

TAGUNGSBERICHTE

"International Symposium on the WTO and Judicial Review", organized by the Supreme People's Court of the PRC and the Asian Development Bank, Hangzhou, 1 - 3 November 2006

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China's accession to the World Trade Organization triggered the establishment of numerous legal co-operation programs by national and international actors which were carried out to assist the necessary adjustments of the Chinese domestic legal system. A typical example is the Asian Development Bank's technical assistance program for the implementation of WTO rules. This program was included in the Bank's 2002 country assistance plan for the PRC. Subsequently, the Bank reached an understanding with the Supreme People's Court and the National Judges College on the objectives, scope and implementation arrangements for the technical assistance. The purpose of the technical assistance is to help the judicial system of the PRC to meet WTO requirements in independent reviews of decisions made by the administrative authorities pertinent to the enforcement of WTO rules. The Symposium in Hangzhou formed part of this program.

The Supreme People's Court issued Regulations on the Trial of Administrative Cases Involving International Trade² in 2002. This was made in response to the WTO requirement of setting up an independent adjudication body to review administrative decisions. The Regulations provide that cases involving international trade will be tried by the courts at the intermediate level or above. In accordance with the Administrative Litigation Law, the courts are granted jurisdiction over administrative cases involving international trade in goods, services, trade related intellectual property protection and other international trade. While the Regulations provide that the applicable law shall be domestic law, they also emphasize that in a conflict between two interpretations of a domestic law pro-

vision, the interpretation consistent with the international obligation shall prevail.

Apart from foreign law experts, the symposium in Hangzhou was attended by a large number of Chinese scholars and judges. The experts offered some thoughts on the issues raised by China's membership of the WTO and its implications for judicial review.

One of the repeatedly discussed topics was the question of the extent to which Chinese courts can and should be able to review the reasonableness of the administrative determination and the relationship between such review and legality review in Article 5 of the Administrative Litigation Law. Further, Article 54 allows judicial intervention on a variety of grounds, including "abuse of power" and cases where the administrative sanction is "obviously unfair". The report of Professor *Yu Lingyun*, Chinese People's Public Security University, explained why Chinese courts only in a few cases reviewed administrative acts on the basis of "abuse of power" and why judges prefer other criteria of administrative review. Professor *Christopher Forsyth*, University of Cambridge, introduced the foundations of the judicial review in England, the rule of law and the ultra vires doctrine which clarified why judges only exercise judicial review to check the legality of administrative decisions. Professor *Paul Craig*, University of Oxford, exemplified by experience drawn from the UK, USA and EU how judicial control is exercised over the way in which discretion is exercised by administrative authorities.

The standard of review for issues of fact was seen as a topic with considerable practical implications for review under the WTO. Article 54 of the Administrative Litigation Law provides for judicial review and annulment where there is an inadequacy in the essential evidence. This provision provides the Chinese courts with the legal basis on which to review disputed evidentiary findings. Professor *Paul Craig* introduced the experience in the EU with the concept of "manifest error" for the review of fact and showed how this test can be interpreted by courts far more intensively than would seem apparent from the mere wording.

Another important issue concerned the types of administrative acts that can be challenged before the courts as determined by the Administrative Litigation Law, Articles 2, 11 and 12. Article 12 excludes certain types of cases from being reviewed by the courts, the most important exclusion being

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² Regulations of the Supreme People's Court Concerning Several Questions of the Trial of Administrative Cases Involving International Trade (Zuigao renmin fayuan guanyu shenli guoji maoyi xingzheng anjian ruogan wenti de guiding) of 27 August 2002, Gazette of the Supreme People's Court (Zuigao renmin fayuan gongbao) 2002/5, p. 165.

provided for in Article 12 (2), which prevents the courts from adjudicating upon administrative rules and regulations that have general binding force. Professor *Paul Craig* suggested that both specific administrative acts and administrative rules or regulations should be subject to judicial review. Given the fact that any administrative authority can in principle apply its area of law either through individualized decision-making or through the making of regulations, he saw the danger that the administration has an incentive to proceed through the issuance of rules and regulations in order to resolve individual cases because regulations cannot themselves be challenged. Further, he doubted whether the exclusion in Article 12 (2) can be regarded as consistent with the requirements of the WTO. Considering the example where an administrative authority devises detailed rules on what constitutes dumping and foreign firms believe that provisions of these rules are unfair, he came to the conclusion that those firms would not be able to challenge the rules because of the exclusion in Article 12 (2).

Finally, the presentation by Professor *Luo Wenyan*, Zhejiang University of Industry and Commerce, demonstrated that Chinese courts in a number of cases reviewed abstract administrative acts. On the basis of this practice, she developed a new understanding of the criteria distinguishing concrete and abstract administrative acts.