

Revamping Laws for the Market Economy in the Post-WTO China

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Booming Economic Legislation

China has begun to adopt and/or amend a series of economic laws during the five-year period between 2003 and 2008 better to meet the needs of a market economic system.¹ After the leadership succession from the third generation to the fourth generation in early 2003, China launched this new wave of economic legislation in order to further its economic reform and to build up its legal system. It is a big part of China's current legal reform towards the rule of law. There are several factors driving that move forward.

The first is the continuing reconstruction and reform of the legal system. It is an open secret that the Chinese legal system is incomplete and lacks enforceability. There was a vacuum in the legal system after the Cultural Revolution (1966-1976) and the Beijing leadership headed by Deng Xiaoping strived to fill it by exerting tremendous efforts. The communiqué of the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party (CCP) held in December 1978 set the goals of the re-establishment of the legal system in China. More than two decades have passed and China has experienced unprecedented changes in many areas. The addition of new economic laws is simply a reflection of this continuation of change. As China has planned, a sound and comprehensive legal system should be established by 2010.

The requirements of the World Trade Organisation (WTO) are the second main factor promoting the new wave of economic legislation. After China entered into the WTO, it has to be obliged to meet the requirements of the WTO rules and regulations, particularly those governing trade and other economic activities. In the *Report of the Working Party on the Accession of China*, China ensured that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as fully to perform its international obligations, and the WTO Agreement would be implemented by China in an effective and

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¹ See Kathy Chen, "China Turns Focus to Economic Laws", *The Asian Wall Street Journal*, 13 August 2003, at 1.

uniform manner through the revision of its existing domestic laws and the enactment of new ones in full compliance with the WTO Agreement.² The same process would apply to administrative regulations, departmental rules and other central government measures. The WTO effect is thus fundamental to the change of economic laws at present and in the years to come.

In preparation for joining the WTO, China launched the overall review process of its laws and regulations as early as 1999. Many administrative regulations and measures either by the State Council or ministries were annulled before the end of 2000. Since entry into the WTO, China has quickened its pace of revising its existing laws and regulations. According to a statistic, as of the end of 2002, China had revised 14 laws and 37 administrative regulations, annulled 12 administrative regulations, suspended 34 relevant documents, and changed more than 1,000 departmental rules and measures. Meanwhile, new laws have to be timely adopted to cope with the changed situation. As one Justice of the Supreme Court commented, the biggest change after WTO entry would be in the legal environment.³ In this sense, the wave of new economic legislation was not initiated by the new Chinese leadership, but was already scheduled in line with WTO requirements.

What is more remarkable is that the idea of the rule of law has been gradually accepted by the Chinese. The 1999 Amendment to the Chinese Constitution expressly endorsed the concept of the rule of law and this endorsement can be regarded as a milestone in China's overall legal reform.

The most dynamic driving force which cannot be ignored is the need for laws and regulations for the development of the market economy. As is said, market economy is the rule of law economy. It is understandable that, during the early period of economic reform before the 1990s, China's legislation took place mainly in the economic field so as to facilitate economic development and foreign trade. Since the 1990s with the further development of China's economic reform and its increased international involvement, particularly after it endorsed the concept of market economy, legislation has been expanded to cover new areas in the economic field, including, *inter alia*, company law, insurance, securities, anti-dumping, telecommunications, and intellectual property.

Because of economic reform, economic law has become the most developed branch in the current Chinese legal system. According to statistics, the 7th NPC and its Standing Committee adopted more than 80 laws and decisions on legal issues, and a quarter of them concerned the economy; and out of 117 laws and relevant decisions enacted in the 8th NPC, one third related to the market economy. From 1979 to the

² Sec Paragraph 67 of the Report, in WTO, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, 1 October 2001, available at <http://law.people.com.cn/bike/note.html?id=650> (accessed 16 September 2003).

³ Comments of Justice Li Guoguang, available at <http://www.npcnews.com.cn/gb/paper228/1/index.htm> (accessed 23 November 2001).

end of 2002, two thirds of 304 laws adopted by NPC were related to economic development. Local legislation also reflects the same trend. For example, Jiangsu Province, between 1993 and 1997, adopted 76 economic laws and regulations, accounting for 55 per cent of its total legislation.

Banking Laws

Significantly, three major banking laws have recently been revised or adopted by the NPC. China enacted the People's Bank Law and Commercial Bank Law in 1995. However, after China's entry to the WTO and thanks to its commitment to fulfilling WTO obligations, these two existing laws needed to be revised, and such revision can be regarded as part of the reform of the banking system.

The most remarkable development in the reform of the banking system is the establishment of the Banking Regulatory Commission (BRC) in April 2003 in accordance with the Decision adopted by the NPC Standing Committee. One of the purposes of the BRC is to deal with bad loans which have produced high financial risks which should be avoided and prevented. The BRC is responsible for preparing supervisory measures for financial institutions in the banking sector, preparing relevant administrative regulations, examining and approving the change and scope of purposes and businesses of financial institutions in the banking sector, supervising the above institutions, and dealing with law breakers.

According to the Law on Banking Supervision, the BRC has the authority to request financial institutions in the banking sector to submit relevant materials, to take measures during spot inspections, to take over financial institutions in the banking sector which have serious problems such as credit crisis, and wind up financial institutions in the banking sector which caused severe damage to financial order and public interest. Clearly, China has introduced into its law the Core Principles for Effective Banking Supervision (Basel Core Principles) adopted by the Basel Committee on Banking Supervision in 1997.⁴ This indicates that China relies more and more on international law and practices in its economic legislation.

The People's Bank Law needs revision for two reasons: to harmonise with WTO requirements and to enable the People's Bank to co-ordinate and co-operate with the newly-established BRC. The power of banking supervision assumed by the BRC was originally within the competence of the People's Bank and stipulated in the 1995 People's Bank Law. However, after the establishment of the BRC, the relevant provisions on banking supervision had to be changed. According to the revised law, the People's Bank will no longer assume the overall supervisory role, but be responsible for preparing and carrying out currency policy, for improving operational rules for financial institutions, and for controlling and preventing financial risks as a cen-

⁴ For details, see "Core Principles for Effective Banking Supervision", available at <http://www.bis.org/publ/bcbs30.pdf> (accessed 19 September 2003).

tral bank. However, while some of its supervisory power has been transferred to the BRC, the People's Bank will retain such power in six areas including inter-banking markets, payment and settlement rules, working together with the BRC, etc.

The Commercial Bank Law has also been revised accordingly. Commercial banks will be mainly responsible to the BRC, and the category of its business operations is enlarged. The provision on the awarding of government loans under government instruction was deleted. The provision prohibiting commercial banks from investing in non-financial institutions and enterprises within China was watered down. The punishment of illegal activities was strengthened.

Other Important Laws

Related to the banking system is the Law on Securities, and its revision was another onerous task in the NPC. This law needed a relatively big surgery since it involved a number of controversial issues, such as whether banks' funds can be traded on the stock market and it is also related to the enactment of banking laws. After several deliberations, the NPC finally adopted the amended Law on Securities in October 2005. There are a number of changes, including the expansion of the scope of stocks; the provision of a legal basis for commercial banks to invest in the stock market by establishing fund management companies and other relevant companies; and strengthening risk control and guaranteeing the safety of clients' assets.

Among all new economic laws and regulations, one regulation that is particularly meaningful for international trade is the Decision on Certain Issues of Handling Administrative Cases of International Trade issued by the Supreme Court in August 2002.⁵ It is the first such regulation relating to the handling of trade cases in line with the WTO regulations. It has introduced the principles of national treatment and reciprocity. According to its Article 10, foreigners and foreign entities have the same litigation rights as Chinese citizens and entities in administrative cases relating to international trade. However, if a certain foreign country discriminates against Chinese citizens in respect of the same right, then the reciprocity principle applies.

China does not directly apply the WTO regulations within Chinese territory. Rather, China implements such regulations through its domestic legal procedure by adopting and revising relevant laws. This general rule applies to court proceedings, i.e., the court should not directly use WTO regulations as the judicial basis for its decision, nor should any individual or enterprise directly invoke WTO regulations in taking or defending proceedings. The above regulation reflects this general rule. Nevertheless, it provides that, when relevant provisions in an applicable domestic law have more than two different interpretations, that which is much closer to the WTO regulations prevails.

⁵ Available at <http://www.chinacourt.org/sfjs/detail.php?id=41166> (accessed 7 September 2002).

In fact, the regulation embodies the rule of judicial review required by the WTO law. In China's legal framework, judicial review refers to administrative litigation and administrative trial. Under the new regulation, any person, whether legal or natural and foreign or local, has the right to ask for such review of a particular administrative act through litigation. The relevant court will examine the case by looking into seven aspects: whether the evidence is genuine and adequate; whether laws and regulations are applied correctly; whether there is a breach of statutory procedure; whether there is *ultra vires*; whether there is abuse of power; whether administrative punishment is obviously unfair; and whether there is failure or delay in performing statutory duties. The regulation assists Chinese courts in supervising the conduct of governmental organs involved in international trade administration.⁶ However, it should be noted that such judicial review of administrative acts is limited to cases relating to international trade.

Another law which is significant for the development of the market economy is the Law on Administrative Licensing which was adopted in August 2003.⁷ In the economic field, public health, macro-economic adjustment and control, ecological environmental protection, and the development and utilisation of limited natural resources require administrative licensing. Any regulation on administrative licensing should be published; if not, it cannot become the basis for granting an administrative licence. In order to prevent localism, the Law specifically provides that any administrative licensing at a certain locality should not restrict individuals and enterprises from other regions from producing goods or providing services, nor restrict the access of commodities from other regions to the local market.

Whither Next?

From the above general survey, we can see that in the last 25 years China has made remarkable achievements in economic legislation so as to reconstruct and develop its legal system. However, China's legal system is not complete, and there is a need for further development. For a legal system, quality is much more important than quantity. The large amount of legislation alone cannot give a true picture of the development of China's legal system. In fact, there are numerous problems in both legislation and enforcement.

Transparency in the legislation process is an important element in the adoption of good laws. It is to be noted that, very recently, China has begun a new practice of soliciting opinions from relevant circles for the draft law about to be enacted. During the review process of the Marriage Law, the draft law was widely discussed throughout the country. In addition, the principle of transparency requires all WTO

⁶ See "New role for legal system in trade", *China Daily*, 30 August 2002.

⁷ Text is available in *People's Daily* (in Chinese), 28 August 2003, 13. It came into force on 1 July 2004.

members to publicise all their laws and policies in relation to trade. Since the WTO entry, China has been unable to continue using a large number of normative internal documents to govern economic operations. Instead, the existing documents, when needed and in line with the WTO regulations, should be enacted into laws.

Previously, there was no clear-cut status of property right and ownership in China. The relevant stipulations in the Chinese Constitution are ambivalent, since the Constitution provides only that "in the primary stage of socialism, the state upholds the basic economic system ensuring common development of the economy belonging to diverse forms of ownership". However, the Fourth Amendment to the Constitution has partially remedied this by emphasising the inviolability of legally owned private property.⁸ But private property rights are still lack of legal protection.

The effectiveness and validity of a law depend on its enforcement and implementation. The important area in law enforcement is the current judicial reform. A series of substantial measures have been taken. The judiciary adopted specific programmes for judicial reform, trying to reform the adjudicating system by making adjudication more transparent, improving the quality of judges, and improving the internal management mechanisms. After 2002, anybody who intends to work within the judiciary must pass the recently created National Judicial Examination and hold a bachelor's degree. It is expected that more cases, particularly those involving foreign elements, will come to court after China's entry to the WTO.

Corruption is rampant in China. The deeply entrenched culture of *guanxi*, instead of legal rules, prevails in economic transactions. During the transitional period from the planned economy to the market economy, there have been *lacuna* in the management and economic structure. Almost all corrupt government officials took advantage of these loopholes, thus making corruption exceptionally severe.⁹ Despite various efforts by the CCP and the government, there is no obvious sign that corruption has been effectively curbed and mitigated. Clearly, corruption laughs at law enforcement.

In addition, localism is particularly reflected in the legislation concerning economic matters. Since differences in interests exist in the transitional period from the old economic system to the new, local interests can be protected by local legislation. Economic rights and interests drive local legislatures to be actively engaged in enacting economic laws. However, improper laws will cause local market blockade, monopoly and chaos, abuse of power, and corruption. For these reasons, the Chinese leaders have realised that legal reform in China remains a "long-term" matter.

⁸ Art. 22 of the amended Constitution. The text is available in *People's Daily* (in Chinese), 16 March 2004, 1.

⁹ Zou Keyuan, "Judicial Reform versus Judicial Corruption: Recent Developments in China", *Criminal Law Forum* (2000) 346.