commercial) from the Chinese Embassy in Washington DC, said that since its accession to the WTO, the Chinese Government has been making great efforts to comply with the WTO rules and commitments. See also Congressional-Executive Commission on China, *2002 Annual Report*, cit., p. 47; Asian Development Bank, *Private Sector Assessment: People's Republic of China*, November 2003, p. 17. Available: <http://www.adb.org/Documents/Reports/PSA/PRC/PRC_PSA.pdf>.
74. See *Communication from the People's Republic of China*, Information Required in Sections I and III of Annex 1A of the Protocol, 25 November 2002, WT/GC/68. Before the accession to the WTO, by the end of 2000, Chinese Government reports 'the review of over 1400 laws, regulations, and similar documents [...]', see Clarke, cit. at 104 [2003].
75. In 2002, more than 2,500 laws and regulations have been checked and cleaned up due to the WTO non-compliance, and more than 800 of these had been abolished. See United States Trade Representative, *2003 Report to Congress on China's WTO Compliance*, 11 December 2003, Washington DC 2003, p. 64–65. Available: <www.ustr.gov/assets/Document_Library/Reports_Publications/2003/asset_upload_file425_4313.pdf>. In 2003, the Central Government adopted more than 100 new or revised laws and regulations. See United States Trade Representative, *2004 Report to Congress on China's WTO Compliance*, 11 December 2004, Washington DC 2004, p. 81–82. Available: <www.ustr.gov/assets/Document_Library/Reports_Publications/2004/asset_upload_file281_6986.pdf>. See also United States Government Accountability Office (GAO), *Report to Congressional Committees: US-China Trade, Opportunities to Improve US Government Efforts to Ensure China's Compliance with World Trade Organization Commitments*, cit., p. 2.
76. Congressional-Executive Commission on China, *2003 Annual Report*, cit., p. 57.
77. *Ibid.*, p. 58.
78. *Ibid.*
79. Congressional-Executive Commission on China, *2005 Annual Report*, cit., p. 86. See also Congressional-Executive Commission on China, *2004 Annual Report*, cit., p. 83.
80. Congressional-Executive Commission on China, *2003 Annual Report*, cit., p. 58.

vague and not precise,⁸¹ but as to the 'Trade-related laws, regulations and other measures', some Chinese scholars attribute this inadequacy to the extreme complexity and technical nature of the WTO words to be adapted to Chinese language and to the necessity to create a WTO Chinese language standard.⁸² Therefore, it is challenging for the Chinese legislator to transpose the WTO commitments in the Chinese legal system,⁸³ and the potential lack of specificity of the Chinese laws will not grant full compliance with the WTO agreement.

With regard to the provincial and local authorities, it has been pointed out that, with the 1954 Soviet inspired Constitution,⁸⁴ the leadership had clearly set the objective of a unified legislative system, which prevented conflicts of law. In this way, the obvious conflict between the formal law making powers of the NPC and the use of normative documents by other state bodies rose clearly to the surface.⁸⁵ For these reasons, in 1956, Mao Tse-tung stated that, 'under the *Constitution*, legislative power is concentrated at the centre. But where central policies are not violated and it is in accordance with the needs of the situation and the work at hand, localities may issue regulations ('zhangcheng, tiaoli, banfa'). The *Constitution* certainly does not prevent this.'⁸⁶ Local and provincial administrative implementation and enforcement is often behind with formal objectives, but recently there has been some improvement.⁸⁷ Before the WTO accession on 21 April 2001, the State Council,

81. Congressional-Executive Commission on China, *2005 Annual Report*, *cit.*, p. 16. See Meixian LI, 'China's Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China', (Spring 2004) 18 *Temple International and Comparative Law Journal* at 165–166, arguing that 'the legislative body aims to provide flexibility in the language of the laws so that the policy goals of the Party can be easily interpreted into the black letter laws. The vagueness of Chinese laws is not only created by the drafters of the laws but also by the interpreters of those laws'. See also Claudia Ross and Lester Ross, 'Language and Law: Sources of Systemic Vagueness and Ambiguous Authority in Chinese Statutory Language', (1997) 31 *University of British Columbia Law Review* at 209–210.

82. Interview with Chinese scholars in Beijing in May 2005.

83. Susan S. Westin, 'Prepared Statement' in Congressional-Executive Commission on China, *WTO: Will China Keep its Promises? Can it?*, One Hundred Seventh Congress, Second Session, 6th June 2002, p. 57. Available: <www.cecc.gov>.

84. The NCP radically centralized the exercise of law making powers. See Perry Keller, 'Source of Order in Chinese Law', (1994) 42 *American Journal of Comparative Law* at 722–723.

85. *Ibid.*

86. Liu Han, 'Zhongguo Xianxing Zhengzhi Tizhi he Fazhi de Lishi yu Xianzhuang' (The History and Circumstances of China's Current Political Structure and Legal System), in Wu Daying and Liu Han (eds.), *Zhengzhi Tizhi Gaige Yu Fazhi Jianshe* (Political Structural Reform and Legal Construction), 1991, p. 55, as quoted in Perry Keller, 'Source of Order in Chinese Law', *cit.* at 723.

87. See United States Trade Representative, *2003 Report to Congress on China's WTO Compliance*, *cit.*, p. 65: China's 31 provinces and autonomous regions and 49 major cities made progress, as they repealed 490 trade-related measures and amended 185 more.

in view of complying with the WTO requirements, adopted the ‘*Regulations Concerning Prohibiting the Implementation of Regional Barriers in the Course of Market Economy Activities*’,⁸⁸ establishing more powers of control for the central authorities on provincial entities and specifically on the local government officials implementing and transposing national laws in the provincial regulations. The State Council has also requested the local government ‘to review local regulations, administrative rules, policies and measures in line with the principles of uniform application, non-discrimination and transparency’.⁸⁹ Some provinces and municipalities set up WTO compliance centres and have seriously engaged in a thorough reform of their local system.⁹⁰ In fact, the provincial authorities occasionally had to slow down their review procedures, because the central government has not yet finished its legislative procedures. However, from a national perspective, these important steps are sometimes a drop in the bucket. In addition, there are various and divergent levels of compliance for the different entities and a large number of laws and regulations that need to be abrogated or amended.⁹¹ There is a lower standard of compliance where the regional governments have more autonomy and economic independence. This independence from the central government is replaced by the local government’s dependence upon local enterprises taxes on revenues. The result is that local governments would protect local enterprises’ interests, and they would consider some WTO commitments as a danger for their businesses.⁹² It is predictable that central government establishes a form of ‘tax base along with a reduction in the independence of local governments upon specific enterprises for revenues’.⁹³ Currently, even though a sort of body of parameters exists, which is a sign of goodwill by the central government, it is not enough to assure that the regional powers will respect these rules⁹⁴ or

88. United States Trade Representative, *2002 Report to Congress on China’s WTO Compliance*, 11 December 2002, Washington DC 2002, p. 49. Available: <www.usvtc.org/trade/wto/China_WTO_compliance_report.pdf>.

89. *Communication from the People’s Republic of China*, Information Required in Sections I and III of Annex 1A of the Protocol, 25 November 2002, WT/GC/68 at 5.

90. Congressional-Executive Commission on China, *2002 Annual Report*, cit. p. 48.

91. Susan S. Westin, ‘Prepared Statement’, cit., p. 57; see also Congressional-Executive Commission on China, *2002 Annual Report*, cit. p. 47.

92. Arjun Subrahmanyam, ‘China and the WTO: Perspective on a Changing Environment’, (February 2005) *China Law and Practice* at 21.

93. Clarke, cit. at 107 [2003].

94. It has been reported recently that, in several ports in China, many Chinese custom personnel still continue to use the ‘reference pricing’, with consequently higher fees for the foreign products, and apply inconsistent value of license fees. See *Minutes of the Meeting of 18th October 2005*, Committee on Customs Valuation, China Transitional Review under Section 18.2 of the Protocol of Accession to the WTO Agreement, G/VAL/M/40, Geneva, 12 December 2005 at paragraph 4.4–4.7, p. 7. See also United States Trade Representative, *2005 Report to Congress on China’s WTO Compliance*, cit., p. 24

that the conflicts of powers between the central authorities and the localities will be always avoided.⁹⁵

Protocol, I, 2, A, 4 states that: 'China shall establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application of the trade regime'. This is an important element, which recognizes the necessity of establishing an enforceable mechanism in the event of non-uniform application of the trade regime.

Working Party Report on the Accession of China provides in paragraph 75 that:

'The representative of China further confirmed that the mechanism established pursuant to Section 2(A) of the Draft Protocol would be operative upon accession. All individuals and entities could bring to the attention of central government authorities cases of non-uniform application of China's trade regime, including its commitments under the WTO Agreement and the Draft Protocol. Such cases would be referred promptly to the responsible government agency, and when non-uniform application was established, the authorities would act promptly to address the situation utilizing the remedies available under China's laws, taking into consideration China's international obligations and the need to provide a meaningful remedy. The individual or entity notifying China's authorities would be informed promptly in writing of any decision and action taken. The Working Party took note of these commitments.'

The Working Party Report in comparison with Protocol, I, 2, A, 4 has an additional element, which is important to point out. Paragraph 75⁹⁶ specifies that the Chinese 'authorities would act promptly to address the situation utilizing the remedies available under China's laws, taking into consideration *China's international obligations* [...]'.⁹⁷ The definition of China's interna-

95. Federico R. Antonelli, 'La Legge sulla Legislazione ed il problema delle fonti del diritto cinese', *cit.* at 32.

96. Paragraph 75 of the WPR is one of the commitments listed in paragraph 342 of the WPR directly incorporated in the Protocol, so it is a commitment *per se* and independent from Protocol, I, 2, A, 4.

97. *Ibid* (*emphasis added*); for an analysis of the Chinese compliance with international law, see James Feinerman, 'Chinese Participation in International Legal Order: Rogue Elephant or Team Player', *cit.* at 210, arguing that it is quite difficult to predict or assess the future since Chinese 'practice shows both admirable compliance with, and complete disregard of, international law'. This same doubt is still valid for the specific WTO context. See also Qiang Chen and Qian Hu, 'Chinese Practice in International Law: 2001', (2002) 1 *Chinese Journal of International Law* at 347–356 and 380–386; Jerome A. Cohen, 'Chinese Attitudes Toward International Law – And Our Own', (1967) 61 *American Society of International Law Procedure* at 108–116; see generally Jerome A. Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study*, Princeton University Press, Princeton NJ 1974.

tional obligations could imply broader commitments for the Chinese government well beyond the *WTO obligations*.

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

Protocol, I, 2, C, 1 reflects the provisions of the second part of Article X (3) of GATT:⁹⁸

‘China undertakes that only those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange⁹⁹ that are *published* and *readily available* to other WTO Members, individuals and enterprises, shall be enforced.

In addition, China shall make available to WTO Members, upon request, all those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange before such measures are implemented or enforced. [...]’¹⁰⁰

The Protocol in Paragraph 2, C, 1, if compared with Article X (3) of GATT, goes in the direction of strengthening the previous provisions demanding supplementary requirements for the public availability of the ‘Trade-related laws, regulations and other measures’. Indeed, as already stated, the WTO agreements demand that all the ‘Trade-related laws, regulations and other measures’ be administered in a uniform, impartial and reasonable manner, but also that those measures not be implemented and enforced before they are published promptly and readily available to the other WTO Members with the right to comment.¹⁰¹ On the other hand, Article X limited this statement only on any increase in barriers.¹⁰² Moreover, unlike in Article VIII, Article X established the creation of a single inquiry point with a time limit for response.¹⁰³ All these formal rules, which are the core of the WTO agreements, meet difficulties in the Chinese context. A scholar opined that the term ‘transparency’ does not completely fit in with the Chinese culture and bureaucratic system.¹⁰⁴ Neither the regulations in the 1990s nor the new laws brought

98. See also the statement of art. III of GATS.

99. ‘Laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange’, hereinafter ‘Trade-related laws, regulations and other measures’

100. Protocol of China’s accession, *cit. (emphasis added)*.

101. Sylvia, ‘Article X and the Concept of Transparency in the GATT/WTO’, in Sylvia Ostry, Alan S. Alexandroff and Rafael Gomez, *cit.* p. 127.

102. *Ibid.*, p. 128.

103. *Ibid.*

104. Icksoo Kim, ‘Accession into the WTO: External Pressure for Internal Reforms in China’, (2002) 32, 11 *Journal of Contemporary China* at 438.

China toward a more transparent system. In fact, the formal body of laws and administrative regulations is not the only one applicable. It is necessary to remember the importance of the disorganized body of rules, complex secondary legal sources called 'normative documents' (*guifanxing wenjian*), which are not included in the administrative and legal framework. They are scraps of the old regime from the pre-reform period when China was governed by administrative decrees and not by legislation.¹⁰⁵ Accession to the WTO has not drastically changed the situation. Indeed, the normative documents are still used at local levels by the state officials in the administrative bodies (ministries, commissions and enforcement agencies).¹⁰⁶ Since 'year three' after the accession, there are signs that these conditions are being upgraded, but even these improvements are insufficient to comply with WTO transparency obligations. The system of law resulting from this general and complex situation has fundamental divergences; not only normative documents, but also procedures (*banfa*), regulations (*tiaoli*), circulars (*tongzhi*) and orders (*guiding*) often contradict one another. Even though it is not clear if they are really legal, it is totally clear that they are not published. They often are adopted for provisional (*zanxing*) or experimental (*shixing*) use.¹⁰⁷ Even more they have clearly binding effects on the bureaucrats who should apply them.¹⁰⁸ These documents are designed to give 'specific and practical instructions about matters of internal organization or work methods of that agency.'¹⁰⁹ Therefore, this body of rules has the concrete potential to affect the rights and duties of the external actors because it defines the ways in which state agencies carry out their work and implement the law. There also exists a quantity of unwritten rules and regulations. In fact, before the accession, it was possible to ask the competent au-

105. Sarah Biddulph, 'The Production of Legal Norms: A Case Study of Administrative Detention', *cit.* at 269.
106. Sylvia Ostry, 'China and WTO: the Transparency Issue', *cit.* at 12; Sylvia Ostry, 'WTO Membership for China: To Be and Not to Be: Is that the Answer?', in Patrick Grady and Andrew Sharpe (eds.), *The State of Economics in Canada*, Festschrift in Honor of David Slater, John Deutsch Institute for the Study of Economic Policy, McGill-Queen's University Press, Montreal and Kingston, London, Ithaca 2001 at 5. Available: <<http://www.csls.ca/events/slt01/ostry.pdf>> (Last visited: 01-03-06).
107. Renzo Cavalieri, *La legge e il rito: Lineamenti di storia del diritto cinese*, Centro Studi per i Popoli Extraeuropei Cesare Bonacossa dell'Università di Pavia, Franco Angeli, Milano 1999, pp. 167–168; see also Renzo Cavalieri, *L'adesione della Cina alla WTO. Implicazioni giuridiche*, Argo, Lecce 2003 at 29.
108. Peter Howard Corne, *Foreign Investment in China: The Administrative Legal System*. Transnational Publishers, Inc., New York 1997. Available : <<http://www.law.emory.edu/EILR/volumes/spg97/LAKAR.html>>. See also Xixin Wang, 'Rule of Rules: An Inquiry into Administrative Rules in China's Rule of Law Context', (2000) *The Rule of Law: Perspective from the Pacific Rim*, The Mansfield Center for Pacific Affairs at 72–73. Available: <<http://www.mcpa.org/rol/compendium.pdf>>.
109. Sarah Biddulph, 'China's Accession to the WTO: Legal System Transparency and Administrative Reform', in Sylvia Ostry, Alan S. Alexandroff and Rafael Gomez, *cit.*, p. 161

thorities to look into a particular regulation and commonly receive as an answer that it was confidential (*neibu*), internal and not in the public domain.¹¹⁰ For example, even though transparency in the importation approval process has improved with particular reference to industrial goods, the unclear nature of customs and government procedure, pricing or accounting and the constant reference in all these sectors to the normative documents reduce the importance of any goal already achieved. In order to construct a transparent and rule based system, statutes and clear laws should replace opaque local and internal instructions. Conversely, if these general conditions persist, they can create uncertainty and instability on the foreign investors' actions,¹¹¹ which are obliged to operate with a higher degree of caution and prevented from planning their economic activities freely. For these reasons, the Chinese central government is strongly determined to eliminate these sources, but 'it is clear that such a reform will be a part of an extended and gradual process by which internal procedures and guidelines are to be brought into line with the new legislative mandates.'¹¹² A study of local protectionism published by the Chinese State Planning Commission in April 2001, some months before the final accession, stated, 'After [the accession to] the WTO, it will become even more important for central government to have national unified management and clear policies. This will be extremely important for *maintaining the confidence* of those foreign companies which invest and trade in China.'¹¹³ As stated more recently by the Congressional-Executive Commission on China, notwithstanding the reforms carried out in the past years, after all the efforts and progress engaged in by the Chinese government in meeting all of its WTO commitments, its interventions are still lacking in efficacy and failing to be implemented in a timely manner.¹¹⁴ The Chinese government holds different views on this point: 'The pre-WTO administrative regime, which had been mostly regulated by internal instruments like internal administrative rules and circulars, had been reformed to ensure conformity with WTO rules and disciplines. This reform had greatly improved uniformity, predictability, fairness and non-discrimination of the foreign trade administration.'¹¹⁵

110. Interview in Beijing in May 2005. See also Peter Howard Corne, 'No Pain, No Gain: Steps Toward Securing the Future of China's Legal System', (2000) *The Rule of Law: Perspective from the Pacific Rim*, The Mansfield Center for Pacific Affairs at 57. Available: <<http://www.mcpa.org/rol/compendium.pdf>>.

111. Another practical example is related to the possibility of consultation of the companies' register. The information in the public domain is limited. It is really difficult through the normal legal procedures to obtain the register of the shareholders, to have access to the copies of business licenses of statutes or to obtain copies of judgments or judicial acts.

112. Groombridge and Barfield, *cit.*, p. 66.

113. Chinese State Planning Commission in April 2001 as quoted in Bruce Gilley, 'Breaking Barriers', (12 July 2001) *Far Eastern Economic Review* at 17 (*emphasis added*).

114. Congressional-Executive Commission on China, *2005 Annual Report, cit.*, p. 98. See also Congressional-Executive Commission on China, *2004 Annual Report, cit.*, p. 83.

115. Oral Statement of the representative of China, *Minutes of Meeting held on 10-12 and 20*

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

'China shall establish or designate an *official journal* dedicated to the publication of all those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange and, after publication of its laws, regulations or other measures in such journal, shall provide a *reasonable period* for comment to the appropriate authorities before such measures are implemented [...]. China shall publish this journal on a regular basis and make copies of all issues of this journal readily available to individuals and enterprises.'

The Ministry of Commerce, after authorization of the State Council and since the negotiations of 1993, established its own gazette, but it has been sporadically publishing the adopted 'Trade-related laws, regulations and other measures'. This journal includes neither the relevant provincial and local ordinances nor normative documents. It only contains laws and regulations published at the national level.¹¹⁶ The Legislation Law of 2000 had already provided for the possibility of publishing drafts of important bills.¹¹⁷ The official journal requirement has also been included in the Protocol of China's accession at paragraph 2, C, 2, quoted above, and a regular basis of its publication is demanded. Moreover, China has agreed to provide the translation of the 'Trade-related laws, regulations and other measures' into one or more of the WTO languages.¹¹⁸ During the General Council Meeting of December 2002, the Chinese government declared it 'had [...] designated the Foreign Economic and Trade Gazette as the official journal' for 'Trade-related laws, regulations and other measures'.¹¹⁹ However, according to the USTR, in 2004 China did not designate or establish one single journal,¹²⁰ and several foreign lawyers and practitioners have recently confirmed they did not know about this journal.¹²¹ After further investigation, it was possible to discover the existence of the journal 'Duiwai maoyi wengao', which contains some of the na-

December 2002, WTO General Council, China Transitional Review under Section 18.2 of the Protocol of Accession to the WTO Agreement, WT/GC/M/77, Geneva, 13 February 2003 at 9 paragraph 30

116. Chinese State Planning Commission on April 2001 as quoted in Bruce Gilley, 'Breaking Barriers', *cit.* at 17.

117. Congressional-Executive Commission on China, *2002 Annual Report*, *cit.*, p. 47

118. The WTO official languages are English, French and Spanish. See Working Party Report on the Accession of China, *Report of the Working Party on the Accession of China*, *cit.* at paragraph 334, p. 69–70.

119. Oral Statement of the representative of China, *Minutes of Meeting held on 10–12 and 20 December 2002*, *cit.* at paragraph 29, p. 9.

120. United States Trade Representative, *2004 Report to Congress on China's WTO Compliance*, *cit.*, p. 83.

121. Interview with lawyers and practitioners in Beijing in July 2005.

tional legislations, but not the local ones.¹²² Therefore, the appropriate authorities have to continue to refer to several different sources such as newspapers, journals, and also ministry websites,¹²³ often without any translation at all.¹²⁴ The Chinese government recently stated that its officials are working hard to establish a single official journal.¹²⁵ The provision of a single journal is also predicted to help WTO members enhance their active role of checking the drafting and implementation procedures held by the Chinese Government. Moreover, WTO members could more easily meet their obligation (and right) to submit comments to China in a timely manner, if they can refer to a sole source of information. The same section of the Protocol also includes the requirement that drafts of new laws are distributed before the implementation of those laws and that a reasonable period for comment by the appropriate authorities is allowed. This last condition of a possibility for comment exceeds usual WTO commitments.

The provision of paragraph 2, C, 2 should be read together with paragraph 2, C, 3 of the Protocol:

‘China shall establish or designate an *enquiry point* where, upon request of any individual, enterprise or WTO Member all information relating to the measures required to be published under paragraph 2 (C) 1 of this Protocol may be obtained. Replies to requests for information shall generally be provided within 30 days after receipt of a request. [...] *Notice of the delay* and the *reasons* therefore shall be provided in writing to the interested party. *Replies* to WTO Members shall be *complete* and shall represent the *authoritative view of the Chinese government*. Accurate and reliable information shall be provided to individuals and enterprises.’¹²⁶

122. Interview with lawyers in Shanghai in July 2005.

123. United States Trade Representative, *2004 Report to Congress on China's WTO Compliance*, cit., p. 83; Federico R. Antonelli, ‘La Legge sulla Legislazione ed il problema delle fonti del diritto cinese’, cit. at 31. See also Working Party Report on the Accession of China, *Report of the Working Party on the Accession of China*, cit. at paragraph 330, p. 69: ‘The representative of China stated that the full listing of official journals was as follows: Gazette of the Standing Committee of the National People's Congress of the People's Republic of China; Gazette of the State Council of the People's Republic of China; Collection of the Laws of the People's Republic of China; Collection of the Laws and Regulations of the People's Republic of China; Gazette of MOFTEC of the People's Republic of China; Proclamation of the People's Bank of the People's Republic of China; and Proclamation of the Ministry of Finance of the People's Republic of China.’

124. United States Trade Representative, *2003 Report to Congress on China's WTO Compliance*, cit., p. 66.

125. Representative of China, *Minutes of Meeting held on 10th November 2005*, Council for Trade in Goods, China Transitional Review under Section 18.2 of the Protocol of Accession to the WTO Agreement, WT/G/C/M/82, Geneva, 28 November 2005 at paragraph 3.16, p. 7. See also United States Trade Representative, *2005 Report to Congress on China's WTO Compliance*, cit., p. 90.

126. See also Working Party Report on the Accession of China, *Report of the Working Party on the Accession of China*, cit. at paragraph 335–336, p. 70.

The interested parties are thus granted a type of right of consultation before the promulgation of the 'Trade-related laws, regulations and other measures', which involves the creation of a single enquiry point, a central enquiry point to which any individual, enterprise or WTO Member could address its questions and obtain all information relating to the measures. Before the accession, two scholars proposed a new state institution on administrative procedures, located within the MOFTEC.¹²⁷ After the NPC reform plan of March 2003,¹²⁸ the MOFCOM has become the new enquiry point replacing MOFTEC after its merger with SETC.

According to Liang Shufen, a senior researcher with the Chinese Academy of International Trade and Economic Co-operation (CAITEC),¹²⁹ this merger was another attempt to increase the administration's efficiency. Wang Zhongyu, general secretary of the State Council, had previously declared at the 10th National People's Congress (NPC). 'The separation of MOFTEC and SETC did not conform to the WTO requirements.'¹³⁰ As a result, any individual, enterprise or WTO Member can now obtain all the information related to the 'Trade-related laws, regulations and other measures', directly from the WTO Enquiry and Notification Centre, operated by MOFCOM's Department of WTO Affairs established in January 2002.¹³¹ This has increased centralization in favour of foreign businesses and investors,¹³² and this enquiry point has been considered responsive and helpful.¹³³ But the MOFCOM cannot make bills and laws for all the sectors of legislation. Therefore, different tasks are shared by several Ministries, institutions, working groups and agencies. In any case, the enquiry point remains the MOFCOM and, when there is an individual demand, it will be a problem of internal administration to determine the agency directly involved with that demand. Because of this subdivision of tasks, the level of compliance is differentiated by the varied sectors of legislation taken into consideration.¹³⁴ As a consequence, the

127. Groombridge and Barfield, *cit.*, p. 66.

128. This reform plan has the announced purport of developing a 'market economy with socialist characteristics'. See Congressional-Executive Commission on China, *2003 Annual Report, cit.*, p. 61.

129. CAITEC was the think-tank affiliated with the Ministry of Foreign Trade and Economic Co-operation (MOFTEC).

130. Jia Hepeng, 'Ministry to Better Control Goods, Quotas', *China Daily, Xinhua News Agency*, 18th March 2003. Available: <<http://www1.chinadaily.com.cn/bw/2003-03-11/108438.html>>.

131. United States Trade Representative, *2002 Report to Congress on China's WTO Compliance, cit.*, p. 49.

132. Congressional-Executive Commission on China, *2003 Annual Report, cit.*, p. 61.

133. United States Trade Representative, *2002 Report to Congress on China's WTO Compliance, cit.*, p. 5.

134. Arjun Subrahmanyam, 'China and the WTO: Perspective on a Changing Environment', *cit.* at 21.

MOFCOM has established training courses with a view to improve the knowledge of WTO commitments among the Ministries and institutions, which are indirectly involved in 'Trade-related laws, regulations and other measures' and risk not acting in compliance with WTO rules.¹³⁵ Unfortunately, the overall compliance with basic requirements in other Ministries and agencies is still unsatisfactory. In general, Chinese officials from the Ministry of Commerce are considered the best interlocutors due to their efforts to improve transparency.¹³⁶ There are some institutions that publish regulations and other measures, for both trade-related laws and other kinds of legislation,¹³⁷ also in draft form before the implementation and seek for public comment.¹³⁸ Other institutions adopt new regulations without any prior distribution of drafts¹³⁹ but, at least, include commentaries with systematic description of all the details. Others disclose neither prior drafts nor commentary.¹⁴⁰ In addition, even in the cases the comments are sought, the period of public comment has generally been too short to grant the appropriate foreign authorities an effective opportunity to exercise their right.

In 2004, China adopted significant trade-related laws and regulations. As reported by the USTR, the Chinese Government furnished the appropriate authorities with the drafts of the insurance regulations, most of the government procurement measures¹⁴¹ and the proposed measures in the area of intellectual property rights.¹⁴² Unfortunately, the same behaviour has not been

135. Susan S. Westin, 'Prepared Statement', *cit.*, p. 57.

136. See Oral Statement of the representative of the United States, *Minutes of Meeting held on 13 December 2004*, WTO General Council, China Transitional Review under Section 18.2 of the Protocol of Accession to the WTO Agreement, WT/GC/M/90, Geneva, 10 February 2005 at paragraph 66, p. 13.

137. Congressional-Executive Commission on China, *2004 Annual Report*, *cit.*, p. 84.

138. The China Security Regulatory Commission and other administrative bodies involved in trade and investment have increased the amount of published regulations and other measures in draft for public comment. Under the State Council's Procedural Rules for Formulating Administrative Regulations, the State Council seeks opinions from relevant government bodies, associations, and citizens, but there is no obligation to furnish draft regulations to the public. See Congressional-Executive Commission on China, *2002 Annual Report*, *cit.*, p. 47; see also Oral Statement of the representative of China, *Minutes of Meeting held on 13 December 2004*, *cit.* at paragraph 58, p. 11.

139. Oral Statement of the representative of the European Communities, *Minutes of Meeting held on 10–12 and 20 December 2002*, *cit.* at paragraph 33, p. 10.

140. United States Trade Representative, *2004 Report to Congress on China's WTO Compliance*, *cit.*, p. 81–82; Sarah Biddulph, 'China's Accession to the WTO: Legal System Transparency and Administrative Reform' in Sylvia Ostry, Alan S. Alexandroff and Rafael Gomez, *cit.*, p. 169; see also Congressional-Executive Commission on China, *2002 Annual Report*, *cit.* p. 47.

141. United States Trade Representative, *2004 Report to Congress on China's WTO Compliance*, *cit.*, p. 82.

142. See generally, *Report to the General Council by the Chair*, China Transitional Review under Section 18.2 of the Protocol of Accession to the WTO Agreement, Annex Item C of the

adopted for the Foreign Trade Law, the rules of origin regulations, the customs regulations, the automobile industrial policy or the *2005 Measures on the Importation of Parts for Entire Automobiles*.¹⁴³ The drafts of these trade-related laws were not circulated or provided according to the Protocol and to the WTO standard requirements.¹⁴⁴ It is also important to mention that in 2004, the MOFCOM started to follow the rules included in the *Provisional Regulations on Administrative Transparency*,¹⁴⁵ with the objective of increasing transparency at MOFCOM by establishing procedures and deadlines for publication of information.¹⁴⁶ These new regulations could be taken as a model for other ministries and agencies seeking to improve their own internal procedures with respect to the WTO transparency requirements. However, the necessary consultation between the Chinese government and the foreign companies remains inconsistent¹⁴⁷ and the Provisional Regulations on Administrative Transparency are not fully applied.

With regard to the Local People's Governments regulations with respect to the right of access to information, for example, Shanghai and the Beijing People's Congress¹⁴⁸ and some other municipalities started holding open hearings¹⁴⁹ on a number of draft legislation.¹⁵⁰ In particular, since the accession, Shanghai has increasingly become a point of reference for many other Local

Minutes of the Council's Meeting of 25–26 October 2005 to be circulated as IP/C/M/49, Council for Trade-Related Aspects of Intellectual Property Rights, Geneva, 21st November 2005. See also United States Trade Representative, *2005 Report to Congress on China's WTO Compliance*, *cit.*, p. 89.

143. United States Trade Representative, *2005 Report to Congress on China's WTO Compliance*, *cit.*, p. 89. Jim Mendenhall, general counsel in the U.S. Trade Representative's office said in a speech that the United States was 'seriously' considering a case against China's barriers to foreign auto parts. He also added that other cases against China are possible in 2006. See 'US plans more WTO cases against China', *China Daily, Xinhua News Agency*, 24th February 2006. Available: <http://www.chinadaily.com.cn/english/doc/2006-02/24/content_523497.htm> (last visited 24-02-2006).
144. *Ibid.*
145. Provisional Regulation on Administrative Transparency has been issued by the MOFCOM in November 2003.
146. American Chamber of Commerce in China, *2004 White Paper – China's WTO Performance* Beijing, 2004. Available: <http://www.amcham-china.org.cn/amcham/show_content.php?Id=348&menuid=04&submid=05> (last visited 18-05-05).
147. *Ibid.*
148. Shanghai started holding open hearings in 2000 and Beijing in 2002. See Congressional-Executive Commission on China, *2002 Annual Report*, *cit.* p. 48.
149. Public hearings have already been provided under Article 34 of the PRC Legislation Law, *cit.*, *supra* note 54.
150. Congressional-Executive Commission on China, *2005 Annual Report*, One Hundred Eighth Congress First Session, 11th October 2005, US Government Printing Office, Washington DC 2005, p. 92. Available: <<http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf>>.

People's Congress (LPCs)¹⁵¹ willing to improve public participation and transparency in the drafting process.¹⁵² The Guangdong People's Congress and the Sichuan People's Congress have started to publish all legislation on their websites before formal approval. More recently, Shenzhen has also begun soliciting legislative proposals through its websites and the Guangdong has even started to diffuse these requests through newspapers, direct invitations and open hearings.¹⁵³ The principal uncertainties are related to the modalities of exercise of this right of access to regulations. In fact, the provisions asserted in the Protocol leave many doubts as to the extensions of its concessions to the other WTO Members. It is not clear, for example, when the interested parties can have access to these drafts or if they can refer at all to the draft legislation before promulgation, or if this right covers also the administrative rules and regulations. It is important to recognize all the efforts made by the Chinese government, but many problems remain unsolved.¹⁵⁴ Sometimes, the WTO rules are transposed in Chinese legislation, but some requirement is added which makes it more difficult to exercise the right granted. The Chinese government is not allowed to grant unjustified privileges on the whole with unfair procedures.¹⁵⁵ If China is not going to honour its commitments, the foreign trading companies will continue to suffer from the lack of certainty,¹⁵⁶ the incongruity between laws and unexpected political interventions.¹⁵⁷

151. Among the provincial authorities improving the transparency issues related problems, it is possible to mention among others the Yunnan Provincial People's Congress opening the legislative process to public participation, the Sichuan People's Congress publicly soliciting proposals, the Guiyang Municipal People's Congress asking for comments on existing legislation from the public, the Zhejiang Province opening all its meetings to the public, Beijing, Kunming, Gansu, and Guangdong collecting suggestions on legislation from citizens. Moreover, when the Shanghai People's Congress is bringing in any new laws, it has also begun to ask the Shanghai Bar Association for its opinion. See Congressional-Executive Commission on China, *2003 Annual Report*, *cit.*, p. 60.

152. Congressional-Executive Commission on China, *2005 Annual Report*, *cit.*, p. 71. Congressional-Executive Commission on China, *2003 Annual Report*, *cit.*, p. 59.

153. Congressional-Executive Commission on China, *2004 Annual Report*, *cit.*, p. 84.

154. United States Trade Representative, *2005 Report to Congress on China's WTO Compliance*, *cit.*, p. 4.

155. See European Union Chamber of Commerce, *European Business in China Position Paper 2005*, Beijing, China, 2005, p. 146–150; Martin G. Hu, 'WTO's Impact on the Rule of Law in China', (2000) *The Rule of Law: Perspective from the Pacific Rim*, The Mansfield Center for Pacific Affairs at 103. Available <<http://www.mcpc.org/roll/compendium.pdf>>.

156. See European Union Chamber of Commerce, *European Business in China Position Paper 2005*, *cit.*, p. 148.

157. See Martin G. Hu, 'WTO's Impact on the Rule of Law in China', *cit.* at 103. According to Martin HU, taking into consideration the regulations about foreign investment for companies which practice foreign trade or business logistics, 'it could be easy to realize that foreign investment is allowed but under conditions that concretely prevent part of the potential operators from having access to the market'. During my interview on August 2005 in Beijing, a Chinese scholar stated that the regulations about foreign investment generally improved since the accession to the WTO.

3. The Role of the EU and the US in the Substantial Implementation of Transparency Issues and the Transitional Review Mechanism

3.1. Introduction

The European Commission acting on behalf of the EU and the USTR acting on behalf of the US have the right to monitor China's compliance with WTO commitments and the obligation to help China to integrate into the WTO and the worldwide trade system through bilateral and multilateral negotiations. I will focus on the bilateral trade relations between the EU-US and China with an analysis of the multilateral perspective through the WTO Transitional Review Mechanisms.

3.2. A Bilateral Perspective – The EU–US: Monitoring of Chinese Efforts

As members to the WTO agreement and as signatories of the bilateral agreements, the EU and the US have to help China to comply with its commitments,¹⁵⁸ but they also have the obligation of monitoring the advancement of legislative review and the application of the transparency requirements.¹⁵⁹ Paragraphs 2 and 3 of art.133 of EC Treaty establish that:

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with one or more States or international organizations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with a *special committee* appointed by the Council to *assist the Commission in this task* and within the framework of such directives as the Council may issue to it.¹⁶⁰

158. European Commission Working Document, 'Country Strategy Paper (China) 2002–2006', Brussels, 1 March 2002 at 10. Available: <http://europa.eu.int/comm/external_relations/china/csp/02_06en.pdf>.

'China has shown a genuine capacity to absorb foreign aid and is particularly keen to develop co-operation with the EU', and this is confirmed by the long bilateral negotiations with the EU and by all the European Commission communications related to China.

159. Under the provisions the PNTR Law, 'US federal agencies initiated programs overseeing China's compliance with WTO rules' and also 'monitoring market disruptions, expediting investigations, enforcing unfair trade laws involving Chinese goods and practices, and *establishing a Trade Law Technical Assistance Center* [emphasis added], *Permanent Normal Trade Relations for China Act, Pub. L. No. 106–286, § 413, 114 Stat. 880 (2000)*, as quoted in Leo Wise, 'Trading with China', (2001) 38 *Harvard Journal on Legislation* at 576.

160. Article 133 (ex article 113) of the Consolidated Version of the Treaty establishing the European Community.

Under the provisions of paragraph 3 of art. 133, the EU created the so-called '133 Committee' for implementing the common commercial policy. The EU charged it with the task of comparing Chinese performance and WTO commitments. This committee verifies the Chinese level of compliance by using the 'EU traffic light' to assign China a red light if there is no compliance with WTO requirements, a green light if its level of WTO compliance is satisfactory or a yellow one when the overall China WTO compliance is good, but still not in perfect compliance with WTO rules. As a result, the committee reports to the Council of Ministers and to the WTO General Council on the current global situation in China.¹⁶¹ The creation of this committee does not seem enough to sufficiently comply with the EU obligation of monitoring China's commitments.

On the other hand, the US government has an established and comprehensive structure to monitor and enforce foreign governments' compliance with trade agreements. The US Trade Representative has the mandate to direct it and the Departments of Commerce, Agriculture (USDA), and State have primary responsibilities in monitoring and enforcement. Other agencies, such as the departments of the Treasury and Labour, support the Departments of Commerce, USDA and State by undertaking more technical and specific tasks.¹⁶² In total, there are about 17 federal agencies directly involved in monitoring issues and 13 other federal agencies which cooperate with them by granting a broad range of technical expertise and data.¹⁶³ Within this organized structure, the importance and the duty of monitoring China's compliance of trade agreements immediately sped up after its accession to the WTO with all of its new related commitments.

With regard to the EU internal organization, the institutional framework created, consisting of the mixed commission, is considered to be a new relevant forum with a stronger political value for its decisions. The commission is composed of EU and Chinese officials, including the President of the Commission and the Chinese Minister of Foreign Trade and Economic Cooperation. There is mutual co-operation between the parties, a regular exchange of

161. Olivier Micol, 'Organization at EU Level for the Follow-Up of EU-China Bilateral Trade', Symposium chaired by Mr. Pascal Lamy, *A New Century of Advances in Market Integration: The European Union's Market Access Strategy*, Workshop 5 – Trade relations after China's WTO accession, Palais des Congrès, Brussels, 27 February 2003. Available: <<http://mkacddb.eu.int/news/DocSymp/Micol.pdf>>.

162. United States Government Accountability Office (GAO), *Report to Congressional Committees: World Trade Organization, First Year US Efforts to Monitor China's Compliance*, GAO-03-461, 31 March 2003, Washington DC 2003, p. 4.

163. United States Government Accountability Office (GAO), *Report to the Chairman, Committee on Ways and Means, House of Representative, International Trade: Strategy Needed to Better Monitor and Enforce Trade Agreements*, GAO/NSLAD-00-76, 14 March 2000, Washington DC 2004, p. 4.

visits and diplomatic missions, to improve the dialogue about trade issues and to facilitate bilateral contacts. This mixed commission only has formal meetings every three months and, in the opinion of the author, it is not enough to substantially act on Chinese trade issues. Moreover, the structural organization at the European Commission had no fundamental changes in view of or after the accession of China to the WTO. On the other hand, the US government created several interagency systems, such as the WTO Compliance Subcommittee, in view of promoting and facilitating exchange of information and know-how among the different US agencies that usually meet every two weeks: 'On an intra-agency level, each of the four agencies [USTR, Commerce, USDA and State] have reorganized or established teams to better coordinate the activities among the various agency units involved in China's WTO compliance'.¹⁶⁴ In addition, there are Congressional agencies and commissions assisting the Congress for China-WTO trade issues.

With regard to the staff directly involved, on the one hand, the EU increased full-time positions devoted to cooperation programs, but not those for monitoring China's WTO compliance. On the other hand, as reported by the US General Accounting Office, the full-time American staff for China WTO compliance increased from 28 to 53 from fiscal year 2000 to 2002 in China, Geneva and Washington, D.C.¹⁶⁵

The EU is using different 'non-governmental' means to monitor Chinese efforts to respect its obligations. The European Commission is also updated thanks to several channels of information. The principal on-lookers – the European companies and industries present in China, which are directly affected by the Chinese non-compliance with the requirements – are fundamental in drawing the Commission's attention to particular issues which, without their help, could remain unchecked.¹⁶⁶

Indirectly, the Industrial Confederations and the Chambers of Commerce, which are another source of information and which are made up of the indi-

164. United States Government Accountability Office (GAO), *Report to Congressional Committees: World Trade Organization, First Year US Efforts to Monitor China's Compliance*, cit., p. 5 and 11–13; United States Government Accountability Office (GAO), *Report to Congressional Committees: US-China Trade, Opportunities to Improve U.S. Government Efforts to Ensure China's Compliance with World Trade Organization Commitments*, cit., p. 15–16: 19 U.S.C. § 1872 in the Trade Expansion Act of 1962 (amended several times) codified the creation of an interagency structure and the 'Formal interagency coordination was accomplished through three main structures (1) the Trade Policy Review Group, (2) the Trade Policy Staff Committee and (3) the Trade Policy Staff Committee's Subcommittee on China-WTO Compliance.'

165. United States Government Accountability Office (GAO), *Report to Congressional Committees: World Trade Organization, First Year US Efforts to Monitor China's Compliance*, cit., p. 8.

166. Opinion expressed by Olivier Micol, First Secretary of the Economic & Commercial Section of the European Commission Delegation in Beijing, during the Symposium chaired by Mr. Pascal Lamy, *A New Century of Advances in Market Integration: the European Union's Market Access Strategy*, cit. Available: <<http://mkaccdb.eu.int/news/DocSymp/MinutesWSH-5.htm>>

vidual companies, could inform the European Commission on behalf of their members and defend their damaged interests.¹⁶⁷ It is also important to emphasize the creation of the European Chamber of Commerce in Beijing. The companies, members of the national chambers of commerce, are directly members of the European Chamber of Commerce, which would be able to defend the interests of European companies in China in a more ordinal and efficient way. This cooperation from the private sector is critical, but it cannot replace EU commission action. Moreover, EU companies' businessmen, while having very long-standing experience in China, mostly do not have a broad WTO legal perspective. American companies have close cooperation and exchange of information on an informal basis with the US officials involved in China trade issues.¹⁶⁸ Recently, the EU opened the office of the EU-China WTO programme for support to China's integration into the World Trading. This is another good attempt to comply with its obligation of monitoring China WTO compliance.

All of this organizational and practical information is fundamental, because the monitoring and enforcement obligations of trade agreements are a demanding task with technical complexity requiring a very high level of expertise. This is more than true with China because of its premature accession to the WTO, its vast territory and several years of gradual decentralization in favour of localities.¹⁶⁹ The EU is one of the greatest foreign financial backers for the implementation of WTO agreements in China. As described above, the European Commission has already strongly invested in cooperation programs in order to develop a mutual understanding, to facilitate the implementation of the WTO agreements by Chinese government officials and avoid future problems in the compliance with the requirements.¹⁷⁰ As to the programs

167. See 'EU proposes WTO consultations with China on two textile product categories', *Press Releases*, IP/05/566, Brussels, 17 May 2005. Available: <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/566&format=HTML&aged=0&language=EN&guiLanguage=en>>. See also the most recent 'Notice of initiation of an anti-dumping proceeding concerning imports of ironing boards originating in the People's Republic of China', *OJEU*, C 29/2, 4/02/2006. Available: <http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2006/c_029/c_02920060204en00020005.pdf>.

168. See also Section 135 of the Trade Act 1974, P.L. No. 93-618, 88 Stat. 1996, codified at 19 USC § 2155, which established the creation of a formal trade advisory committee system of the private sector, but there is not any advisory committee specifically on China. For further information, see United States Government Accountability Office (GAO), *Report to the Ranking Minority Member, Committee on Finance, US Senate International Trade Advisory Committee System Should Be Updated to Better Serve US Policy Needs*, GAO-02-876, 24 September 2002, Washington DC 2002, p. 4 and 7.

169. Marina Timoteo, *Il contratto in Cina e in Giappone nello specchio dei diritti occidentali*, CEDAM, Padova 2004, pp. 259-265.

170. Also the US has already invested a great amount of money in order to increase the possibilities that China complies with the WTO agreement. The US Permanent Normal Trade Relations

which should monitor and enforce the Chinese effective compliance with the WTO commitments, it is interesting to compare the EU and the US internal organizations and the financial and human resources devoted to China WTO compliance. In fact, it is clear that the EU just recently has started to grant the same importance attached to cooperation programs (with the creation of the EU-China WTO programme) after four years of China's WTO membership.

3.3. *A Multilateral Perspective – The Trade Policy Review Mechanism (TPRM) and the Transitional Review Mechanism*

The WTO, as an international governmental system, requires substantial reinforcement with the accession of a large, transitional economy like China's. Some have proposed a greater expansion of the 1989 TPRM process.¹⁷¹ The TPRM¹⁷² would review and challenge every other year, starting from April 2006,¹⁷³ local trade policies and practices, trade policy-making institutions in China and macroeconomic conditions. The TPRM is not intended as a multi-annual examination of internal and domestic policies.¹⁷⁴ According to Victoria

for China Act (the 'PNTR Law) 'provides for *additional funding* to the US Commerce Department for the monitoring China's WTO compliance' [*emphasis added*], *Permanent Normal Trade Relations for China Act* § 413, *cit.* at 576.

171. Groombridge and Barfield, *cit.*, p. 76.

172. The 'Wisemen's Report' of 1985 followed by the 'Functioning of the GATT System' (FOGS) group recommendations, both claimed for a better control and periodic review by the GATT of all its members. As stated in Punta Del Este Ministerial Declaration, FOGS group wanted to 'enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of Contracting Parties and their impact on the functioning of the multilateral trading system'. See Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, New York 2003, pp. 6–9; John H. Jackson, *Restructuring the GATT System*, Pinter, Royal institute of international affairs, London 1990, pp. 38–41; see also Petros C. Mavroidis, 'Surveillance Schemes: The GATT's New Trade Policy Review Mechanism', (1992) 13 *Michigan Journal of International Law* 2 at 376–378. The Trade Policy Review Mechanism (TPRM) was created in 1989 within the GATT, because it was considered a 'viable surveillance scheme' for achieving greater transparency the trade policies and practices of Members. In January 1995, the TPRM was also included into the Marrakech Agreement which established the WTO. The letter A of Annex 3 of the Marrakech Agreement describes the function of this review mechanism.

173. 'Trade policy reviews of the world's four largest traders are done in every two years, and China is now No. 4. [...] According to WTO rules, traders numbered 5 to 20 are reviewed every four years. Canada, which is the former fourth and now fifth largest trader, has slipped into this category'. See 'WTO to Review China's Trade Policy Every 2 Years', *China Daily, Xinhua News Agency*, 28 October 2004. Available: <http://www.chinadaily.com.cn/english/doc/2004-10/28/content_386482.htm>

174. United States Government Accountability Office (GAO), *Report to Congressional Committees: US-China Trade, Opportunities to Improve US Government Efforts to Ensure China's Compliance with World Trade Organization Commitments*, *cit.* p. 21.

Curton Prize, 'the TPRM reflects a diplomatic and peer-pressure approach to the enforcement problem'.¹⁷⁵ The TPRM provides a good opportunity for WTO members to submit questions to China and receive further clarifications in a multilateral forum. This could also have a very positive effect in terms of tackling the difficulties posed by the lack of transparency.¹⁷⁶

Three years before the final accession, in 1998, Sylvia Ostry considered that the Chinese legal system was not only unprepared for but also of a low standard with respect to transparency issues and, in general, to WTO commitments. She also thought that in such conditions it was impossible to implement it at all.¹⁷⁷ Thus, without a deep reform of 'China's administrative legal infrastructure, Chinese accession could be seriously damaging to the long term viability of the WTO'.¹⁷⁸ For these reasons, besides the ordinary WTO TPRM, a special 'precautionary' instrument, the Transitional Review Mechanism (TRM),¹⁷⁹ was included in Section 18 of the Protocol of China's Acces-

175. Victoria Curzon Prize, 'New Institutional Developments in GATT', (Fall 1992) 1 *Minnesota Journal of Global Trade* at 101. See also Donald Kessing, *Improving Trade Policy Reviews in the World Trade Organization*, Institute for International Economics Press, Washington DC 1998, chapter 2, p. 4–5: 'By providing an independent, outside assessment of a country's trade policies, the process also lends intellectual and moral support to those within the country who favour liberalization. Arguably the most effective pressure that can be brought to bear to repeal protectionist policies comes from other countries, whether acting individually or collectively'. Available: <http://www.iie.com/publications/chapters_preview/60/2ie2512.pdf>.
176. 'WTO to Review China's Trade Policy Every 2 Years', *China Daily, Xinhua News Agency*, 28 October 2004. Available: <http://www.chinadaily.com.cn/english/doc/2004-10/28/content_386482.htm>.
177. Sylvia Ostry, 'China and WTO: the Transparency Issue', *cit.* at 12.
178. See Sylvia Ostry, 'Article X and the Concept of Transparency in the GATT/WTO', in Sylvia Ostry, Alan S. Alexandroff and Rafael Gomez, *cit.* p. 123.
179. Paolo D. Farah, 'L'adesione della Cina all'Organizzazione mondiale del commercio: come conciliare cultura e diritto', (Luglio – Settembre 2005) XXXIII, 3 *Mondo Cinese* 124 at 34–42; Gerald Chan, 'China and the WTO: the Theory and the Practice of Compliance', (2004) 4, *International Relations of the Asia-Pacific* at 62–63; see also Thomas Rumbaugh and Nicolas Blancher, *China: International Trade and WTO Accession, cit.* In the Protocol of China accession to the WTO at Section 16, the Transitional Product-Specific Safeguard Mechanism (TPSSM), another special instrument, was included in view of better protecting WTO members domestic industries against the potential market disruptions caused by Chinese products. See generally Lingliang Zeng, 'The Legal Effectiveness and Appropriateness of Transitional Product-Specific Safeguard Mechanism against China', in Henry Gao and Donald Lewis (eds.), *China's Participation in the WTO*, Cameron May, London 2005, p. 97 and ff; Marco Bronckers and Martin Goyette, 'The EU's Special Safeguard Clause in Respect of China: (How) Will it work?', (2003) 30, 2 *Legal Issues of Economic Integration*. See also Fabio Spadi, 'Discriminatory Safeguards in the light of the Admission of the People's Republic of China to the World Trade Organization', (2002) 5, 2 *Journal of International Economic Law* at 438–442; Alberto Santa Maria, 'Limiti alle importazioni dalla Cina fra clausole di salvaguardia ed interventi a tutela della concorrenza', (2005) 2 *Il Diritto dell'Unione Europea* at 323–325; Alberto Santa Maria, 'Cina: regole internazionali e dumping sociale e monetario', (2003) *Diritto del commercio internazionale* at 667–673. For an analysis of the differences between Section 16 and paragraph

sion to the WTO,¹⁸⁰ as requested by the US¹⁸¹ and supported by the EU. Both the US and EU were pinning a great part of their hopes and financial support on the good performance of the TRM. The TRM was a trade-off because China, lacking a market based system, was not considered ready for admission to the WTO.¹⁸² The TRM is more comprehensive than the TPRM. The TRM has the objective of monitoring and enforcement of implementation of WTO commitments (which TPRM does not), promoting transparency¹⁸³ and exchange of information in trade relations with China. On the other side, the TPRM final report by the WTO secretariat does not need

242 of the Report of the Working Party on China WTO accession, *see* 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', (2006) 40, 1 *Journal of World Trade* at 147–149.

180. The TRM has been established by Section 18 of Protocol of China's Accession to the WTO:
1. Those subsidiary bodies of the WTO which have a mandate covering China's commitments under the WTO Agreement or this Protocol shall, within one year after accession and in accordance with paragraph 4 below, review, as appropriate to their mandate, the implementation by China of the WTO Agreement and of the related provisions of this Protocol. China shall provide relevant information, [...] to each subsidiary body in advance of the review. China can also raise issues relating to any reservations under Section 17 or to any other specific commitments made by other Members in this Protocol, in those subsidiary bodies which have a relevant mandate. Each subsidiary body shall report the results of such review promptly to the relevant Council established by paragraph 5 of Article IV of the WTO Agreement, if applicable, which shall in turn report promptly to the General Council.
 2. The General Council shall, within one year after accession, and in accordance with paragraph 4 below, review the implementation by China of the WTO Agreement and the provisions of this Protocol.
 3. Consideration of issues pursuant to this Section shall be without prejudice to the rights and obligations of any Member, including China, under the WTO Agreement or any Plurilateral Trade Agreement, and shall not preclude or be a precondition to recourse to consultation or other provisions of the WTO Agreement or this Protocol.
 4. The review provided for in paragraphs 1 and 2 will take place after accession in each year for eight years. Thereafter there will be a final review in year 10 or at an earlier date decided by the General Council.
181. *See* Pub. L. 106–286, div. B, title IV, Sec. 401, Oct. 10, 2000, 114 Stat. 900: 'It shall be the objective of the United States to obtain as part of the Protocol of Accession of the People's Republic of China to the WTO, an annual review within the WTO of the compliance by the People's Republic of China with its terms of accession to the WTO', *Foreign Relations and Intercourse – United States-China Relations – Monitoring and Enforcement of the People's Republic of China's WTO Commitments – Review of Membership of the People's Republic of China in the WTO – Review within the WTO*, (Title 22 – Chapter 77 – Subchapter III – Part A – Sec. 6931). Available: <<http://uscode.house.gov/download/pls/22C77.txt>>.
182. Oral Statement of the representative of the US, *Minutes of Meeting held on 13 December 2004*, at paragraph 63, p. 12.
183. Both the EU and US 'attached great importance to the TRM exercise as an important mechanism to ensure transparency', *see* Oral Statement of the representative of the EU and US, *Minutes of Meeting held on 13 December 2004*, *cit.* at paragraph 69, p. 14 and at paragraph 63, p. 12.

consensus approval of the WTO members. The TRM had already been operating during these four years of China's WTO membership. The review under TRM started to take place after accession and will continue each year for eight years with a final review in the tenth year or at an earlier date decided by the General Council. This mechanism requires that China provides WTO members with specific information,¹⁸⁴ such as economic data, economic policies, policies affecting trade in goods, policies affecting trade in services, the trade-related intellectual property regime and specific questions in the context of the TRM.¹⁸⁵ These questions are different than those required by the general notification requirement for WTO members. The examination of this information is conducted by 16 subsidiary bodies¹⁸⁶ and at the end of the year at the General Council meeting.¹⁸⁷ The TRM grants WTO members with additional multilateral forums to ask the Chinese Government for clarification and to improve mutual understanding in the field of China's accession.

At the 2002 TRM, it was China's first year of WTO membership and China had to overcome its lack of experience, resources and the absence of sufficient time for preparation.¹⁸⁸ In 2003, 2004 and 2005 at the TRM, the EU and US,¹⁸⁹ while appreciating the efforts made by China, also had to recognize the necessity of further progress on WTO commitments related to transparency and in several specific fields, such as banking, telecommunications, automobile, construction,¹⁹⁰ and agriculture sectors.¹⁹¹ From the

184. 'Information to be provided by China in the context of the Transitional Review Mechanism', Protocol, WT/L/432 (Annex 1A) at 13.

185. *Ibid* at 14–18.

186. See footnote 1 of Section 18 of the Protocol.

187. 'Issues to be addressed by the General Council in accordance with the Section 18.2 of China's Protocol of Accession', WT/L/432 (Annex 1B) at 19: The following issues have to be addressed by the General Council: (i) reports of subsidiary bodies on China's implementation of the WTO Agreement and of the related provisions of the Protocol; (ii) development of China's trade with WTO Members and other trading partners; and (iii) recent developments and cross-sectoral issues regarding China's trade régime'.

188. Oral Statement of the representative of the European Communities, *Minutes of Meeting held on 10–12 and 20 December 2002*, *cit.* at paragraph 34, p. 10.

189. See generally United States Government Accountability Office (GAO), *US-China Trade: Summary of 2003 World Trade Organization Transitional Review Mechanism for China*, GAO-05-209R, 25 January 2005, Washington DC 2005. Available: <<http://www.gao.gov/new.items/d05209r.pdf>>

190. United States Trade Representative, *2005 Report to Congress on China's WTO Compliance*, *cit.*, p. 89. See also Oral Statement of the representative of the European Communities, *Minutes of Meeting held on 13 December 2004*, *cit.* at paragraph 70, p. 14. For a deeper analysis of the improvements and results of China WTO compliance in banking sector, see Michael Overmyer, 'WTO: Year Five with China's WTO Entry Requirements Winding Down, Will 2006 Become China's 'Year of the Bank'?', (January 2006) *The China Business Review*. Available: <<http://www.chinabusinessreview.com/public/0601/overmyer.html>>.

191. Oral Statement of the representative of the United States, *Minutes of Meeting held on 13*

Chinese general behaviour in the framework of TRM committees at the WTO, it seems that China does not accept this new mechanism. According to an EU official, the Chinese government is doing the minimum to comply with it. China considers the TRM discriminatory, because it is applicable just to China.¹⁹² But the negotiations for the accession of a new country to the WTO often establish more commitments than those included in the multilateral agreements (WTO plus obligation).¹⁹³ China negotiated and signed the final agreement which had also provided the inclusion of the TRM.¹⁹⁴ For example, paragraph 1 of Section 18 and Annex 1B of the Protocol established that China has to provide any relevant information and documentation to each subsidiary body at least 30 days in advance of the TRM review. However, the Protocol does not specify all the TRM procedural rules, so China has some discretion for providing timely answers to the questions in the TRM sub-committees. Without the introduction of supplementary procedural rules to improve the timeliness of Chinese answers, the TRM procedures cannot work properly.¹⁹⁵ In fact, China is constantly challenging them,¹⁹⁶ since such proce-

December 2004, cit. at paragraph 65, p. 13; see also Oral Statement of the representative of the European Communities, *Minutes of Meeting held on 15–16 December 2003*, WTO General Council, China Transitional Review under Section 18.2 of the Protocol of Accession to the WTO Agreement, WT/GC/M/84, Geneva, 27 February 2004 at 64 paragraph 206.

192. United States Government Accountability Office (GAO), *Report to Congressional Committees: World Trade Organization, First Year US Efforts to Monitor China's Compliance*, cit., p. 27. According to Prof. Tong, former vice minister of commerce of China and chief negotiator for China's accession to the WTO and China-US trade negotiations, other unfair conditions were imposed upon China 'such as the refusal to recognize China as a market economy and the creation of special safeguards to restrict China's exports', see Zhiguang Tong, 'The Development of China and the World Trade', (2006) 40, 1 *Journal of World Trade* at 134.
193. See Julia Ya Qin, 'WTO-Plus Obligation and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol', (2003) 37, 3 *Journal of World Trade* at 491; see also Claudio Dordi, *La discriminazione commerciale nel diritto internazionale*, Giuffrè, Milano 2002, pp. 306–310.
194. 'WTO Ministerial Conference Approves China's Accession', World Trade Organization, Press Release, 10 November 2001, cit.; 'China cannot have her cake and eat it, too', as stated by Richard D'Amato, 'China and the WTO: Compliance and Monitoring', Hearing before the US – China Economic and Security Review Commission, One Hundred Eight Congress, Second Session, 5 February 2004, US Government Printing Office, Washington DC 2004, p. 7. Available: <http://www.uscc.gov/hearings/2004hearings/transcripts/04_02_05.pdf>.
195. It would be predictable, for example, to introduce precise and narrow deadlines for the Chinese government to furnish the relevant information and pass on the written answers to the other members before the committees meetings. Some EU official pointed out that most of the time China replies only orally or submits 'answers [...] in writing just before or during meetings and [sometimes] written versions of their oral answers to other members' questions after some other meetings'. See Oral Statement of the representative of European Communities, *Minutes of Meeting held on 10–12 and 20 December 2002, cit.* at paragraph 34, p. 10. During the 2004 TRM, the US representative said that 'China had provided responses which were more detailed and candid. [...] The TRM activities in several subsidiary bodies had been especially useful, including, for example, the TRIPS Council, the Council for Trade in Services

dures were not in the commitments and appeared to China as an attempt to renegotiate and add to the terms of its accession.¹⁹⁷ China is at least required to comply with the stated procedures and the EU also adds that it '[...] believe[s] that the TRM exercise should follow the common rules and practices in the WTO [and not just the WTO notification requirements], to ensure that questions and replies were exchanged in writing in advance of a committee's meeting'.¹⁹⁸ Chinese officials constantly offered their support and provided information and clarifications to individual members bilaterally and orally after the meetings, but not in the context of the TRM.¹⁹⁹ This is also indirectly confirmed by the representative of China who declared that 'China was open to bilateral discussions at any time on issues of interest to Members'.²⁰⁰ Unfortunately, China is lowering the expectations of some of the WTO members for the outcome of the TRM.²⁰¹ It follows that the WTO members' participation in the review had declined²⁰² in favour of bilateral negotia-

and the Committee on Trade in Financial Services' but in few of the subsidiary bodies '[...] such as the SPS Committee, the Committee on Subsidies and Countervailing Measures, and the Committee on Trade in Financial Services', China continues not to give satisfactory answers to the questions. See Oral Statement of the representative of the United States, *Minutes of Meeting held on 13 December 2004*, cit. at paragraph 62, p. 12.

According to the Chinese representative, 'relevant economic data and information has been provided to the General Council in a timely manner [...]. A large amount of information had also been submitted in advance of reviews held by subsidiary bodies'. See Oral Statement of the representative of China, *Minutes of Meeting held on 10–12 and 20 December 2002*, cit. at paragraph 29, pp. 8–9.

On the other hand, neither does the US always properly respect procedural rules. In fact, for example, in 2003, the US submitted questions to China on the average of 9 days in advance of the meetings, and sometimes the representatives of China said they were not able to answer the US questions because they received them immediately before the meetings. The EU score is better, because the EU provided questions to China around 30–35 days before the meetings.

196. Charles W. Freeman III, 'China and the WTO: Compliance and Monitoring', Prepared testimony for the Hearing before the US – China Economic and Security Review Commission, cit., p. 27.
197. United States Government Accountability Office (GAO), *Report to Congressional Committees: World Trade Organization, First Year US Efforts to Monitor China's Compliance*, cit., p. 28.
198. Oral Statement of the representative of European Communities, *Minutes of Meeting held on 10–12 and 20 December 2002*, cit. at paragraph 34, p. 10; see also United States Government Accountability Office (GAO), *Report to Congressional Committees: World Trade Organization, First Year US Efforts to Monitor China's Compliance*, cit., p. 27.
199. As stated by Charles W. Freeman III, 'China and the WTO: Compliance and Monitoring', Hearing before the US – China Economic and Security Review Commission, cit., p. 36; see also, United States Government Accountability Office (GAO), *Report to Congressional Committees: World Trade Organization, First Year US Efforts to Monitor China's Compliance*, cit., p. 31.
200. Representative of China, *Minutes of Meeting held on 13 December 2004*, cit. at paragraph 72, p. 15.
201. Julie Walton, 'WTO...Year 4', (January–February 2005) *The China Business Review* 32 at 24–34. Congressional-Executive Commission on China, *2004 Annual Report*, cit., p. 85.
202. Terence P. Stewart, *China in the WTO – Year 3*, A Research Report Prepared for the US–

tions,²⁰³ which result in the best means to overcome many problems in China's WTO compliance.²⁰⁴ It is necessary to try to understand if there are comprehensive and 'justifiable' reasons for China to delegitimize the multilateral system at the WTO in general and in the TRM context. According to some scholars, the general Chinese behaviour not in favour of the TRM could be explained with reference to the Chinese cultural tradition,²⁰⁵ where the best way to resolve the disputes was through mediation and conciliation.²⁰⁶ China is a high-context society,²⁰⁷ where the central role is played by collective entities and groups and not by individuals.²⁰⁸ A key element in the Chinese

China Economic and Security Commission, 21 January 2005, Washington DC 2005, p. 96: 'In the second TRM, there was a pronounced decline in the submission of questions to China from Members compared to the first TRM (44 submissions from 7 Members versus 74 submissions from 13 Members). At the third review, Member participation registered a similar record as the second review. Six Members submitted a total of 44 documents posing questions to China with respect to its WTO compliance'. Available: <http://www.uscc.gov/researchpapers/2005/05_01_21_china_inthe_wto.pdf>

See also United States Government Accountability Office (GAO), *Report to Congressional Committees: US-China Trade, Opportunities to Improve U.S Government Efforts to Ensure China's Compliance with World Trade Organization Commitments*, cit. p. 18: '[...] [T]he number of WTO members that asked questions or made statements during the TRM meetings decreased from 23 to 11 over the same time period.'

203. Stefan Napel, *Bilateral Bargaining : Theory and Applications*, Springer, Berlin 2002
204. United States Government Accountability Office (GAO), *Report to Congressional Committees: US-China Trade, Opportunities to Improve U.S Government Efforts to Ensure China's Compliance with World Trade Organization Commitments*, cit., p. 14. See also p. 15: 'The US government utilized two consultative mechanisms to address trade issues with China, both of which further demonstrated an emphasis on high-level, bilateral engagement. [...] [T]he United States agreed to China's request to elevate and transform the JCCT, a forum for dialogue on bilateral trade issues and a mechanism to promote commercial relations, to include three cabinet-level US officials for 2004. [...] JCCT was transformed from a trade promotion dialogue into a mechanism to resolve trade disputes.'
205. According to Confucius, for the dispute settlement it is necessary to appeal to moral persuasion and without coercion or other acts of compelling: 'Do not impose on him, and, moreover, withstand him to his face', Confucius, *The Analects of Confucius*. Translated and annotated by Arthur Waley, Vintage Books, New York, Reissue edition (originally published by George, Allen, & Unwin, 1938), August 28, 1989 at Book XIV, Hsien Wan, Chap. XXIII.
206. For an analysis of the Chinese dispute resolutions and the mediation, see Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao*, cit., pp. 40–70 and pp. 217–249; see generally, Jerome A. Cohen, 'Chinese Mediation in the Eye of Modernization', (1966) 54 *California Law Review*; Donald C. Clarke, 'Dispute Resolution in China', (1991) 5 *Journal of Chinese Law* and in particular at 270–277.
207. For a deeper analysis of the 'low-context cultures' and 'high-context cultures', see generally Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World*, Revised Edition, United States Institute of Peace Press, Washington DC 1997.
208. See generally, Stella Ting-toomey, 'A Face Negotiation Perspective', in Felipe Korzeny and Stella Ting-toomey, *Communicating for Peace: Diplomacy and Negotiation (International and Intercultural Communication Annual)*, Sage Publications, Thousand Oaks, CA, 1990; Ge Gao and Stella Ting-toomey, *Communicating Effectively with the Chinese (Communicating Effectively*

mentality (such as in other Asian, Middle East and South American countries)²⁰⁹ is the concept of preserving group harmony and maintaining one's public image.²¹⁰ The best behaviour is to try to avoid any direct confrontation, such as bringing a lawsuit.²¹¹ In fact, it is possible to compromise one's public image simply because you did not obtain the goal of concluding an agreement.²¹² Thus, Chinese officials²¹³ try to plan out the negotiations in order to prevent any failure. The multilateral system can more easily disclose unpredictable problems or risks. It is more difficult to foresee the reactions of each part in a multilateral forum than those of one counterpart in a bilateral negotiation and so there are more dangers of losing one's credibility.

4. Concluding Remarks

It is necessary to be prudent optimists regarding the possible evolution of the Chinese legal and economic system towards its WTO commitments and the principles of transparency.²¹⁴ China's accession to the WTO has both strong positive aspects and also great and dangerous risks. Some years ago, one Chinese commentator remarked, 'To not reform is to wait for death, to reform is to look for death' (*bu gaizao shi deng si, gao gaizao shi zhao si*).²¹⁵ In any case,

in Multicultural Context), Sage Publications, Thousand Oaks, CA, 1998; see also Maria Weber, 'La negoziazione in Cina', (2005) 1 *Economia & Management* at 31.

209. Sarah Rosenberg, 'Face', *Beyond Intractability*, Ed. Guy Burgess and Heidi Burgess, Conflict Research Consortium, University of Colorado, Boulder, Colorado, USA, February 2004. Available: <<http://www.beyondintractability.org/m/face.jsp>>.

210. Marina Timoteo, *cit.*, pp. 11–13.

211. Jerome A. Cohen, 'Chinese Mediation in the Eye of Modernization', *cit.* at 1201–1202.

212. Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World*, *cit.*, p. 133; see also B. Brown, 'Face Saving and Face Restoration in Negotiation' in Daniel Druckman (Ed.), *Negotiations: Social-Psychological Perspectives*, Sage Publications, Beverly Hills, CA, 1977, p. 275: 'Among the most troublesome kinds of problems that arise in negotiation are the intangible issues related to loss of face. In some instances, protecting against loss of face becomes so central an issue that it swamps the importance of the tangible issues at stake and generates intense conflicts that can impede progress toward agreement and increase substantially the costs of conflict resolution'; Maria Weber, 'La negoziazione in Cina', *cit.* at 33.

213. According to a survey conducted by the China Youth Daily (official newspaper of the Communist Youth League): '87% of the Chinese public agree that 'saving face' is an integral part of their lives [...] men and in particular government officials, care about saving face the most', see China Online Blog, 'Polls show that 87% of Chinese believe in saving face', 12 August 2005.

214. Margaret M. Pearson, 'China's Past Behaviour in the Global Economy Shows that the Country is Likely to Conform to WTO Norms', *The China Business Review*. Available: <<http://www.uschina.org/public/wto/uscbc/pearson.html>>.

215. Zhang Shangtang, 'Xishou waishang touzi, jiajie gaizao guoyou qiye' (Attracting Foreign In-

it is certain that WTO membership had already been a good instrument for the Chinese leadership²¹⁶ and in particular for former Premier Zhu Rongji. He tried to give 'shock therapy' to the old system in order to substitute it with a new one²¹⁷ and overcome local protectionism. In brief, the Chinese leadership was able to take advantage of the opportunity to heighten the compliance with WTO rules and transparency. The new Chinese leadership must continue in this way. This is echoed by Donald Clarke of George Washington University who asserted, 'the accession is part of a larger strategy of massive and fundamental economic reform'.²¹⁸

It is also predictable that China could resolve its internal limits faster and really fight against the local barriers with external interventions. In October 1978, Deng Xiaoping said that: 'China cannot develop by closing its door, sticking to the beaten track and being self-complacent.[...] It will be quite difficult for us to realize the four modernizations [industry, agriculture, national defence and science and technology], [without] learning from other countries and we must obtain a great deal of foreign assistance'.²¹⁹ This statement is still true and for this reason, the increasing collaboration between China and the EU (and between China and the US) could be a potential solution for China. In particular, China showed good will in the bilateral relations with the EU. If the EU wants to reach an effective 'matured partner-

vestment, Restructuring Indirectly the State-Owned Enterprises), (February 1995) 77 *Guanli xiandaihua* (Management Modernization) at 4.

216. John N. Paden, 'The World Trade Organization and the Rule of Law in China: A First-year Assessment', (April 2003) 51, 9 *Virginia Lawyer*, International Law, Official Publication of Virginia State Bar at 21–23. Available: <<http://www.vsb.org/publications/valawyer/apr03/paden.pdf>>.
217. Government work report of 1999: The Third Session of the Ninth National People's Congress on March 5, 2000. Zhu Rongji speaking about the uncompetitive industries and inefficient SOEs said that those SOEs, which are unable to comply with the new environment, will be slung out of the market or be absorbed by the efficient ones: 'Rapid waters should wash away dirty sands.'
218. Donald C. Clarke, 'Prepared Statement' in Congressional-Executive Commission on China, *WTO: Will China Keep its Promises? Can it?*, One Hundred Seventh Congress, Second Session, 6th June 2002 p. 66. Available: <www.cecc.gov>; Clarke, *cit.* at 97 [2003].
219. Deng Xiaoping was the first one to propose this concept on October 1978, during his speech to a press delegation from the Federal Republic of Germany. See <<http://www.peopledaily.com.cn/english/dengxp/contents2.html>> (last visited: 15-03-06)
This position was confirmed by the December 1978 Third Plenary Session of the Communist Party of China's Eleventh Central Committee. The focus of the party and state's work has officially shifted from class struggle to modernization. See 'Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China', XH (23 December 1978), in *Foreign Broadcast Information Service, Daily Report: People's Republic of China* at E4, E10 (26 December 1978) as quoted in Frances Hoar Foster, 'Codification in Post-Mao China', (1982) 30 *American Journal of Comparative Law* at 395.

ship'²²⁰ with China, it is necessary for the EU through the bilateral meetings to convince the Chinese government to have a better score in the WTO multilateral forums, such as TRM. In this way, the EU will be able to show all the WTO members that it's cooperating position with China is the best way to obtain concrete results on China WTO compliance issues. Recently the EU has demonstrated²²¹ that it is ready to consider taking an aggressive approach toward China, under specific conditions and if other methods fail.²²² The EU is prepared to introduce safeguard measures and quotas to protect EU companies when Chinese imports are the cause of material damage or might cause material damage to EU industry.²²³ It is surely important for the EU to protect its enterprises, but safeguard measures should be considered a temporary solution because they do not facilitate the good trade relations between the EU and China. The EU has to try to prevent problems instead of intervening at the very last moment, when the situation has become critical for EU companies. In the opinion of the present author, it is necessary for the EU to begin demanding more and more respect of all the WTO principles and in particular the transparency principles. In this way, by exploiting all the internal and

220. Commission Policy Paper for transmission to the Council and the European Parliament, *A Maturing Partnership – Shared Interests and Challenges in EU-China Relations*, *cit.*

221. *See supra* note 167.

222. Peter Mandelson, 'Challenges and Opportunities for EU and China', Speech at the Central Party School, Beijing, China, 6 September 2005. EU Commissioner Mandelson said: 'I had no choice last June but to find some temporary relief for European producers [...]. I refused to do this unilaterally, or without sound evidence, because I do not believe that is the way to respond to China. I will continue to resist unilateral action so long as China, too, maintains the spirit of dialogue and cooperation'. Available: <http://europa.eu.int/comm/commission_barroso/mandelson/speeches_articles/temp_icentre.cfm?temp=sppm051_en>. *See also* Pascal Lamy, 'EU-China Trade Relations', Speech at the Chamber of Commerce, Beijing, China, 17 October 2002. Former EU Trade Commissioner Pascal Lamy was taking into account 'the possibility of going to WTO dispute settlement proceedings if the EU does not manage to solve a particular case'. Pascal Lamy was 'ready to go to the WTO, where other courses of action have produced no effective results. European Commission preferred approach is to recognize the size of the challenge and to try to build confidence in the systems to facilitate trade and not to drag China into the WTO at the first sign of a problem'. Available: <http://europa.eu.int/comm/commissioners/lamy/speeches_articles/spla128_en.htm>.

223. Peter Mandelson, 'Challenges and Opportunities for EU and China', *cit.*; 'China slams EU anti-dumping charges on shoes', *China Daily, Xinhua News Agency*, 24th February 2006. Available: <http://www.chinadaily.com.cn/english/doc/2006-02/24/content_523780.htm> (last visited 24-02-06);

EU – China Textile Agreement 10 June 2005, Memo-05-201, Brussels, 12 June 2005. Available: <http://europa.eu.int/comm/external_relations/china/intro/memo05_201.htm>; *see also* Aubrey Silberston, 'Anti-dumping Rules – Time for Change?', (2003) 37, 6 *Journal of World Trade* at 1074; Xiang Liu and Hylke Vandenbussche, 'European Union Anti-dumping Cases Against China: An Overview and Future Prospects with Respect to China's World Trade Organization Membership', (2002) 36, 6 *Journal of World Trade* at 1125–1144.

international means, it is possible to help and convince China to comply with the WTO commitments, to open its system for generating market access opportunities for European companies.

While recognizing that great results have been obtained by the EU during these years, many things still have to be changed. First of all, in view of effectively complying with its monitoring obligation, the EU should increase the funds and human resources devoted to the monitoring and enforcement of China's WTO compliance and improve the technical training in Chinese trade issues for its officials. Secondly, it would be wise to better organize the internal structure to allow for more cooperation and exchange of information among the different Directorates-General of the European Commission in Brussels, the offices of the European Council, and those of the European Parliament involved in Chinese issues. An increasing consciousness of the EU and a legal technical knowledge of the inadequacies of the Chinese internal system should not directly result in a subsequent attack of the EU against China. The EU could also be granted a better juridical basis for potential actions also through the WTO dispute settlement system, in the event that China shows a non-cooperative position. Incidentally, it will also be profitable for China, because the EU would grant improved technical assistance to China in all the fields of trade issues.

As to the coordination between all WTO Member States, the US-China Economic and Security Review Commission pointed out that the coordination between the US and the other trading countries (in particular with the EU) is still minimal and there is no common strategy regarding China's WTO compliance.²²⁴ Another fundamental problem is related to the absence of a measuring system to evaluate Chinese compliance. It would be profitable for at least those WTO Members, who consider the TRM system a good instrument to bring China to full WTO compliance, to adopt an agreed upon internal system for grading China's improvements.

Moreover, the TRM should not be considered just as a political forum, but it could really become a key instrument for China to improve and also resolve substantive problems in its internal system in compliance with its transparency issues and, in general, with all WTO commitments. On the other hand, increased cooperation of China in the TRM (in all the subcommittees) would improve China's international standing and reputation as a global player in multilateral forums and not just as a good-compromising partner in bilateral trade negotiations. If China starts to adopt a more WTO-friendly behaviour by respecting WTO procedures such as the TRM system, it would 'obviate

224. US-China Economic and Security Review Commission, *2004 Report to Congress*, One Hundred Eighth Congress, Second Session, June 2004, US-Government Printing Office, Washington DC 2004, p. 63-64.

any need [...] to seek alternatives to multilateralism²²⁵ and indirectly reinforce the WTO system. According to the Consultative Board to the Director-General Supachai Panitchpakdi, 'the WTO constrains the powerful'.²²⁶ Even if the GATT and the WTO have always tried to convince all WTO Members to choose multilateral arrangement for their disputes, lately, the most powerful WTO Members started to privilege regional and bilateral solutions,²²⁷ and China is one of the most recent and impressive examples.

I partially agree with Jiangyu Wang, as quoted, when he chooses, in light of the WTO requirements, the 'thin' model of the theory of rule of law as the best option for China.²²⁸ Francis Snyder and Cheng Weidong seem to share the same opinion.²²⁹ They say that in the EU-China relations, the 'soft law' has been a primary and temporary result, which can be helpful to lead to the 'hard law', but they consider that 'soft law' *per se* is not enough. The 'thin' model, much like soft law, surely does not require a perfect legal system. However, the 'thin model' should be shaped in the direction of the final goal, which has to be represented by the 'thick' model of the rule of law (or by the hard law). According to Donald Clarke, 'the WTO does not mandate a perfect legal system or even a basically fair one, outside of a few specific areas'.²³⁰ He also adds that '[T]here is reason to be generally sanguine about the prospect of China's compliance with its commitments and its willingness and ability to modify its rules if it loses a WTO dispute settlement proceeding'.²³¹

The problem has already become topical. In fact, it is not necessary to wait for China to lose a WTO dispute settlement proceeding to point out the

225. Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, World Trade Organization, Switzerland, 2004, p. 18. Available: <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf>.

226. *Ibid.*

227. *Ibid.* With reference to the negative aspects of bilateralism for least-developed countries, see Nerina Boschiero, 'Le biotecnologie tra etica e principi generali del diritto internazionale', in Nerina Boschiero (a cura di), *Bioetica e biotecnologie nel diritto internazionale e comunitario. Questioni generali e tutela della proprietà intellettuale*, G. Giappichelli Editore, Torino, forthcoming, pp. 78–84. See also Mitsuo Matsushita, 'Interest of Developing Countries in the WTO Dispute Settlement', in Henry Gao and Donald Lewis (eds.), *China's Participation in the WTO*, *cit.*, p. 283 and ff. As regards the differential treatment for developing countries in the WTO, see Cesare Pitea, 'Il trattamento differenziato dei paesi in via di sviluppo nella prassi contenziosa dell'OMC', in *Comunicazioni e Studi dell'Istituto di Diritto Internazionale dell'Università degli Studi di Milano*, Vol. XXII, 2002, pp. 803–842.

228. See Jiangyu Wang, 'The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development', *cit.* at 349.

229. Francis Snyder and Cheng Weidong, 'Soft Law in EU-China Trade Relations', paper presented at the Workshop on '*Nouvelles configurations normatives européennes*', Ceric, Université Paul Cézanne Aix-Marseille III, 17–18 June 2005.

230. Clarke, *cit.* at 111 [2003].

231. *Ibid.* at 106.

Chinese attempt to modify or, at least, to give a restrictive interpretation of the WTO rules or apply its selective adaptation.²³² While all the elements described above, which related to the concept of conciliation, explain and may be used to 'justify' the general unwillingness for the Chinese government to have recourse to the Dispute Settlement system at the WTO, it is not possible to reach the same equal conclusion as related to the TRM. As already said, China considers the TRM to be discriminatory, but China accepted it by signing the agreement. The TRM could not be considered as a judicial system (such comparison is possible in the case of the DSU)²³³ and there are no clear dangers to one's public image in that context. Moreover, some Chinese scholars consider that the DSU could not cause any risk of losing one's credibility either.²³⁴ Many Chinese governmental officials were and are still substantially worried about two related problems: the risk of being humiliated and losing their job in the event China loses a dispute at the WTO, and the risk of an obligation to compensate the winner countries. The first concern and anxiety is understandable, but both are unjustified. The terms loser or winner country are used in a common sense, but the Panel of experts at the WTO does not clearly recognize a country as a winner or loser of a dispute, but it just determines if a piece of legislation is or is not in compliance with WTO agreements. Moreover we can add that the EU and the US continue to 'lose and win cases', so China would just enter this new 'global game' without necessarily becoming the first loser country. Secondly, as far as compensation is concerned, the WTO dispute settlement does not decide for the past, but for the

232. Pitman B. Potter, 'Legal Reform in China: Institutions, Culture, and Selective Adaptation', *cit.* at 478–479.

233. With reference to the DSU, see among others Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy*, *cit.*, pp. 21–44; John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations*, Cambridge University Press, Cambridge 2000, pp. 133–144; Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Trade Law, International Organizations and Dispute Settlement*, Kluwer, London 1997; David Luff, *Le droit de l'Organisation mondiale du commerce. Analyse critique*, *cit.*, pp. 771–981; Paolo Picone and Aldo Ligustro, *Diritto dell'Organizzazione mondiale del commercio*, *cit.*, pp. 575–614; Marcella Distefano, *Soluzione delle controversie nell'OMC e diritto internazionale*, *cit.*, pp. 37–75 and pp. 145–168. As to the issue of the implementation of DSB adopted reports in the EU, see Geert A. Zonnekeyn, 'EC Liability for Non-Implementation of WTO Dispute Settlement Decisions – Are the Dice Cast?', (2004) 7, 2 *Journal of International Economic Law* at 483–490; Pieter J. Kuijper and Marco Bronckers, 'WTO Law in the European Court of Justice', (2005) 42 *Common Market Law Review* at 1313–1355; Giacomo Gattinara, 'European Banana Importers and WTO Dispute Settlement Decisions: Is the Door Closed?', (March 2005) *European Law Reporter* at 101–106; Giacomo Gattinara, 'La responsabilità extracontrattuale della Comunità europea per violazione delle norme OMC', (2005) 1 *Il Diritto dell'Unione europea* at 111 and ff.

234. Interview with two Chinese scholars.

future and so the WTO does not ask for compensation.²³⁵ The loser WTO member just has to rectify or replace its law or legislation or practice under the rules of the breached law²³⁶ or in compliance with the indications of the Panel reports, following carefully its recommendations and the timing procedures.²³⁷ If the WTO member (in our analysis China) modifies it, there would be no fault and China would be in perfect compliance with WTO rules. These characteristics seem to conform perfectly to Chinese cultural traditions, summarized by the Confucian idea that to have faults and not to reform them should be pronounced as having faults.²³⁸ Therefore for the Chinese governmental officials, there is no risk of public shame in the Dispute Settlement system or in the TRM context.

China has to continue on the right track in view of reaching at least a 'better' (if not perfect) legal system and take advantage of all the means granted by the WTO to improve its internal system and the multilateral relations with the other WTO Members. Therefore, China should respect not just the rules and procedures included in the Protocol, but it should be necessary to apply an extensive interpretation of all the general WTO rules and procedures, also in TRM context. All WTO Members, including China, should act and keep in mind that 'Everyone has an interest in the continued success of the WTO as an institution'.²³⁹

235. Paolo Picone and Aldo Ligustro, *Diritto dell'Organizzazione Mondiale del Commercio*, cit., p. 600.

236. *Ibid.*

237. Art. 19 DSU.

238. Confucius, *The Analects of Confucius*. Translated and annotated by Arthur Waley, Vintage Books, New York, Reissue edition (originally published by George, Allen, & Unwin, 1938), August. 28, 1989 at Book XV, Wei Ling Kung, Chap. XXIX.

239. Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, cit., p. 18.