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SHAREHOLDERS' INFORMATIONAL RIGHTS IN AN ITALIAN LIMITED LIABILITY COMPANY (S.R.L.)

by

Giovanna Giacchero♦

Abstract:

The paper investigates features of, and limits to, the right to information a shareholder of a Limited Liability Company under Italian law (S.r.l.) has vis-a-vis the management. The broad extension of this right, coupled with the absence of objective standards in well-established case law, raises concerns that its exercise may be used as a means to exert illicit pressure on management and, in some cases, substantially paralyze a company's activities. There is widespread consensus among authors about the need to balance the right to information of a single shareholder with the interests of the company (e.g. confidentiality, protection of industrial secrets, and competition), as, in certain cases, this would allow directors to legitimately deny requests that could be detrimental to the company. The paper aims to identify the circumstances in which management opposition to shareholder requests may be considered legitimate. Furthermore, it investigates whether and how the right to information may be derogated or regulated through the inclusion of specific provisions in the corporate By-laws.

Keywords: corporation; limited liability; management; directors; shareholders; informational rights; right to control; right to inspect.

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1. RIGHT TO INFORMATION

1.1. PRELIMINARY CONSIDERATIONS

The reform of Italian company law has introduced, under Art. 2476, 2nd paragraph ("c."), of the Italian Civil Code ("c.c.") ([1]), a significantly extended regulation on the right to information of a shareholder of a società a responsabilità limitata ("S.r.l.", a Limited Liability Company under Italian law) *vis-a-vis* the management of the company.

The new regulation highlights the intention of the legislator to provide the shareholder who does not take part in the management with wide and penetrating powers of review over the directors of the company.

The extension of these powers, considering the standards currently available, raises some risks. Indeed, an investigation aimed at identifying possible limits to the shareholder's informational rights unveils a regulatory system dangerously biased towards an ironclad protection of the shareholder's rights.

Certainly the identification of the boundaries of a shareholder's right to information appears difficult for three reasons:

As to statute law, the relevant code provisions contain numerous gaps that allow diverging interpretations on the extension of the shareholder's rights.

As to court decisions, the available rulings pertain to companies of limited size that conduct business that does not involve confidentiality issues or critical industrial secrets, and mostly, arguably, without a board of auditors or external accountancy firm auditors. The absence of more articulated precedents combined with opinions usually very short and concise, are not useful in predicting case law in more complex situations.

As to the opinions of legal scholars, the large spaces left to interpretation appears to lead to a certain self restraint in providing clear-cut solutions. As will be explained better *infra*, most of the suggestions as to the possible arguments directors may employ to limit shareholders' informational rights consist in suggestions on the drafting of possible By-law provisions.

As a consequence, current regulation on the limits to informational rights does not appear to be characterized by a set of objective standards that may help to determine solid grounds for opposing a

([1]) See Legislative Decree January 17, 2003, No. 6. Previously the relevant code provision – Art. 2489 c.c. – provided for a shareholders' much more limited right to information in that: (i) the right to information was recognized only in an S.r.l. without a board of auditors; (ii) the shareholder had the right to review only the corporate books; (iii) only shareholders representing at least one third of the corporate capital had the right to launch an audit on the company management at their own expense and once a year.

shareholder's power when its exercise constitutes serious disruption to the business activity of the company ([2]).

It has been argued that, given the absence of well-established case law that could provide safe guidance, the matter is characterized by a substantial dangerous *deregulation* [(3)]. This, coupled with the objective extension of the right under the Civil Code, may entail the risk that the right to information may be used as a means to exercise illicit pressure on the management ([4]) and possibly substantially paralyze the company's activities ([5]).

Understandably, the right to information has even been described as a "poison pill", making it prudent and advisable to avoid adopting a corporate structure such as the S.r.l. ([6]).

In this context, the identification of a number of arguments that may support reasonable limits to such a broad right to information may positively contribute to the development of a wider and deepened regulation of the matter.

1.2. DEFINITION AND CONSEQUENCES OF FAILURE TO MEET A SHAREHOLDER'S REQUESTS

Pursuant to Art. 2476, 2nd c., c.c., a shareholder of an S.r.l. who "does not take part in the management" ([7]) has a right to information that consists of:

a) a right to receive information and data from the directors concerning all business matters ("right to information and data");

([2]) Courts rarely allow the directors to oppose the exercise of the right to information (see, however, Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972), even though it is worth mentioning that case law is limited to the S.r.l. of limited size, most frequently without a board of auditors or external accountancy firm, and where the type of business does not raise critical issues pertaining to industrial secrets or other confidentiality duties.

([3]) Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata,* in *Giur. comm.*, 2005, 801.

([4]) Renna, *Il diritto di controllo del socio non amministratore di s.r.l.*, in *Giur. it.*, 2008, 130; Arato, *Il controllo dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1195; Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, edited by Maffei Alberti, Padova, 2005, 1977.

([5]) Cagnasso, *Diritto di controllo dei soci e revoca dell'amministratore per gravi irregolarità: primi provvedimenti in sede cautelare relative alla "nuova" società a responsabilità limitata*, in *Giur. it.*, 2005, 316.

([6]) Ambrosini, *Comment to art. 2476 c.c.*, in *Società di capitali*, edited by Niccolini and Stagno d'Alcontres, Napoli, 2004, 1609; Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, edited by Maffei Alberti, Padova, 2005, 1976. Furthermore, Abriani, *Controlli e autonomia statutaria; attenuare l'"audit" per abbassare la "voice"*, in *Analisi giur. econ.*, 2003, 342, evidences the risk of interference in an S.r.l. of larger size between the shareholder and the board of auditors/external auditors. In order to avoid the company becoming a victim of its minorities, it is advisable to employ an S.r.l. only in companies of limited size where all the shareholders cooperate directly in its management. The rigidity brought about by the right to information concerning an S.r.l. should advise to choose the S.p.A. type of corporation for more structured companies. See Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata,* in *Giur. comm.*, 2005, 808 and also Bartolomucci, *Configurazione e portata del diritto di controllo del socio non gestore di s.r.l.*, in *Società*, 2009, 1336.

([7]) But a minority shareholder who appoints a non-executive director without proxy (or veto powers) maintains his right to information. See, among others, Trib. Taranto, July 13, 2007, in *Giur. it.*, 2008, 122; Cesiano, *Il (limitato?) diritto di consultazione del socio ex-amministratore nella S.r.l.*, in *Società*, 2010, 1140. The shareholder preserves his right to information when the company has appointed a board of auditors, see Rodorf, *I sistemi di amministrazione e di controllo nella nuova s.r.l.*, in *Società,* 2003*,* 664; Parrella, *Comment to art. 2476*, in *La riforma delle società. Commentario del d.lg. 17 gennaio 2003 n. 6,* edited by Sandulli e Santoro, Torino, 2003, 123; Santosusso, *La riforma del diritto societario,* Milano, 2003, 220; Zanarone, *Le altre società di capitali,* in *Diritto commerciale* edited by Allegri, Bologna, 2004, 316; Cagnasso, *Commento all'art. 2476 c.c.,* in *Il nuovo diritto societario. Commentario,* edited by Cottino, Bonfante, Cagnasso, Montalenti, Bologna, 2004, 1883; Ambrosini, *La responsabilità degli amministratori nella nuova s.r.l.,* in *Società,* 2004, 1587; Fregonara, *I nuovi poteri di controllo del socio di societa' a responsabilita' limitata*, in *Giur. comm.*, 2005, 790; Abriani, *Comment to art. 2477,* in *Codice commentato delle s.r.l.* edited by Benazzo e Patriarca, Torino, 2006, 363. *Contra* Graziani – Minervini and Belviso, *Manuale di diritto commerciale,* Padova, 2004, 334; Buonocore, *La riforma delle società,* Milano, 2004, 93.

b) a right to inspect (including through trusted professionals): i) the corporate books and records, and, ii) documents pertaining to the management of the company ("right to inspect").

The right to information and data basically involves anything, with the exception of personal data such as that of directors or shareholders ([8]).

The right to inspect comprises all corporate documents ([9]), i.e., not only corporate books, but also other documents pertaining to the management of the company, e.g., financial statements and related documents, contracts, agreements of any kind, and banking documents ([10]).

There are severe consequences for failing to meet shareholders' requests. A director who fails to satisfy a shareholder's *legitimately* exercised right to information may be subject to administrative and criminal law liability.

Indeed, pursuant to Art. 2625 c.c., a director who "*(…) impedes or, in any event, hampers the activities of review or of audit legally attributed to the shareholders (…)*" may receive an administrative fine of up to EUR 10,329. Moreover, if a complaint is filed against a director whose conduct has damaged the shareholders, that director may be sentenced to one year imprisonment ([11]).

It is important to point out that the conduct punishable under this rule is the impeding of the right to information by (i) concealing documents, or (ii) engaging in other kinds of deception (e.g., an activity that impedes the exercise of the informational rights by altering the data). Neither type of conduct, therefore, appears compatible with omissions, i.e., simply not answering a shareholder's request for information ([12]).

([8]) See Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione*, in *Giur. merito*, 2008, 2279.
([9]) Except for an isolated opinion that does not include in the *documents* the accounting books and records (Associazione Disiano Preite, *Il nuovo diritto delle società*, edited by Olivieri, Presta, Vella, Bologna, 2003, 261), the majority of authors (for all see Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 448) and case law (see Trib. Milano, November 30, 2004, in *Giur.it.*, 2005, 1245; Trib. Chieti, May 31, 2005, in *Giur. it.*, 2005, 1652; Trib. Biella, May 18, 2005, in *Società*, 2006, 50; Trib. Ivrea, July 4, 2005, in *Giur. comm.*, 2007, 748; Trib. Catania, March 5, 2006, in *Giur. comm.*, 2007, 920; Trib. Pavia, June 29, 2007, in *De jure online*, 2008) make no distinction among the types of documents the shareholder is allowed to review.
([10]) Abriani, *Controlli e autonomia statutaria; attenuare l'"audit" per abbassare la "voice"*, in *Analisi giur. econ.*, 2003, 341, includes the shadow accounting in the *documents*. See also Buta, *I diritti di controllo del socio nella s.r.l.*, Milano, 2007, 609 ss.
([11]) The administrative fines are applicable regardless of the subjective status (criminal intent *versus* negligence) of the wrongdoer. Given the description of the code provision, however, the conduct of the directors should be characterized by malice; see Giarda – Seminara (edited by), *I nuovi reati societari: diritto e processo,* Padova 2002, 468; Bernasconi, in Giunta (edited by), *I nuovi illeciti penali ed amministrativi riguardanti le società commerciali,* Torino, 2002, 76, *contra*, specifying that malice is required, Musco (and Masullo), *I nuovi reati societari,* Milano, 2007, 252; Antolisei, *Manuale di diritto penale. Leggi complementari. I, I reati e gli illeciti societari e bancari. I reati di lavoro e previdenza. La responsabilità degli enti,* edited by Grosso, Milano, 2007, 475.
([12]) Foffani, in Alessandri (edited by), *Il nuovo diritto penale delle società,* Milano, 2002, 387; Bernasconi, in Giunta (edited by), *I nuovi illeciti penali ed amministrativi riguardanti le società commerciali,* Torino, 2002, 74, Antolisei, *Manuale di diritto penale. Leggi complementari.* I*, I reati e gli illeciti societari e bancari. I reati di lavoro e previdenza. La responsabilità degli enti,* edited by Grosso, Milano, 2007, 307; but *contra* Giarda – Seminara (edited by), *I nuovi reati societari: diritto e processo,* Padova 2002, 462; see also App. Catania, November 11, 2009, n. 2012, in *Riv. pen.*, 2010, 175.

Where a director refuses a shareholder's request, the shareholder is entitled to seek an urgent decree from a court, pursuant to Art. 700 of Italian Civil Procedure Code, to order the directors to release the requested information or documents ([13]).

2. LIMITS TO THE RIGHT TO INFORMATION

2.1. THE BASIC LIMIT: THE ABUSE OF RIGHT

Case law almost unanimously defines the right to information ([14]) as a right (*diritto potestativo),* which is basically unlimited, provided that it is exercised in good faith ([15]).

A shareholder would be in breach of the duty of good faith for abusing the right to information, i.e., when exercising the right to information in a way that is: (i) anti-social, i.e., the shareholder's interests conflict with the corporate interests, or (ii) characterized by the intention to disrupt or thwart the company's activity ([16]).

In principle, where there is an abuse of the right to information, directors are legitimately entitled to refuse to release the requested information and documents to the shareholder (and the shareholder could be held liable for any possible consequential damage) ([17]).

As a matter of fact, asserting an abuse of right appears extremely difficult because:

a) directors may oppose a shareholder's request only upon *evidence* of wrongdoing and, in most cases, such evidence is likely to be clear only "ex post", i.e., after the abuse has been committed, ([18]);
b) the courts have applied the abuse exception quite strictly by substantially ruling out the possibility of directors refusing a request based on this exception when opposing a shareholder's request through: (i) arguments such as business confidentiality, industrial secrets

([13]) See Trib. Catania, March 3, 2006, in *Giur. comm.*, 2007, 920.
([14]) See Trib. Biella, May 18, 2005, in *Società*, 2006, 50; Trib. Ivrea, July 4, 2005, in *Giur. comm.*, 2007, 748; Trib. Bologna, December 6, 2006, in *Giur. comm.*, 2008, 213; Trib. Trento, October 27, 2006, in *Società*, 2007, 12; Trib. Roma January 16, 2008, in *Riv. not.*, 2009, 668; Trib. Civitavecchia, April 21, 2004, in www.dircomm.it; Trib. Taranto, July 13, 2007, in *Giur. it.*, 2008, 305; Trib. Pavia, June 29, 2007, in *De Jure Online,* 2008.
([15]) The recognition of a *diritto potestativo* evidences the individualistic approach to the right to information after the abolition of the judicial review of the Sr.l.; see on this point Cesiano, *Il (limitato?) diritto di consultazione del socio ex-amministratore nella S.r.l.,* in *Società*, 2010, 9, 1134, especially footnote 13.
([16]) See Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972; Trib. Catania, March 3, 2006, in *Giur. comm.,* 2007, 920; Grasso, *"Documenti relativi all'amministrazione" e diritto di consultazione di socio di s.r.l. non amministratore*, in *Giur. comm.* 2007, 929, who specifies the shareholder may act out of *non-corporate* interests but not out of interests against the company. On the abuse of right, generally, see Monateri, *La responsabilità civile,*Torino, 2006, 88. It has been pointed out that an abuse occurs when: i) the shareholder has no real need to obtain information/documents because his requests have already been met; ii) the shareholder's only purpose is to thwart the normal course of the business; and iii) the shareholder is a competitor of the company see Cesiano, *Il (limitato?) diritto di consultazione del socio ex-amministratore nella S.r.l.,* in *Società*, 2010, 1136-1137.
([17]) Fregonara, *I nuovi poteri di controllo del socio di societa' a responsabilita' limitata,* in *Giur. comm.*, 2005, 805-806; see also Patti, *Abuso del diritto*, in *Digesto*, Torino, 1991, 1 ss; Levi, *L'abuso del diritto*, Milano, 1993; Ferrari, *L'abuso del diritto nelle società*, Padova, 1998.
([18]) See Fregonara, *I nuovi poteri di controllo del socio di societa' a responsabilita' limitata,* in *Giur. comm.*, 2005, 806. Expressly on this issue Trib. Roma, January 16, 2008, in *Riv. notariato,* 2009, 668.

or competition issues ([19]) (see *infra* paragraph 2.2.); or (ii) other kinds of practical constraints (see *infra* paragraph 2.3.).

The following paragraphs 2.2. and 2.3. provide a brief overview of the content and boundaries of the abuse exceptions developed to date, and currently being discussed by courts and authors.

2.2. ABUSE EXCEPTIONS BASED ON CONFIDENTIALITY AND CONFLICT OF INTEREST

2.2.1. Confidentiality

2.2.1.1. The main view: No Abuse Based on Confidentiality

Case law has established the principle that directors may not refuse to release information or documents to a shareholder by invoking a confidentiality duty ([20]).

Authors, instead, are divided. According to some scholars, confidentiality issues never prevail over a shareholder's right to information ([21]). According to others, directors should always take confidentiality issues into account ([22]).

The argument employed by the courts and the authors who have ruled out confidentiality as a means to oppose a shareholder's request hold that the exchange of information between a shareholder and directors is an internal affair that does not involve any third parties. It is the shareholder who has the duty not to reveal to third parties any information received ([23]).

This argument is usually based on the assumption that a shareholder has a duty of confidentiality that prevents the divulgence of information acquired by exercising the right ([24]). However, the confidentiality duty of shareholders is not grounded on any specific statutory provision. Moreover, it

([19]) With exceptions like Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972, pertaining to a case of (plain) conflict of interests; Trib. Bologna, December 6, 2006, in *Giur. comm.*, 2008, 213; Trib. Catania, March 3, 2006, in *Giur. comm.*, 2007, 920; Trib. Nocera Inferiore, October 13, 2005, in *Giur. comm.*, 2007, 159; Trib. Chieti, August 25, 2005, in *Giur. it.*, 2006, 305; Trib. Ivrea, July 4, 2005, in *Giur. comm.*, 2007, 748; Trib. Chieti, May 31, 2005, in *Giur. it.*, 2005, 1652; Trib. Biella, May 18, 2005, in *Società,* 2006, 50; Trib. Parma, October 25, 2004, in *Società*, 2005, 758; Trib. Milano, November 30, 2004, in *Giur. comm.,* 2006, 682.

([20]) See, *infra*, decisions under footnote 45 and Trib. Roma, December 4, 2007, in *Riv. notariato,* 2009, 672.

([21]) Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 02, 160, and in *Scritti in onore di Vincenzo Buonocore*, Milano, 2005, 1816; Perrino, *Il controllo individuale del socio di società di capitali tra funzione e diritto*, in *Società*, 24; Parrella, *Comment to art. 2476 c.c.*, in *La riforma delle società*, edited by Sandulli e Santoro, Torino, 2003, 125; Ricciardello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio,* in *Giur. comm.,* 2008, 237; Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione,* in *Giur. merito,* 2008, 2288.

([22]) Mainetti, *Il controllo dei soci e la responsabilità degli amministratori nella società a responsabilità limitata*, in AA. VV., *La riforma delle società*, edited by Ambrosini, Torino, 2003, 90; Salafia, *Comment to art. 2476 c.c.*, in *Codice commentato delle nuove società*, edited by Bonfante, Corapi, Marziale, Rordorf, Salafia, Milano, 2004, 1065; Santosuosso, *La riforma del diritto societario*, Milano, 2003, 220.

([23]) See Ricciardello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio,* in *Giur. comm.,* 2008, 1, 238. Abriani, *Controllo individuale del socio e autonomia contrattuale nelle societa' a responsabilita' limitata,* in *Giur. comm., 2005, 160;* Cagnasso, *La società semplice*, in *Trattato di diritto civile,* edited by Sacco, Torino, 1988, 179; Ambrosini, *Comment to art. 2476 c.c.*, in *Società di capitali*, edited by Niccolini e Stagno d'Alcontres, Napoli, 2004, 1587.

([24]) See Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione,* in *Giur. merito,* 2008, 2288.

seems quite evident that a shareholder may not only harm the company by divulging information acquired, but also by simply making use of it ([25]).

Considering how critical the confidentiality on company data is, some authors have developed a number of arguments aimed at identifying (arguably) legitimate means of protecting restricted corporate information. Below is a brief outline of these.

2.2.1.2. Criticism: Possible Limits based on Confidentiality

a) Specific provisions in the By-laws

A reasonably safe means of protecting reserved corporate data is including a specific provision in the By-laws that requires the shareholder and/or hired professionals to sign a confidentiality agreement. This solution may be considered legitimate and particularly useful where the shareholder exercises the right through a professional who has no duty of confidentiality under law. Alternatively, the right to information may be restricted to professionals enrolled in a professional affiliation due to the duty of confidentiality that normally accompanies such qualification ([26]).

b) Signing a Confidentiality Agreement

The majority of authors ground a shareholder's duty of confidentiality through the drafting of a specific provision in the By-laws.

However, it seems that directors may legitimately request a shareholder to abide by the duty of confidentiality by signing a specific confidentiality agreement and by employing professionals who have a legal duty of confidentiality for the reviewing of documents. Directors may require the appointed professionals to be members of a professional affiliation that imposes a duty of confidentiality and also – but by virtue of a specific By-law provision – may only allow the professionals access in the presence of one of directors' delegates or an auditor ([27]).

([25]) Sangiovanni holds the same opinion, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione,* in *Giur. merito,* 2008, 2288; *contra* Trib. Biella, May 18, 2005, in *Società,* 2006, 50.
([26]) See Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria,* in *Riv. notariato,* 2008, 679.
([27]) See Fregonara, *I nuovi poteri di controllo del socio di società a responsabilità limitata,* in *Giur. comm.*, 2005, 799, Perrino, *Il controllo individuale del socio di società di capitali tra funzione e diritto*, in *Società*, 25; Ambrosini, *Diritto di controllo del socio di s.r.l. alla luce della riforma societaria e tutela innominata*, in *Società*, 2005, 1546. In the absence of supporting case law Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione,* in *Giur. merito,* 2008, 2289, argues that the directors should have this decision adopted by a shareholders' meeting in order to be relieved from a possible liability.

c) Intellectual Property

Some authors ([28]) believe that an objective standard that could be employed by directors as a legitimate means to deny a shareholder's request can be identified in Arts. 98 and 99 of Legislative Decree February 10, 2005, No. 30 (the Intellectual Property Code) ([29]).

Indeed, Art. 99 of the Intellectual Property Code forbids disclosure to third parties of the data described under Art. 98 (a set of corporate and technical-industrial information) or their acquisition or use. According to some authors, this standard highlights the presence of clear and unequivocal rules in the legal system pertaining to the protection of intellectual property that prevents directors from revealing sensitive information such as business, technical, industrial, or commercial information pursuant to Art. 98 of the Intellectual Property Code. This data may touch upon activities pertaining to production, distribution, organization, or financing aspects that ultimately compose the know-how of the company.

From this viewpoint, a denial of a shareholder's request based on this law provision should be considered legitimate.

d) Confidentiality Duties based on Contract Signed by the Company

It has been argued that another legitimate reason for directors opposing a shareholder's request may occur when the company has signed a contract containing a confidentiality clause.

Certainly the directors cannot insert such a clause as a means to withhold information from a shareholder. However, in certain contracts, confidentiality is a feature that is even part of the nature of the agreement, and cannot be removed by the parties (a *naturalia negotii*, e.g., in a know-how contract). In such cases, the directors should be allowed to oppose a shareholder's request by invoking the confidentiality duty ([30]).

e) Removal of Information

Sometimes, directors protect sensitive corporate information by removing part of the data, including names, from the documents provided to shareholders.

([28]) Guidotti, *Ancora sui limiti all'esercizio dei diritti di controllo nella S.r.l. e sul (preteso) diritto di ottenere copia dei documenti consultati,* in *Giur. comm.*, 2008, 225; Bartolomucci, *Configurazione e portata del diritto di controlo del socio non gestore di s.r.l.*, in *Società*, 2009, 1343; Di Bitonto, *Comment to App. Milano February 13, 2008*, in *Società*, 2009, 211.

(29) Art. 98 refers to "*corporate information and technical-industrial experience, including of a commercial nature, subject to the legitimate control of the holder, provided that such information: (a) is secret*" (i.e. not generally known or easily accessible by experts and other persons active in that business sector); "*(b) has economic value because of its being secret; (c) is subject (…) to measures reasonably adequate to keep it secret*". The protection of the Code also applies to "*data for testing or other secret data, whose development involves a considerable commitment*" and subject to the *"marketing authorization of chemical products, pharmaceuticals or agricultural products involving the use of new chemicals*".

([30]) Guidotti, *Ancora sui limiti all'esercizio dei diritti di controllo nella S.r.l. e sul (preteso) diritto di ottenere copia dei documenti consultati,* in *Giur. comm.*, 2008, 225, believes the directors can oppose the request but – to counteract a claim by the shareholder – they should file a claim aimed at obtaining a court decision on their duty to reveal the content of the information. Bartolomucci, *Configurazione e portata del diritto di controlo del socio non gestore di s.r.l.*, in *Società*, 2009, 1343, recognizes in such a case an objective limit to the shareholder's right.

Unless this choice is supported by further arguments – beyond the mere confidentiality of the data – this is likely to be considered an illegitimate action. The possibility of protecting the confidentiality of some information by removing some sensitive data has been expressly ruled out by the courts ([31]).

2.2.2. Conflict of Interest

Frequently the right to information is exercised by a shareholder who has an interest that competes against the corporate interests, thus potentially causing significant damage to the company ([32]).

To ensure that possible competition between the interests of the shareholder and of the company is safely and efficiently managed, certain authors suggest including a non-competition clause in the By-laws as a means of preventing such a situation ([33]).

It is reasonable to argue that in the case of conflicts of interests, the insertion of a specific provision in the By-laws should not be considered a precondition to a legitimate denial of a shareholder's request if detrimental to the company ([34]). Nevertheless, in the absence of strong, corroborative evidence of the shareholder's wrongdoing, the absence of well-established case law supporting this principle prevents directors from safely putting forward a legitimate denial ([35]).

2.3. ABUSE EXCEPTIONS BASED ON OTHER CONSTRAINTS

2.3.1. Timing

In principle, no limit has been placed on how frequently a shareholder may exercise the right to information nor in the timeframe within which a shareholder's request should receive a prompt answer from the management.

As a consequence, the timing of the request could potentially disrupt the course of business. As this would be analogous to a breach of the duty of good faith by the shareholder ([36]), it is arguable that a denial by management, in such a case, may be (at least temporarily) justified.

([31]) See Trib. Milano, November 30, 2004, in *Giur. comm.,* 2006, 682. See also Grasso, *"Documenti relativi all'amministrazione" e diritto di consultazione di socio di s.r.l. non amministratore*, in *Giur. comm*., 2007, 930.

([32]) The regulation of the S.r.l. does not contain provisions that prevent the shareholder from exercising a business in competition with the company; see Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione,* in *Giur. merito,* 2008, 2287.

([33]) Cagnasso, *Diritto di controllo dei soci e revoca dell'amministratore per gravi irregolarità:primi provvedimenti in sede cautelare relativi alla "nuova" società a responsabilità limitata*, in *Foro it.*, 2005, 316; Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, a cura di Maffei Alberti, Padova, 2005, 1977; Perrino, *La "rilevanza" del socio nella s.r.l.: recesso, diritti particolari, esclusione*, in www.associazionepreite.it.

([34]) Sangiovanni concurs on that point, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione,* in *Giur. merito,* 2008, 2297.

([35]) See Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972, where the shareholder requested to inspect documents pertaining to a contract between the company and the same shareholder. Considering that the contract was the subject matter of a litigation between the parties, the shareholder's request was considered illegitimate in that aimed at pursuing an interest against the company's interests. See also Trib. Milano, November 30, 2004, in *Giur. comm.,* 2006, 682.

([36]) Grasso, *"Documenti relativi all'amministrazione" e diritto di consultazione di socio di s.r.l. non amministratore*, in *Giur. comm.* 2007, 928.

2.3.2. Generic Requests

In principle, generic requests from a shareholder may be followed by generic answers by the directors([37]). Indeed, it has been stated that a generic or too widely framed request to see *all* the documents may be legitimately rejected by directors ([38]).

As a matter of fact, more than the request of the shareholder, it seems that it is the nature of the request that may – objectively – determine directors' responses. Directors should be free to decide how to respond, whether by documents or by releasing information. In any event, the duty to act in good faith implies that a shareholder may not object to a different method of release if the requested method is particularly onerous for the company.

It is also worth mentioning that shareholders do not have the duty to expressly justify their requests. However, since requests must be "reasonable", the absence of justification may constitute another element that could affect the legitimacy of the request (e.g., the shareholder cannot keep the management busy with several unrelated questions over a long time) ([39]).

2.3.3. Repetitive Requests

Repetitive and unjustified (in their reiteration) requests are usually considered evidence of the (malicious) intention of the shareholder to keep the management under illicit pressure ([40]).

Indeed, directors can legitimately refuse to provide the shareholder with information or documents that have already been granted. Also, directors can legitimately refuse to provide a shareholder with information or documents that were previously made available but were not reviewed by the shareholder.

2.3.4. Copies

In contrast to the regulation in force before the company law reform, the new code provision, Art. 2476 c.c. does not reproduce the disposition set forth in Art. 2490 c.c., which expressly stated the shareholder's right to obtain copies, at his own expense, of the inspected documents. As a consequence, the existence of such a right of the shareholder is currently under debate.

Some authors support the view that a shareholder has the right to make copies of the documents reviewed ([41]) arguing that denial would nullify the exercise of the right to information, making the collecting of information aimed at contesting the directors' behavior too troublesome. Some authors

([37]) Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione,* in *Giur. merito,* 2008, 2279.
([38]) Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione,* in *Giur. Merito,* 2008, 9, 2279.
([39]) Trib. Civitavecchia, April 21, 2004, in www.dircomm.it.
([40]) App. Milano, February 13, 2008, in *Società*, 2009, 205; Trib. Catania, March 3, 2006, in *Giur. comm.,* 2007, 920.
([41]) Ricciardello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio,* in *Giur. comm.,* 2008, 237; Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione,* in *Giur. merito,* 2008, 2285-2286, who also specifies the directors should set up a data room and provide the shareholder with the personnel required to carry out such task (arguably at the shareholder's expenses); Ambrosini, *Diritto di controllo del socio di S.r.l. alla luce della riforma societaria e tutela innominata,* in *Società*, 2005, 1547; Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 449.

([42]) even doubt that a provision in the By-laws forbidding the making of photocopies may be legitimate because time to review the documents is often required.

Other authors ([43]), conversely, deny the survival in the current regulation of shareholder's right to obtain copies, observing that: i) whereas the old Art. 2490 c.c. expressly recognized this right, Art. 2476 c.c. does not mention anything in this regard; ii) the right to copy was only permitted for the shareholders' ledger and shareholders' meeting records, not for other, maybe more reserved, documents; iii) the same fact that the shareholder may consult the documents through hired professionals implies that there is no need to make copies ([44]).

Court decisions are divided on this issue, although the majority of courts appear to favour the shareholder's right to make copies of the documents reviewed ([45]). Decisions to not permit the making of copies are fewer ([46]), and comprise the position of the Court of Milan ([47]). In any event, an established principle is that copies must be made: i) at the shareholder's expense; and ii) at the company's offices ([48]).

2.3.5. Scope of Inspection

Authors are currently discussing whether the shareholder's right to inspect includes:

a) the business assets;

b) the right to inspect the business premises, by visiting the warehouses, controlling the quantity and quality of the products, and reviewing the cash assets.

([42]) Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria,* in *Riv. notariato,* 2008, 679.
([43]) Guidotti, *Ancora sui limiti all'esercizio dei diritti di controllo nella S.r.l. e sul (preteso) diritto di ottenere copia dei documenti consultati,* in *Giur. comm.*, 2008, 226; Menicucci, *Il "contenuto" del controllo del socio nella società a responsabilità limitata,* in *Giur. comm.,* 2007, 167-168, evidencing that in consideration of the broadening of the shareholder's right to information, the legislator has balanced the need to protect confidentiality by excluding the right to make copies.
([44]) This argument has been used by Trib. Bologna, December 6, 2006, in *Giur. comm.*, 2008, 217, to state the opposite principle, i.e. that copies of the documents are needed to enable the professionals to carry out the review; the shareholder is only required to draft a list of the documents he intends to copy.
([45]) Trib. Taranto, July 13, 2007, in *Giur. it.*, 2008, 305; Trib. Pavia, August 1, 2007, in *Società*, 2009, 504; Trib. Pavia, June 29, 2007, in *De Jure Online*, 2008; Trib. Bologna, December 6, 2006, in *Giur. comm.*, 2008, 213; Trib. Nocera Inferiore, October 13, 2005, in *Giur. comm.*, 2007, 159; Trib. Ivrea, July 4, 2005, in *Giur. comm.*, 2007, 748; Trib. Biella, May 18, 2005, in *Società*, 2006, 50; Trib. Civitavecchia, April 21, 2004, in www.dircomm.it; Trib. Roma, December 4, 2007, in *Riv. not.*, 2009, 668; Trib. Roma, January 16, 2008, in *Società*, 2009, 668; Trib. Novara, December 19, 2009, in *filodiritto.it.*
([46]) Trib. Catania, March 3, 2006, in *Giur. comm.*, 2007, 920; Trib. Chieti, May 31, 2005, in *Giur. it.*, 2005, 1652; Trib. Chieti, August 25, 2005, in *Giur. it.*, 2005, 305; Trib. Milano, November 30, 2004, in *Giur. comm.*, 2006, 682; Trib. Parma, October 25, 2004, in *Società*, 2005, 758; App. Milano, February 13, 2008, in *Società*, 2009, 205. In Trib. Catania, March 3, 2006, *cit.*, the court ordered that the documents had to be deposited at a Notary's office.
([47]) Trib. Milano, November 30, 2004, in *Giur. comm.*, 2006, 682, ruled out the shareholder's right to make copies as well as any other kind of document reproduction. The court also denied the shareholder's right to question employees and to access the company's premises without the prior consent of the directors and outside office hours. See also App. Milano, February 13, 2008, in *Società*, 205. *Contra*, recently, Trib. S. Maria Capua Vetere, June 10, 2011, in *De Jure Online*, 2011.
([48]) See Trib. S. Maria Capua Vetere, June 10, 2011, in *De Jure Online*, 2011. See also Abriani, *Controllo individuale del socio e autonomia contrattuale nelle societa' a responsabilita' limitata, in Giur. comm.,* 2005, 160; Ambrosini, *Diritto di controllo del socio di S.r.l. alla luce della riforma societaria e tutela innominata,* in *Società*, 2005, 1547; Mainetti, *Il controllo dei soci e la responsabilità degli amministratori nella società a responsabilità limitata*, in *Società*, 2003, 938. Fregonara, *I nuovi poteri di controllo del socio di societa' a responsabilita' limitata,* in *Giur. comm.*, 2005, 800; Salafia, *Comment to art. 2476 c.c.*, in *Codice commentato delle nuove società*, edited by Bonfante, Corapi, Marziale, Rordorf, Salafia, Milano, 2004, 1064.

Although the issue is debated, the majority of authors believe that the right to inspect the documents does not include the business assets or the company premises ([49]). Indeed, such a broad interpretation would imply a shareholder's right to check the physical premises and goods used for the business that the provision of the code certainly has not covered. As a consequence, it appears reasonable to argue that, unless the By-laws expressly provide for such an extensive right, an inspection with this scope may be legitimately opposed by the directors.

2.3.6. Recording

Finally, another constraint or limit that may be encountered by a shareholder exercising the right to information, is the duty to record the shareholder's activities.

It has been pointed out that a provision in the By-laws may legitimately impose the obligation to record shareholder activity ([50]). This provision is legitimate and, while certainly making the exercise of the informational rights somewhat more onerous, also provides transparency to these activities in the interest of the same shareholder.

3. CONCLUSIONS

3.1. THE NEED FOR A BALANCE OF INTERESTS

The principles developed by case law on Art. 2476, 2° c., c.c., deliver a regulation of the S.r.l. where directors are *subject* to the shareholder's right to information even when its exercise is likely to be harmful to the company ([51]).

([49]) Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria,* in *Riv.* n*otariato,* 2008, 680; Abriani, *Comment to art. 2477,* in *Codice commentato delle s.r.l.* edited by Benazzo e Patriarca, Torino, 2006, 369; Grasso, *"Documenti relativi all'amministrazione" e diritto di consultazione di socio di s.r.l. non amministratore*, in *Giur. comm*., 2007, 928; Cagnasso, *Diritto di controllo dei soci e revoca dell'amministratore per gravi irregolarità: primi provvedimenti in sede cautelare relative alla "nuova" società a responsabilità limitata*, in *Giur. it*., 2005, 316; Guidotti, *Ancora sui limiti all'esercizio dei diritti di controllo nella S.r.l. e sul (preteso) diritto di ottenere copia dei documenti consultati,* in *Giur. comm*., 2008, 227; Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm*., 2005, 159, who rules out that the shareholder may conduct inspections such as visiting plants and warehouses or examine the cash inventory; Cagnasso, *La società semplice*, in *Trattato di diritto civile*, edited by Sacco, Torino, 1998, 184; Fregonara, *I nuovi poteri di controllo del socio di societa' a responsabilita' limitata,* in *Giur. comm*., 2005, 796, who refers to the By-laws for a regulation of the inspection. *Contra* see Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 449-450 and *Il diritto di controllo del socio non amministratore di s.r.l.*, in *Giur. it*., 2008, 126, who, however, limits the inspection to situations where "*it turns out difficult, if not impossible, to exercise the right of control on the documentation alone*".

([50]) See Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria,* in *Riv. notariato,* 2008, 689 and Abriani, *Comment to art. 2477,* in *Codice commentato delle s.r.l.* edited by Benazzo e Patriarca, Torino, 2006, 369.

([51]) Differently from the previous Art. 2489 c.c. where the legislator clearly intended to avoid the possibility that the company might incur risks and disruption – not least a paralysis of the business – consequent to the exercise of the powers attributed to a single shareholders See Rivolta, *La società a responsabilità limitata*, in *Trattato di diritto civile e commerciale* edited by Cicu e Messineo and continued by Mengoni and Schlesinger, Milano, 1982, 339. Guidotti, *Sulla derogabilità della noma relativa ai diritti di controllo del socio nella S.r.l.,* in *Giur. comm.,* 2010, 437; Menicucci, *Il "contenuto" del controllo del socio nella società a responsabilità limitata,* in *Giur. comm.,* 2007, 164, recognizes the limit of the duty of good faith but clarifies that (only) under "*extreme circumstances*" can the managers legitimately express a denial.

Only in few cases have the courts allowed directors to place a limit on shareholder requests ([52]) and, in such case, mostly by making limited tools available to the management, such as denying the right to make copies, questioning employees, and to freely accessing the company premises ([53]).

Case law, however, meets with strong criticism by authors who point out the need to find a fair balance between the right to information of a single shareholder and the interests of the company (e.g., confidentiality, protection of industrial secrets, and competition) ([54]). Even authors more keen to recognize a wide right to information ([55]) acknowledge the necessity, in certain circumstances, to allow directors to legitimately deny requests that could be detrimental to the company, also considering that directors may be held responsible *vis-a-vis* the company for, e.g., divulging information that could be harmful.

Without prejudice to the undeniable limits of the code provision and its application under case law, there are a number of circumstances where opposition to a shareholder's request, even in the absence of a By-law provision pertaining to the right to information, may be considered legitimate (see paragraph 3.2.).

Moreover, in the quest for a fair balance of interests, investigating whether the right to information may be derogated or, more importantly, regulated through the insertion of specific provisions in the By-laws (see paragraph 3.3) cannot be omitted.

3.2. GROUNDS FOR A LEGITIMATE DENIAL OF THE SHAREHOLDER'S REQUESTS

Subject to all the limits evidenced above in terms of absence of safe standards (see paragraph 2.3.), it seems that directors may legitimately implement a number of actions aimed at preventing possible abuse of the informational rights of a shareholder.

Indeed, directors may legitimately:

a) request the shareholder and any professional to sign a confidentiality agreement;
b) deny requests that are unreasonable in terms of timing (e.g. that, as a result of frequency and deadlines imposed on the management, disrupt the business);
c) deny repetitive and, in the first instance, generic requests;

([52]) See Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972.
([53]) Courts acknowledge the clear unbalance between certain needs of the company, e.g. confidentiality, and the right to information of the shareholder. See Trib. Milano, November 30, 2004, in *Giur. comm.,* 2006, 682; Trib. Catania, March 3, 2006, in *Giur. comm.,* 2007, 920.
([54]) Especially criticized is the case law on confidentiality in the light of the fact that the regulation of the S.r.l. does not provide any rule that obliges the shareholder to maintain a secret. Resorting to *analogia legis* in such a case, invoking similar provisions addressed to subjects other than shareholders (e.g. auditors ex Art. 2407 c.c., or stakeholders of other types of company, e.g. s.n.c., ex Art. 2301 cc) does not appear to comply with the intention of the legislator; see Codazzi*, Il controllo dei soci di S.r.l.: considerazioni sulla derogabilità dell'art. 2476, 2° comma,* in *Giur. comm.,* 2006, 689, who suggests the drafting a provision in the By-laws setting out a non-competition duty and a just cause of exclusion of the shareholder who abuses his right.
([55]) Sangiovanni, *Il diritto del socio di S.r.l. di estrarre copia dei documenti relativi all'amministrazione,* in *Giur. merito,* 2008, 2287.

d) deny requests to make copies ([56]);
e) deny inspection of business assets;
f) deny inspection of business premises;
g) impose a recording of shareholder activity.

Doubts, conversely, should be expressed in relation to the possibility – argued by certain authors (mostly by resorting to the principles developed by the case law under the previous regulation) ([57]) - that directors might deny the release of the requested information or documents if:

a) the requests are from a shareholder whose interests conflict with those of the company ([58]);
b) the requests are from a shareholder who conducts a business that is in competition with the company([59]);
c) the requests imply a breach of industrial secrets or confidentiality duties undertaken by the company;
d) there is evidence that the shareholder intends to pass the information to third parties ([60]).

Notwithstanding the uncertainties necessarily inherent in any *assumption* about how courts could possibly decide, it is reasonable to argue that where strong, corroborative evidence is available to directors (especially in the form of documents from the shareholder), management may well refuse to meet a shareholders' requests when the demand is characterized by the circumstances above specified.

3.3. DEROGATION AND REGULATION OF THE RIGHT TO INFORMATION THROUGH BY-LAWS

The discussion on the possibility of derogating the shareholder's right to information through the insertion of a provision in the By-laws was prompted by the absence in Art. 2476 c.c. of a provision similar to Art. 2489 c.c. pursuant to which any agreement among shareholders contrary to the code regulation was void. Notwithstanding the fact that the Civil Code gap could allow diverging interpretations, only a minority of authors support the view that shareholders be allowed to depart

([56]) Based on the current orientation of the Court of Milan.
([57]) Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 455; Renna, *Il diritto di controllo del socio non amministratore di s.r.l.*, in *Giur. it.*, 2008, 130; Arato, *Il controllo dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1195; Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, edited by Maffei Alberti, Padova, 2005, 1977; Di Bitonto, *Comment to App. Milano February 13, 2008*, in *Società*, 2009, 211.
([58]) Unless based on clear evidence, see Trib. Roma, July 9, 2009, in *Foro it.*, 2010, 1972. See Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 455, who refers to grounded suspicion that the shareholder is acting to pursue an "*interest which is conflicting with the company's interest*". See also Trib. Piacenza, August 12, 1994, in *Foro it.,* 1995, 3009.
([59]) Trib. Milano, March 22, 1990, in *Società*, 1990, 915, that applied *analogia legis* with Art. 2301 c.c. with regard to the non-competition; Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, edited by Maffei Alberti, Padova, 2005, 1976.
([60]) Ghidini, *Le società personali*, 1972, 451.

from the code regulation by way of a different provision in the By-laws ([61]). Indeed, such a possibility is excluded by the majority of case law ([62]) and authors ([63]).

Conversely, there is widespread consensus that the By-laws may regulate the exercise of the right to information ([64]). In this regard, several authors have identified a number of possible provisions that shareholders can insert in the By-laws, and that should be legitimately accepted as a means of providing a balanced regulation of the exercise of the right to information ([65]).

Besides the limited constraints to shareholder requests evidenced under paragraph 3.2., it is possible to claim that the company By-laws may provide for a set of rules that – where carefully drafted - may efficiently address the issues of possible abuse of the informational rights of the shareholders.
Namely, the main By-law provisions may certainly include:

([61]) In any event, provided that such regulation is supported by the unanimous vote of the shareholders. See Abriani, *Controllo individuale del socio e autonomia contrattuale nelle societa' a responsabilita' limitata*, in *Giur. comm*., 2005, 180; Guidotti, *Sulla derogabilità della noma relativa ai diritti di controllo del socio nella S.r.l.,* in *Giur. comm.,* 2010, 436; Codazzi*, Il controllo dei soci di S.r.l.: considerazioni sulla derogabilità dell'art. 2476, 2° comma,* in *Giur. comm.,* 2006, 692.

([62]) Trib. Milano, November 30, 2004, in *Giur.it.*, 2005, 1245; Trib. Chieti, May 31, 2005, in *Giur. it.*, 2005, 1652; Trib. Chieti, August 25, 2005, in *Giur. it.*, 2006, 305; Trib. Catania, March 5, 2006, in *Giur. comm.*, 2007, 920; Trib. Bari, May 10, 2004, in *Foro it.*, 2004, 3229. No doubts on the fact that the right to information may be regulated *in melius*, e.g. by attributing more powers to the shareholder.

([63]) An agreement that limits the right to information to certain qualified minorities or to those types of S.r.l. where no board of auditors has been appointed or limits the right to information to certain corporate documents has been deemed equivalent to an agreement that "cancels" more than "regulates" the code provision, see Abriani, *Controllo individuale del socio e autonomia contrattuale nelle societa' a responsabilita' limitata*, in *Giur. comm.*, 2005, 174. See, among others, Fregonara, *I nuovi poteri di controllo del socio di societa' a responsabilita' limitata*, in *Giur. comm*., 2005, 796; Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, a cura di Maffei Alberti, Padova 2005, 1976; Cagnasso, *Diritto di controllo dei soci e revoca dell'amministratore per gravi irregolarità: primi provvedimenti in sede cautelare relative alla "nuova" società a responsabilità limitata*, in *Giur. it*., 2005, 316; Nigro, *La Società a responsabilità limitata nel nuovo diritto societario: profili generali,* in *La nuova disciplina delle società a responsabilità limitata* edited by Santoro, Milano, 2003, 10; Parrella, *Comment to art. 2476,* in *La riforma delle società. Commentario del d.lg. 17 gennaio 2003 n.6,* edited by Sandulli and Santoro,Torino 2003, 123 ss.; Cagnasso, *Commento all' art. 2476 c.c.,* in *Il nuovo diritto societario. Commentario,* edited by Cottino, Bonfante, Cagnasso and Montaleni, Bologna, 2004, 7883; Ibba, *In tema di autonomia statutaria e norme derogabili,* in *Le grandi opzioni della riforma del diritto e del processo societario,* edited by Cian, Padova, 2004, 147 ss.; Rescigno, *Le regole organizzative della gestione della s.r.l.,* in *Le grandi opzioni della riforma del diritto e del processo societario,* edited by Cian, Padova, 2004, 328; Ambrosini, *Comment to art. 2476,* in *Società di capitali, Commentario,* edited by Niccolini, Stagno d'Alcontres, Napoli, 2004, 1558; Zannarone, *Le altre società di capitali,* in *Diritto commerciale* edited by Allegri, Bologna, 2004, 317; Renna, *Il diritto di controllo del socio non amministratore di s.r.l.,* in *Giur. comm.,* 2008, 126 ss. The view is supported by a number of arguments: (i) the right to information is aimed at allowing the shareholder a meaningful and effective exercise of the action against the directors for violation of their duties as well as the exercise of the power to remove them from their position (Guidotti, *Sulla derogabilità della noma relativa ai diritti di controllo del socio nella S.r.l.,* in *Giur. comm.,* 2010, 432); (ii) the administrative and criminal sanctions under Art. 2625 c.c. evidence the mandatory nature of the legal rule (Arato, *Il controllo dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1105) - both views appear ungrounded in that the exercise of the right to information is by no means conditional upon the exercise of the right to act against the directors or ask for their removal; neither may the mandatory nature of Art. 2476 c.c. be derived from the existence of Art. 2625 c.c. that assumes the mandatory nature of the rule it refers to, and does not determine it - (iii) the right to information is aimed at guaranteeing the good functioning of the S.r.l. (Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria,* in *Riv. notariato,* 2008, 675, believes this is a public interest principle that does not allow the By-laws to exclude the right to information); (iv) the right to information is legitimate in itself, without any further aim other than accomplishing the shareholder's interest to monitor the management of the company as a useful means of negotiating some management decisions with the management (see Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 453-454) - neither view is convincing; it is seriously doubtable that the exercise of a right to information necessarily benefits the functioning of the S.r.l. if the exercise is not proper; and what is "proper" is exactly what needs to be ascertained.

([64]) See Arato, *Il controllo dei soci e il controllo legale dei conti nella s.r.l.,* in *Società*, 2004, 1105; Benazzo, *I controlli nelle società a responsabilità limitata: singolarità del tipo od omogeneità della funzione?*, in *Riv. soc.* 2010, 18; Abriani, *Controllo individuale del socio e autonomia contrattuale nella società a responsabilità limitata*, in *Giur. comm.*, 2005, 170; Fregonara, *I nuovi poteri di controllo del socio di societa' a responsabilita' limitata,* in *Giur. comm.*, 2005, 806.

([65]) Abriani, *Controllo individuale del socio e autonomia contrattuale nelle societa' a responsabilita' limitata,* in *Giur. comm.*, 2005, 162; Sangiovanni, *Diritto di controllo del socio di S.r.l. e autonomia statutaria,* in *Riv. notariato,* 2008, 678; Ricciardiello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio,* in *Giur. comm.,* 2008, 238-239; Arato, *Il controllo individuale dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1195.

a) express confidentiality duties of the shareholder;
b) express non-competition duties of the shareholder ([66]);
c) express provision of just cause of exclusion of the shareholder who abuses the right to information;
d) express provision as to shareholder liability for damage ([67]).

The By-laws may also require the shareholder to exercise the right to information by ([68]):

a) respecting certain formalities (e.g., sending a written request);
b) respecting a reasonable notice period, or providing directors a feasible deadline ;
c) respecting reasonable restrictions in terms of timing of the access to the documents (e.g., office hours and days);
d) appointing a maximum number of professionals; appointing professionals meeting certain requisites (e.g., belonging to a professional affiliation that entails confidentiality duties) ([69]);
e) obliging the shareholder and hired professionals to sign a confidentiality agreement ([70]).

Furthermore, the By-laws may:

a) request the prior identification of the appointed professionals;
b) forbid the shareholder to divulge the information acquired or use it for purposes in competition with the company's business;
c) require the directors to set up a data room and identify a person with whom the shareholder should liaise;
d) forbid the shareholder and any professionals from questioning personnel;
e) forbid making copies and not allow shareholders free access to offices when searching for documents ([71]);
f) specify how the shareholder may make copies – at the shareholder's own expense – of the documents reviewed;

([66]) Codazzi*, Il controllo dei soci di S.r.l.: considerazioni sulla derogabilità dell'art. 2476, 2° comma,* in *Giur. comm.,* 2006, 689.
([67]) Shareholders need to insert clear rules of exclusion of the shareholder in the By-laws since, pursuant to Art. 2473-bis, 1° c., c.c., the exclusion of the shareholder is allowed only upon a detailed just cause. See Pasquariello, *Comment to art. 2476 c.c.*, in *Il nuovo diritto delle società*, a cura di Maffei Alberti, Padova 2005, 1976. Abriani, *Controllo individuale del socio e autonomia contrattuale nelle società a responsabilità limitata*, in *Giur. comm.*, 2005, 02, 160, and in *Scritti in onore di Vincenzo Buonocore*, Milano, 2005, 1821; Ambrosini, *Diritto di controllo del socio di s.r.l. alla luce della riforma societaria e tutela innominata*, in *Società*, 2005, 1547; Codazzi*, Il controllo dei soci di S.r.l.: considerazioni sulla derogabilità dell'art. 2476, 2° comma,* in *Giur. comm.,* 2006, 689; Cagnasso, *Diritto di controllo dei soci e revoca dell'amministratore per gravi irregolarità: primi provvedimenti in sede cautelare relative alla "nuova" società a responsabilità limitata*, in *Giur. it.*, 2005, 316; Renna, *Comment to art. 2476 c.c.*, in *Commentario al codice civile*, edited by Cendon, Milan, 2010, 455; Fregonara, *I nuovi poteri di controllo del socio di societa' a responsabilita' limitata,* in *Giur. comm.*, 2005, 806, Abriani, *Controllo individuale del socio e autonomia contrattuale nelle societa' a responsabilita' limitata,* in *Giur. comm.*, 2005, 164; Arato, *Il controllo individuale dei soci e il controllo legale dei conti nella s.r.l.*, in *Società,* 2004, 1195.
([68])Although supported though varying levels of detail by the authors.
([69]) Abriani, *Controllo individuale del socio e autonomia contrattuale nelle societa' a responsabilita' limitata,* in *Giur. comm.*, 2005, 163; Ricciardello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio,* in *Giur. comm.,* 2008, 238-239; Arato, *Il controllo individuale dei soci e il controllo legale dei conti nella s.r.l.*, in *Società*, 2004, 1195.
([70]) Abriani, *Controllo individuale del socio e autonomia contrattuale nelle societa' a responsabilita' limitata,* in *Giur. comm.*, 2005, 163; Ricciardello, *L'inerenza del diritto di controllo del socio non amministratore di S.r.l. al potere gestorio,* in *Giur. comm.,* 2008, 238-239.
([71]) Arato, *Il controllo individuale dei soci e il controllo legale dei conti nella s.r.l.*, in *Società,* 2004, 1195.

g) specify the duty to record any session of inspection;
h) state that the exercise of the right to information cannot hinder the activity of the management and of other corporate bodies (e.g., by providing for a suspension of the informational rights during the weeks preceding the preparation of the financial statements).

Although the current status of case law on the matter does not allow a more detailed development of the abovementioned provisions, the insertion in the By-laws of a more exhaustive regulation on the exercise of the informational rights can certainly contribute to effectively balance the conflicting interests of the company and of the single shareholder.

Conference Proceedings

Rapports des conférences

Reportes des conferencias

Istituto Confucio di Pisa
比萨孔子学院

Scuola Superiore Sant'Anna
di Studi Universitari e di Perfezionamento

LIDER·LAB

november 25-26th, 2011
Aula Magna
Scuola Superiore Sant'Anna

Alternative Dispute Resolution Models
in China and Western Countries Practice

Friday november 25th, 2011

8.30 Registration
9.00 Greetings and introduction
(Prof. Maria Chiara Carrozza, *Director of Scuola Superiore Sant'Anna*;
Prof. Giovanni Comandé, *Coordinator of Lider Lab, Scuola Superiore Sant'Anna*)

SESSION I (9.30-13.30)
Circular circulation of legal solutions: roots and characteristics of contemporary ADR models
Chair: Prof. Vincenzo Varano (Università di Firenze)

Mediation in China from the Xizhou dynasty to the People's Mediation System and Court-Performed Mediation
Prof. Chen Zhonglin (Chongqing University)

Inverted fluxes: the impact of online ADR
Prof. Hans Micklitz (European University Institute)

The legal and cultural roots of mediation and ADR
Prof. Robert A. Baruch Bush - Judith A. Saul (Hofstra Law School)

11.00-11.30 Break

Is arbitration still a part of ADR? Is the answer the same in China and elsewhere?
Prof. Gabriele Crespi Reghizzi (Università di Pavia)

Mediating Commercial Cases in US Municipal Courts
Jody B. Miller (Hofstra Law School)

Some features and trends of Chinese ADR in a western perspective
Prof. Renzo Cavalieri (Università Cà Foscari, Venezia)

13.30-14.30 Lunch

SESSION II (14.30-19.30)
Chinese and European issues in ADR today
Chair: Prof. Marina Timoteo (Università di Bologna)

Review and analysis of the arbitration practice in China in the perspective of legal culture
Prof. Fei Anling (China University of Political Science and Law)

ADR in specific areas in China
Prof. Yang Chunping (Chongqing University)

The role of lawyers in European ADR
Prof. Maria Angela Zumpano (Università di Pisa)

16.30-17.30 Break

Relationship between state courts and arbitration: support or hostility?
Prof. Luca Radicati di Brozolo (Università Cattolica del Sacro Cuore, Milano)

Mediation and state civil justice
Prof. Remo Caponi (Università di Firenze)

Saturday november 26th, 2011

SESSION III (9.00-13.00)
Inverted fluxes: international arbitration
Chair: Prof. Giovanni Comandé (Scuola Superiore Sant'Anna)

What is pro-arbitration today? Remarks on a cross-cultural motto
Prof. Tibor Várady (Central European University)

Mediation and international arbitration in China: cohabitation or cross-contamination?
Prof. Shen Sibao (UIBE Law School - Shanghai University Law School)

WTO dispute resolution mechanisms and China
Prof. Jacques Bourgeois (College of Europe)

10.30-11.00 Break

Investment arbitration and China: investor or host state?
Prof. Yang Shudong (Chongqing University)

Strengthening commercial long term relationships with the help of ADR
Prof. Paola Lucarelli (Università di Firenze)

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INTERNATIONAL WORKSHOP

Alternative Dispute Resolution Models in China and Western countries practice

WORKING PAPERS SERIES

Starting from this Issue, Opinio Juris in Comparatione is pleased to public the series of Working Papers[1] presented in the International Workshop *"Alternative Dispute Resolution Models in China and Western Countries Practice"* held in Italy, on November 25 and 26 2011 at Scuola Superiore S. Anna, Pisa.

As stated in the Conference Announcement released in the last Issue of Opinio Juris, legal transplants and legal model circulation are widely studied processes. Nowadays, they have reached momentum as fundamental tools for defining and shaping the most attractive legal system for doing business.

These phenomena are often understood as patterns moving from the so-called western legal tradition towards countries belonging to the so-called oriental legal tradition. This is mostly the case also with reference to ADR. Yet, despite the fact that in recent times China has adopted western like solutions, due - for instance - to the adhesion to the WTO, it is clear that ADR are culturally embedded in the Chinese tradition with autonomous developments. The interdisciplinary workshop intended to study, among else, the historical origins of ADR systems, their actual roots in the oriental legal tradition and the possibility of discovering crossed fluxes of legal transplants in a largely globalized world, with a particular emphasis on the interaction between western arbitration models and oriental mediation experiences.

For this reason, the workshop has involved as speakers experts and practitioners in comparative law and other social sciences coming from the Italian and the Chinese experiences, as well as distinguished international experts in the field of ADR and international arbitration.

[1] Please notice that these Working Papers, unlike the ones included in *Article* and *Essays* section, have not been submitted to a peer-review evaluation.

Paper n. 2

CHINA AND THE WTO DISPUTE SETTLEMENT MECHANISM

by

Jacques H. J. Bourgeois

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CHINA AND THE WTO DISPUTE SETTLEMENT MECHANISM

by

Jacques H. J. Bourgeois ♦ *

Abstract:

This working paper elaborates on China's approach towards and use of the World Trade Organisation (WTO) Dispute Settlement Mechanism (DSM). It builds on statistical data and existing opinions in the literature to demonstrate the evolution of China's behaviour as a participant in the DSM. It also endeavours however to take the analysis one step further and to determine whether China's adherence to the DSM may be less genuine than this of the other WTO Members, notably in comparison to its main trading partners – the European Union (EU) and the United States of America (US). To this end, an examination of China's arguments put forward as a respondent in WTO proceedings is undertaken in search of suggested restrictive interpretations of its obligations under the WTO Agreement. The paper goes on and poses the question whether indeed such attitude could be characterised as systematic and whether traditional sovereignty-bound considerations underlie it. Conclusions are drawn as to the existing balance between national regulatory autonomy and global governance in the WTO legal system, the importance of which may go beyond China's economic and political context.

Keywords: China; World Trade Organisation; Dispute Settlement Mechanism.

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A. INTRODUCTION

One may wonder about how the topic of this working paper fits in the general theme of a conference on alternative dispute resolution models.

First, the WTO DSM, laid down in the Dispute Settlement Understanding (DSU) contained in Annex 2 of the WTO Agreement[1], has some characteristics that set it apart from classical international dispute resolution models. It is a compulsory and binding system: any dispute between WTO Members about any of the covered agreements can only be solved by recourse to the DSU[2]. Moreover, a WTO Member against whom another WTO Member initiates a dispute settlement proceeding has to accept this and the DSU provides for a number of rules that prevent the respondent WTO Member from evading the proceeding[3]. In addition, the final rulings and recommendations of a dispute settlement panel are binding on the parties. In theory the WTO political organs can review such rulings and recommendations but only a consensus of these political organs to reject the panel or the Appellate Body (AB) report prevent such reports from becoming binding[4]. In practice, so far no such report has been rejected. Finally, the DSU contains detailed rules on surveillance of implementation of recommendations and rulings issued by panels and the AB[5] and binding prescriptions on remedies[6,7].

Second, in view of these characteristics can conclusions be drawn from a comparison of China's approach towards the WTO DSM and China's approach towards alternative dispute resolution models? When China ratified the Vienna Convention on the Law of Treaties (VCLT) in 1997, it entered a reservation to its Article 66 on the submission of disputes to the International Court of Justice (ICJ).

It has since entered reservations on the dispute settlement provisions of all its international agreements.[8] The only instance in which China accepted an international judicial body jurisdiction prior to the WTO, was its accession to the International Centre for Settlement of Investment Disputes

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The working paper is written with the invaluable assistance of Svetlana Chobanova, trainee lawyer at WilmerHale (Brussels), svetlana.chobanova@coleurope.eu. Errors are my own.

[1] Marrakesh Agreement Establishing the World Trade Organization, available at: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm, last visited 08.12.2011

[2] DSU, Article 23(1).

[3] E.g. DSU, Articles 6,7 and 8.

[4] DSU, Articles 16(4) and 17(14).

[5] DSU, Article 21

[6] In the absence of withdrawal of the measure found to be contrary to a WTO obligation, compensation and suspension of concessions (DSU, Article 22)

[7] Or to use still other qualifications: "contentious, compulsory and exclusive" – J. Bourgeois and R. Soopramanien, "The World Trade Organisation Dispute Settlement System: Embedded in Public International Law?", in: C. Baudenbacher (ed.), *Dispute Resolution*, GLP, Stuttgart (2009), at 315; featuring "four automaticities: automatic jurisdiction, automatic acceptance of panel report, automatic acceptance of Appellate Body reports, and automatic authorization of retaliation" - S. Wenhua, "Redefining the Chinese concept of sovereignty", in: W. Gungwu and X. Yongnian, *China and the New International Order*, Routledge, Oxon (2008) 53, at 66.

[8] M. D. Harpaz, "Sense and Sensibilities of China and WTO Dispute Settlement", 44 *Journal of World Trade*, 6 (2010), at 1166.

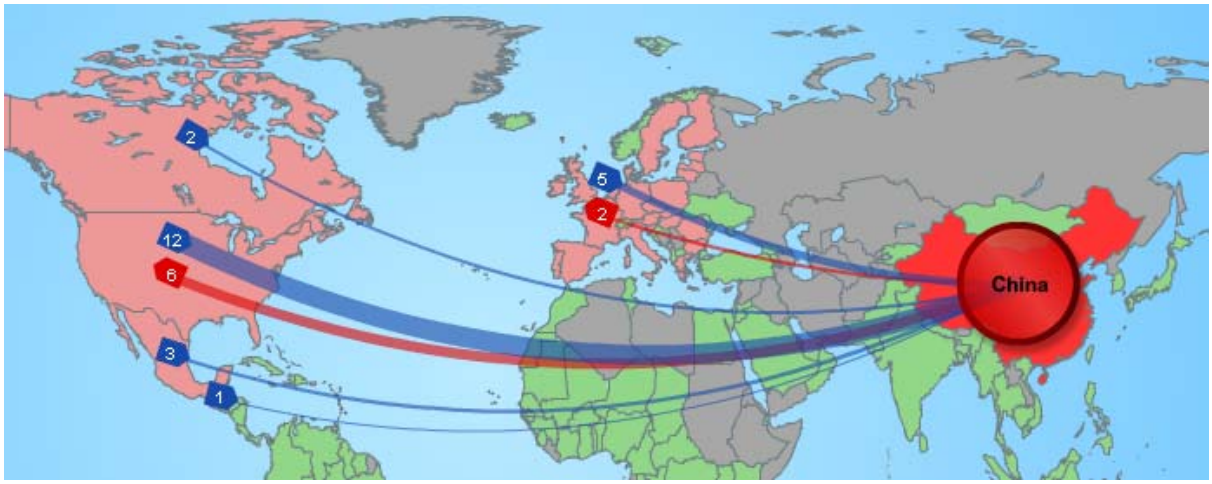
(ICSID) in 1993 whose jurisdiction, however, covers a given dispute subject to prior consent from both parties to it[9]. Its record of non-participating in dispute resolution is confirmed by the fact that so far China has not initiated any proceedings before the Centre and it was only in May 2011 that the ICSID registered what is believed to be the first ever investment treaty claim filed against China[10].

It would probably be wrong to draw from China's acceptance of the WTO DSM conclusions regarding China's approach towards (other) alternative dispute resolution models. When acceding to the WTO, China could not pick and choose. It was bound to accept the whole of the WTO Agreement including the DSU.[11]

However, it appears worthwhile to attempt to verify to what extent China has itself made use of the WTO DSM how it acted as a respondent. This working paper presents first some facts and figures (Section B), it then looks at China's behaviour in concrete cases and the different interpretations given to it in the literature (Section C). In a further section the draft report examines the positions taken by China on more systemic issues (Section D).

[9] Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States
[10] The case, *Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15), involves a dispute in the sphere of arts and cultural facilities and arises under the Agreement Between the Government of the People's Republic of China and the Government of Malaysia Concerning the Reciprocal Encouragement and Protection of Investments.
[11] Marakesh Agreement, Article XII(1)

B. FACTS & FIGURES



I. PARTICIPATION OF CHINA IN THE WTO DISPUTE SETTLEMENT

Statistical data show that the percentage of disputes initiated by a WTO member is proportional to its amount of trade and the number of its trading partners, as well as to its market access interest in a particular case.[12] In 2009 China overtook Germany to become the world's largest exporter[13] and foreign direct investment (FDI) in the country has increased considerably in the last decade reaching $185 billion in 2010. It is the second largest recipient of FDI globally.[14]

Judging by these criteria, a surge of cases was expected after accession of China to the WTO in 2001, both by and against China. Some even expressed concerns that the system would crush under this additional workload.[15] Non-compliance with AB rulings on the part of China was another fear.[16] So far as a complainant in the WTO DSM, China has filed 8 cases, 2 of which against the EU and another 6 against the US, focusing mainly on trade remedies, border issues. 7 of them have been initiated in the last 5 years with an average of 1 per year (only in 2009 3 requests for consultations were made). In comparison with China's leading trade partners, the EU has commenced 9 proceedings during the same period and the US – 14.[17]

[12] C. P. Bown, "China's WTO Entry: Antidumping, Safeguards, and Dispute Settlement", *NBER Working Paper Series*, Vol. w13349, 2007(revised version September 2008), at 33, footnote 43
[13] Available at: http://www.economist.com/node/15502811, last visited 16.11.2011
[14] Available at: http://greyhill.com/fdi-by-country/, last visited 16.11.2011
[15] H. Gao, "Taming the Dragon: China's Experience in the WTO Dispute Settlement System", *Legal Issues of Economic Integration*, 34, 4 (2007)
[16] D. Z. Cass, "China and the 'constitutionalization' of international trade law", in: D. Z. Cass (ed.), *China and the World Trading System: Entering the New Millennium*, at 45
[17] Available at: http://www.worldtradelaw.net/dsc/database/complaintscomplainant.asp, last visited 16.11.2011

Interestingly, in a classification of WTO disputes by income level of the parties' economies[18], China being classified as a 'lower middle income' country, it has participated as a complainant in 8 out of a total of 58 disputes, initiated in its group but has been challenged in 23 out of 67 proceedings, followed by Turkey – respondent in 8 cases only. [19] That is, in a group of more active complainants than respondents, China displays a contrasting tendency. It should also be noted however that 3 of the 5 AB reports (ABR) from this year concern initial proceedings commenced by China.[20] To compare, in 2008 there were 10 notices of appeal filed by WTO Members, in 2009 and 2010 – 3 and in 2011 – 6.[21]

China has been a respondent in a total of 23 cases concerning 14 different issues. 2 of those were initiated by Canada, 5 by the EU and 12 by the US. While it has yet to commence a dispute against another developing economy, disputes filed against China have included challenges by developing economies like Mexico (3 times) and Guatemala (once). In parallel, since 2001 the EU has been confronted 40 times within the WTO DSM, while the complaints against the US for the same period amount to 63.[22] China and the US have filed against each other a total of 18 disputes – 12 of them filed by the US and 6 – by China. 15 of these cases have been initiated since 2007, taking also into consideration that since China's accession in 2001 the US has filed a total of 29 cases against all WTO Members. Thus, the majority of China's complaints have been filed against the US and the latter has initiated almost half of its proceedings against China. For the period 2002-2009 the US requested 3.2 consultations for every trillion dollars of two-way merchandise trade flow with China and just 1.2 consultations with the world as a whole. At the same time China's complaint intensity, relative to merchandise trade with the US, is below average for all Members that lodged complaints against it. China has requested 2.7 consultations for every trillion dollars of two-way merchandise trade flow with the US and 0.5 with the world as a whole (noting that it has only requested consultations with the US and the EU).[23]

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[18] Classified as "high income"; "upper middle income"; "lower middle income"; and "low income" countries and based on data and terminology from the World Bank. Available at: http://www.worldtradelaw.net/dsc/database/complaintsclassification.asp?f1001=&f1002=&f1003=&f1004=turkey&f1005=&datefieldstart=&datefieldstarty=0&datefieldstartm=0&datefieldstartd=0&datefieldend=&datefieldendy=0&datefieldendm=0&datefieldendd=0&backlink=http%3A%2F%2Fwww.worldtradelaw.net%2Fdsc%2Fdatabase%2Fcomplaintsclassification.asp&form1_btn5=Search&id=&form1_mode=1, last visited 16.11.2011

[19] Available at: http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm?year=none&subject=none&agreement=none&member1=CHN&member2=none&complainant1=true&complainant2=false&respondent1=false&respondent2=false&thirdparty1=false&thirdparty2=false#results, last visited 16.11.2011

[20] *Ibid.*

[21] Available at: http://www.worldtradelaw.net/dsc/database/noticecount.asp, last visited 16.11.2011

[22] Available at: http://www.worldtradelaw.net/dsc/database/complaintsrespondent.asp, last visited 16.11.2011

[23] G. C. Hufbauer and J. C. Woollacott, "Trade Disputes between China and the United States: Growing Pains so Far, Worse ahead?", in: *Working Paper Series*, WP 10-17 (2010), Peterson Institute of International Economics, at 6-7 (some figures updated)

Insofar as trade remedies are concerned, 2010 statistics reveal that since China joined the WTO, the US has conducted 71 AD investigations against Chinese exporters and has imposed AD duties in 61 of them. China is thus the most frequent target of the US, followed by Korea with only 9 cases. Similar statistics, though with lower frequency apply to the US imposition of countervailing duties (CVD). China has however challenged just 4 of these AD duties in WTO proceedings. For the same period it imposed AD duties in 22 cases against the US and a similar number has been imposed on other countries. Moreover, China has investigated only 3 and imposed duties in only 2 CVD cases, concerning US exports of steel and chicken products.[24] Until recently the US had not challenged any of those measures but presently already two cases are pending, notably concerning both instances of CVD imposed on US products by China[25].

As to safeguard measures, since 2001 the US has implemented only 1 global safeguard (subsequently challenged in the WTO by several Members, including China[26]) but has conducted 7 China-specific safeguard investigations, finding affirmatively in 5 instances. Only one of those cases was an action taken by the US president and subsequently brought before the WTO tribunals by China[27]. Finally, between January 2002 and June 2010 255 investigations in the field of intellectual property rights were initiated by the US, 104 of which cited China as a respondent. In 2009 the US Customs and Border Protection seized $ 1 in goods for every $ 1,874 worth of goods imported from China and $ 1 in goods for every $ 1,174 imported from Hong Kong, whereas in a recent study Hong Kong was indentified as the leading source of counterfeited goods trade relative to the volume of exports and China only occupied 15th place.[28]

The EU has lodged 5 complaints against China and so with slightly higher merchandise inflows, the EU complaint intensity with China is much lower that the US one.[29] In addition, a framework for negotiation-through-dialogue has been established in the form of sectoral dialogues. At the same time, the EU has made explicit its determination to use more formal legal channels to effect dispute resolution in the event of failure to reach a negotiated settlement of outstanding issues.[30]

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[24] *Ibid.*, at21-25

[25] See *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the US* WT/DS414 and *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the US* WT/DS427.

[26] See *US — Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248-9, 251-4, 258-9/AB/R, from 10 November 2003.

[27] See *US — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R from 05 September 2011.

[28] Hufbauer & Woollacott, *op. cit.*, at 21

[29] *Ibid.*, at 7-8

[30] In a document entitled "EU-China Trade and Investment: Competition and Partnership" the EU has stated with regard to WTO dispute settlement: "Where trade irritants arise between China and the EU, the EU will always seek to resolve them through dialogue and negotiation. However, where this fails, the Commission will use the WTO dispute settlement system to resolve trade issues with China and to ensure compliance with multilaterally agreed rules and obligations. This is not a

However, China is the major target also of EU's trade defence investigations and the EU has not has not hesitated to use the DSM to engage China over specific trade concerns.[31]

II. OBSERVATIONS

Most of China's disputes as a complainant concern trade remedies but in light of the frequency with which WTO Members have challenged foreign anti-dumping (AD) measures, the number of disputes is seen by some as strikingly small, taking account of the number of AD measures China's exporters have been subjected to.[32] China has also not taken the matter into its own hands – use of AD has been limited and evenly-concentrated.[33] Thus, although recent complaints illustrate that China is willing to resort to the WTO DSM if bilateral negotiations do not provide satisfaction, it still remains much less active as a complainant than other large developing countries, such as Brazil or India.[34]

As a respondent, China has been frequently involved in the WTO dispute settlement and while initially the cases concerned mainly behind-the-border measures, a clear tendency has recently emerged from both the EU and the US to challenge China's AD and CVD measures.[35] In Section D the paper will examine in more detail China's strategy as a respondent in particular disputes and attempt to draw conclusions as to its attitude towards the DSM.

question of replacing cooperation with confrontation but of creating a sound relationship based on objective application of agreed multilateral rules." Available at: http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_131234.pdf

[31] K. Qingjiang, "Trade Disputes between China and the EU", in: *East Asian Policy* 1, 2 (2008), at 86 and 89

[32] Bown, *op. cit.*, at 34

[33] *Ibid.,* at 35

[34] H. Liyu and H. Gao, "China's experience in utilizing the WTO Dispute Settlement Mechanism", in: G.C. Shaffer, R. Meléndez-Ortiz (eds.), *Dispute Settlement at the WTO. The Developing Country Experience* (Cambridge University Press, 2011), a t 159

[35] See *China — Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the EU* WT/ DS425 and *China — Broiler Products (US)* WT/DS427

C. CHINA'S BEHAVIOUR AS A MEMBER OF THE WTO

The first question to ask is how exactly the aforementioned facts and figures are to be interpreted within the WTO legal and political context and whether China's attitude towards the WTO DSM appears to be one of an average new Member, given the circumstances of its accession and its economy, or whether it is indeed avoiding formal WTO dispute settlement.

Non-compliance with Panel and AB rulings was not a viable option for China, even upon the assumption that after its accession it still adhered to the traditional policy of not recognizing binding international dispute resolution, as this would go against the country's political, economic or strategic interests in the WTO[36]. Equally debateable is however to what extent China broadly used, as expected by many authors, the possibilities to appeal under the DSU or took advantage of the uncertainties relating to the DSU's interpretation, a conduct hardly untypical among WTO Members.[37]

I. TYPICAL BEHAVIOUR

According to one view, taking the *Auto parts*[38] case as a turning point in China's attitude, the country has started to demonstrate faith in public law and international rules "at the expense of its sovereignty, historically one of its most sacred policy goals"[39]. According to a socialisation hypothesis, China's legal culture and traditional foreign policy of avoiding binding international adjudication is perceived as changing through the exposure to the WTO dispute settlement.[40] Some claim that not only is China realising that its interests cannot be effectively protected through compromise only, but that a change in mentality among Chinese decision-makers has occurred: they no longer see WTO litigation as a political defeat. A parallel is drawn even with the EU integration literature as providing guidance to the process of identity formation.[41] Moreover, it is claimed that the Chinese authorities clearly view the WTO dispute settlement as a legitimate means for challenging foreign trade barriers and publicly express disapproval of other Members' infringements.[42]

Gao also views the WTO as an example of China's readiness to accept certain limitations to its sovereignty and embrace a compulsory dispute settlement. He considers that China's participation in the process of trade negotiation and trade policy review has been subject to severe constraints on its accession.

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[36] D. Cass (*op. cit.* at 45) suggests that a refusal to comply would lead to other Members' reluctance to bargain trade concessions in China in subsequent negotiation rounds
[37] *Ibid.*
[38] *China — Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R of 15 December 2008
[39] Harpaz, *op. cit.,* at 1156
[40] *Ibid.*
[41] *Ibid.*, at 1161
[42] *Ibid.*, at 1176

However, in the area of dispute settlement no restriction was imposed to it from the very beginning.[43] It would thus seem natural for China to endeavour asserting its rights through that system and softening the negative impact of its accession terms through interpretation in WTO dispute settlement proceedings. 5 out of 6 cases filed since 2008 aim at changing the terms of China's Accession Protocol (AP). The author suggests that insofar as the panel and the AB have a traditionally critical stance towards trade remedies, it is plausible that the unclear terms in the AP would be interpreted in a restrictive manner. These arguments support a thesis that China has made a successful transition to a WTO Member using the DSM increasingly skilfully and more confidently.[44] While this might be true for earlier cases[45], it should also to be noted that the two latest rulings pursuant China's challenges – the ABR in *US – Tyres*[46] and the Panel Report in *EU – Footwear*[47] – largely support the interpretation of the respondents.

The conclusions drawn are that in view of its overall performance and experience, China's attitude towards the WTO dispute settlement is typical for an average large WTO Member. A further argument is that in terms of issues rather than number of cases China's defensive and offensive stances are balanced (an assessment made in mid 2010).[48] It is also argued, in view of its recent accession to the WTO and inexperience of international dispute settlement, that it is unfair to judge China's performance only in terms of trade volume and economic size, and that the country is gradually developing a more assertive attitude.[49] China is even described as having undergone a successful transition from a passive rule taker to an active rule maker, advancing its interests with sophistication and confidence through the WTO litigation system. The prediction is that an increasing amount of claims will follow.[50]

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[43] H. Gao, "China in the WTO Dispute Settlement System: From Passive Rule-Taker to Active Rule-Maker?", submitted to International Centre for Trade and Sustainable Development, available at: http://ictsd.org/downloads/2011/07/ictsd-gao-paper.pdf, last visited 16.11.2011, at 1

[44] *Ibid.*, at 5-6

[45] See *US — Anti-Dumping and Countervailing Duties* WT/DS379/AB/R; *US — Poultry* WT/DS392/R ; *EC — Fasteners* WT/DS397/AB/R

[46] *US — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China* WT/DS399/AB/R from 5 September 2011. The AB upheld the Panel's finding that the US did not act inconsistently with its obligations under Section 16 of China's AP, which allows other WTO Members to impose safeguard measures on imports from China alone when such imports are "increasing rapidly" so as to be a "significant cause" of material injury to the domestic industry.

[47] *EU — Anti-Dumping Measures on Certain Footwear from China* WT/DS405/R from 28 October 2011. The Panel found that Article 9(5) of the Basic AD Regulation was inconsistent with the EU's WTO obligations, and that the EU had acted inconsistently with the AD Agreement in some aspects of the original investigation and expiry review, but rejected the bulk of China's specific claims of violation in connection with the original investigation and expiry review, and the resulting Definitive and Review Regulations.

[48] W. Ji and C. Huang, "China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective", in: *Journal of World Trade* 45, 1 (2011), at 30

[49] *Ibid.*

[50] Gao, "From passive rule-taker…", *op. cit.*, at 6

II. OBJECTIVELY JUSTIFIED BEHAVIOUR

Undoubtedly, at least during the first years of its accession, China preferred to avoid formal WTO disputes as a complainant and as a respondent and expressed clear preference for settling cases through "out-of-court" negotiation. The statistics still show a relatively low participation as a complainant and even authors that defend China's commitment to the WTO dispute settlement system express doubts whether its attitude towards binding international adjudication has changed and consider it might remain an exception.[51] Different arguments have been adduced to justify China's attitude, involving a case-by-case analysis or putting the disputes into a broader economic, bilateral relations' context.[52]

China's culture embracing the Confucian values appears to be an important factor, since litigation is traditionally equated with coercion and seen as a last resort option which destroys social relationships. Failure to come to a successful resolution through informal means implies that the parties are not able to honourably settle their dispute. Particular attention has been given in the literature even to the drafting of international arbitration clauses in view of ensuring neutral resolution of disputes and goodwill. It remains however that China has participated in very few genuine international arbitration proceedings.[53]

In at least two cases in 2004 and 2005, concerning coke and draft linerboard, China yielded to the demands of the EU and the US when they threatened to bring the matter to the WTO.[54] While this is often explained by China's traditional partiality for mediation and avoidance of international dispute settlement, it is also argued[55] that this culture has limited bearing on China's attitude towards WTO dispute settlement since it could not amount to "unilateral concession or self-surrender" and has already made place for the rule of law in China's international relations. But even if accepting "a latent dispute avoidance preference in the Chinese approach to trade conflicts", those cases are argued to be strategically and wisely kept away from adjudication. For example, the settlement with the EU in the coke export quota case purportedly resulted in a 5-year effective delay of the EU's systematic challenge of China's export regulatory regime of raw materials.[56]

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[51] Ji & Huang, *op.cit.*, at 37
[1] *bid.*, at 33-35
[53] A. J. Farina, "Talking Disputes Into Harmony" China Approaches International Commercial Arbitration, in: *American University International Law Review* 4, 1 (1989), at 157
[54] Harpaz, *op. cit.*, at 1171
[55] Ji & Huang, *op.cit.*, at 35
[56] *Ibid.*

A more cautious view is expressed by Gao in applying the aggressive legalism theory, i.e. the active, strategic use of the WTO substantive rules to serve both as 'shield' and 'sword' in trade disputes. He compares China's early experience in the WTO DSM to Japan and Korea's attitude and finds a clear reluctance of China to make use of the DSM. Referring to the coke case, he notes that it was the EU's fear of losing essential coke supplies for its domestic industries that prompted its attack against China's export quotas, and that the latter would have had sound legal arguments in case the dispute had gone to the WTO.[57] However, China's future attitude towards the DSM is seen as dependent upon rather objective factors – proper understanding of the dispute settlement system, improvement and the latter itself, availability of expertise in China and its trade surplus.[58]

A central issue around which the question revolves is China's traditional view on national sovereignty. It is described as one of its most sacred foreign policy goals[59] and accepting the binding nature of the WTO DSM is in itself a considerable departure from its former model of avoiding international judicial adjudication. Another factor may be the bureaucratic decision-making process and the caution of the Chinese government which leads it to avoid taking definitive positions but does not necessarily amount to reluctance to litigate.

III. RELATIONSHIP WITH THE EU AND THE US

It might seem strange that complaints from China have been brought only against the US and EU, particularly because developing countries like India and Argentina have also frequently applied AD and CVD measures to Chinese products. This could be explained by the non-comparable economic importance of the US and EU markets, as well as by the common interests and support that developing countries share[60]. One may nonetheless wonder whether avoidance of disputes with WTO Members that have not yet challenged it in the WTO DSM, shows excessive caution on the part of China.

As of 2009, both the volume and imbalance of US merchandise trade with China had increased dramatically. Although in 2007 it was overtaken by the EU as China's number one export destination, the US still remains by far the largest single-country destination for Chinese merchandise. Both countries have also invested directly in each other's economies. The great majority of the cumulated historical trade flows between them have been governed by the terms of the WTO legal framework.[61] The figures in Section B clearly outline a very aggressive line of conduct in the field of trade remedies on the part of the US which so far has not been entirely reciprocated by China.

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[57] H. Gao, "Aggressive Legalism: The East Asian Experience and Lessons for China", in: H. Gao and D. Lewis (eds.), *China's Participation in the WTO*, Cameron May (2005), at 335 and 348
[58] *Ibid.*, at 348-351
[59] Harpaz, *op.cit.*, at 1166
[60] Ji & Huang, *op.cit.*, at 32
[61] Hufbauer & Woollacott, *op. cit.*, at 2-3

Until 2010 proceedings initiated by the EU and the US were exclusively focused on "behind the border" measures. But since then, both Members have launched complaints against China's AD and CVD measures. Conversely, China's complaints remain to date entirely focused on US and EU border measures. Reliance on border protection may be understandable for the EU and the US, seeking to protect mature domestic industries, rather than to support the growth of nascent ones. However, they also have "behind the border" measures, a number of which may be motivated by a desire to guard certain sectors of the economy or may have the effect of hindering import trade. An example of border measures is the reclassification by the US Customs and Border Protection of certain solar panels under a dutiable tariff heading, contrary even to the US calls for free trade in environmental goods and services during the Doha Round. Having in mind the jurisprudence of the AB as to tariff reclassification[62] and the trade interests of China in the field[63], one may wonder about the reasons underlying the absence of proceedings brought to date.[64]

Insofar as EU measures are concerned, potential areas of conflict could be the EU technical/sanitary and phytosanitary (SPS) standards/environmental criteria, that have a negative impact on EU-bound Chinese exports. From a Chinese point of view, EU standards are either complex or opaque, or not necessarily scientifically based.[65] Again, in view of the strict approach adopted by the AB in applying the 'precautionary principle' in the SPS Agreement, possible claims could be brought successfully.

China's large trade surpluses in relation to the EU and the US are seen as a major reason mitigating China's "political toughness and enthusiasm" for asserting its rights though the DSM. A parallel is drawn in this respect with Japan (in relation to the EU and the US), Chinese Taipei and Korea (in relation to China).[66] Furthermore, both the EU and the US have claimed that the exchange rate of China's currency is unfairly helping it gain shares in global markets and should either be raised or left to the market forces. There is a contention that the undervaluation of the renminbi violates Article XV(4) of the GATT and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).[67] The latter might also be an argument against more aggressive attitude in bringing claims before the WTO tribunals but authors have noted that such claims are in fact likely to be rejected[68].

[62] See for example *EC — Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R from 12 September 2005
[63] In 2009, the US imported $ 0.1 billion of electric motors and generators (under the dutiable heading) from China, which account for 21.1 % of the $ 0.7 billion Chinese exports of these devices.
[64] Hufbauer & Woollacott, *op. cit.*, at 35-36
[65] K. Qingjiang, *op. cit.*, at 88
[66] Ji & Huang, *op. cit.*, at 34
[67] K. Qingjiang, *op. cit.*, at 86
[68] *Ibid.*

However, a recent paper[69] suggests an interesting analysis of the current undervaluation of the Chinese currency which might render this trade-surpluses justification at the very least debatable. After examining China's export statistics, the author concludes that the almost exclusive concern traditionally attached to the maximisation of export earnings does not reflect the reality of the international economy. In the case of China for example, 60% of its exports are operated by 'foreign-invested enterprises', more than half of them involve 'processing trade'[70] and imports have not been substantially lower than them.[71] Also, while admittedly a country with a savings surplus would build up claims on the rest of the world, the imbalances between the US and China have narrowed pursuant to the financial crisis, plus China's savings ratio is dependent on domestic specificities of its financial system.[72] Finally, it is suggested that complaints from the US and the EU about some of China's policies (such as IPR violations, discrimination and protection against foreign firms) should lie on a different plane.[73]

At any rate, authors suggest that the political friction between the US and China is unlikely to subside unless considerable appreciation of the renminbi is allowed. And if trade disputes of the sort that has already arisen before the WTO tribunals can be managed if each country respects potential adverse decisions, more troublesome are sweeping measures with the potential to isolate entire parts of the economy from foreign competition, such as the 'Buy American' provisions in the American Recovery and Reinvestment Act (February 2009) or the US Currency Bill which passed the Senate in October 2011.[74] It remains to be seen whether the channelling of such measures into targeted policies will be challenged before the WTO tribunals by either Member and what the effect of an adverse judgement would be.

IV. OBSERVATIONS

Wu argues that China has become a strong stakeholder in the WTO and its membership could be beneficial to the world but on the condition that its relationships with the established WTO powers are grounded in the rules-based multilateral system. He suggests that while the US and the EU should not abuse China's non-reciprocal concessions and should treat it as an equal partner, China should react by discontinuing its strategies of regionalism and unilaterism. He appeals for fairness and equality in

[69] S. Plasschaert, "Is the Renminbi Undervalued", European Centre for International Political Economy Working Paper, No. 02/2011, available at: http://www.ecipe.org/publications/ecipe-working-papers/is-the-renminbi-undervalued-the-myths-of-china2019s-trade-surplus-and-global-imbalances/PDF, last visited: 21.11.2011

[70] In 'processing trade', components and other intermediaries are imported from abroad, prior to their further elaboration and finishing.

[71] *Ibid.*, at 5-9

[72] *Ibid.*, at 12

[73] *Ibid.*, at 15

[74] Hufbauer & Woollacott, *op. cit.*, at 37

China–US and China–EU bilateral relations as the only one politically and economically sustainable in the long term.[75]

The more pragmatic views however find other arguments to explain China's attitude towards the WTO dispute settlement. It could be reasoned that the driving force behind it is not China's changing approach towards international dispute resolution but rather its desire to balance against the US power.[76]

It remains that since May 2010 five new dispute settlement proceedings have been initiated against China, while it has brought only one. If China's inactivity could have been initially due to the uncertainty surrounding its non-market economy status (i.e. discretion given to other Members in constructing dumping margins for example), the AB has endeavoured to apply to it a relatively strict and balanced interpretation. In addition, it seems that the benefits for the real economy from China's own cases have not been great and it needs to engage in more and winning cases in order to improve domestic recognition for the importance of the WTO legal framework.[77]

[75] X. Wu, "No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization", in: *Chinese Journal of International Law (2011)*, at 268
[76] Harpaz, *op.cit.,* at 1158
[77] Ji & Huang, *op.cit.*, at 31

D. WHETHER CHINA'S ADHERENCE TO THE WTO DSM IS GENUINE

The proper question is whether China's adherence to the WTO is less genuine than that of the other WTO Members. If reasonable doubt could be raised about the reasons underlying China's approach towards the dispute resolution system of the WTO, a question arises whether its adherence to the DSM is genuine or if it has rather been accepted grudgingly. In the latter case it would only be natural for China to be pushing for a narrow interpretation of the WTO Agreement and its commitments under it. An ancillary issue to verify is whether, if China is defending a narrow interpretation, this amounts to a systemic attitude and not just an ordinary course of defence, thus attempting to approximate the WTO DSM to alternative dispute resolution.

I. PREMISES OF THE QUESTION

There is an obvious tension between the binding nature of the DSB rulings and the objective assessment standard of review adopted by the AB[78], on the one hand, and China's insistence on sovereignty and its wish to exclude certain state or local government measures from the scope of judicial review, on the other. It has been noted for example that some of China's trade-restrictive sanitary measures might not prove scientifically justified.[79]

Does part of the explanation lie in the important role played in China by arbitration, particularly in resolving disputes with foreign investors[80]? As opposed to adversarial proceedings, it keeps many procedural and substantive factors within the parties' control: they may negotiate the forum, the procedural rules, the arbitrators, often even the substantive law used. The Chinese find arbitration especially appealing because the rule of law need not be followed strictly but may be substituted by other norms, including morality. The arbitrators are not bound by precedent and can decide the issue on the equities of the particular case.[81]

Further doubts are raised by certain authors elaborating on the Chinese understanding of judicial review and independence. Judicial independence is a concept subjected to the ideological understanding of the society. In the Western sense it is grounded upon the notion of liberalism – which sees law as neutral and above everything. By contrast, in China the law is viewed as an instrument that helps the communist party leadership in the construction of the ideal society; thus, judges' fidelity to the law

[78] *EC – Measures affecting Meat and Meat Products (Hormones)* WT/DS26/AB/R from 13 February 1998.
[79] Cass, *op. cit.*, at 49-50
[80] R. Yu, "Dispute Resolution in the People's Republic of China" (1996), available at: http://raymondyu.net/pub/papers/dispute.html, last visited 18.11.2011
[81] Farina, *op. cit.*, at 155-156

must not subvert their loyalty to the party leadership.[82] It has been suggested that there is not likely to be any change while the present political climate persists.[83]

Moreover, the current Chinese constitution seems to reserve the power of its interpretation, enforcement and amendment to the legislator[84] and concerns have been raised with regard to the powers of constitutional supervision by the Standing Committee of the NPC, realised, among others, through inspecting the implementation of selected laws and supervising the work of the administrative and judicial organs.[85] Hence the attempt by some local legislatures to control individual cases before the judiciary.[86]

Indeed concerns have been raised about possible idiosyncratic interpretations of key provisions of the WTO Agreement by China. For instance, China, notwithstanding the fears of some WTO Members, has stated that it would make 'full use' of the balance-of-payments provision and would "decide whether to apply and on which conditions to apply the developing country provisions [of the SCM] in the light of its own conditions and needs".[87]

II. CHINA'S ARGUMENTS AS A RESPONDENT IN WTO PROCEEDINGS

An examination of China's submissions in its capacity of a respondent in dispute settlement proceedings could reveal its attitude towards the WTO DSM. In the following sub-section three recent cases will be analysed, identifying interpretations put forward by China narrowing the scope of its obligations under the WTO Agreement.

1. China – Intellectual Property Rights[88]

The case was a follow-up of an ancient controversy between the US and China concerning IPRs protection in China. After its accession to the WTO bilateral negotiations were held on the matter. Pending such negotiations the US initiated a WTO dispute settlement proceeding, probably as a result of internal political pressure. China reacted with much displeasure and freezing of the bilateral

[82] The author cites: "The practice in recent years is apparently that the courts still receive instructions from relevant party authorities regarding cases which are regarded as 'important', 'difficult' or politically sensitive, sometimes because the courts seek such instructions themselves in order to avoid any suspicion that they are not obeying the fundamental principle of party leadership, and sometimes because the party authorities seek to intervene in matters they consider crucial."
[83] R. Yu, *op. cit.*
[84] J. Chen, "Constitutional Judicialization and Popular Constitutionalism in China: Are we there yet?", in: G. Yu (ed.), *The Development of the Chinese Legal System: Change and Challenges*, Routledge, Oxon (2011), at 4. The author states that in practice, there are no mechanisms for enforcement and supervision, interpretations of the Constitution have been rare and all amendments have been proposed by the Party, none of which has ever been rejected or even modified by the National People's Congress (NPC)
[85] *Ibid.*, at 8
[86] See the famous 'Seeds Case' where, after invalidation of a local regulation for conflict with national law, the local Standing Committee intervened seeking the rectification of the ruling and severe punishment for the judges even before a decision on appeal. (*Ibid.*)
[87] Cass, *op. cit.*, at 46
[88] *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R from 26 January 2009

discussions. Both parties acclaimed the Panel decision and did not appeal but some analyses have suggested that on most of the important issues Chinese measures were upheld and the decision was in reality a loss for the US.[89]

a. Copyright Law

It was claimed by the US that Article 4(1) of China's Copyright law denied protection to certain works of creative authorship. China drew a distinction between "copyright" and "copyright protection/enforcement", claiming that insofar as Article 2 of its Copyright Law "directly implement[ed] an author's rights under the Berne Convention (1971) into Chinese law"[90] (enumerated in Article 10), the minimum set of exclusive rights guaranteed by this Convention was protected in accordance with its obligations. Nevertheless, Article 4 of the same national law was interpreted by the Panel to provide for the denial of copyright protection to works which have failed content review[91]. It considered the distinction made by China as inapposite since it would be difficult to conceive that copyright would continue to exist, undisturbed, after the competent authorities had denied copyright protection to a work on the basis of its nature and the prohibition in the Copyright Law itself. In any event, the TRIPS Agreement provided for certain subject matter to enjoy protection and Members were to ensure that procedures to enforce that protection are available.[92]

China also supported a broad interpretation of Article 17 of the Convention – a provision confirming that governments have certain rights to control the exploitation of works.[93] It asserted, contrary to the Panel's finding, that this right of the government could involve denial of all copyright with respect to certain works[94], thus completely eliminating copyright for materials that have not been approved for publication or distribution. Moreover, the provision was seen by China as a non-exhaustive codification of the sovereign right to censor and as drafted using very expansive language that effectively denied WTO jurisdiction in the area.[95]

Article 4(1) of the Chinese Copyright law provided for complete denial of protection in relation to certain works and thus censorship interfered directly with copyright owners' rights. China argued however that since these economic rights were pre-empted by public prohibition copyright enforcement in case of censorship became meaningless and unnecessary and that its protection would

[89] Ji & Huang, *op.cit.*, at 19-20
[90] Panel Report, Para 7.70
[91] Para 7.103
[92] Paras 7.66 and 7.68
[93] It provides: "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right."
[94] Para 7.124
[95] Para 7.120

amount to "legal and material nullity". To this end, it was noted by the Panel that copyright and government censorship addressed different rights and interests. [96]

Finally, with regard to China's obligation under Article 41.1 of the TRIPs to ensure effective enforcement procedures against infringement of IPRs, China asserted that the ban on publication of a work is a form of "effective action" and that "it is in a sense an alternative form of enforcement against infringement". The Panel rejected also this argument, on the ground that the TRIPs Agreement contained a minimum set of enforcement procedures that Members must make available to right holders against any infringement of IPRs.[97]

b. Customs Measures

The contention of the US was that the competent Chinese authorities lacked the scope of discretion to order the destruction or disposal of infringing goods required by Article 59 of the TRIPs Agreement. Instead, a "compulsory scheme" was created in which customs authorities were obliged to give priority to disposal options allowing infringing goods to enter the channels of commerce or otherwise cause harm to the right holder. China alleged that the determination of what constituted an appropriate grant of authority under the TRIPSs Agreement was highly circumstantial. The circumscribed discretion granted for the customs authorities to choose among the options for disposal of confiscated infringing goods was appropriate, considering that the rules constraining this authority serve legitimate government interests.[98] The US failed on this claim.

China also opted for a broad interpretation of sentence 4 of Article 46 of the TRIPs Agreement, which allowed for much broader scope of manoeuvre in relation to those goods. According to this provision "[i]n regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in *exceptional* cases, to permit release of the goods into the channels of commerce". The term "exceptional" as seen by China included "special" (which suggested a qualitative test), and "unusual", (referring to frequency and suggesting a quantitative test), so that an interpretation in terms of the set of circumstances, and an interpretation in terms of the number of cases, were both consistent with the plain meaning of "exceptional cases".[99] The Panel disagreed finding ultimately that China's customs measures provided that the simple removal of the trademark unlawfully affixed was sufficient in more than just "exceptional cases".[100]

[96] Paras 7.133-7.136
[97] Para 7.180
[98] Para 7.200
[99] Para 7.388
[100] Para 7.393

c. Criminal Thresholds

The approach of China was particularly defensive in this field. One of the claims concerned the application of the first sentence of Article 61 of the TRIPs Agreement, under which Members should provide for criminal procedures and penalties at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. As a procedural claim, China argued that for criminal law matters the complainant should satisfy "a significantly higher burden [of proof] than it would normally encounter". Thus, the Panel was expected to treat sovereign jurisdiction over police powers as a powerful default norm, departure from which could only be authorized in light of explicit and unequivocal consent of the Members. The interpretative rule *in dubio mitius* was seen to have particular justification in the field of criminal law.[101]

Concerning the standard of compliance with Article 61 of the TRIPs, China:

i. Advocated absence of a specific obligation under sentence 1 of Article 61, TRIPs as its wording left to the national authorities to define when a right has been substantively infringed[102]

ii. Argued lack of sufficient specificity of Article 61 as compared to the ADA and the SCM Agreement and no specific article in the TRIPs to require states to ensure conformity of their laws with is provisions (ignoring Article XVI: 4 of the WTO Agreement)[103]

iii. Referred to the freedom provided for in the agreement to determine the appropriate implementation method and interpreted it as a specific establishment of boundaries on the enforcement obligations of the Members.[104]

iv. In relation to the scope of the obligation under the article, China adopted a restrictive interpretation of the term "commercial scale", decisive for determination of its obligations. It argued in particular that the term should refer to a "significant magnitude of infringement activity"[105] and that low-scale thresholds for criminalisation IP infringements would go contrary to the logic of the agreement[106].

The Panel disagreed in its reasoning with most of the interpretations suggested by China. Ultimately however, it concluded that the US had not established that the criminal thresholds were inconsistent with China's obligations.

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[101] Para 7.497
[102] Para 7.506
[103] Para 7.508
[104] Para 7.511
[105] Para 7.564
[106] Paras 7.591 and 7.597

2. China – Publications and Audiovisual Products[107]

The case was filed simultaneously with the previous one. The Panel supported 32 of about 70 claims raised by the US, most of which were upheld upon appeal. Compliance actions were however not promptly initiated by China and it was almost a year and a half later that the file was closed with agreed procedures under Articles 21 and 22 of the DSU.

The importance of these proceedings lies in the fact that cultural products in China are deemed essential for the purpose of disseminating government policy and shaping public opinion. In the pre-WTO accession period these industries were largely state-owned, a general ban on foreign investment existed and a licensing system controlled market access. China's GATS commitments are however one of the broadest – an ambitious undertaking in view of its heavy domestic regulation. Authors note that notwithstanding China's efforts a large part of the country's cultural sector still contains severe limitations for foreign producers and distributors.[108]

In response of the US claims, China invoked UNESCO instruments and Article XX(a) of the GATT to defend the measures as necessary for the protection of culture and public morals. Plus, it argued that some of the products at issue were not goods and were therefore out of the scope of its trading rights commitments and national treatment obligation.

a. 'Measures' which the Panel should arguably not examine

China raised a general issue that certain documents should not be examined by the Panel since they were not regulatory documents but mere internal guidance or summaries of procedures and requirements of other measures aimed at providing guidance. The Panel considered that this was an issue that went to the root of its jurisdiction – that is, to its authority to deal with and dispose of matters – and should be examined even on its own motion under Article 3.3 of the DSU, so as to satisfy itself that it had the authority to proceed.[109]

b. China's trading rights commitments

i. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

China invoked the latter instrument in order to justify its domestic measures by reference to the unique nature of the products at stake. This line of defence, used to counterbalance the generality of China's

[107] *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R from 12 August 2009 and WT/DS363/AB/R from 21 December 2009

[108] J. Shi and W. Chen, "The 'Specificity' of Cultural Products versus the 'Generality' of Trade Obligations: Reflecting on 'China – Publications and Audiovisual Products'" in: *Journal of World Trade*, 45, 1 (2011), at 161-162

[109] Panel Report, Paras 7.163 and 7.170

trade obligations, could be seen as delicate for a number of reasons. First, the WTO tribunals, in interpreting the provisions of the Agreement, should not add to or diminish the Member's existing obligations[110]. Second, the case law seems to show that 'rules of international law applicable in the relations between the parties' would be taken into consideration in accordance with Article 31(3)(c) of the VCLT, if they have been ratified by all parties to the WTO agreement.[111] And third, the US not only is not a member of the UNESCO Convention but is in fact strongly opposed to the latter.

ii. Interpretation of the relevant articles from China's AP

Under its AP, China has the obligation to progressively liberalize the availability and scope of the right to trade, so that, essentially within three years after accession, all enterprises shall have the right to trade in all goods throughout China's customs territory, however without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement. China assumed that this implied a derogation enabling it to regulate trade in a WTO-consistent manner, without breaching its obligation to ensure trading rights to all enterprises. On the contrary, the Panel interpreted it in a more restrictive manner, asserting that such a measure would be inconsistent with its commitments but it could nevertheless be maintained if at the same time it regulated trade in a WTO-consistent manner.[112]

China maintained that the sentence "foreign enterprises and individuals with trading rights" (i.e. foreign enterprises and individuals which under China's AP have to be accorded treatment no less favourable than enterprises in China with respect to the right to trade) comprised only such foreign enterprises and individuals to which it had already granted trading rights and so it had no obligation not to apply "requirements relating to minimum capital and prior experience" in situations where trading rights are being restricted. Also, "foreign enterprises" meant according to China only foreign enterprises not registered in it, to the exclusion of foreign-invested ones. However the reasoning was rejected by the Panel as not in conformity with the logic of the drafters.[113]

iii. Products/services at issue and applicable rules

China argued that the relevant paragraphs of its AP governed only trade in goods while the measures at issue in the dispute regulate services related to the licensing of rights for the exploitation of motion pictures (films for theatrical release, unfinished AVHE products and unfinished sound recordings) and so fell exclusively under the GATS and China's Schedule of Commitments. In any event, it claimed that any effect these measure may have on goods (i.e. on who may import hard-copy cinematographic films)

110 Article 3.2 of the DSU
111 See *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/293, paras 7.68-7.70
112 Paras 7.254-7.255
113 Paras 7.294-7.299

should be regarded as accessory and not examined under its trading rights commitments. To substantiate this argument China interestingly referred inter alia to an European Court of Justice case in which the latter determined that licensing agreements between film producers came under the provisions of free movement of services.[114] In the US' view such an interpretation would transform all goods commercially exploited through associated services, into services themselves.[115]

The Panel, drawing on the AB jurisprudence determined that the different aspects of the measures could be scrutinised under the GATS but that did not preclude the application of the trading rights commitments in China's AP to the extent they affect who may import a good. Furthermore, it concluded that the AP should be applied even if the import transaction involving hard-copy cinematographic film was not the essential feature of the film exploitation.[116] The same argument was advanced and rejected for audiovisual products intended for publication (tangible master copies).[117]

Upon appeal the AB confirmed these findings and stressed that China's view was based on an artificial dichotomy between films as content and the physical carrier on which this content was embedded.[118] As noted however, the tribunals' conclusion that the WTO agreements coexist and that one obligation cannot override the other is not an exception.[119]

iv. Right to regulate trade in cultural goods

China submitted that Chinese regulations establishing a content review mechanism and a system for the selection of import entities (and thus denying trading rights both to foreign and privately owned Chinese importers) had the purpose of protecting public morals. They reflected a longstanding policy of a complete prohibition of cultural goods with inappropriate content and of a high level of protection against dissemination of such goods with potentially negative impact on public morals[120]:

> (…) imported cultural goods, because they are vectors of different cultural values, may collide with standards of right and wrong conduct which are specific to China.[121]

China emphasized the essential role of these goods in "the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours"[122]. With reference the content review mechanism, it has been argued that the case was more about conflict between liberalisation,

[114] Paras 7.540, 7.547 and 7.553
[115] Para 4.301
[116] Paras 7.542 and 7.555
[117] Para 7.642
[118] AB Report, paras 193-195
[119] Shi & Chen, *op.cit.*, at 176
[120] Panel Report, Para 4.277
[121] Para 7.712
[122] Para 4.276

political censorship and ideological control in China.[123] Both the Panel and the AB however sidestepped the sensitive question of whether China could conduct censorship of cultural goods and determined that it had either not made a prima facie case that the measures were "necessary", or had not demonstrated that an alternative put forward by the US was not a genuine one or not reasonably available.[124]

v. Distribution of sound recordings in electronic form

The US claimed that China's commitments on "sound recording distribution services" included the distribution of sound recordings through electronic means. China however submitted that its Services Schedule was to be interpreted in light of the circumstances of its conclusion and that at the time of its accession to the WTO these services were largely illegal. It again invoked the *in dubio mitius* principle, stating that "one should not lightly assume that a sovereign state intends to impose upon itself the more onerous, rather than the less burdensome, obligation" and consequently when a GATS commitment could be interpreted clearly to include a new service, it should not be interpreted to do so.[125]The Panel admitted, though with caution, that evidence that such sound recordings were not commercially feasible at the time China's Schedule was negotiated, could be relevant as a supplementary means of interpretation with respect to the scope of that commitment[126] but eventually concluded that the electronic distribution of sound recordings had become a commercial reality in many markets before China's accession to the WTO and that China was aware of this fact.[127]

vi. Discrimination through internal regulations

Article III:4 of the GATT calls into question the legality of domestic regulations that fail to grant foreign products national treatment. It is thus interesting to note that China failed to fully address the US' charges concerning reading materials, sound recordings and films for theatrical release. Aside from defending a narrow definition of the term "distribution"[128] and generally arguing absence of less favourable treatment[129] it provided no other meaningful arguments. A crucial element was the question of 'likeness' between domestic and imported products and notwithstanding the absence of argumentation, the Panel found that only the measures affecting newspapers and periodicals were inconsistent with China's national treatment obligations. Authors have pointed out however that sound

123 Shi & Chen, *op. cit.*, at 170, referring to H. Gao, "The Mighty Pen, the Almighty Dollar, and the Holy Hammer and Sickle: An Examination of the Conflict between Trade Liberalization and Domestic Cultural Policy with Special Regard to the Recent Dispute between the United States and China on Restrictions on Certain Cultural Products" in: *Asian Journal of WTO & International Health Law and Policy*, 2, 2 (2007)
124 Panel Report, para 7.911 and AB Report, para 337
125 Paras 7.1164-7.1165
126 Para 7.1237
127 Para 7.1246
128 Paras 7.1454-7.1455
129 Para 7.1475

considerations existed as to the absence of likeness of these products and that the Panel's findings, not appealed, represented a big loss for China and greatly expanded its national treatment obligations.[130]

3. China – Raw Materials Exports[131]

Here the US complained that the downstream Chinese markets were afforded considerable competitive benefits as a consequence of the export restraints on raw materials. These resulted in higher export prices of the products at issue, creating substantial competitive benefits to downstream Chinese producers. What is interesting is that higher prices of Chinese goods is something the US has always solicited and has imposed trade remedy measures for that purpose, including on some of the raw materials at issue. Authors have suggested that the case had a potential to affect fundamentally the framework of China's export regulatory regime.[132]

a. Export Duties

The Panel found that China's measures resulted in imposition of export duties on the various raw materials. China defended a restrictive interpretation of its obligation under Paragraph 11.3 of its AP to eliminate all its taxes and charges applied to exports unless (pursuant Annex 6 of the AP) in exceptional circumstances or in application of Article VIII of the GATT (fees or charges applied at the border and related to importation/exportation). It claimed that Article XX of the GATT could also be invoked to justify such measures since in imposing an obligation on China to forego export duties in certain circumstances, the WTO did not exclude its inherent right to regulate trade. The Panel found however that China has exercised its sovereign right to regulate trade in negotiating the terms of its accession into the WTO and could not rely on Article XX in these circumstances.[133] This line of argumentation is consistently repeated throughout the Panel report to reject China's sovereignty claims.

b. Export Quotas

China did not contest the imposition of quotas on the products at issue which would consequently be inconsistent with Article XI:1 of the GATT which provides for general elimination of quantitative restrictions. It maintained however that the complainants failed to establish China's non-compliance with Article XI:2(a) with respect to the export quotas on all of the products at issue. That is, they did not prove that the quotas were "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party". This interpretation was rejected by the Panel in line with the AB's jurisprudence – the provision amounted to a limited

130 Shi & Chen, *op. cit.*,, at 183
131 China – Measures Related to the Exportation of Various Raw Materials, WT/DS394,395,398/R from 5 July 2011
132 Ji & Huang, *op.cit.*, at 23
133 Panel Report, Paras 7.155-7.156

exception and it was only reasonable that the burden of establishing such a defence should rest on the party asserting it.[134]

c. Defences to the Application of Export Restrictions

China sought to justify the application of export duties and quotas for part of the products at issue. Notwithstanding its finding as to the non-application of Article XX of the GATT to China's export duties, the Panel, in view of the extensive evidence and arguments submitted and in order not to undermine the parties' right to prompt settlement of the dispute, decided to examine, *arguendo*, the possibility of this article justifying the WTO-inconsistent export duties.[135]

i. Article XI:2(a)

China advocated a more extensive interpretation of Article XI:2(a) allowing for temporarily applied prohibitions/restrictions to prevent or relieve critical shortages of essential products. China argued that the defence could apply for an extended period of time, provided the measure was regularly reviewed but the Panel interpreted it as permitting the application of a measure "for a limited time under limited circumstances".[136] Similarly, the Panel did not support China's view that the a Member could on its own determine whether a product is essential to it, that the essential nature of a product should be measured in terms of its significance to a Member's GDP, employment, welfare or any other variable, or that a panel should view products to be more or less "essential" by considering the development of a given WTO Member.[137] Finally, the Panel put a particular emphasis on the temporal dimension of the defence and found that the term "critical shortage" referred to situations that may be relieved/prevented through the application of measures on a temporary, and not indefinite or permanent, basis.[138] This was contrary to China's contentions that the temporary situation of a preventive action would depend on the essentiality of a product, that the degree of shortage need not be so extreme and that a Member's tolerance in case of a potential shortage should be evaluated.[139] It could not therefore be considered that:

(…) China's restriction on exports of refractory-grade bauxite, which has already been in place for at least a decade with no indication of when it will be withdrawn and every indication that it will

134 Paras 7.209-7.211
135 Paras 7.227-7.230
136 Paras 7.251 and 7.257
137 Paras 7.276-7.277 and 7.280
138 Paras 7.297-7.305
139 Paras 7.285-7.288 and 7.2

remain in place until the reserves have been depleted, can by any definition be considered to be "temporarily applied" to address a critical shortage within the meaning of Article XI:2(a).[140]

ii. Article XX(g)

China invoked Article XX(g) with regard to certain raw materials deemed to be scarce exhaustible natural resources which need to be managed or protected.[141] It maintained that the exception must be interpreted in a manner recognizing a WTO Member's "sovereign rights over their own natural resources" and that these rights must be exercised in the interests of a Member's own social and economic development.[142] The Panel addressed the argument in an elaborate and intriguing manner. It acknowledged that the principle of state sovereignty is one of the fundamental principles of international law and that the principle of sovereignty over natural resources was an important part of it.[143] It went on to observe however that the ability to enter into international agreements is a quintessential example of the exercise of sovereignty and that in joining the WTO, China obtained significant commercial and institutional benefits, including with respect to its natural resources, but it also committed to abide by WTO rights and obligations:

> Exercising its sovereignty over its own natural resources while respecting the requirements of Article XX(g) that China committed to respect, is an efficient way for China to pursue its own social and economic development.[144]

With regard to the need of such measures to be made effective in conjunction with restrictions on domestic production/consumption, China was of the opinion that Article XXXVI:5 of the GATT confirmed its right to use and conserve its natural resources for itself with a view to diversifying its own economy and that export restrictions are needed to support it. To this end, proportionately higher burden on foreigners was justified.[145] The Panel, recalling China's own decision to exercise its sovereignty in accordance with the WTO Agreement, confirmed that the justification could be used for GATT-inconsistent trade measures applied only along with parallel domestic restrictions and cannot be invoked for measures whose goal or effects is to insulate domestic producers from foreign competition in the name of conservation.[146]

The ultimate conclusion was that, first, China did not establish that its export quotas related to the conservation of the said natural resources (on the contrary, such an export restriction, by reducing the

[140] Para 7.350
[141] Para 7.356
[142] Para 7.364
[143] Paras 7.378 and 7.380
[144] Paras 7.382-7.383
[145] Para 7.403
[146] Para 7.408

domestic price of the materials, worked as a subsidy to the downstream sector, which could result in an substantial increase of domestic demand)[147], secondly, Chinese restrictions are neither intended, nor enforcing a reduction on domestic production or consumption[148], and, thirdly, the domestic measures did not impose an even-handed burden on foreign and domestic consumers[149].

iii. Article XX(b)

This justification was invoked by China in order to justify certain restrictions as necessary for the protection of the environment and the Chinese population. However, the Panel, engaging in a lengthy discussion as to the content and substance of the Chinese measures, found that these were neither contributing to, nor formed part of, a comprehensive programme for the fulfilment of the stated environmental objective[150], did not materially contribute to the alleged goal[151], and WTO-consistent or less-restrictive alternative measures existed[152].

d. Export quota allocation and administration

The claim addressed the requirement imposed by China to exporters to meet certain prior export performance and minimum registered capital criteria in order to receive an allocation of a quota. Notwithstanding China's allegations that the relevant provisions of its AP recognized its right to impose a WTO-consistent quota and to administer it consistently with the WTO covered agreements, the Panel had no difficulty to find that China expressly committed through these provisions to eliminate any "examination and approval system" after December 2004, including eliminating "export performance" and "prior experience requirements" and minimum registered capital requirements.[153]

It remains to be seen whether the AB will confirm the findings of the Panel in the proceedings currently pending before it.

III. ATTITUDE IN OTHER CASES

China's involvement in cases that have not ended with a panel or an AB ruling, as well as in still pending proceedings could also offer important indications. In particular, some authors have endeavoured to justify China's strategy and reluctance engage in formal proceedings.The first case of China as respondent, *China – Value-Added Tax*[154], created ample public interest and a variety of opinions. Some commentators translated China's readiness to negotiate and make concessions by

147 Paras 7.430 and 7.435
148 Para 7.458
149 Para 7.466
150 Paras 7.511-7.512
151 Para 7.550
152 Para 7.590
153 Paras 7.662 and 7.665
154 *China — Value-Added Tax on Integrated Circuits*, DS309

reaching a Memorandum of Understanding with the US rather than going through the entire dispute settlement process as a preference for a more discrete diplomatic resolution of conflicts. Others observed that the incentive policy for domestic enterprises at issue had not brought the expected results and the negotiations process allowed China to adjust to a more effective regime. Consequently its behaviour was prompted by more practical considerations.[155]

China – Taxes[156] involved Chinese preferential tax treatment accorded in reality mainly to foreign investment companies. At the time a new income tax law was adopted in China, which aimed at establishing an equal tax burden on all enterprises and steps were already made towards complying with its provisions. Thus, reaching of a mutually agreed solution could be viewed as a logical step and the request for establishment of a panel by the US is seen only as a pressurising technique – it would have been "politically unnecessary and legally meaningless for both sides to continue to litigate".[157]

In *China – Financial Information Services*[158] the outcome of the consultations was successful and China agreed to reform its requirements for foreign financial information suppliers. It also implemented the settlement efficiently. However, the solution is said to reflect China's own conviction that regulators should be independent, so that a fair legal environment is ensured, and that it was internal allocation of powers and domestic considerations, rather than external ones, that finally contributed to the agreement.[159]

Two particularities of the case *China – Export Subsidies*[160] have been mentioned: first, it concerned mainly regional measures and, second, the latter's number was extremely high – 107. Commentators have noted that in view of the specificity of the WTO subsidy legislation and the large number of the measures at issue, a dispute would have consumed a great amount of resources and the mutually agreed solutions reached by the parties may have been prompted largely by such considerations.[161]

China – Fasteners[162] was the first WTO dispute involving China's trade remedy measures. The background of the proceedings is telling because the case was brought to the WTO after China had conducted investigations, had imposed preliminary AD measures and had brought a WTO complaint against the EU trade remedy measures on fasteners from China. Commentators have suggested that if China had withdrawn its measures as a result of the litigation threat on the part of the EU, it would in

[155] Ji & Huang, *op.cit.,* at 15
[156] *China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, DS358, 359
[157] Ju & Huang, *op.cit.,* at 17
[158] *China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, DS372, 373, 378
[159] Ju & Huang, *op.cit.,* at 22
[160] *China — Grants, Loans and Other Incentives*, DS387, 388, 390
[161] Ju & Huang, *op.cit.,* at 22 and 23
[162] *China — Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the EU*, DS407

the future be greatly hindered in conducting AD investigations and would provide support to the domestic criticism about its cautious attitude in defending its WTO rights[163]. Indeed, 2010 and 2011 saw a wave of trade remedy complaints in the WTO against China.

Notwithstanding the above justifications, the fact that 9 of the complaints against China were settled at the consultation stage and that in all cases of adverse findings China agreed to withdraw its WTO-inconsistent measures, reaffirms the country's traditionally 'soft' approach in solving international disputes.[164] However, it has been suggested that China's attitude is gradually changing and although certain deficiencies in its litigation skills remain[165], the strategy will continue. This is required, on the one hand, by China's trade interests and by the fact that it is increasingly being challenged before the WTO tribunals in politically sensitive areas, such as censorship policy and economic sovereignty over raw materials' exports. On the other hand, these cases frequently result in domestic ultra-nationalist reactions from the public, thus further compelling the government to actively defend itself.[166]

And indeed, in the recent *China — Electronic Payment Services*[167] and *China – GOES*[168] China seems to be adopting a resolutely defensive stand from the very beginning. Using its veto power, China has blocked the establishment of a panel for the two US requests concerning Chinese measures affecting electronic payment services and Chinese duties on flat-rolled electrical steel. Since the second establishment of a panel would be automatic upon a second request on the part of the US, the step has been characterised as a tactical procedural move to slow the process down.[169]

IV. INTERPRETING THE JURISPRUDENCE

Xiaohui Wu[170] argues that China's terms of membership were particularly unfavourable, asymmetric and non-reciprocal and that this creates a difficulty of ascertaining the appropriate interpretative approach towards China-specific substantive obligations to be adopted by WTO panels and the AB. He explains that a rigid textualist even inconsistent approach has been applied towards the customary rules of interpretation in the VCLT and too little attention has been given to systematic or policy issues in light of the object and purpose of the provisions or agreements as a whole.

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163 Ju & Huang, *op.cit.,* at 25

164 P. L. Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building", *Journal of International Economic Law* 13, 4 (2010) 997, at 1031

165 For example in the *Publications and Audiovisual Products* case China failed to provide English translations of key provisions of its own laws, which were at the core of the case (*Ibid.*)

166 *Ibid.*

167 *China — Certain Measures Affecting Electronic Payment Services* WT/DS413

168 *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States* WT/DS414

169 Available at: http://economyincrisis.org/content/china-blocks-wto-dispute-settlement-panel, last visited 17.11.2011

170 X. Wu, "No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization", in: *Chinese Journal of International Law* 10 (2011), at 227

The adoption of a new, "truly holistic and multifaceted approach" is advocated for the interpretation of China-specific obligations in view, first, of the fact that their object and purpose "are primarily unknown or questionable" if the adjudicative bodies only rely on the text and context of the provisions. Second, a contradiction is said to emerge between their unilateral and discriminatory character, on the one hand, and the WTO objectives of entering into reciprocal and mutually advantageous agreements, on the other. In particular, the author suggests that a restrictive interpretation should be given to the meaning of a term (*in dubio mitius*), i.e. limitations to the State's sovereignty in case of doubt are to be interpreted narrowly. The rationale lies in the fact that "due to the voluntary nature of treaties between sovereign States, a treaty provision should be interpreted narrowly in order to avoid extending the consent of States"[171].

Thus, for instance China's national-treatment obligation towards foreign investors, being both broader than general WTO rules and non-reciprocal, should, in case of more than one permissible interpretation, be interpreted restrictively. However, the AB disagreed with this approach in *China – Publications and Audiovisual products* and reasoned that:

> (…) interpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member's accession to the treaty. Such interpretation would undermine the predictability, security, and clarity of GATS specific commitments (…)[172]

To put the issue in a broader context, Shan Wenhua[173] examines the concept of Chinese sovereignty and points at three distinctive "Chinese characteristics" of the principle: first, it features a "sovereignty-bound thinking" on international law; second, it implies faithful adherence to the principle of inviolability of state sovereignty; third, it emphasises on "reciprocity" or "mutuality". The author highlights the most significant aspects of China's international practice and draws a distinction between the BITs concluded by China[174] and its participation in the WTO. The DSM is viewed as "[t]he WTO's final and probably most significant threat to state sovereignty" and an Order by the Supreme People's Court that rules out the "direct effect" of the WTO agreements, while consistent with the practices of other WTO Members, is seen as signalling an attitude of caution towards the WTO dispute settlement system. Interestingly, the conclusion reached is double. On the one hand, China seems to have become

171 *Ibid.*, at 261
172 Para. 357
173 S. Wenhua, *op.cit*, at 57 *et seq.*
174 Which only change the way sovereign powers are exercised, not sovereignty per se, insofar as the BITs are bilateral treaties and can be renegotiated and modified as parties see necessary (*Ibid.*, at 64)

ready to give up certain "economic sovereignty" in return for perceived opportunities of economic development.[175] On the other hand, however, an analysis of recent Chinese government officials' statements leads to the finding that, "despite significant concessions of important sovereign powers through those treaties and organizations, China's official perception of "sovereignty" has hardly changed"[176].

V. PROVISIONAL CONCLUSIONS

One major contentious issue in these cases was the interpretation of various provisions in China's AP. While it is evident that China was pushing for a restrictive interpretation of its obligations under the latter, this could not be regarded as exceptional or unnatural in view, first, of the broad WTO-plus obligations undertaken by China during the accession process and, secondly, of the often imprecise language of the AP.

For their part, the WTO tribunals seem to be endeavouring to come to an objective and balanced interpretation. While leaning towards a stricter interpretation in earlier years, they have recently developed a more demanding attitude towards China's obligations under its AP and, as could be observed from the latest judgements, did not hesitate to reject China's sovereignty claims.

It could only be conjectured whether the compelling language used by the Panel in *China – Raw Materials* and the AB's refusal to support China's interpretation in *US – Tyres (China)* might mean an end of the narrower interpretation given to China's AP and how this approach would be consistent with the recent appeals for leaving more space to national regulatory autonomy.

[175] The latter in the author's opinion provides a sharp contrast with China's general standing, which still adheres to the traditional concept of "inviolable sovereignty", particularly in respect of issues such as territorial sovereignty and integrity, humanitarian intervention, and universal human rights. (*Ibid.*, at 66-67)
[176] *Ibid.*, at 53

E. CONCLUDING REMARKS

The figures show that China's attitude towards the WTO DSM has been gradually developing. Its use of formal dispute settlement may still remain relatively low, as compared to its strategic trade interests in the US and the EU and to the frequency with which it has been a target of other Members' trade remedies or its own measures have been challenged before adjudicative bodies. It is difficult however to draw definite conclusions about a possible deliberate choice to abstain from asserting its rights and defending its interests as a member of the WTO through its formal (and binding) DSM. China's reluctance could be explained by various factors, including the circumstances surrounding its accession, the insufficient expertise in the field of international litigation, its lack of familiarity with WTO substantive rules and its traditional preference for informal dispute settlement.

An increasingly assertive approach in advancing its claims through the means of the WTO DSM could be considered natural for China. It must not be forgotten that accession to the WTO was a package deal and the compulsory jurisdiction of its adjudicative bodies was only one of the concessions made by China for the benefits it gained as a member of the organisation. Having accepted it and thus limited its sovereignty, it would be both economically and politically to the detriment of China to abstain from using the mechanism, even if it could contribute to the improvement if its position in the organisation.

Another issue is to what extent China might be trying, by using its rights as a Member or complainant/respondent in WTO proceedings, to circumscribe the powers of the adjudicative bodies, for instance, by promoting restrictive interpretations of the WTO legislative framework or of the range of its domestic measures that can be reviewed. The analysis of China's respondent pleas in recent cases does not provide a clear-cut answer to this question either.

But even if China's adherence to and use of the binding WTO DSM is genuine and evolving, broader conclusions as to the general conduct of its foreign policy and use of binding international adjudication should only be drawn with caution. The balancing exercise between economic opportunities and restraints to sovereignty, which proved favourable to accepting the binding DSM, does not necessarily apply in other situations where China might still remain reluctant to accept limitations to its sovereign powers.

Whether China's sovereignty concerns have valid grounds outside its political and economic context is a further query. In a recent article[177] Michael Ming Du reflects on where to draw the line between global governance expressed in the WTO system and its binding rules, on the one hand, and the national

[177] "The Rise of National Regulatory Autonomy in the GATT/WTO Regime", *Journal of International Economic Law* 14 at 659 (September 2011)

regulatory autonomy, on the other, and particularly how much interference into that national regulatory autonomy from the WTO "tribunals" is appropriate. Michael Ming Du argues that national regulatory autonomy merits a deferential treatment despite the legalisation of the GATT/WTO regime. He reviews recent WTO case law which marks a start of a better balancing between trade liberalisation and national regulatory autonomy and submits that the pendulum has swung in favour of affording more policy space to nation state in the GATT/WTO regime[178].

To the extent that Michael Ming Du reflects the sensitivities of the Chinese authorities on this, its is interesting from the perspective of the theme of this conference focusing on China that in the US criticism has been voiced in Congress[179] and in the academic literature in the US[180] and the EU[181] precisely on the interference into national regulatory autonomy from WTO dispute settlement panels and the WTO AB.

[178] *Ibid.* at 673
[179] "US DSU Proposals Receives Mixed Reaction", Bridges Weekly Trade News Digest (20 September 2002)
[180] P. Schlafly, "The World Trade Organisation is no Friend to U.S." (2008), available at: http://townhall.com/columnists/phyllisschlafly/2008/01/07/world_trade_organization_is_no_friend_to_us/page/full/, last visited 09.12.2011
[181] L. Bartels, "The Separation of Powers in the WTO: How to Avoid Judicial Activism", 53 *International and Comparative Law Quarterly* 861 (2004), at 871

F. INDEX[182]

TABLE 1
CHINA AS COMPLAINANT

	Dispute Number	Issue	Respondent	Course of Dispute	Findings / Outcome	Implementation
1	**DS252**	Definitive Safeguard Measures on Imports of Certain Steel Products	US	RC* - Mar 2002; **ABR** - Nov 2003	All safeguard measures *inconsistent* with US obligations under the GATT and the Agreement on Safeguards	All safeguard measures terminated - December 2003
2	DS368	Preliminary AD and CVD Determinations on Coated Free Sheet Paper	US	RC - Sep 2007	Terminated when US did not implement the trade restriction after negative final injury determination - 2007	
3	**DS379**	Definitive AD and CVD on Certain Products	US	RC - Sep 2008; **ABR** - Mar 2011	Measures *inconsistent* with US obligations under the SCM Agreement	Reasonable period of time - February 2012
4	**DS392**	Certain Measures Affecting Imports of Poultry	US	RC - Apr 2009; **PR** - Sep 2010	Measures *inconsistent* with US obligations under the SPS Agreement and the GATT	No recommendation - measure already expired
5	**DS397**	Definitive AD Measures on Certain Iron or Steel Fasteners	EU	RC - Jul 2009; **ABR** - Jul 2011	Measures *inconsistent* with EU obligations under the WTO Agreement, the ADA and the GATT	
6	**DS399**	Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres	US	RC - Sep 2009; PR - Dec 2010; **ABR** - Sep 2011	Measures *consistent* with US obligations under China's AP and the GATT; Upheld on appeal	August 2011, the EU informed the DSB that it intends to implement its recommendations and rulings and needs a reasonable period of time.
7	DS405	AD Measures on Certain Footwear	EU	RC - Feb 2010; PR - Oct 2011	Article 9(5) of the Basic Regulation inconsistent but the bulk of China's specific claims *rejected*	
8	DS422	AD Measures on Shrimp and Diamond Sawblades	US	RC - Feb 2011	Pending – alleged inconsistencies with Article VI:1 and VI:2 of the GATT and with the ADA (use of zeroing and sunset reviews)	

*Request for Consultations

[182] Last updated: 09.12.2011

TABLE 2
CHINA AS RESPONDENT

	Dispute Number	Issue	Complainant	Course of Dispute	Findings / Outcome	Implementation
1	DS309	Value-Added Tax on Integrated Circuits	US	RC - Mar 2004; Mutually Agreed Solution - Oct 2005	Agreed to amend / revoke the measures allegedly inconsistent with Article XVII of the GATS and Articles I and III of the GATT	The terms of the agreement successfully implemented
2	**DS339** **DS340** **DS342**	Measures Affecting Imports of Automobile Parts	EU US Canada	RC - Mar/Apr 2006; **ABR** - Dec 2008	Measures *inconsistent* with Articles III:2, first sentence, and III:4 of the GATT	New decree, in force from 1 Sep 2009, intended to bring the measures into conformity
3	DS358 DS359	Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments	US Mexico	RC - Feb 2007; supplemental consultations - Apr 2007; requested the establishment of a panel - Jul 2007	Terminated	Agreement between China and the US/Mexico - Dec 2007
4	**DS362**	Measures Affecting the Protection and Enforcement of Intellectual Property Rights	US	RC - Apr 2007; **PR** - Jan 2009	Copywrite Law and custom measures *inconsistent* with Articles 9.1, 41.1 and 59 of the TRIPS Agreement	Legislative amendments but the US not yet in a position to share China's claim that it had complied - March 2010; Agreed Procedures - Apr 2010
5	**DS363**	Measures Affecting Trading Rights and Distribution Services for Publications and Audiovisual Entertainment Products	US	RC - Apr 2007; **ABR** - Dec 2009	Measures *inconsistent* with China's AP, Article XVII of the GATS and Article III:4 of the GATT	Concern of the US over the lack of progress by China in bringing its measures into compliance; discussion on requests for a compliance proceeding and for authorization to suspend concessions - Mar 2011; Agreed Procedures - Apr 2011

6	DS372 DS373 DS378	Measures Affecting Financial Information Services and Foreign Financial Info Suppliers	EU US Canada	RC - Jun 2008	Terminated	Agreement between China and the EU/US/Canada - Dec 2008
7	DS387 DS388 DS390	Grants, Loans and Other Incentives	US Mexico Guatemala	RC - Dec 2008 / Jan 2009	Terminated	Agreement - all of the export-contingent benefits in the challenged measures - Dec 2009
8	DS394 DS395 DS398	Measures Related to the Exportation of Various Raw Materials	US EU Mexico	RC - Jun / Aug 2009; PR - July 2011	Export restraints *inconsistent* with China's AP and the GATT	All parties - decisions to appeal
9	DS407	AD Duties on Certain Iron and Steel Fasteners	EU	RC - May 2010	Pending - alleged inconsistencies with the ADA, the DSU, and the GATT	
10	DS413	Measures Affecting Electronic Payment Services	US	RC - Sep 2010	Pending - alleged inconsistencies with Articles XVI and XVII of the GATS	
11	DS414	CVD and AD Duties on Grain Oriented Electrical Steel	US	RC - Sep 2010	Pending - alleged inconsistencies with the SCM Agreement, the ADA, and Article VI of the GATT; envisaged final report – May 2012	
12	DS419	Measures concerning wind power equipment	US	RC - Dec 2010; EU and Japan requested to join	Pending - alleged inconsistencies with the SCM Agreement, China's Protocol of Accession, and Article XVI:1 of the GATT	
13	DS425	AD Duties on X-Ray Security Inspection Equipment	EU	RC - Jul 2011	Pending - alleged inconsistencies with the ADA and Articles VI:1 and VI:6(a) of the GATT	
14	DS427	AD and CVD measures on Broiler Products	US	RC - Sep 2011	Pending - alleged inconsistencies with the ADA, the SCM Agreement and Articles VI of the GATT	

Paper n. 3

MEDIATION AND STATE CIVIL JUSTICE

by

Remo Caponi

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MEDIATION AND STATE CIVIL JUSTICE

by

Remo Caponi♦

Abstract:

The promotion of mediation is element of the access to the courts. Mediation should not be a remedy for inefficiencies of the state civil justice system, but should have an "added value" in relation to it, even tough the state courts work effectively and efficiently. Accordingly, mediation should not be encouraged in all cases, but only in those categories of disputes which are better suited than others to be resolved through mediation. One category is where the parties are members of a group or maintain a long-term social or economic relationship. The civil process is intended to ascertain the past and, as a rule, does not take into account the future. For this reason it often results in a conclusive breakup between the parties. Instead, mediation can broaden the perspective and help maintain future relations between the parties. Another category is that of small claims, often those of consumers. In these cases the average length of the civil procedure and the lawyer's fees are disproportionate in relation to the small value of the dispute. So the consumer often does not claim his right before the courts. Mediation is an alternative that costs less than the civil procedure. Frequently, consumers injured by an illegal act are many and fall into a class. When there are questions of law or facts at stake which are common to the class, and the claims are typical, the most efficient solution is not an individual mediation but a class action eventually followed by a collective mediation.

Keywords: Mediation; State Civil Justice.

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1. Access-to-Justice Movement – 2. Procedural Law - 3. Barriers to Access to Justice - 4. Declining Welfare State – 5. "Active State" and "Reactive State" (M. Damaska) – 6. Mediation in the U.S.A. – 7. Mediation in Germany – 8. Concluding Remarks – 9. Beautiful Monuments and Beautiful Legal Ideas.

1. - As a scholar in civil procedure teaching in the University of Florence, I would like to begin my presentation with the Mauro Cappelletti's ideas. In his opinion, the development of alternative dispute resolution methods became part of the "access-to-justice movement" and "effective access to justice can [..] be seen as the most basic requirement – the most basic 'human right' – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all".[1]

2. - As Cappelletti put it: "Procedural law is not just about techniques - methods to regulate the business of courts. Procedural law, in the first place, details the role of government, through public courts, in settling disputes, creating new substantive rules and policies, and implementing policies through law. Important public policies are at stake in decisions about when to encourage parties to litigate, how to shape their factual and legal claims, and wheter to promote a strictly legal resolution as opposed to a negotiated settlement. How much law regulates social behavior depends in large part on how the machinery of justice is constructed"[2].

3. – Barriers to access to justice are many and often interrelated, but they are most evident for small claims and for isolated individuals, especially the needy. In order to overcome them, a complex strategy is needed. Accordingly, the movement for access to justice is characterised by three "waves".

The first wave consists of the development of mechanisms for providing legal aid. The second wave is the movement to give representation to "diffuse" collective interests and/or to protect "homogeneous" individual interests through such mechanisms as class actions and the granting of standing to sue to consumer and enviromental associations.[3] The third wave is driven precisely by the simplification of proceedings and the development of alternative methods of dispute resolution.

In my opinion, the distinctive feature of Cappelletti's approach is that only the harmonic and proportionate combination of the three waves can effectively and efficiently respond to the demand for

[1] See *M. Cappelletti, B. Garth*, Access to justice: The Worldwide Movement to make Rights Effective. A General Report, 1, 1, Milan and Alphenaandenrijn, 1978-79, p. 9.

[2] *M. Cappelletti, B. G. Garth,* Introduction – Policies, Trends and Ideas in Civil Procedure, in International Encyclopedia of Comparative Law, XVI, Tübingen, Dordrecht et a., 1987, p. 1.

[3] It is worth mentioning Marc Galanter's distinction between individuals, who tipically have isolated and infrequent contacts with the judicial system, and organizations with a long-term judicial experience, stressing the advantages of the "repeat players": *M. Galanter*, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, in Law & Society Review, 9 (1974), p. 95.

justice from society. Accordingly, mediation should not be a remedy for inefficiencies of the state civil justice system, but should have an "added value" in relation to it, even tough the state courts work effectively and efficiently. For this reason the promotion of mediation should always be accompanied by efforts to improve the efficiency of the state civil justice system and not by attempts at limitating the access to the state courts. This point of view explains the search for types of disputes that should be "better" resolved through informal methods than through legal actions before the courts.

4. – As U. Mattei put it "Cappelletti's work [..] witnessed a moment of general optimism in the public interest model, an idea of an activist, redistributive, democratizing, public-service-minded approach to the public sector in general and to private law in particular. In this intellectual mode of thought, the Welfare State in Western Societies was seen as a point of arrival in civilization, and access to justice was the device through which communities could provide law as a public good, after having provided shelter, healthcare and education to the needy. [..] Beginning in the early eighties, the global ideological picture had changed. Neo-liberal policies, inaugurated by prime minister Thatcher in Great Britain, [..] and imported on a much weaker institutional background in Reagan's America, were based on the very basic assumption that the welfare state was simply too expensive. [..] Public shelter, health, education and justice for the poor were the natural "victims" of such budget cuts."[4]

The turn to neo-liberal policies has taken influence on the development of ADR methods, cutting off their relationship with the idea of access to justice. Facing this new political environment, mediation has increasingly been employed as a mean to cut the costs of the state civil justice as well as to reduce courts' caseloads.

5. - So where are the western legal orders now as to the interplay between mediation and state civil justice? Systematizing the results of a comparative analysis it seems to me very useful to apply the patterns developed by Mirjan Damaska in the book *The Faces of Justice and State Authority.*[5]

I mean the opposition between "active state" and "reactive state". The active state seeks to manage the society by implementing its own social policies. The reactive state seeks to resolve conflicts that arise in the private sector which, on the whole, sets its own policies. The active state employs courts to implement policy. The reactive state employs them to resolve conflict[6].

[4] *U. Mattei*, Access to Justice. A Renewed Global Issue? In Katharina Boele-Woelki, Sjef van Erp (Eds.): General reports of the XVIIth congress of the international academy of comparative law, Bruxelles, Utrecht, 2007, pp. 383–408; *H. Micklitz* (ed.), The Many Concepts of Social Justice in European Private Law, Elgar, 2011, Introduction, p. 34 ff.

[5] *M. Damaska*, The Faces of Justice and State Authority, New Haven, Yale University Press, 1986.

[6] *M. Shapiro*, *Book Review*, in America Journal of Comparative Law, 1987, p. 835.

6. - We can easily imagine that ADR methods meet with a propitous enviroment in a reactive State. As example we may consider the United States of America. The ADR movement has had some success over the past thirty-five years in changing business and legal decision-makers' views of how best to resolve legal disputes. Courts' civil caseloads have declined significantly over the past decade in many jurisdictions. Federal courts are now required by law to offer some form of ADR and many state courts require parties to attempt to resolve their cases through mediation before they can obtain a trial date.[7]

So far, so good. But: we also to take into account the long-term consequences of the birth of the ADR industry, and the development of a professional class of mediators, not necessarily trained in the law and serving the interests of harmony and non-adversary social control[8].

As D. Hensler put it: "To encourage people to consider alternatives to litigation, in federal and state courts nationwide, judges and mediators are telling claimants that legal norms are antithetical to their interests, that vindicating their legal rights is antithetical to social harmony, that juries are capricious, that judges cannot be relied upon to apply the law properly, and that it is better to seek inner peace than social change"[9].

7. – Let's consider now the developments in tipical active state like Germany. Modern Germany has developed a highly sophisticated and relatively successful system of civil justice. It is a good example of an efficient and respected system by which the rule of law can be maintained in the everyday world of civil litigation.[10]

This context helps to explain the German approach to mediation. As R. Stürner put it: "During the last decades, the German judicial branch and the German legislature established an efficiently working machinery of amicable case settlement through activities of judges and lawyers. This may be the reason why American style out-of-court-mediation or mediation by neutrals without legal education has not been as successful in Germany as it has been in the U.S. or in other countries of the Western world".[11]

The German legislature is now obliged to implement the European Mediation Directive by national German Law. The legislature determined to enact tha sames rules for mediation in national and international cases. The draft provides three forms of mediation: mediation which is initiated independently of a court procedure, mediation which parallels an already initiated court procedure, mediation by a judge without competence to decide the already commenced court dispute.

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[7] *D. Hensler*, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System, 108 Penn St. L. Rev. 165 (2003).

[8] *U. Mattei*, Access to Justice. A Renewed Global Issue? (n. 4).

[9] *D. Hensler*, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System (n. 7).

[10] *P. L. Murray*, *R. Stuerner,* German Civil Justice, Durham, 2004, p. XXIII, p. 19-22.

[11] *R. Stuerner*, Mediation in Germany and the European Directive 2008/52/EC, in La mediazione civile alla luce della direttiva 2008/52/CE, a cura di N. Trocker e A. De Luca, Firenze, 2011, p. 46.

It should be stressed that the bill does not provide obligatory out of court mediation by private mediators unlike the italian Bill n. 28 of the 2010. The German justice system strives to guarantee that a litigant who is seeking justice as dispensed by the court will not be placed under undue economic, procedural or judicial pressure to accept a settlement. Settlement may not squeeze final judgment from the litigation process, because the community of law needs judments. The law is preserved in judgments, and only judgments can develop and propagate the law. The German constitution speaks only about justice, not mediation (GG Art. 92). The judge, who is bound to the law and justice (GG Art. 20 III), may not misuse his authority in settlements negotiations to deny a party a judgment[12].

8. – In my opinion, the German approach of mediation is to be preferred, because it harmonize well with the access-to-justice movement.

Thus I am coming to my first and fundamental conclusion: the promotion of mediation is element of the access to the courts.

My second point is: mediation should not be a remedy for inefficiencies of the state civil justice system, but should have an "added value" in relation to it, even tough the state courts work effectively and efficiently. Accordingly, mediation should not be encouraged in all cases, but only in those categories of disputes which are better suited than others to be resolved through mediation. Let's consider a few examples.

One category is where the parties are members of a group or maintain a long-term social or economic relationship. The civil process is intended to ascertain the past and, as a rule, does not take into account the future. For this reason it often results in a conclusive breakup between the parties. Instead, mediation can broaden the perspective and help maintain future relations between the parties. This is the perspective of situational justice, already adopted *ante litteram* in the Italian Civil Code of 1942 (Article 1965, par. 2, CC).

Another category is that of small claims, often those of consumers. In these cases the average length of the civil procedure and the lawyer's fees are disproportionate in relation to the small value of the dispute. So the consumer often does not claim his right before the courts. Mediation is an alternative that costs less than the civil procedure.

Frequently, consumers injured by an illegal act are many and fall into a class. When there are questions of law or facts at stake which are common to the class, and the claims are typical, the most efficient solution is not an individual mediation but a class action eventually followed by a collective mediation.

If there are many people injured, but the damages suffered by each individual are mild, an individual judicial lawsuit is certainly not advisable; neither is an individual mediation. Instead a

[12] So *P. L. Murray*, *R. Stuerner,* German Civil Justice, (n. 10), p. XXIII, p. 486 ss.

'collective redress action' is more convenient. The latter costs the individual consumer less time and money than the individual mediation. The class action, then, encourages consumers to claim their rights.

However, if the costs for the recovery are greater than the value of the sum to be recovered (when this is really very small), it is preferable to confiscate the profits of the company through the application of an administrative fine equal to the value of profit unlawfully obtained (so called 'skim off').

In addition, collective redress actions organise a collective response by the consumers against the company's wrongdoing. Therefore this reaction has a deterrent effect against the company which is much greater than that of a consumer's individual lawsuit.

The existence of collective redress action also serves to improve the functioning of mediation because it strengthens the position of the weaker party, the consumer. He can refuse to enter into an unfair agreement, because he knows that an effective remedy is available before the courts.

9. - Just another concluding remark. Beautiful legal ideas are not like monuments, e.g. like the cupola of Brunelleschi in Florence: everyone going by can see it! Beautiful legal ideas - just because they are beautiful - meet with obstacles, while trying to become legal realities. They often remain only in the books. In such a case, legal scholarship has the task to repeat and repeat them, until they can find access in the political agenda and become reality.

Such a beautiful idea is the idea of access to justice.

Paper n. 4

THE APPLICATION OF ADR IN DIFFERENT AREAS IN CHINA: CONSUMER PROTECTION, THE LABOR DISPUTES, ENVIRONMENTAL PROBLEMS AND FAMILY DISPUTES

by

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THE APPLICATION OF ADR IN DIFFERENT AREAS IN CHINA: CONSUMER PROTECTION, THE LABOR DISPUTES, ENVIRONMENTAL PROBLEMS AND FAMILY DISPUTES

by

Yang Chunping♦

Abstract:

This paper, using the methods of literature analysis, theoretically inductive analysis, as well as cross-disciplinary approach, analyses the present conditions and problems of the application of ADR in specific areas in China, such as in the protection of consumers` rights and interests, the labor disputes, environmental pollution disputes, and marriage and family disputes. And it also discusses the further development and improvement of ADR in the relevant fields.

Keywords: China; special areas; disputes; ADR.

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1. Introduction

ADR (Alternative disputes Resolution) is a collective term for non-litigation dispute resolution mechanism other than the civil litigation mechanism, which is commonly used in modern countries. In the process of civil justice reform in China, ADR, for its specificity and unique advantages, gets more and more attention from the public. Traditionally, ADR usually refers to various dispute resolution methods other than litigation, such as consultation, negotiation, conciliation, mediation, arbitration and so on. In other words, ADR is a general alternative term of methods for various dispute resolutions other than litigation. ADR is now adopted in many countries because it does not need a complex process, and does not harm the relationship between the parties.

2. The general situation of ADR in China

2.1 The Definition and features of ADR in China

ADR is a general alternative term of methods for various dispute resolutions other than judicial litigation and arbitration. In China, ADR generally refers to dispute resolution mechanism except for the litigation mechanism. So the mediation chaired by a judge in civil litigation is not considered as a form of ADR and it is just a way of the judge-trying.

The main features of ADR in China are as follows:

A. it is a dispute resolution method for the parties to reach a voluntary agreement.

B. the dispute settlement body is non-professional. ADR is different from the trial in litigation by the professional judges and it can be chaired by the non-legal professionals.

C. the basis for the dispute resolution is not limited to the substantive law.

D. It is of informality and flexibility in the procedure.

E. the relationship between the dispute solver and the parties is of equality.

F. the dispute settlement reached through ADR doesn't have a directly legal enforcement.

G. ADR can either be applied alone, or be applied in the procedures of litigation and arbitration.

H. the cost of the dispute settlement is low.

2.2 Types of ADR in China

Based on the above definitions and features, types of ADR in the practices of dispute resolutions in China are as the following:

A. ADR with civil nature, such three ways as people's mediation, arbitration and notary.

B. ADR with administrative nature, that is, administrative mediation and administrative solution.

C. ADR in specialized fields, including ADR in the consumer protection, labor disputes, environmental problems, marriage and family disputes, health care disputes and real estate disputes and so on.

2.3 The existing problems of ADR and its improvement in China

China is still in a full exploring stage of ADR from the modern legal perspective. In the process of building up ADR in accordance with China's national conditions and cultural backgrounds, we have found out lots of problems. For example, the number of accepted cases in the mediation and arbitration agencies is small, and the court is still facing such an embarrassing situation as "litigation explosion". ADR cannot fully play the role of complementing or easing the pressure on litigation. In addition, the civil mediation is lack of authority and the parties often unilaterally break the mediation agreement. What is more, the mediation agency, arbitration agency and courts hang separately rather than together and they are lacking in effective communication and coordination. These problems arise from many respects: some are from the over-reliant mood of the party on litigation; some are from the current imperfect and unreasonable ADR institution in China; some are from the lack of ability to resolve disputes of the mediation and arbitration agencies themselves and so on. To solve these problems is not easy, which asks for the necessity to correct the deep-rooted "litigation totalitarian" in China and at the same time seeks of a way out through the specific institution design of ADR and needs a further study on the relationship between ADR and trail.

Presently China is trying to improve the alternative dispute resolution mechanism. The People's Mediation Law implemented in January 2011 stipulates that upon the formation of the mediation settlement agreement through People's Mediation Committee and once validated by the court, it can be used as the basis for applying for enforcement to the court. This provision changes to a great extent the situation that a settlement agreement lacks authority, playing a very important role in promoting ADR through people's mediation.

That is the brief summary of the present situation of ADR in China. Now, I will fix the attention on the practice of ADR in the specialized areas in China.

3. The application of ADR in the field of consumer protection

With the economic development and prosperity of the market, the number of consuming disputes substantially grows. In order to maintain the market stability and social harmony, we must resolve consuming disputes in a proper way to safeguard the legitimate rights and interests of consumers. The Article 34 of Law on the Protection of Consumers` Rights and Interests provides that for the disputes between consumers and operators, they can be settled through the following five ways: negotiations with the operator; requesting for mediation through the consumers' association; appealing it to the

relevant administrative agencies; submitting it to the arbitration agency for arbitration in accordance with the arbitration agreement with the operator; pursuing a litigation to the people's court. Except litigation, the first four solutions are part of the applications of ADR in the fields of consumer protection under the current legal system in China.

3.1 Settlement by negotiation

Consuming disputes can be settled by the negotiation between consumers and operators, that is, for their controversies, the two sides can reach a voluntary agreement to eliminate the disputes through direct and equal negotiation in the spirit of fairness and justice. This approach has such features as timely, direct, moderate, and etc. For some small disputes or those in which the operators stress their own credibility and quality, the adoption of this approach can ensure a more satisfactory result.

When consumers seeking for a settlement directly by a negotiation with the operator, the following three aspects should be paid special attention to: firstly, detailed and sufficient evidences and the necessary materials need to be prepared; secondly, the principle of being fair and reasonable, and practical and realistic should be adhered to and in consultation with the operators, consumers should clarify the actual process of the conflicts and make a reasonable request and refer to the specific legal provisions when necessary in order to get the dispute resolved quickly; thirdly, the requirement of timeliness should be followed. Some disputes have certain time requirement, so the consumers can not be fooled by the delay of the operator to blindly wait for an answer. Like those regarding food and beverage quality, once it is delayed, the inspection agency can not verify it. Therefore, if the operator deliberately prevaricate and evade responsibility when the evidence and the facts are clear, consumers must take other means to decisively resolve the dispute.

3.2 Mediation by the Consumers' Association

Consumers can also request mediation from the Consumers' Association. According to the summary of statistics from National Consumers' Associations, the total number of consumer complaints in 2010 was 666,255, an increase of 4.6% over the previous year, of which 627,271 were resolved through mediation, an increase of 6.6% over the previous year. It can be seen that the mediation of Consumers' Associations is playing an increasingly important role in protecting the interests of consumers and becoming one of the important means to resolve consuming disputes.

3.3 Administrative mediation

Consumers can appeal to the relevant administrative authorities. In reality, consumers may appeal to the industry and commerce agency, pricing agency, health agency and quality supervision agency based on the nature of the disputes and the actual situation. According to the postal notice of consumer complaints by the State Post Bureau, in November 2010, the State Post Bureau and the provincial(regional and municipal) Postal Service received a total number of 3288 consumer complaints and 326 consumer inquiries through the consumer complaint hotline "12305" and the website of the

State Post Bureau. The consumer complaints have been properly handled through mediation, restoring an economic loss of 314,307 RMB and keeping a consumer complaint handling satisfaction rate of 93.5%. It can be seen that the executive agency has its unique advantages in the settlement of consuming disputes because of its certain punishment authority and the corresponding management powers.

3.4 Consuming arbitration

Consumers can apply for arbitration from the arbitration body under the relevant arbitration agreement. Currently, arbitration bodies have been set up to specially resolve consuming disputes in many provinces in China, such as Chongqing, Hebei, Zhejiang, Liaoning, Shandong, Henan and so on. Branches of the Arbitration Commission based on the consumer associations are set up to specially accept consuming disputes, especially the disputes of small consumption.

4. The application of ADR in the field of the labor disputes

4.1 The present situation of ADR in the labor disputes

ADR in the field of labor disputes in China refers mainly to negotiation, mediation, administrative mediation and arbitration.

Under the provisions of Labor Contract Law and Labor disputes Mediation and Arbitration Law in China, when employers and employees have a labor dispute, the parties may resolve it through internal consultation or apply for mediation from the mediation organization. The parties must go through the labor dispute arbitration commission for arbitration before appealing to the courts, that is to say, arbitration has a feature of being prefixed and non-final. At present, the labor dispute arbitration charges nothing in China and most of the parties choose to submit their disputes directly to the arbitration bodies. But because of non- finality of labor dispute arbitration, parties can appeal to the courts after the arbitration out of various reasons, thus resulting in an increasing trend of labor dispute cases to the courts in China. A large number of labor disputes turning to the courts after arbitration greatly increases the judicial cost of the Court without playing an alternative function of arbitration. On the one hand, the resulting accumulation of lawsuits in the courts makes some courts have to set up labor dispute divisions to resolve the blockbuster litigations of labor disputes; on the other hand, the work of the arbitration commissions producing no value is a huge waste of national human resources.

All those show that ADR has not played its greater practical role in the labor disputes in China and ADR cannot play an active and effective role in labor disputes. Another reason that ADR cannot fully play its advantages should be attributed to the unqualified professional quality of personnel in the mediation agencies and the low efficiency of mediation.

4.2 The improvement of ADR in the labor disputes

All circles in the society are now starting to focus on the further improvement of labor disputes settlement mechanism to fully play the advantages of ADR in the labor disputes. Some regions started to attempt to establish a docking mechanism between the labor dispute mediation and arbitration and the people's mediation. For example, after the filing of the case in the labor dispute arbitration commission, the parties are leaded to first select the people's mediation for the disputes so that the case can be solved by mediation, if succeeding, a conciliation statement can be made by the arbitration commission. The mediation and the arbitration can also be distinguished to achieve the professional applications of both means of the disputes resolutions. Some regions started to intensify efforts to deal with labor disputes, for example, the Chongqing Municipal People's Government began to strengthen and standardize the management of labor dispute arbitration organizations and arbitrators and improve the staff`s quality. It also comprehensively spread a kind of grass root mediation.

5. The application of ADR in the field of environmental problems

5.1 The present situation of ADR in environmental disputes

5.1.1 Consultation

In environmental disputes, environmental infringers are often reluctant to undertake the liability for their environmental tort, so very few environmental disputes in China are solved through consultation.

5.1.2 Mediation

Mediation is a major way to resolve environmental disputes in China. Up to now, 75% of the environmental disputes in China have been solved through various forms of mediation. There are two main ways of mediation in China: people's mediation and administrative mediation.

5.1.3 Administrative solution

Administrative solution refers to the activities that the environmental protection administrative agencies or other authorities empowered by law exercise the powers of environmental supervision and management to resolve the environmental disputes at the request of the parties in accordance with law. The specific forms include administrative mediation and administrative adjudication.

5.1.4 Environmental petition

Environmental petition refer to such activities that the citizens, legal entities and other organizations report the environmental conditions and provide comments, suggestions and requests to the environmental protection and administration agencies at all levels through correspondence, telephone, visits and so on, and then the environmental protection and administration agencies deal with them under the law.

5.1.5 Environmental arbitration

Environmental arbitration is such a procedure that upon agreeing in advance or reaching the arbitration agreement afterwards, the parties of environmental disputes submits the disputes to a selected arbitrator to make an award binding on both parties and both parties obey the award to finally resolve their environmental disputes. Now there are no environmental dispute arbitration regulations on the use of arbitration to resolve environmental disputes as well as specific environmental arbitration organizations in China.

5.2 The existing problems of ADR in environmental disputes

As a traditional dispute resolution, more and more shortcomings are revealed in the litigation in China and the existing ADR mechanism is extremely underdeveloped and its effect of dealing with environmental disputes is not obvious. Different dispute resolution mechanisms always conflict with one another and they are not coordinated and fail to form an organic system, which makes China's current ADR mechanism at a low level not sound enough.

5.2.1 The lack of legislation on environmental arbitration

With the deepening of China's legal construction, laws relating to environmental protection in China have been improved, but the laws on ADR in environmental disputes are rarely mentioned or have no detailed provisions, making ADR lack of operational practice in the environmental disputes resolution.

There is so far no special environmental arbitration body and no special laws and regulations on environmental arbitration formally promulgated in China. In practice, except for the practice of the marine environment damage disputes, arbitration in the environmental disputes has not been really started.

5.2.2 Ambiguity of the status and force of administrative solution

A complete set of procedures to make the executive agencies handle the environmental disputes systematically and timely has not been established in China. The division of the management powers among the executive agencies is also chaotic. The key point is that the status and force of administrative mediation is not clear, which leads to a lot of problems in the process of administrative mediation.

5.2.3 Inadequate legal force of ADR

The application of ADR in resolving environmental disputes in China has not received its due attention, which is to a great extent related to the ambiguous legal force of ADR in handling environmental disputes.

5.2.4 The lack of effective cohesion between ADR and litigation

The prevalence of isolated disconnection between the litigation procedures and ADR of environmental disputes in China has seriously affected the overall function of the environmental disputes settlement mechanism.

6. The application of ADR in the field of marriage and family disputes

6.1 ADR in divorce disputes

Divorce disputes are civil disputes between husband and wife on whether they should divorce and how to divide the property and raise the children due to various causes. Divorce is the dissolution of marriage between husband and wife under the law during the time of the existence of spousal relationship and it involves changes of relationship in personal relationship of the couple, and property. Divorce disputes involve such social phenomena as various emotional, moral, religious, ritual, ethical and legal factors. China has its own unique way of divorce settlement with a history of several thousand years. Therefore, divorce litigation alone is not enough to the study of divorce and it must also be combined with China's tradition and reality. The application of ADR in divorce disputes at this time is undoubtedly of great significance.

Currently, the applications of negotiation, mediation, arbitration, etc. of ADR in China in divorce disputes are as follows:

First, as for negotiation, according to the provisions on the divorce registration of Article 31 of China`s Marriage Law, the marriage registration authority shall issue a divorce certificate on the conditions that the two sides are completely voluntary and issues of children and property have been adequately addressed. To the issues of the amount of the children's living expenses and child support after divorce, of the visiting rights of the husband and wife after divorce and of the settlement for the joint debt of the husband and wife, Article 37, 38 and 41 respectively provide that they shall be negotiated at first by the husband and wife, so in most cases the process of reaching an agreement between the two sides is the process of negotiation and reconciliation.

For mediation, the application of court mediation in the divorce cases is common, the Article 9 of China`s Law of Civil Procedure provides that: in the course of trying civil cases, the People's Court should conduct mediation under the principle of voluntariness and lawfulness and where the efforts to make a conciliation fail, the People's Court shall render judgments without delay. Article 30 (2) of Marriage Law provides that: the People's Court should conduct mediation in the course of trying civil cases. The long-standing judicial practice has also proved that mediation has played a certain role in divorce disputes. Article 43 and 44 of Marriage Law provides that: as for domestic violence or abandonment, abuse of family members, the victims are entitled to request interference from the residents' committees, village committees or their work units and those organizations should dissuade

and mediate the conflicts. It can be seen that in the legal system of marriage in China, the position of people's mediation is clearly defined.

However, although Article 2 of China`s Arbitration Law states that: "disputes over contracts and disputes over property rights and interests between citizens, legal persons and other organizations as equal subjects of law may be submitted to arbitration", the Article 3 negatively provides that: the following disputes cannot be arbitrated: (a) marriage, adoption, guardianship, maintenance, and inheritance disputes; (b) executive disputes which shall be handled by the executive agencies. Therefore, the application scope of the arbitration law in China does not cover such family disputes as marital relations. Today, the arbitration is broadly applied to solve various disputes in the world, the arbitration law passed in 1994 is apparently unable to adapt to the development trend of an increasing number of disputes and greatly affect the full application of ADR in China.

6.2 ADR in family disputes

Family disputes refer to disputes arising from inheritance of property, supports, foster care, guardianship duties and daily households among the family members of the husband and wife, parents and children, brothers and sisters, mothers-in-law/daughters-in-law, aunts/sisters-in-law, fathers-in-law/sons-in-law, sisters-in-law, and etc. Family disputes can be settled by negotiation or by mediation from people's mediation committee and so on.

7. Conclusions

Throughout the development of ADR, the worldwide legal culture is directing from "struggle for rights" to "communication for rights". The development of ADR reflects a switching concept of dispute resolutions from confrontation to cooperation and from the fight for success to the achievement of win-win.

China should learn from the advanced experience of foreign countries and fully mobilize the available resources of dispute resolution with constant innovation and exploration in accordance with its national conditions so as to develop various flexible ADRs and finally establish and perfect an ADR system of Chinese characteristics. What is more, we should improve the existing ADR system in consuming disputes, marriage and family disputes, labor disputes, environmental disputes and medical disputes. We should also continue to explore and develop the expertise of ADR to resolve specific disputes and establish convenient and flexible ADR for the traffic accident disputes, sports disputes, educational and intellectual property disputes and so on.

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Paper n. 5

ADR AND CONSUMERS BETWEEN EUROPE AND CHINA

by

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ADR AND CONSUMERS BETWEEN EUROPE AND CHINA

by

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Abstract:

A renewed attention to alternative dispute resolution (ADR) models give the cue for some observations in a comparative perspective: mediation is a good laboratory in order to observe cross-circulation of legal models for contemporary comparative law scholars. We witness here a recent convergence of Western systems and East Asian countries on ADR mechanisms which represent a typical feature of the legal tradition of the latter even with its own characteristics.

Indeed, in the last decade the European Union has promoted extrajudicial forms of disputes resolution, in the first place with Directive 2008/52/EC. The two proposals of Directive on consumer ADR and Regulation on consumers Online Dispute Resolution (ODR) issued on November 2011 go farther on this track, by extending recourse to ADR models to consumer litigation.

Consumer protection, a traditional policy area of the EU, represents an emerging field of law instead in the Chinese legal landscape. After scandals such as the highly debated Sanlu tainted-milk case, the Chinese Government seeks to enhance consumer protection standards. The reform draft of Chinese Consumer Law currently under discussion mandates mediation for consumers disputes as well.

The two scenarios are examined in order to highlight lights and shadows of ADR with regard to consumer rights protection.

Keywords: Consumers; Alternative Dispute Resolution (ADR); Online Dispute Resolution (ODR); Litigation; European Union; China.

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I. ADR between history and dynamics of legal development

In the past few years, several countries have renewed their legal framework on mediation and other alternative means of dispute resolution by passing new legislation: this is the case of countries such as France[1], Italy[2], Portugal[3], China[4], but also Russia[5], Albania[6], and so on.

At the same time there has been a flourishing of studies, researches and conferences about the topic of amicable resolution of disputes.

One could say that Alternative Dispute Resolution (ADR) models are "back in vogue" both on legal practice and theory throughout the world. Indeed, for its dimensions which cross national borders, this phenomenon arouses interest not only from procedural law scholars and practitioners, but also among comparative law scholars.

If it is questionable whether we can discern in this circumstance a kind of cultural fashion, at least we are faced with a "legal flow", as theorized by Maurizio Lupoi[7]: a legal flow takes place when an element peculiar of a legal system – in this case, ADR and especially mediation - is perceived in another as significant, therefore introducing an unbalance factor, subsequently rejected or assimilated by the latter legal system.

In the old continent this process has been favoured, led and quickened by the institutions of the European Union. A Directive adopted in 2008 encouraged the recourse to mediation (Directive 2008/52/EC on mediation in civil and commercial matters)[8] in large fields of law with a view to promoting the amicable settlement of disputes. Among the goals mentioned in the Directive, also ensuring a balanced relationship between mediation and judicial proceedings, improving and simplifying access to justice (whereas 2 e 3), assuming that mediation provides for a cost-effective and quick extra-judicial resolution of disputes, with processes tailored to the needs of the parties (whereas 6).

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1 Ordonnance No 2011-1540 of 16 November 2011, amending Law no. 95-125 of 8 February 1995 on the judicial organisation and civil, criminal and administrative procedure.

2 Legislative Decree no. 28 of 4 March 2010.

3 In Portugal the Law no. 21/2007, of 12 June introduced criminal mediation and the Law No 29/2009 (Lei n.º 29/2009. D.R. n.º 123, Série I de 2009-06-29) amended the Civil Procedure Law (Código de Processo Civil of 1961) by adding some new articles (Article 249-A, B, C and 279-A) concerning civil mediation, homologation of the mediation agreement, confidentiality of the mediation proceeding, and suspension of the trial.

4 The People's Mediation Law (*Renmin tiaojie fa*) was adopted by the Standing Committee of the National People's Congress (NPC) of the People's Republic of China on 28 August 2010 and entered into force on 1 January 2011.

5 In Russia two Federal Laws 193-FZ ("On Alternative Dispute Resolution Involving a Mediator (Mediation)") and 194-FZ ("On Amendments to Certain Legislative Acts of the Russian Federation Owing to Adoption of the Federal Law 'On Alternative Dispute Resolution Involving a Mediator (Mediation)'") passed on 27 July 2010 and came into force on 1 January 2011.

6 The new Albanian Law on Mediation and Conflict Resolution, adopted on 24 February 2011, has replaced the previous law, entered into force in 2003, but never applied.

7 LUPOI, Maurizio, *Profili (anche linguistici) dei flussi giuridici,* 2002, available at http://www.accademiadellacrusca.it/img_usr/Profili_Lupoi.pdf (last visited on 29 November 2011).

8 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136/3, 24.5.2008).

As a result, Member States transposed the Directive into their national legislation by the deadline of 21 May 2011[9]. Nonetheless, the implementation process has met with difficulties; the most striking example is Italy, where the Legislative Decree No 28 of 4 March 2010 has not been well received by practitioners, who have challenged the decree in court and even gone on strike[10].

The transposition of the Directive results in a dynamics of "communitarisation" of law in the field of administration of justice, consistently with the EU policy of judiciary cooperation in civil matters which came into the Union framework with the Maastricht Treaty, and is now generally sanctioned by Article 67 and 81 of the Treaty on the Functioning of the European Union (TFEU).

The European Union keeps on fostering forms of amicable resolution of disputes: last in time, on 29 November 2011, the EU Commission proposed legislation on ADR/ODR for consumer disputes[11].

Meanwhile in China, the Standing Committee of the National People's Congress (NPC) passed the People's Mediation Law (*Renmin tiaojie fa*) in 2010, bringing up again a propensity towards a non-judicial solution of disputes traditionally rooted in East Asian societies.

Indeed, this bias reveals the influence of classical Confucian thought, which abhorred the use of strict law to assert one's rights, preferring the instrument of persuasion and moral values to restore social harmony[12] within family structures or other informal institutions[13]. One famous paper written by

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9 Member States were required to transpose the Directive by 21 May 2011, except for Denmark, which - as provided bywhereas (30) and Article 1.3 – did not take part to the adoption of the Directive and is not bound by it. At that date the majority of Member States had completed the implementation process (Italy, Portugal, Finland, Greece, Slovenia, …). Some complied with some delay: this is the case of France, where the abovementioned Ordonnance no. 2011-1540 was adopted only on 16 November 2011. On the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts, see the Report of the European Parliament of 15 July 2011 (available at http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0275&language=EN, last visited on 27 November 2011), and the European Parliament Resolution of 13 September 2011 (available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0361, last visited on 27 November 2011), urging the Commission to ensure that all Member States comply without delay with Article 6 of the Directive, which deals with one of the key aspects, i.e. the procedure for giving the mediation settlement agreement the same authority as a judicial decision.

10 Aiming at making up for the notoriously congested Italian courts by reducing judiciary workload and the nine-year average time to complete litigation in a civil case, the Italian Legislative Decree No 28/2010 provides for a mandatory mediation in a number of fields, including disputes concerning medical liability, real rights, insurance, banking and financial contracts, successions. The choice of mandatory mediation, going beyond what is required by the Directive 2008/52/EC, aroused bitter controversy and rife discontent, as it appears in contraddiction with the principle of voluntariness, a typical feature of mediation. See, *inter al.*, BOVE, Mario, *La mancata comparizione innanzi al mediatore*, in *Le società*, fasc. 6, 2010, pp. 759-765; ZUCCONI GALLI FONSECA, Elena, *La nuova mediazione nella prospettiva europea: note a prima lettura*, in *Riv. Trim. Dir. e proc. Civ.*, 2, pp. 2010, pp. 653-673; LUISO, Francesco Paolo, *Giustizia alternativa o alternativa alla giustizia?*, in *Il giusto processo civile*, fasc. 2, 2011, pp. 325-332. The Legislative Decree No 28/2010 is now under judicial review before the Italian Constitutional Court after an exception of unconstitutionality was raised by an administrative court (TAR Lazio, order of 9 March - 12 April 2011): the text of the order is available at http://www.lider-lab.sssup.it/lider/it/home/documenti/doc_download/435-pagni-la-mediazione-dinanzi-alla-corte-costituzionale-corr-giurpagni.html (last visited on 29 November 2011).

11 Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); Proposed Regulation on consumer ODR - online platform for resolving consumer disputes about online purchases in another EU country.

12 Western literature is extensive on the subject of Chinese mediation, as Chinese methods of dispute resolution have historically attracted attention from foreigners, along with the interest in alternative dispute resolution (ADR) in general: see, *inter al.*, CLARKE, Donald, *Dispute Resolution in China*, in *Journal of Chinese Law*, vol. 5, no. 2, 1991, pp. 245-296; LUBMAN,

Jerome Cohen in 1966[14] on Chinese mediation (*tiaojie*) quoted an old Chinese proverb which is meaningful in this sense: "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit".

Even today in China the use of out-of-court means of dispute settlement is remarkable, in spite of a rate of litigation before the people's courts that has been increasing in recent years, non-judicial mediation being performed before people's mediation committees and administrative organs[15]. In particular, it is given preference to conciliatory mechanisms for minor civil disputes and minor criminal offenses, in a wide range of areas of civil, commercial and criminal law: family and succession law, obligations, contracts, tort liability, property and other real rights, minor offenses.

Legislation on consumer protection in China represents a sensitive field in light of recent sensational cases of defective products (melamine-tainted milk powder, etc.). China's State Administration for Industry and Commerce (SAIC) is currently reviewing a reform draft of the Law on the Protection of Rights and Interests of Consumers (*Xiaofeizhe quan yi baohu fa*) of 1993[16] for final submission to the Standing Committee of NPC[17]: the draft includes some provisions on mediation and arbitration as a first step to resolving business to consumer (B2C) disputes.

The current developments give us a starting point for some reflections on the combination of consumer protection with the spread of alternative dispute resolution techniques.

II. Consumers protection through ADR

II.1 The European Union

Consumer protection is enshrined in the EU framework since the Maastricht Treaty in 1992 with the provision of Article 129a in the Treaty establishing the European Community (TEC), now Article 169 TFEU, as before then there was no explicit legislative competence attributed to the European Community (EC) in the consumer field.

Stanley, *Deng and Dispute Resolution: 'Mao and Mediation' Revisited*, in *Columbia Journal of Asian Law*, Vol. 11, 1997, pp. 229-391. See also YU, Sheng, *La conciliazione popolare*, in PICARDI, Nicola, GIULIANI, Alessandro (eds.), *Ricerche sul processo. 7 – Il processo civile cinese*, Maggioli, Rimini, 1998, pp. 85-240; LIANG, Jiaqi, *The Enforcement of Mediation Settlement Agreements in China*, Am. Rev. Int'l Arb., vol. 19, 2008, pp. 489-519; XU, Xiaobing, *Different Mediation Traditions: A Comparison between China and the U.S.*, in *Am. Rev. Int'l Arb.* , vol. 16, 2005, pp. 515-545.

13 Informal third-party dispute resolvers were chosen among neighbors, relatives, friends, and local notables, such as clan leaders. During the Mao era local notables could be locally powerful Communist Party or public security officials: CLARKE, Donald, *Dispute Resolution in China*, cit.

14 COHEN, Jerome A., *Chinese Mediation on the Eve of Modernization*, in *California Law Review*, Vol. 54, No. 3, 1966, pp. 1201-1226.

15 Administrative mediation (*xingzheng tiaojie*) is carried out by officials of basic-level people's governments and of specific administrative agencies.

16 The Standing Committee of the NPC passed the Law on Protection of the Rights and Interests of the Consumers (*Xiaofeizhe quan yi baohu fa)* on 31 October 1993, and entered into force as of 1 January 1994.

17 See www.winston.com/siteFiles/Publications/CLU_Sept2010.pdf (last visited on 5 December 2011).

Therefore, "protecting the health, safety and economic interests of consumers", along with "promoting their right to information, education and to organise themselves in order to safeguard their interests" appear among the goals pursued by the EU.

Less explicitly, nonetheless, EU consumer policy lied (even before Maastricht) and still lies under the functioning of the integrated market, based on the assumption that a free circulation of the factors of production ultimately benefits the consumers.

The rise of consumer policy is now regarded as a case study in the expansion of law- and policy-making at EU level[18].

From the mid-eighties onwards, some directives were adopted, following a minimum harmonisation approach: directives set minimum requirements and basic rights, allowing Member States to adopt more stringent rules in their national laws.

Among these "Consumer Directives" the following eight directives are worth mentioning as they represent what is commonly referred to as the "Consumer Acquis", even though they don't cover all consumer protection legislation in the EU[19]: Directives on doorstep selling (85/577/EEC)[20], package travel (90/314/EEC)[21], unfair contract terms (93/13/EEC)[22], timeshare (94/47/EC)[23], distance selling (97/7/EC)[24], unit prices (98/6/EC)[25], injunctions (98/27/EC)[26], and sales and guarantees (1999/44/EC)[27].

Insofar as many Member States have ensured a higher level of protection as made possible by the Directives themselves, the adopted approach resulted in a fragmented and somehow uncertain regulatory framework. In order to strenghten the protection conferred to EU consumers, by eliminating or at least reducing differences existing in the level of protection and in the modalities for

18 WEATHERILL, Stephen, *Consumer Policy*, in CRAIG, Paul, DE BURCA, Grainne, *The Evolution of EU law*, Oxford University Press, Oxford, 2011, pp. 837-868.

19 For instance, we have also the Directive on liability for defective products and the Directive against unfair commercial practices: respectively, Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210 of 7 August 1985, p. 29–33) and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11 June 2005, pp. 22–39).

20 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372 , 31 December 1985 pp. 31–33).

21 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23 June 1990, p. 59).

22 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95 , 21 April 1993 pp. 29-34).

23 Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis (OJ L 280, 29 October 1994, p. 83).

24 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4 June 1997, pp. 19–27).

25 Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18 March 1998, p. 27).

26 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166, 11 June 1998, p. 51).

27 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7 July 1999 pp. 12-16).

exercising the rights (withdraw, information, etc.) granted by the Directives, Consumer Acquis is now under review[28] and in 2008, the European Commission adopted the proposal for a Directive on consumer rights[29].

The aforementioned recent Commission proposals are to be framed in the outlined scenario, with a view to bringing EU legislation in line with technological change (m-commerce, online auctions, …) and to promoting amicable settlement of disputes: the proposal for a Directive on ADR for consumer disputes (Directive on consumer ADR) and a proposal for a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR).

The proposed legislation follows two Commission Recommendations of 1998[30] and 2001[31], establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users.

The proposed Directive on consumer ADR sets out a series of requirements that ADR bodies[32] have to comply with, in order to guarantee homogeneous quality standard of ADR procedures (Articles 5-9). The standards are inspired to the principles of impartiality, transparency, effectiveness and fairness.

In this perspective, the examined Proposal provides for more stringent requirements than those laid down by Article 4 of the Directive 2008/52/EC[33], which, in order to ensure the quality of mediation, simply refers to voluntary codes of conduct, control mechanisms and (initial and further) training of mediators.

As for independence and impartiality of the natural persons in charge of dispute resolution, the Directive requires that where they form part of a collegial body, an equal number of representatives of consumers' interests and of traders' interests is provided for (Article 6.2). Furthermore, attention is paid also to possible pressures that can result from financing: therefore, according to Article 7.1(b), ADR entities should make public information on the source of financing (including percentage share of public and of private financing) and - but no specific provision in the proposed Directive reproduces it - whereas 17 expresses a particular need to ensure the absence of a pressure that potentially influences

28 The Commission launched the Review of the Consumer Acquis in 2004 and three years later adopted a Green Paper (Green Paper on the Review of the Consumer Acquis, of 8 February 2007, available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf, last visited on 30 November 2011).

29 Proposal for a Directive of the European Parliament and of the Council on consumer rights, of 8 October 2008 (COM(2008) 614 final). The proposal aims at affording higher protection to consumers and making easier cross-border transactions, by modernising existing consumer rights and keeping up with technological change. On the subject, see HOWELLS, Geraint G., SCHULZE, Reiner (eds.), *Modernising and Harmonising Consumer Contract Law*, Sellier, Munich, 2009; SCHULTE-NÖLKE, Hans, TICHY, Lubos (eds.), *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and beyond*, Sellier, Munich, 2010.

30 Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes (OJ L 115, 17.4.1998, p. 31).

31 Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

32 Article 4 Directive on consumer ADR defines "ADR entity" as any entity which is established on a durable basis and offers the resolution of a dispute through an ADR procedure.

33 As for the relationship between the proposed Directive on consumers ADR and the Directive 2008/58/EC, the former is without prejudice to the latter by express provision of Article 3.

the attitude towards the dispute, where ADR entities are financed by one of the parties to the dispute or an organisation of which one of the parties is a member.

ADR procedures should be fair so that the parties to a dispute are fully informed about their rights and the consequences (i.e. legal effects) of the choices they make in the context of an ADR procedure (whereas 21). These provisions are in particular in favour of consumer in the delicate phase in which the solution is suggested, and he must decide whether to accept or reject it: he is informed that he has the choice as to whether or not to agree to a suggested solution; for this purpose he has the right to seek independent advice; the suggested solution may be less favourable than an outcome determined by a court (Article 8, 2(a)). Nevertheless, doubts arise whether the described full information is a sufficient (not only necessary) condition in order to guarantee fairness towards the party of the dispute generally weaker and inexperienced. One should take into consideration, indeed, that consumers are less familiar (at least at present) with ADR models than business operators, resulting in an additional benefit for the latter.

These quality standards are supported by the provision of a close monitoring of ADR entities (the proposed Directive devotes to the subject a specific chapter: chapter IV, Articles 15-17), and of a system of effective, proportionate and dissuasive penalties, which Member States should lay down for infringements of the national rules transposing Directive provisions about consumer information by traders and information to competent authorities by ADR entities (Article 18).

The proposed Regulation on consumer ODR offers a more specific set of rules for online B2C transactions, by providing for a European platform for the out-of-court resolution of contractual disputes arising from the cross-border[34] online sale of goods or provision of services between consumers and traders.

From the perspective of the proposed Regulation, the transaction is online when goods or services are offered by the trader and ordered by the consumer on a website or by other electronic means: both offer and order are to be performed electronically, so they represent cumulative conditions.

According to EU lawmakers, the platform should consist in a interactive website as a single point of entry to consumers and traders seeking the out-of-court resolution of disputes. The platform should provide an electronic form to submit complaints, propose an ADR entity to the parties, refer complaints to the ADR entity which the parties have agreed to use, enabling the parties and the ADR entity to conduct the procedure online (Article 5).

34 Under Article 4(e) Regulation on consumer ODR, an online sale of goods or provision of services is to be considered cross-border "where, at the time the consumer orders such goods or services, the consumer is resident in a Member State other than the Member State where the trader is established".

The proposed Regulation aims at increasing among consumers and traders confidence in cross-border transactions on the digital market[35], with the ultimate goal of developing the Internal Market itself in its digital dimension.

The EU initiative appears praiseworthy in order to accelerate and simplify the dispute resolution: the Directive on consumer ADR disputes provides that the procedure duration generally does not exceed 90 days, whereas according to the Regulation on consumer ODR, the online procedure should be completed in 30 days from the institution of the proceedings. In both cases, the ADR entity may extend the time limit when the complexity of the dispute in question so demands.

Nonetheless, some criticalities remain, particularly with respect to the costs of the procedure and language issues: in the envisaged ODR mechanism, even though the platform can be accessed electronically in all official languages of the Union (an electronic complaint form, available in all official languages of the Union, can be filled in to submit the complaint), it is not clear which language is used to conduct the procedure, depending on the rules adopted by the single ADR entity. On this regard, Article 8.3(b) of the Regulation on consumer ODR simply states that the platform shall communicate to the parties the language or languages in which the procedure will be conducted. This aspect might create problems, bearing in mind that foreign languages often represent a barrier, especially for consumers and small business operators.

As for costs, if, on the one hand, access to the ODR platform is free of charge, on the other hand the ADR entity might require fees: that consumer could afford them cannot be taken for granted. According to the Directive on consumer ADR, procedures should be free of charge or at moderate costs for consumers to guarantee effectiveness, so that it remains economically reasonable for consumers to use such procedures (whereas 20 and Article 8(c)). However, exercising the right to seek independent advice before agreeing or rejecting the suggested solution of the dispute implies additional costs for consumers. Failing to exercise this right might put the consumer, again, in a position of relative weakness.

These critical aspects could limit the effectiveness of the proposed legislation, partially frustrating the intentions of the proposing EU lawmakers, i.e. contributing to the functioning of the internal market and to the achievement of a high level of consumer protection (Article 1 Directive consumer ADR).

II.2 The Chinese experience

a. The existing legal framework

The Chinese legal framework about consumer protection is quite fragmentary, resulting from a series of laws and regulations: the aforementioned Law on Protection of the Rights and Interests of the

35 See whereas 2, 5-6 and Article 1 Regulation on consumer ODR.

Consumers of 1993, the Product Quality Law (*Chanpin zhiliang fa*) of 1993[36], the Food Safety Law (*Shipin anquan fa*) of 2009[37] and its implementing Regulations[38]. Last in time, the Tort Law (*Qinquan zeren fa*) of 2009[39] included some provisions on defective products (Articles 41-47)[40], by introducing punitive damages for manufacturers and sellers knowingly producing or selling defective products causing death or serious damages to the health of people[41]. Owing to the scandals and the consequent heightened concerns about safety of food and food-related products, in the last two years the Chinese authorities have issued a series of regulations for the purpose of reinforcing the existing legal framework: for instance, in 2010 the Ministry of Health published Measures restricting the use of food additives[42]. Last amendments of Criminal law, passed by the NPC in February 2011[43], included some provisions on food-related crimes (Articles 143-144), raising the penalties and even providing for the death penalty for cases where producing or knowingly selling food mixed with poisonous or harmful non-food raw materials causes human death or "there is any other especially serious circumstance". Apart from doubts about the proportionality and the effective deterrence of such a provision[44], from this crackdown one can easily infer the Chinese Government's commitment to address a social emergency, using a sort of emotional band-aid to face an alarming situation.

Indeed, in 2008 the melamine-tainted milk case involving Sanlu Dairy caused a sensation in China and abroad: six children died and nearly 300.000 others were diagnosed with urinary system diseases after being fed milk powder that had been adulterated with melamine. Farmers and traders had added this toxic industrial chemical to raw milk in order to circumvent quality tests[45].

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36 The Product Quality Law (*Chanpin zhiliang fa*) was approved in 1993 and then amended in 2000.

37 The Food Safety Law (*Shipin anquan fa*) was promulgated on 28 February 2009 and entered into force as of 1 June 2009.

38 The Implementing Regulations of the Food Safety Law (*Shipin anquan fa shishi tiaoli*) became effective on 20 July 2009, the date of their promulgation by the PRC State Council.

39 The Tort Law (*Qinquan zeren fa*) was adopted on 26 December 2009 and entered into force on 1 July 2010.

40 About the previous system of protection the following contribution of the Italian scholar Crespi Reghizzi noteworthy: CRESPI REGHIZZI, Gabriele, *La responsabilità da prodotti difettosi in Cina e in Unione Sovietica*, in Diritto commerciale e arbitrato in Cina - tra continuità e riforma, EGEA, Milano, 1991, pp. 115-158.

41 "Where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation" (Article 47 Tort Law).

42 The Measures for Administration of New Food Additives were published by the Chinese Ministry of Health on 10 March 2010. In addition, the Chinese General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) published the Rules of Administration and Supervision on Production of Food Additives on 4 April 2010 (effective on 1 June 2010), by introducing a manufacturing licence as a requirement for all manufacturers producing food additives in China.

43 The Amendment (VIII) to the Criminal Law of the PRC, as adopted at the 19th meeting of the Standing Committee of the NPC on 25 February 2011, came into force on 1 May 2011.

44 See the debate reported in the article *Will the Death Penalty Stop Food Safety Crime?*, Chinafrica, Vol. 3, May 2011, available at http://www.chinafrica.cn/english/pros_and_cons/txt/2011-05/01/content_353818.htm (last visited on 2 December 2011).

45 See BRANIGAN, Tania, *Chinese figures show fivefold rise in babies sick from contaminated milk*, in *The Guardian*, 2 December 2008, available at http://www.guardian.co.uk/world/2008/dec/02/china (last visited on 3 December 2011). As reported by some China observers, the timing of the incident raised suspicions that Chinese officials disguised the health risk to avoid a scandal in conjunction with the Olympic Games held in Beijing in August 2008: see WANG, Tina, *Olympics Led To Milk Scandal Hush-Up, Some Say*, in *Forbes*, 17 September 2008, available at http://www.forbes.com/2008/09/17/china-milk-scandal-markets-equity-cx_tw_0917markets03.html (last visited on 3 December 2011).

This – unfortunately no isolated - incident shows that safety of food and, more generally, of all products is a sensitive issue now in China. Public authorities hastened to improve the regulatory landscape by providing for harsher punishments, but such measures do not represent an adequate solution. A Chinese saying goes that "the difficult lies not in legislation, but in implementation": here - as well as in other fields of Chinese law (see intellectual property, ..) - we have a divergence between law in the books and law in action, a traditional feature of the Chinese legal system. The problem is the enforcement, especially at the peripheral level, where officials are often reluctant to take effective measures that might affect local firms, sometimes in order to support local economy, sometimes owing to a management of public power marked by frequent episodes of corruption.

Therefore, the will expressed by central authorities (for instance with nationwide campaignes for food safety[46]) is likely to be contradicted at the local government level. What is worse, resources allocated by Beijing for compliance with legal requirements and standards are reported as often spent at sub-national levels on other matters[47], so deviating from national priorities.

Still, the China's lack of an aware and proactive civil society collectively representing the interests of consumers[48] and manufacturers also contributes to complete the opaque scenario Stanley Lubman bluntly defined as a "jungle of problems"[49].

b. What role for mediation?

As previously mentioned, Chinese lawmakers are discussing a reform of the Law on the Protection of Rights and Interests of Consumers of 1993: beyond a series of provisions concerning substantive rights for consumers (cooling-off period, protection of personal information, compensation for false advertising, ...), the draft deals with the resolution of B2C disputes by promoting the use of court-enforceable mediation and arbitration.

New emphasis given to alternative dispute resolution mechanisms can be understood as a part of a policy meant to face the increased rate of litigation that has been registered in the last decades[50]. The new People's Mediation Law – laying down a set of rules concerning qualities required to mediators, organization of the people's mediation committees, mediation proceedings, form and legal effects of

46 See http://news.xinhuanet.com/english2010/indepth/2011-11/13/c_131244094.htm (last visited on 3 December 2011).

47 World Bank Report, *Equity and Public Governance in Health System Reform. Challenges and Opportunities for China*, January 2011, available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/01/13/000158349_20110113134311/Rendered/PDF/WPS5530.pdf (last visited on 5 December 2011).

48 Yet, Hooper argues that right consciousness in the area of consumer rights is developing during the post-Mao era and the awareness is comparatively improved particularly in urban areas, partly as a result of a Government policy of information and education: see HOOPER, Beverley, *The Consumer Citizen in Contemporary China*, Working Paper No. 12, Centre for East and South-East Asian Studies Lund University, Sweden, 2005, pp. 2-9.

49 LUBMAN, Stanley, *Jungle of Problems: Beijing's Failure to Protect Consumers*, in *Wall Street Journal, China Real Time Report*, 16 March 2011, available at http://blogs.wsj.com/chinarealtime/2011/03/16/jungle-of-problems-beijings-failure-to-protect-consumers/ (last visited on 5 December 2011).

50 Among factors of increased litigation in China, there are a social and cultural change in attitudes in favor of more formalized methods of dispute resolution, a greater assertion of individual rights, better access to lawyers, improved quality of court opinions.

the mediation agreement - is another brick paving the way towards a recovery in popularity of out-of court settlements.

Since the establishment of the People's Republic of China, people's mediation was formally established in 1954 with the Provisional Organic Rules of People's Mediation Committees[51]. The Constitution (*Xianfa*) of 1982[52] even envisages a mediation system, providing that residents' and villagers committees establish sub-committees for public mediation (Article 111).

More specific regulation on mediation in the PRC could be already traced in the Organic Rules of People's Mediation Committees (*Renmin tiaojie weiyuanhui zuzhi tiaoli*) of 1989[53], the Trial Procedures for the Resolution of Commercial Economic Disputes (*Shangye jingji jiufen tiaojie shixing banfa*) of 1989[54], the Civil Procedure Law (*Shi susong fa*) of 1991, amended in 2007, the Organic Law of the Villagers Committees (*Cunmin weiyuanhui zuzhi fa*) of 1998[55], and Several Provisions on the Work of People's Mediation (*Renmin Tiaojie Gongzuo Ruogan Guiding*) of 2002[56]. People's mediation committees are set up by villagers in rural areas and by residents' committees in urban areas to settle minor civil disputes and handle minor criminal cases.

Under the Civil Procedure Law, mediation is voluntary but at the same time is encouraged as an important means of resolving conflicts, since "the people's mediation committees shall conduct all mediations according to legal provisions and the principle of voluntariness. All concerned parties shall enforce mediation agreement. Where any concerned parties refuse mediation, fail to reach a mediation agreement, or retract a mediation agreement, they may initiate legal proceedings in a people's court" (Article 16).

On the one hand, ADR is alternative to court-based decisions where judiciary is plagued by a persistent problem of technical training and suffers from lack of independence from the executive and from the Chinese Communist Party (CCP): individual judges indeed do not have any guarantee of independence and irremovability, being instead appointed, controlled, and dismissed by the local people's congress. Moreover, the CCP exerts interference on judicial activity, either through the general supervision of the

51 As remarked by Clarke, mediation organizations had existed for years in the areas under Chinese Communist Party control, and by the time the Provisional Organic Rules were promulgated in 1954, a number of local governments at the level of city, province, and military region had already issued their own regulations: CLARKE, Donald, *Dispute Resolution in China*, cit. On the subject of resolution of disputes between individuals in China during the Mao era, see also LUBMAN, Stanley, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, in *California Law Review*, vol. 55, 1967, pp. 1284-1359.

52 The Constitution *(Xianfa)* of the People's Republic of China was adopted at the Fifth Session of the Fifth NPC on 4 December 1982.

53 The Organic Regulations on People's Mediation Committees (*Renmin tiaojie weiyuanhui zuzhi tiaoli*) was adopted on 5 May 1989 and replaced the aforementioned Provisional Organic Rules of 1954.

54 The Trial Procedures for the Resolution of Commercial Economic Disputes (*Shangye jingji jiufen tiaojie shixing banfa*) were issued by the Ministry of Commerce on 23 November 1989.

55 The Organic Law of the Villagers Committees (*Cunmin weiyuanhui zuzhi fa*) was adopted by the Standing Committee of the NPC on 4 November 1998 and became effective on the same date. The Organic Law of the Villagers Committees for Trial Implementation of 1987 was consequently repealed.

56 Several Provisions on the Work of People's Mediation (*Renmin tiaojie gongzuo ruogan guiding*) were issued by the Ministry of Justice on 11 September 2002 and became effective on 1 November 2002.

Party in the appointment of executive positions in the judiciary, or through informal means of political pressure on the courts and individual judges.

On the other hand, out-of-court settlement can be a way to solve sensitive cases away from the spotlight, whilst people sometimes choose to bring a lawsuit in order to draw attention from media and public authorities.

This is particularly true in a field, like the consumer law, where some social instances might result in a potentially embarassing case for people's courts: in an economy where manufacturers and providers of services often are State-Owned Enterprises (SOEs) or have some connections with Government or at least the CCP, the dispute consumer to business might become a dispute citizen v. public authority.

The archetype of harmonious society (*hexie shehui*) - which Article 1 of the People's Mediation Law not coincidentally refers to – can be read bearing in mind these considerations. The ideal descending from Confucian tradition has been evoked in order to modernize the country pursuing economic prosperity, technological progress, balanced and sustainable development, along with social equity goals, such as increasing rural incomes, boosting labor protections, improving access to health care and education, and increasing environmental oversight57. Nonetheless, the harmonious society policy is also an useful tool in the hands of the Chinese leadership to preserve the stability in respect of the so called *status quo*.

On this regard the Sanlu incident is paradigmatical, as highlighted by Yoo in a study of the dispute resolution of the case[58]: the Chinese Government was somehow involved since it omitted inspections and certified melamine-tainted products as safe, Party officials were also implicated in keeping the deaths and illnesses of victims from the media and exerting pressure on judges and lawyers not to take on any milk-related cases[59]. Parents of victims sought justice, some through out-of-court settlements (getting a monetary compensation and a fund to cover medical treatment expenses for the sick children until they reach 18 years of age)[60], some through individual civil lawsuits[61], some by a class action suit[62].

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57 GREEN, Andrew J., *Tort Reform with Chinese Characteristics: Towards a "Harmonious Society" in the People's Republic of China*, in *San Diego Int'l L.J.*, vol. 10, 2008, pp. 122-153.

58 YOO, Yungsuk Karen, *Tainted Milk: What Kind of Justice for Victims' Families in China?*, in *Hastings Int'l & Comp. L. Rev.*, vol. 33, 2010, pp. 555-575.

59 See WONG, Edward, P*arents Accept Cash in Tainted Milk Death*, in *New York Times*, 16 January 2009, at http://www.nytimes.com/2009/01/16/world/asia/ 16iht-milk.2.19429252.html (last visited on 6 December 2011).

60 A young couple from Gansu province who lost their son in May 2008, accepted a 200.000 RMB compensation from Sanlu and forfeited any further rights to sue. The couple had filed a civil action before the Lanzhou Intermediate People's Court (Gansu province) in October 2008, but the court did not accept the case. As reported by Xinhua, more than 3.000 families in Shijiazhuang, the capital of Hebei Province, accepted compensation payments for their sick children: see WONG, Edward, *Milk Scandal in China Yields Cash for Parents*, in *New York Times*, 17 January 2009, available at http://www.nytimes.com/2009/ 01/17/world/asia/17milk.html (last visited on 6 December 2011) and *China couple get payout after child killed by tainted milk,* 16 January 2009, *Channel News Asi*a, available at http://www.channelnewsasia.com/stories/afp_asiapacific/view/402860/1/.html (last visited on 6 December 2011).

61 Hundreds of families filed individual civil actions against dairy producers, as well as retailers who sold the melamine-tainted milk. Only few were accepted: in late 2009, just six of these actions were accepted by the People's courts. The first case was brought before the Shunyi district court of Beijing by a family from Henan province seeking 55.184 RMB in compensation from Sanlu and a Beijing-based supermarket. The first hearing was held in Beijing on 28 November 2009, while a second hearing was postponed to allow defendants more time to investigate the connection between the tainted formula and the child's illness. See WANG, Yan, *Compensation lawsuit over tainted milk postponed*, in *China Daily*, 9 December

Demand for justice has been given inadequate responses: preference has been granted to remedies of criminal law (harsh punishments for the executives of the companies that were involved in the scandal)[63] and a poor response with regard to the legitimate claims for compensation risen from the private sector[64].

III. Concluding Remark

A renewed attention to alternative dispute resolution models give the cue for some observations in a comparative perspective: beyond the particular cultural background where it has been flourishing, mediation is a good laboratory in order to observe cross-circulation of legal models for contemporary comparative law scholars.

Actually, we witness here to a recent convergence of Western systems and East Asian countries on ADR mechanisms which represent a typical feature of the legal tradition of the latter even with its own characteristics. This process marks a significant change, as in the past countries such as China and Japan used to borrow legal concepts and institutions from the Western legal tradition.

In the last decade the European Union has promoted extrajudicial forms of disputes resolution, in the first place with Directive 2008/52/EC. The two recent proposals (Directive on consumer ADR and Regulation on consumers ODR) go farther on this track, by extending recourse to ADR models to consumer litigation.

Consumer protection, a traditional policy area of the EU, represents an emerging field of law instead in the Chinese legal landscape. After scandals such as the highly debated Sanlu case that have undermined

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2009, available at http://www.chinadaily.com.cn/business/2009-12/09/content_9144184.htm (last visited on 6 December 2011).

62 Since the late 2008 several class actions were filed throughout China by legal support teams on behalf of victims of the milk scandal, but they were subsequently rejected: the Intermediate People's Court in Shijiazhuang (Hebei province) rejected the action brought on 8 December 2008 by the "Sanlu Melamine Victim's Legal Support Team" representing 63 victims and seeking compensation for bodily harm (68.180.000 RMB), and emotional distress (6.910.000 RMB). In another attempted class action on behalf of 152 victims, in early March 2009 the same Court of Shijiazhuang did not accept group litigation. This outcome has drawn attention from scholars about admissibility of class actions in the Chinese legal system. Indeed, the Chinese Civil Procedure Law mandates joint litigation (Articles 53-55) rather than class action: see KATZ, Lauren M., *Class Action with Chinese Characteristics: the Role of Procedural Due Process in the Sanlu Milk Scandal*, in *Tsinghua China Law Review*, vol. 2, no. 2, 2010, available at lawlib.wlu.edu/lexopus/works/304-1.pdf (last visited on 7 December 2011). In January 2009, Chinese lawyers filed a class action product liability suit in the Supreme People's Court in Beijing on behalf of the families of 213 children, seeking nearly 32 million RMB in damages from twenty-two dairy producers. See WONG, Edward, *Families File Suit in Tainted Milk Scandal,* in *New York Times*, 21 January 2009, available at http://www.nytimes.com/2009/01/21/world/asia/21milk.html (last visited on 6 December 2011). Unfortunately, there has been no further media coverage about the outcome of these class actions.

63 On 22 January 2009, Zhang Yujun and Geng Jinping, two dairy producers who had sold melamine to Sanlu, were sentenced to death; Tian Wenhua, former general manager of the Sanlu Group, was sentenced to life imprisonment and ordered to pay a fine of 20 million RMB: see BARBOZA, David, *Death Sentences in Chinese Milk Case*, in *New York Times*, 22 January 2009, available at http://www.nytimes.com/2009/01/23/world/asia/23milk.html (last visited on 7 December 2011).

64 The response is poor not (only) for the amount of compensation, but mainly for hesitations and silences which characterized the reaction of the Chinese authorities. Even when the fund was set up to compensate victims, concerns have been expressed about the need for transparent management and open information: LAN, Xinzhen, *Questioning Compensation*, in *Beijing Review*, 29 June 2011, No. 26, available at http://www.bjreview.com.cn/quotes/txt/2011-06/29/content_372323.htm (last visited on 7 December 2011).

trust of Chinese consumers both in production system and in justice, the Chinese Government seeks to enhance consumer protection standards. The text of the reform draft of Consumer Law currently under discussion mandates mediation for consumers disputes as well.

The two scenarios show different critical aspects: here potential costs of the proceedings and language barriers might limit benefits for consumers, there, in the name of supporting local economy, protectionism and collusion between supervisors and supervised are likely to adversely affect consumers rights rather than protect them.

In China, until the system remains opaque it will be difficult to record significant improvements in consumer protection, irrespectively with recourse to mediation or other dispute resolution means. Even before focusing on models of dispute resolution, one must pay attention to the need to further develop and promote rights consciousness among Chinese consumers. A lack of consumer information limits popular use of the existing consumer reporting channels services. Therefore, the Government is often unaware of problems until they reach a national scale. Moreover, there is still a significant urban-rural divide which reduces opportunities for protection at peripheral level.

Lastly, the developments here observed in consumer law have particular importance partly due also to the current globalization dynamics and the related growing degree of delocalization in production systems: for instance, weakness in consumer protection for defective products that have been made in China (but the issue does not concern uniquely China, of course) may result in adverse effects upon consumers throughout the world as well, as demonstrated by the cases of Mattel toys[65] and Colgate toothpaste[66] in 2007. That suggests the need for solutions promoting cooperation between national (governmental and non-governmental) institutions, based on recall system, timely alert and exchange of information on dangerous products[67], as a part of a strategy, even before taking into consideration (alternative) mechanisms of dispute resolution.

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65 Between August and September 2007, Mattel had to recall millions of toys produced by its Chinese subcontractors, mainly owed to an excessive level of lead-paint used on plastic toys: see BARBOZA, David, *Cheap Lead Paint Common on Chinese Goods,* in *New York Times*, 10 September 2007, available at http://www.nytimes.com/2007/09/10/business/worldbusiness/10iht-lead.5.7455679.html (last visited on 9 December 2011). The case stirred public opinion and raised concerns about compliance of foreign suppliers with safety standards. Though, in the following days, some industry analysts, academics and consumer advocates begun to question whether the focus on the toys' foreign subcontractors was obscuring an even bigger (more domestic) problem concerning design of new products, reportedly causing even more injuries: see SHIN, Annys and MERLE, Renae, *Misplaced Anxiety over Toys?*, in *Washington Post*, 12 September 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/09/11/AR2007091102153.html (last visited on 9 December 2011).

66 In June 2007, counterfeit Colgate-labelled toothpaste imported from China was found to be contaminated with diethylene glycol (a cheap chemical substitute for glycerin), which may potentially harm children and patients with kidney and liver disease: see YANG, Xiyun, *Counterfeit Colgate Has Poisonous Chemical*, in *Washington Post*, 15 June 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/06/14/AR2007061401946.html (last visited on 9 December 2011).

67 The EU Directorate General for Health & Consumers and the General Administration of Quality Supervision, Inspection and Quarantine of China (AQSIQ) signed in 2006 a Memorandum of Understanding establishing the "RAPEX-CHINA", an on-line system existing for regular and rapid transmission of data between the EU and China product safety administration.

Paper n. 6

INVESTMENT ARBITRATION AND CHINA: INVESTOR OR HOST STATE?

by

Yang Shu-dong

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INVESTMENT ARBITRATION AND CHINA: INVESTOR OR HOST STATE?

by

Yang Shu-dong♦

Abstract:

China`s international investment arbitration practices are currently not plentiful, but its domestic legal and BITs-concluding practices allow the use of international arbitration to resolve China-related international investment disputes to a varying degree at different times. For the disputes between the host government and foreign investors, China's early BITs often adhere to the principle of exhaustion of local remedies and foreign investors only can restrictedly use a third-party international arbitration, such as ICSID under the Convention on the Settlement of Investment Disputes between States and National of Other States; the later BITs broadly allow to use a third-party international arbitration. However, China should continue to maintain the early cautious BITs-concluding position and make a prudent use of the ICSID arbitration mechanism, taking partial acceptance as the principle and full acceptance case by case where appropriate as an exception. For the disputes between private investors, investors always agree to a third-party international commercial arbitration. China should actively improve the environment of domestic arbitration to attract investors to willingly choose China as the arbitration place and make a greater use of China's international commercial arbitration. Only by doing so, can the interests of all the investors be better protected and the healthy development of the national economy can be better promoted.

Keywords: international investment arbitration; China's arbitration practices; ICSID international arbitration; international commercial arbitration.

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I. INTRODUCTION[1]

International investment is a kind of cross-border capital flow. With the development of economic globalization, the cross-border investment is more and more becoming one of the pillars of the international economy like the cross-border trade. [2] Especially in the last two decades the global FDI[3] have been expanding under the incentives of the investment liberalization policy. Just as other states/regions do, China is actively integrating into the wave of international investment liberalization and has become one of the most states/regions that have attracted foreign direct investment and is expanding its overseas direct investment. The rapid development of international investment is bound to bring the stakeholders a variety of frictions and lots of disputes, but how to properly address these investment disputes is a matter relating to the national sovereignty and economic security and also relating to the rights and interests of all the investors. In recent years the international arbitration mechanism, including the common international commercial arbitration and the dedicated international investment arbitration by ICSID[4] under Washington Convention[5], is increasingly becoming the most powerful way to deal with international investment disputes. In this context, how does China treat international arbitration? Does China employ the international arbitration of the investor (capital-exporting) state or that of the host (capital-importing) state or a third-party international arbitration, such as ICSID, to resolve international investment disputes? How does China make better use of the international arbitration mechanism to resolve the disputes concerning international investment to promote the healthy development of its national economy? To these issues, a detailed analysis and discussion is made in this paper.

II. METHODOLOGY

Through the combined techniques of a qualitative analysis, a quantitative analysis, an illustration with selected examples and a comparative study, the paper makes a systematic analysis and an empirical study on the international investment arbitration practices in China.

III. FINDINGS AND DISCUSSIONS

A. The Significance of International Investment Arbitration to China

The international arbitration mechanism, including the common international commercial arbitration and the dedicated international investment arbitration by ICSID under Washington

[1] In this paper, China refers only to the Mainland of People`s Republic of China, excluding Hong Kong, Macao and Taiwan of P.R., China and Hong Kong, Macao and Taiwan are specially treated.

[2] Chen An, *New Developments in International Investment Law and China's New Practice of Bilateral Investment Treaties*, 11 (Shanghai, Fudan University Press, 2007).

[3] It is a short form for "foreign direct investments".

[4] It is a short form for "the International Centre for Settlement of Investment Disputes".

[5] It is a short form for "the Convention on the Settlement of Investment Disputes between States and National of Other States".

Convention, is of great significance to the international investment dispute settlement in China and the healthy development of its international investment.

1. China's stock of international investment is huge and the arising of international investment disputes is inevitable.

Since 1979, China has begun the reform and opening-up policy and actively absorbed foreign investments and encouraged foreign investors to set up investment enterprises in China, for which a series of laws and regulations were promulgated, such as *On the Provisions to Encourage Foreign Investments*, *The Foreign Investment Industrial Guidance Catalogues*, *Sino-foreign Cooperative Ventures Law, Sino-foreign Joint Ventures Law* and *Foreign-owned Enterprises Law*. China is committed to create a good investment climate for foreign investors and strives to achieve a win-win state of affairs, having resulted in remarkable achievements. Over the past decade, China has also started the "going out" strategy and increased its overseas direct investment.

According to the statistics of the PRC[6] Ministry of Commerce, as of the end of March 2011, China has attracted more than 710,000 foreign-funded enterprises and the actual amount of foreign capital utilization has reached nearly $1.1 trillion.[7] The latest *Global Investment Trends Monitoring Report* by UNCTAD[8] issued on January 17, 2011 shows that China's foreign capital utilization amount is increasing year by year. The attracting amount in 2010 was more than one hundred billion U.S. dollars for the first time and arrived at $101 billion and the actual foreign capital inflow accounted for 9% of the total global FDI (see Table 1), ranking second in the world just after the United States and ranking first in developing states. China's top ten investment source states/regions were all developed states and regions, the investment amount from which accounted for 90% in its total foreign capital utilization amount (see Table 2). The actual foreign capital utilization amount by manufacturing industries accounted for almost half of the total foreign investment and the manufacturing industries were still the main areas to attract foreign investment.[9]

[6] It is a short form for "People`s Republic of China".
[7] PRC Ministry of Commerce website http://www.mofcom.gov.cn/aarticle/tongjiziliao
[8] It is a short form for "United Nations Trade and Development Board".
[9] PRC Ministry of Commerce website http://www.mofcom.gov.cn/aarticle/tongjiziliao

Table 1: the percentage of China's actual foreign capital utilization in the total global FDI inflows in recent years (Unit: billion U.S. dollars) [10]

year	Global FDI inflows	China`s amount	Percentage□ %□
2000	**1387.953**	**40.715**	**2.93**
2001	**817.574**	**46.846**	**5.73**
2002	**678.751**	**52.734**	**7.77**
2003	**559.576**	**53.505**	**9.56**
2004	**648.146**	**60.63**	**9.35**
2005	**958.694**	**60.325**	**6.29**
2006	**1411.018**	**63.021**	**4.47**
2007	**1833.324**	**82.658**	**4.51**
2008	**1697.353**	**92.395**	**5.44**
2009	**1114.185**	**90.033**	**8.69**
2010	**1122.257**	**101.035**	**9.07**

Table 2: the 2010' top ten states/regions of the investment in China [11] *(Unit: billion U.S. dollars)*

States/regions	The amount	Percentage□ %□
Hong Kong SAR	**67.474**	**63.83**
The Region of Taiwan	**6.701**	**6.33**
Singapore	**5.657**	**5.35**
Japan	**4.242**	**4.01**
USA	**4.052**	**3.83**
South Korea	**2.693**	**2.55**
the UK	**1.642**	**1.55**
France	**1.239**	**1.17**
Netherlands	**0.952**	**0.91**
Germany	**0.933**	**0.89**

Note: The investment data of above states/regions include the investment in China of these states/regions through Virgin, Cayman Islands, Samoa, Mauritius and Barbados and other free ports.

[10] The United Nations Commission on Trade Development http://www.unctad.org/en/docs/webdiaeia20111_en.pdf
[11] PRC Ministry of Commerce website http://www.mofcom.gov.cn/aarticle/tongjiziliao/v/201101/20110107370784.html

According to the statistics of the PRC Ministry of Commerce, as of the end of March 2011, more than 12,000 Chinese investors have established over 17000 overseas direct investment enterprises, distributing in 177 states/regions and the net cumulative overseas direct investment amount (hereinafter referred to as the stock) is more than $320 billion. [12] *The UNCTAD 2010 World Investment Report* shows that: China's overseas direct investment flow ranked fifth among all the states/regions and ranked first among developing states/regions; Asia and Latin America are the highly concentrated areas of China's overseas direct investment stock and the total stock accounts for 87% (see Figure 1); China`s stock of direct investment in developed states/regions is $18.17 billion, just accounting for only 7.4% (see Figure 2); The direct investment from the state-owned enterprises and limited liability companies account for 90% (see Figure 3). [13]

Figure 1: the regional distribution of China`s overseas direct investment flows

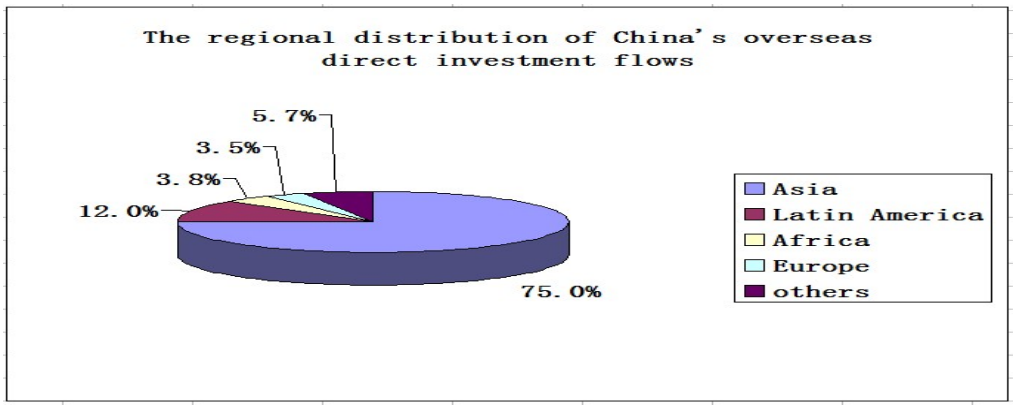
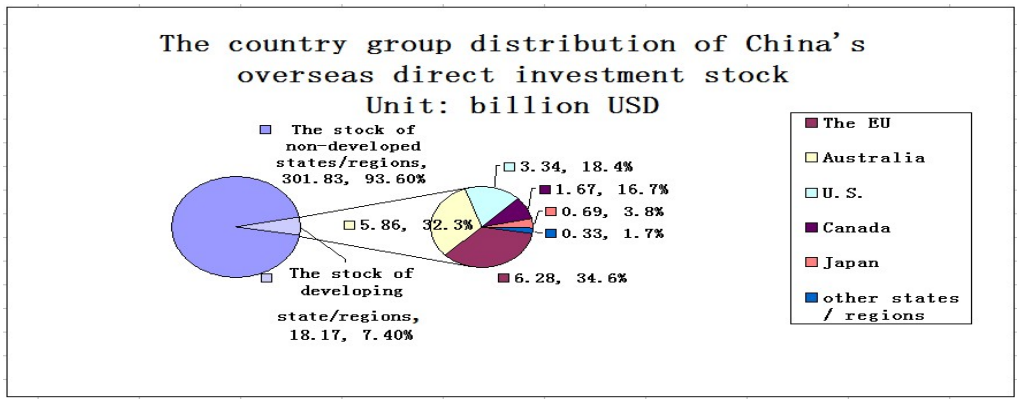
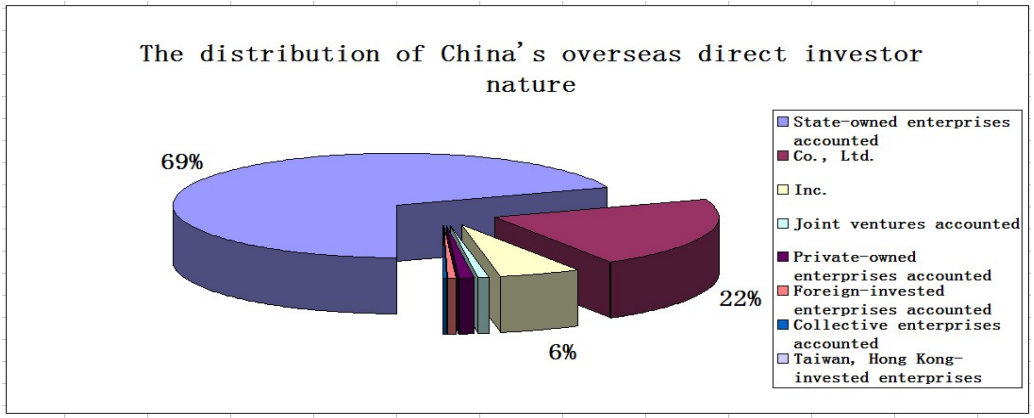


Figure 2: the country group distribution of China's overseas direct investment stock



[12] PRC Ministry of Commerce website http://www.mofcom.gov.cn/aarticle/tongjiziliao
[13] See *2010' Bulletin of China's Foreign Investment.*

Figure 3: the distribution of China's overseas direct investor nature



From the situations of the foreign investment and overseas investment mentioned above, it can be seen that developing trend of international investment in China is very strong and the international investment has become an important part of China's rapid economic development. China's rapid development of international investment is bound to bring the stakeholders a variety of frictions and the occurrence of disputes is inevitable.

2. The international arbitration mechanism is increasingly becoming a most powerful way to address global international investment disputes.

The resolving of international investment disputes unexceptionally relate to the tripartite of investors, the host state, the investor state, involving the relations of the subjects in private law and public law, of foreign interests and the interests within the state, of international law and domestic law and etc. The multiple interests cannot be balanced if just simply applying the principle of private law or public law. Given that the scale of international investment continues to expand and the increasing of investment disputes is inevitable, all states arrange their own investment dispute resolution methods to promptly and effectively resolve their own investment disputes in their bilateral, multilateral, or regional trade agreements and investment agreements so as to strengthen their own ability of attracting foreign investment and stabilize their own domestic investment environment. Some international organizations have also established the corresponding mechanisms.

Generally, a variety of methods can be employed in the international investment dispute settlement: negotiation and mediation, local relief in the host state (including judicial, administrative and arbitration ones), foreign court litigation, international arbitration (including the common international commercial arbitration), and so on.

Specifically, there exist different types of dispute resolution methods to the different types of international investment disputes:

- For the interstate disputes arising from international investment, a political solution is often involved. The agreements between states usually make some brief provisions and require the disputes to be resolved through friendly consultation or diplomatic channels. To such disputes, WTO dispute settlement mechanism also has a detailed solution.
- For disputes between private investors, which are mainly disputes arising out of the investment contracts and the distribution of the interests between the host state`s private investors and foreign private investors in the cooperative or joint ventures. At present, the host state`s local relief and the international commercial arbitration mechanisms are always applied to such disputes. As a private dispute resolution method, the international commercial arbitration is highly sought after by private investors and is getting a universal attention in domestic legislation and international investment treaties. "The Principle of Autonomy", a generally accepted principle of law in many states, has been fully embodied in international commercial arbitration process. In the international commercial arbitration, the parties have rights to choose the arbitration institution, the organization form of arbitration, the arbitrator, the applicable substantive law and procedural law and the arbitration rule, and it also has the merits of low cost, confidentiality, and a high degree of professionalism and the strong enforceability safeguarded by *the Convention on Recognition and Enforcement of Foreign Arbitral Awards* and other international conventions. Therefore, all states have adopted policies conducive to the international commercial arbitration. [14]
- For the disputes between the host government and foreign investors, because of a particular subject feature, one being private investors and the other being a sovereign state, "they are the most complex disputes, which are most difficult to resolve, and thus the studies on international investment dispute resolution methods are mainly for this type of disputes."[15] Under the auspices of the World Bank, in 1965 quite many states signed *the Convention on the Settlement of Investment Disputes between States and National of Other States* and set up an "International Centre for Settlement of Investment Disputes" according to the Convention. Currently, ICSID international arbitration is a special dispute settlement mechanism for these disputes and provides a convenient solution for the investment disputes between investors and the host states. From the new century, more and more cases are submitted to ICSID for arbitration. The statistics released by United Nations Trade and Development Board in March 2011 show that: As of the end of 2010, they have accumulated to 390. Of these cases, there are 51 developing states and 17 states being sued and the vast majority of the applicants

[14] See Xu Hanming and Jiang Jianwei, "China international commercial arbitration in the context of economic globalization", 2 CHINESE PROSECUTORS 23-24(2005).
[15] Cao Jianming and Chen Zhidong, *On International Economic Law,* 207 (Beijing, Law Press, 2000).

are investors from developed states, the highest number of cases of which are against Argentina, amounting to 51 and followed up by Mexico, amounting to 19 cases.[16]

B. China's International Investment Arbitration Practices

This paper divides the international investment disputes into the investment disputes between host government and foreign investors and the investment disputes among Sino-foreign investors to examine China's international investment arbitration practices and its domestic legal and BITs[17]-concluding practices. For disputes between the states on international investment, they are often categorized as political disputes and the states concerned now rarely use the international arbitration to resolve them, so they are not to be discussed in this paper.

1. The investment dispute arbitration between the host government and foreign investors.

a. China's ICSID international arbitration practices.

So far, in the ICSID international investment arbitration practices, China has never been filed as a respondent and Chinese investors also have never filed an arbitration case as an applicant. The main reason relates to China`s attitudes on the ICSID jurisdiction and the range of dispute issues which can be submitted to ICSID. China made the reservations when acceding to Washington Convention: according to Article 24, paragraph 4, China only agrees to submit the compensation disputes arising from expropriation and nationalization to ICSID jurisdiction.[18] In its early BITs China keeps a conservative approach and the majority of BITs only agree to submit "the disputes about expropriation compensation" to ICSID arbitration. The other treaties also adhere to the principle of "case-by-case approval". Despite China's early BITs-concluding position has undergone a marked change, the effect and impact brought about by this change has not yet emerged. In 1998 the BIT concluded between China and Barbados for the first time accepted uncritically the ICSID jurisdiction.[19] Since then, China has fully accepted the ICSID jurisdiction in nearly 30 BITs. The range of dispute issues to which China accepts the jurisdiction of international investment arbitration is also growing and the range of matters which can be submitted to international arbitration are gradually relaxed. Additionally, since the reform and opening up, China has not yet taken any nationalization measure against any foreign investment, so there exists no investment arbitration basis in reality.

b. China's BITs practices.

Since the first BIT between China and Sweden signed in 1982, China has outside concluded more than 110 BITs, ranking first in developing states. From nearly three decades` BITs signed by China, it can be found that the phase characteristic of the BITs-concluding position is very clear about the

[16] The United Nations Commission on Trade Development http://www.unctad.org/en/docs/webdiaeia20113_en.pdf
[17] It is a short form for "bilateral investment treaties".
[18] See Yu Jinsong and Wu Zhipan, *International Economic Law*, 598 (Beijing, Higher Education Press and Beijing University Press, 2008).
[19] See Article 9 of China-Barbados BIT.

jurisdiction of international arbitration on the disputes between the host government and private investors:

- The period of "partial consent" to international arbitration (the BITs of the first generation).

In March of 1982, China signed its first BIT with Sweden, but the treaty only provides a dispute resolution method to the interpretation or implementation of the agreement and does not provide a dispute resolution method in the event of the dispute occurrence between private investors and the host government. The BIT signed by China and Germany in 1983 "for the first time uses international arbitration as a solution way to the 'investor-host' disputes", [20] but it makes a strict restriction to the range of dispute issues which may be submitted to the international arbitration, only allowing investors to submit the matter of compensation amount out of expropriation to an international arbitration tribunal. To other investment issues, out of the respect for the basic legal principles of the state sovereignty, of the closest connection, of the state territorial jurisdiction and etc, China adheres to the Calvo doctrine and advocates the principle of exhaustion of local remedies, which means that the host state enjoys the unalienable jurisdiction over the investment disputes within its territory and has the right to require the parties to seek solutions through local relief to their disputes. Under normal circumstances, unless otherwise provided by law or expressly agreed by the host government, private investors cannot submit the disputes with the host government directly to the international settlement. [21] Only in exceptional circumstances, the two sides can establish a temporary tribunal to resolve their disputes. For example, Article 9 of *The Encouragement and Reciprocal Protection of Investments between PRC government and the Government of the Republic of Kazakhstan* signed in August 1992 states that: " any dispute about the compensation amount for expropriation between Contracting Party and any other`s investors can be submitted to an arbitral tribunal and the tribunal shall be established in each case in accordance of the following ways: ...." In short, based on national sovereignty, China essentially claimed the jurisdiction over the investment disputes between the host government and private investors before China acceded to Washington Convention and took a very cautious position of "partial consent" to international arbitration.

On February 6, 1993, China officially joined Washington Convention, but after 5 or 6 years of the formal accession, China remained cautious about an international arbitration to the investment disputes, especially about ICSID international arbitration jurisdiction, and thus still adhered to a "partial consent" position. In this time China imposed a strict restriction on ICSID arbitration to the disputes between investors and the host government in its BITs and most treaties followed the same common conditions: "If the investment-related disputes between the host government and investors cannot be

[20] Li Bei, "On the perfection of the international arbitration mechanism to 'investor host' disputes of Sino- foreign BITs", (Master Degree thesis, East China University of Politics and Science, 2008).

[21] See Liu Shen, *On Some Important International Legal Issues of International Investment Protection*, 221-222 (Beijing, Law Press, 2002).

resolved through friendly consultations within six months from the date on which a party requests a solution in writing, at investors` choice, they shall be submitted to the competent court in the host state, or the ICSID under Washington Convention, ...".[22] In the BITs, China advocates the host state`s "right of case-by-case approval or consent ","priority of local remedies "and "right of applying the host law" empowered by Washington Convention.

It can be seen that during the period of "partial consent" to international arbitration in the BITs of the first generation, China's BITs-concluding practices very restrictedly allow to choose a third-party international arbitration, such as ICSID, and more frequently advocates the principle of exhaustion of local relief. So foreign investors can only seek local relief from the host state and since China does not accept the common international commercial arbitration to settle the 'investor-host' disputes, they can mainly resort to the judicial or administrative remedies. Even they are occasionally allowed to employ another kind of international arbitration, for example, a dedicated temporary arbitral tribunal belonging to neither the host nor investor state, they are also required to take the host state for the arbitration place and use the host law as the applicable law.

- The period of "comprehensive consent" to international arbitration (the BITs of the second generation).

China and Barbados in 1998 concluded a BIT, in which China for the first time agreed that investors might submit all the investment disputes with the host state to international arbitration. Until January 2007, China has signed about 36 new BITs, most of which have accepted uncritically the ICSID jurisdiction [23](See Figure 4). For example, Article 10 of 2001' BIT between China and the Netherlands provides a dispute settlement method as follows: "... if the dispute fails to be resolved within six months since the date being submitted to an amicable settlement, the parties shall unconditionally agree that the dispute is submitted to ICSID or an ad hoc arbitral tribunal established following UNCITRAL[24] Arbitration Rules upon the demanding of the investors concerned." The new investment agreement between China and Finland in April 2005 provides that: "any dispute arising out of investments between the Contracting Party and the other`s investors fails to be resolved within three months from the date of requesting in writing, at investors` choice, the dispute may be submitted to: i. the competent court of Contracting Party where to be invested; ii. ICSID established by *The Convention on the Settlement of Investment Disputes between States and National of Other States* signed in Washington on March 18, 1965; iii. The ad hoc arbitral tribunal set up according to the UNCITRAL Arbitration Rules, unless the parties to the dispute otherwise agree." The bilateral investment agreements of China with

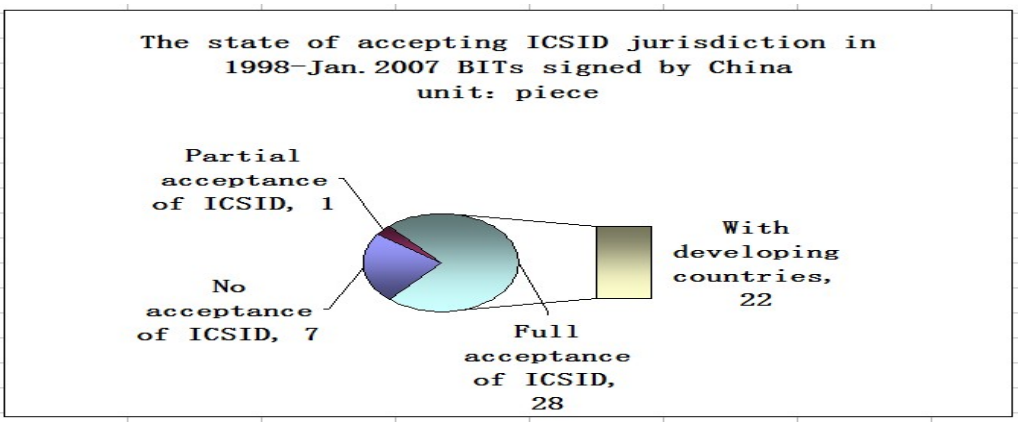
[22] Chen An, "Distinguishing between two categories of states and implementing the differential treatments and reciprocal benefits: again on the issue that the four big 'safety valves' given to China by the ICSID system should not rush to be fully removed", 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW 61 (2007).

[23] See Li Xiaoxia, "On the new development trends of bilateral investment treaties and China's Countermeasures", 3 ECONOMIC PROBLEMS 53-56 (2010).

[24] It is a short form for "United Nations Commission on International Trade Law".

the governments of Germany, Bosnia and Herzegovina signed in 2004 also have similar provisions respectively. These BITs-concluding practices of China still have a trend to continue.

Figure 4: the state of accepting ICSID jurisdiction in 1998-Jan.2007 BITs signed by China



From these BITs of the second-generation, it can be found that most of the BITs signed by China and other states give full acceptance to the ICSID jurisdiction and abandon "the right of case-by-case approval or consent" and "the priority of local remedies", "the right of significant security exception" and other relevant rights, and that they doesn`t exclude the disputes involving public safety, national economy and other important matters from the international arbitration jurisdiction. As a result, China's BITs of the second generation have entered into a period of "comprehensive consent" to the international arbitration, broadly allowing a choice of a third-party international arbitration, such as ICSID, or an ad hoc international tribunal which belongs to neither the host nor investor state, and have no restriction of the arbitration place and applicable law.

- The causes and effects of the change in China`s BITs-concluding positions on international arbitration.

"To what extent to accept ICSID jurisdiction is dependent on the accounting and weighing of gains and losses among the three factors of the demand for foreign capital attraction, the protection to overseas investment and the impact on national economic sovereignty." [25] Some scholars believe that China`s current BITs-concluding position of full acceptance to ICSID arbitration relates to the implementation of the 'going out' strategy beginning in China around 1998. [26] The purpose of keeping such a position is to satisfy the needs of creating a favorable investment environment to attract foreign investment, and more importantly, to satisfy the needs of protecting China's overseas investment and perfecting China's overseas investment service. Throughout the world, even some Latin American

[25] Chen An, *The New Development of International Investment Law and China's New Practice of Bilateral Investment Treaties,* 411 (Shanghai, Fudan University Press, 2007).
[26] See *Id.* at 409.

states, having strictly implemented the Calvo doctrine before, e.g. Argentina, no longer adhere to the original position and empower investors the right to resort to international arbitration. So many scholars have argued that China should follow this trend to better attract investment from foreign states and make its own overseas investment.

Another very important reason is that China does not accept the common international commercial arbitration to settle 'investor-host' disputes and the international commercial arbitration institutions in China cannot do the investment dispute arbitration between the host government and foreign investors well. Although the China`s foreign-related arbitration has made considerable progress in the past 40 years and there are more than 180 arbitration institutions nowadays, there still exist many problems in the arbitration, which cause foreign investors in international investment disputes unwilling to arbitrate in China. The arbitration institutions should be non-government organizations to ensure its independence, impartiality and neutrality, but the China`s arbitration institutions are still prepared to apply the administrative regime and the arbitration committee directors are part of the executive leaders. Moreover, the local arbitration committees are set up by the local governments and there are a lot of contacts with them in staffing, finances, and etc. Thus, foreign investors will inevitably wonder whether the arbitrator can make a fair and equitable award of no favoritism. As a leader in the commercial arbitration, the China International Economic and Trade Arbitration Commission ranks in the forefront of the world's arbitral bodies by the number of cases, but it also has many problems. For example, professional umpire is not trustable, confidentiality of arbitration proceedings is not strong, and the staff functions as an arbitrator,[27] and so on.

The effect and impact on China brought about by the position change in BITs-concluding practices has not yet appeared, but the potential risk it may cause should be of great concern. To foreign investors, especially the investors in developed states, they often hope to be able to resolve the investment disputes in a third-party international arbitration and do not want their disputes subject to the host state jurisdiction (e.g. China). Therefore, China's position of "comprehensive consent" to international arbitration in the BITs of the second generation will inevitably result in the situation that the majority of investment disputes between foreign investors and China will be under the ICSID jurisdiction and ICSID will become a most influential permanent international arbitral institution to solve the 'investor-host' disputes arising out of the Sino-foreign BITs.[28]

2. The investment dispute arbitration among Sino-foreign private investors.

The investment disputes among Sino-foreign private investors are mainly from joint ventures and cooperative ventures. Sino-foreign joint ventures, referred to as joint ventures, are a kind of partnership relations between foreign investors and Chinese economic entities. They are companies or other

[27] See Jerome Cohen and Xiao Kai (tr.), "China's international commercial arbitration: some thoughts from the personal experience", 7 THE SCIENCE OF LAW 44 (2005).
[28] See Li Bei, *supra note* 20.

economic organizations established upon the government`s approval based on China's relevant laws. They are equity-based businesses and the joint venture parties share the risk, total profits and losses. Sino-foreign cooperative ventures, referred to as cooperative ventures, are similar to joint ventures, but this type of business enterprises connect both domestic and foreign investors in the form of contracts and all the obligations, rights and responsibilities are stipulated by the contracts. Unlike joint ventures, the profit distributions in cooperative ventures are not based on contribution shares but rather on the contract provisions.

In 1954 China set up the Foreign Trade Arbitration Commission (now the China International Economic and Trade Arbitration Commission), which supplies its professional solutions to contractual and non-contractual international economic and trade disputes, including international investment disputes. China International Economic and Trade Arbitration Commission is now the most important international commercial arbitration in China. Since *Arbitration Act* was enacted in 1994, some Chinese cities have created more than 170 arbitration committees, which gradually begin to accept foreign-related arbitration cases.

Article 25 of *PRC Sino-foreign Cooperative Ventures Law* provides: "When Chinese and foreign joint venture partners dispute with one another in fulfilling the contract and the articles of association, the disputes should be resolved through negotiation or mediation. If they do not want to resolve them through consultations and mediation, or the negotiation and mediation fail, the disputes may be submitted to China`s arbitration institutions or other arbitration bodies for arbitration in accordance with the arbitration clause in the contract or a written arbitration agreement reached afterwards; .... ". Article 15 of *PRC Sino-foreign Joint Ventures Law* also has similar provisions.

Thus, in view of the nature of disputes among private rights and obligations, China's legislation ensures the parties` autonomy and let them have the freedom to choose arbitration institution and the arbitration place, but because of the special features in Sino- foreign joint ventures or cooperative ventures-the joint or cooperative ventures contracts are signed and implemented in China and their closest points of contact are within China, Article 12 of *PRC Sino-foreign Joint Ventures Law Implementing Regulations* provides: " The laws of China shall govern the formation, validity, interpretation, and implementation of a joint venture contract and its dispute resolution." The similar provisions are also for the cooperative ventures. However, "due to foreign investors` lack of trust in the current legal environment of arbitration in China, the bottom line of foreign investors often is that: it will be good if the dispute is able to be resolved not in China".[29] The arbitration mechanisms and legal measures mentioned above have not reversed the trend of foreign investors` choosing a foreign arbitration. In fact, the international commercial arbitration cases which the arbitration institutions around China have

[29] Kou Li, "On the law application of China's international commercial arbitration", 4 POLITICAL AND LEGAL FORUM - CHINA UNIVERSITY OF POLITICS AND SCIENCE 90-100 (2004).

accepted are almost of foreign-related "non-investment" commercial arbitration nature, the net international investment dispute cases which the China International Economic and Trade Arbitration Commission have accepted are also very limited. For this type of investment disputes, China now relies more on judicial or administrative relief and even if the parties have agreed to resolve them through an international commercial arbitration, they are always ready to choose a third-party international commercial arbitration, rather than the international commercial arbitration in the host or investor state.

C. China and Its Future in International Investment Arbitration

In order to make better use of international arbitration mechanism to deal with China-related international investment disputes, China should focus on the following aspects:

1. China should coordinate the relations between its own sovereign interests and the investors.

In recent years, most of the investment dispute settlement mechanisms provided in international investment agreements or free trade agreements are for the emphasis on international arbitration, which essentially internationalizes the investment dispute settlement mechanism between investors and the host state. To investors, this kind of dispute settlement mechanism will undoubtedly help strengthen the protection to them; to the host states, it can create a climate conducive to attracting foreign investment and thereby promoting their economic development. As a developing state, it is necessary for China to take into account both the protection to investors and the safeguard to the host state's sovereignty and interests and it is also necessary for her to take into account both the substantive rights and the procedural issues so as to perfect its investment dispute settlement mechanism.

2. China should reduce the acceptance range of international arbitration jurisdiction.

China is now in the stage of economic restructuring, the state should have an appropriate management and adjustment capacity to the domestic investment market and environment. For foreign investors, compared with the preferential investment commitments that China has made to the foreign capital, China's huge market potential is the real attracting factor to the investment, so a full acceptance of ICSID arbitration jurisdiction makes no real sense to attracting foreign investment. As mentioned earlier, China`s full acceptance to ICSID arbitration of the investment disputes between the host state and foreign investors is out of the dual needs of attracting foreign capital and protecting overseas investment, but factually this wish has not gotten the expected effects. *Global Economic Prospects 2003* of World Bank points out: "It seems that even relatively strong BIT's protection measures have not increased the investment flows to the developing states that signed the agreements"; "Many bilateral investment agreements are concluded between unequal partners .... These agreements do not set clear requirements that the capital-exporting state ensure the capital flow into the other, but the party hoping to get foreign investment surrenders its sovereignty in the trust of foreign capital inflows. Because the foreign investment under the agreement can obtain foreign protection from the international dispute

settlement mechanism, the local law of the host state is largely beyond the reach and has no jurisdiction, and thus its sovereignty is handed over". [30] To China's overseas investment, the investors choosing to invest in a state have not primarily considered whether the state signed a BIT with China and whether the BIT fully accepted ICSID jurisdiction. Moreover, China's current "introducing amount" is far more than "that of going out", and close to the end of March 2011, China has actually used nearly $ 1.1 trillion foreign capitals while the total non-financial overseas direct investments are $ 320 billion. So, it is obviously not worth the candle to risk being sued ten international investments to protect a foreign investment.

The range of the dispute issues which can be submitted to ICSID has all the times been closely watched and prudently decided by the contracting states. Argentina are facing waves of lawsuits and has been filed in 51 cases, ranking number one as respondents in ICSID, which has a lot with its overall acceptance of ICSID jurisdiction when signing the BITs. In fact, the United States, Canada and other developed states are adopting the principle of significant security exception to sign the BITs and the United States straightly abandons "investors vs. state" dispute settlement procedures in its recent investment treaties. [31] China's foreign investment legislation and administrative regime are still in the stage of reform and improvement, so now it not a safe move for China to rush to accept the ICSID jurisdiction in a wide range of dispute issues. [32]

Therefore, in terms of the arbitration mechanism to investment disputes between the host government and foreign investors, China should change the existing position of "comprehensive consent" to the international arbitration jurisdiction, reiterate the principle of exhaustion of local remedies, make a strict limitation to the range of dispute issues which foreign investors can directly file to international arbitration and readjust the position of full acceptance. China should adopt a position of partial acceptance as the principle and full acceptance case-by-case where appropriate as an exception when newly signing, resigning, or amending the BITs in the future. For the range of dispute issues which may be submitted to international arbitration, it is improper to have all investment disputes submitted to international arbitration based on prior unilateral consent in the agreement, except for the disputes about expropriation, compensation, transfer and other relevant matters. The issues of foreign access, transparency and other relevant matters are not suitable for opening-up, because the consent shall be liable not to take back once made according to Washington Convention.[33]

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[30] M Sornarajah, *The International Law on Foreign Investment,* 207-208 (Cambridge, Cambridge University Press, 2004).

[31] See Liu Shen, "On the challenges of international dispute arbitration to national sovereignty - Comments on the U.S. policy response and its Implications", 3 LAW AND BUSINESS RESEARCH 3-13 (2008).

[32] See Chen An, *On International Economic Law* , 388 (Beijing, Higher Education Press, 2002).

[33] See Yu Jinsong and Zhan Xiaoning, "On the settlement mechanism of disputes between investors and the host state and its impact", 5 CHINA LEGAL SCIENCE 175-184 (2005).

3. China should improve its internal dispute settlement mechanism.

As far as the arbitration of investment disputes between Chinese investors and foreign investors from Sino-foreign joint ventures and cooperative ventures is concerned, because all the closest points of contact of such contract disputes are within China and the laws of China shall govern the formation, validity, interpretation and execution of the joint venture or cooperative contract and its dispute settlement in accordance with Chinese laws, the arbitration place of such disputes should be better in China and the jurisdiction should also belong to China following the principles of territorial jurisdiction and of the closest connection. For the settlement of investment disputes between foreign investors and the host government, it is also necessary for China to take a two-pronged strategy. China should make good use of ICSID international arbitration mechanism and also make full use of the effective domestic dispute settlement mechanisms, including the domestic international commercial arbitration. However, in reality, foreign investors try to avoid arbitration in China through the investment arbitration clause of the contract, for foreign investors do not trust Chinese arbitration and there really exist some problems in its arbitration environment.

Therefore, China should endeavor to improve and perfect the local dispute resolution mechanisms and make them trustable from foreign investors and build up an increasingly sound legal environment. For example, the domestic courts can more directly and frequently apply BITs so that foreign investors can have a direct access to international protection in the host state, which will not only provide the interests of foreign investors more effective protection, but also maintain the jurisdiction of sovereign states and other major public interests. The need to resort to international dispute settlement mechanism will be reduced only at the existence of transparent, reliable and objective local dispute resolution mechanisms. In the long run it is a fundamental solution most favorable to China to improve the domestic dispute settlement mechanism, encourage local solutions to investment disputes as possible so as to avoid abuse of the right to appeal by the investors and to save or reduce the costs, In order to fundamentally solve this problem, China needs to improve the status quo of China's arbitration mechanism and strengthen the independence of local arbitration committee from the regime and organizing mechanism to set it free from the local government's control and let it be the return of their own folk. To China International Economic and Trade Arbitration Commission, so a deeply influenced permanent arbitration institution in China, it should play a leading role in strengthening the arbitrator's neutrality and impartiality and appoint some legal experts of international trade law, investment law, financial law and other relevant areas as the presiding arbitrators and should also strengthen the confidentiality of the arbitration proceedings so that the legitimate interests of foreign investors can get full protection. Only in this way, it can help to improve the environment for arbitration and make foreign investors believe that the results of the investment

arbitration in China are fair and impartial so that they can rush to choose China as a place of arbitration just as treating England and Hong Kong.

IV. CONCLUSIONS

The stock of China's international investment is very huge and the arising of international investment disputes is inevitable, so China should make a rational use of the international investment dispute settlement mechanisms, especially international arbitration, including the common international commercial arbitration and the ICSID international investment arbitration under Washington Convention, to protect the interests of all investors, safeguard the national economic security and economic sovereignty and promote the healthy development of the national economy. In fact, despite China's own international investment arbitration practices are now rare, China's domestic legal and BITs practices allow the use of international arbitration to resolve China-related international investment disputes to a varying degree at different times.

In terms of international arbitration to the disputes between the host government and foreign investors, so far, in the ICSID international investment arbitration practices, China has never been filed as a respondent and Chinese investors also have never filed against other states as an applicant. This greatly relates to China`s attitudes towards the ICSID jurisdiction, the range of dispute issues which may be submitted to ICSID and the other relevant issues in its earlier BITs practices. Additionally, China has not so far imposed any nationalization measure on any foreign investment, so ICSID has no jurisdiction basis in reality. Although China's BITs-concluding positions have undergone a significant change, the effect and impact the change brings about has not yet emerged. From the recent three decades' BITs-concluding practices of China, it can be easily found that a phrase characteristic in the attitudes towards the international arbitration jurisdiction concerning the disputes between the host government and foreign investors is obvious:

In the BITs of the first generation before 1998, China adopts a prudent position of "partial consent" to international arbitration. During this period, China very restrictedly allows the use of a third-party international arbitration, such as ICSID, and very broadly advocates the principle of exhaustion of local remedies, so foreign investors can only seek local relief from the host state. Because China doesn't allow the common international commercial arbitration to address the 'investor-host' disputes, foreign investors mainly seek for the judicial or administrative remedies from the host state; even another kind of international arbitration is occasionally allowed, for example, a temporary tribunal specially organized, belonging to neither the investor nor host state, it is still required to use the host state as the place of arbitration and the law of the host state as the applicable law.

From the BIT concluded in 1998 between China and Barbados, an opening-up position of "comprehensive consent" to international arbitration is taken in nearly 30 BITs of the second generation. During this period, China broadly allows using ICSID –a third-party international

arbitration or an ad hoc international tribunal belonging to neither the investor nor host state and also has no longer the restrictive requirements of the arbitration place and the applicable law. This BIT's-concluding position change still has a continuing trend. The reasons for them may be as follows: China began implementing the 'going out' strategy around 1998 and China`s international commercial arbitration institutions are not allowed to do the investment dispute arbitration between the host government and foreign investors. However, the potential risk in the change of China's BIT's-concluding positions should be of great concern. Considering the painful lessons of other states, China's own economic development level and China`s scale ratio of attracting foreign investment to its overseas direct investment, China should amend the current opening-up position of "comprehensive consent" to international arbitration of the investment disputes between the host government and foreign investors and keep the early cautious position and make a prudent use of ICSID arbitration mechanism, taking a partial acceptance as the principle and a full acceptance case-by-case where appropriate as an exception, to reestablish the state`s control to the international investment dispute settlements.

For international arbitration on the disputes among Sino-foreign private investors, since foreign investors lack a trust in China's current legal environment of arbitration, China are making more use of the judicial or administrative relief. Even if the parties have agreed to the international commercial arbitration, they often make a choice of a third-party international commercial arbitration, rather than international commercial arbitration from the investor or host state. China should actively improve the environment of domestic arbitration to attract investors to willingly choose China as the arbitration place and make a greater use of China's international commercial arbitration mechanism to resolve their disputes based on the autonomy and closest connection principles.

V. CLOSING REMARK

How to resolve the international investment disputes is one of the most complex issues in the international investment law. In recent years, the investment dispute settlement mechanism in international investment agreements is becoming mature and international arbitration is increasingly becoming the most powerful way to deal with global international investment disputes, which helps to strengthen the protection to investors and improve the investment climate in developing states. In the incentives of the global investment liberalization policy, with the deepening of China's reform and opening-up process and accession to the WTO, China's favorable investment environment and huge market potential for foreign investors are more and more popular to the foreign investors and the attracting amount of foreign investment is rising every year. As a host state, how China meets the challenges, including how to resolve the frictions and disputes among the stakeholders, has become the hot issues which must be taken seriously to China. Meanwhile, with China's rapid economic development and economic capacity enhancement, the stock of China's overseas investment is also

increasing, how to better protect the interests of overseas investors also deserves a more attention. China should adopt the "two-hand" policy and design and make good use of international arbitration mechanism. China should strengthen the protection of investors` rights and interests under the premise of safeguarding national sovereignty and should both maintain the power of the government management of public interests and safeguard the right of investors to obtain the legitimate interests to further optimize the investment environment and promote the steady and fast national economic development in China.

Paper n. 7

THE ROLE OF LAWYERS IN EUROPEAN ADR

by

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THE ROLE OF LAWYERS IN EUROPEAN ADR

by

Maria Angela Zumpano ♦

Abstract:

This paper deals with the scarce diffusion of the ADR practice in Europe. Regarding the arbitration, the reason lies in the high costs of this procedure, while respect to the other out-of-Court procedures, like mediation, there is a large mistrust among lawyers, due to lack of training to cooperation and dialogue.

Recently a EU Directive has pushed towards mediation in civil and commercial lawsuits, where cross-border cases are particularly complex due to different national laws and practical matters like costs or language. National legislators have used this occasion to introduce a general discipline of mediation, applicable to domestic disputes as well. So most lawyers are called to abandon their adversarial approach in order to prepare for a cooperative negotiation.

The author examines the numerous aspects on which a lawyer can play his role in every step of a mediation proceeding, and bring the client to an amicable satisfactory settlement.

Keywords: ADR, mediation, lawyers, role.

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1. In Europe and in particular in the continental countries, legal profession receives a highly adversarial training, almost exclusively headed towards the state jurisdiction.

In law schools the trial before the court is widely and extensively studied, while ADRs have little space in traditional university courses. ADRs have been introduced only recently and mainly as optional courses. They arouse interest among students and are always successful, but these subjects are soon put aside by the graduate who approaches the world of work, as they have not found a wide practical response at least so far.

Even the arbitration, which is surely the closest to the civil state justice among the ADRs, is practiced by very few lawyers, both as arbitrators and defense attorneys of parties who choose such alternative method to protect their own rights. The reason lies in the high costs of this procedure: private justice is considered luxury, as only few lucky people can afford the high fees of the professionals who deal with it. Mainly large companies or multinational companies turn to arbitration, in order to avoid waiting for the jurisdiction time delays or not to fall into the specific peculiarities of the different national procedures[1]. Individuals rarely turn to private trial because their lawyers do not usually present this alternative or they even advise against it.

So, most lawsuits converge to state jurisdiction. Therefore lawyers dedicate themselves to this kind of procedure, on the strength that the trial before the court requires their exclusive presence, unlike ADRs which do not prescribe a mandatory advocacy in court. The net practical predominance of state justice explains the difficult development of alternative instruments, which seem "unusable" and "unsuited" not for intrinsic reasons but purely for reasons of fact.

For those who choose to be lawyers, the impact with the court shows a definitely aggressive legal class, whose aim is to achieve the best result for their client and humble the opponent. Similar behaviors do not really suit the fair play which usually characterizes – or should characterize – arbitral procedures and are absolutely counterproductive when the alternative procedure is a non-adjudicative one. Converting to a negotiation or conciliatory model is a long and hard process for most lawyers because it implies a real change of custom: abandon the approach of "fight to the death" in order to prepare for cooperation and dialogue.

In the European context, a EU directive[2] has pushed towards mediation as an appropriate instrument to solve civil and commercial lawsuits of transnational importance. National legislators have used this occasion to introduce a general discipline of mediation, applicable to domestic disputes as

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[1] However, the problem exists also in this case: see *Thechniques pour maitriser le temps et les couts dans l'arbitrage*, *ICC Bull. 2007, 23*.

[2] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, "on certain aspects of mediation in civil and commercial matters", *Official Journal* L 136, 24 May 2008.
About the preliminary work, s. *An Analysis and Evaluation of Alternative Means of Consumer Redress Other than Redress Through Ordinary Judicial Proceedings*, Leuven, 2007.

well. The challenge which lawyers in Europe are required to face is to break through their usual mistrust towards an instrument which they have scarcely practiced so far, and use these opportunities to increase the value of a new professional skill.

2. In alternative procedures, even non-adjudicative ones, the role of lawyers is anything but minor. The aspects on which the party needs to be advised, guided and assisted by the lawyer are numerous.

The lawyer himself is the one who, by examining the controversy, can verify if it is a matter which only a state judge can solve or if it is possible to turn to a conciliatory procedure[3]. If the mediation is possible, the lawyer sees to explain the client what it is about and which results he can achieve through it.

Some national legislators, inspired by the EU directive in this way, have established that for some determined matters the judicial procedure must be mandatorily preceded by mediation proceedings. Actually in Italy the law provided that the missed experiment of an attempt of mediation causes an adjournment of the trial, waiting for the parties to start the mediation proceeding at the not judicial seat. The trial will restart only after the time required to conclude the mediation has elapsed, even with a negative result (failed conciliation)[4].

In these cases, as well as in the cases in which the party spontaneously chooses the mediation procedure, the lawyer is able to advise his client about the most appropriate seat where to carry it out. There are several institutions, both public and private, which offer such services. The lawyer can use his own personal experience gained through previous involvements in similar procedures, to advise a reliable institution, possibly specialized in the specific matter. He can help the client to find his way among the cost estimations, he can analyze the fees and relate them to the items which concern his specific situation. In any case he will use his legal competencies to examine the general rules of procedure adopted (and made public) by the different institutions in order to address the client to the seat which best corresponds to his needs.

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[3] See *Whereas* (10) of the EC Directive: "This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law". Besides, Art. 1/2: "This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)".

[4] Art. 5 D.lgs. n. 28/2010; from March 2011, this mandatory attempt is required in disputes concerning rights *in rem*, division of common properties, wills and successions, family agreements, lease contracts, free-loan contracts, medical liability, libel, insurance, banking and financial contracts. From March 2012, pre-trial mediation should become mandatory also in relation to condominium disputes and to claims for damages deriving from road or maritime collisions.

The lawyer's contribution is precious when presenting the request of mediation. Filling in the petition, defining the subjects to be involved in the proceedings as counter-parties, explaining the initial claims, choosing the documents to communicate and file are activities which the party could do autonomously but it is obvious that if the party avails himself of his lawyer, he will save time and be sure not to make mistakes.

The same, even if in a different way, is valid as well for the party who does not take the initiative first, but is invited to the proceedings and decides to appear by communicating his adhesion.

When the proceedings have started, the lawyer's role varies depending on whether the party asks him to go with him to the meetings with the mediator. Quite often, in particular in the cases in which the lawsuit involves complicated matters on legal level, the party prefers to appear accompanied by a lawyer acting as a consultant. The lawyer shall prepare himself to play this role and study the controversy not only in the terms strictly provided for by the law, as he does when defending the party in court. He shall examine and clarify the background and every involvement even if they do not have a legal nature but relational and emotional. He shall take into account the real interests of his client and weigh up his expectations about the negotiation he is about to do with his help.

In the preliminary step it is fundamental that the lawyer prepares his client to the mediation meeting. Regardless of the fact that the party wants to avail himself of a consultant or that he intends to operate within the proceedings autonomously, in the mediation the party is the main character of the meeting and of the acts done. Therefore it is really important that the lawyer explains his client the details of the proceedings: times and methods, needs of confidentiality, tasks and powers of mediator, the chance to quit in case he decides not to go on with the meetings, the effects of the potential agreement he might stipulate with the other party in case the mediation is successful.

After making sure that the client has properly understood, the lawyer can evaluate with the client the alternatives he is facing at the moment, helping him to grade them within a scale of options on the basis of the interests at play. For each option the lawyer is able to give his contribution by foreseeing the obstacles which may arise on legal level and indicating proper and feasible solutions.

Preparing himself and preparing the party for the meeting, establishing goals and elaborating a negotiation strategy to achieve them means creating the basis of a good mediation[5]. All this will be useful for the party, regardless of the fact that an agreement is achieved or not achieved at the end of the proceedings.

As already said, the lawyer can take part at the proceedings as a consultant of the party. In this case, his role must more than ever adapt to the not adversarial character of the procedure. The

[5] About negotiation strategy: BOYLE F., CAPPS D., PLOWDEN P., SANDFORD C., *A Practical Guide to Lawyering Skills*, Oxon, 2005, 265.

mediator does not judge and the lawyer is not there to convince him of the reasons of his client, if anything he needs to convince the other party to find a shared solution.

An aggressive attitude, typical of win-lose procedures, can easily cause the interruption of the mediation and determine its failure. On the contrary, the lawyer must adopt a collaborative approach based on the highest availability and correctness. He must not steal the show from the party, but he must help him to focus on the most constructive aspects. If tones raise up and the litigants come to a collision, the lawyer must be an ally of the mediator and recreate a peaceful atmosphere in order to re-establish communication. It is easy that in this way the lawyer gains the trust of the mediator and his availability to listen to him carefully, both in the joint meeting and in the individual sessions (caucuses). The legal competence of the lawyer is extremely useful when it is time to determine the best and worst alternative to a negotiated agreement (BATNA and WATNA) or in those cases when the mediator formulates a proposal on which the parties have to express themselves.

Finally the act the whole procedure aims for: the conciliatory agreement. The agreements which originate from mediation are acts of will of the parties. However the parties are rarely able to evaluate how far the consent they have given is consistent with the rules of law. In this case, as in defining the times and ways of implementation, lawyers can give the parties important advice and help them to draw up the document which properly defines the details.

3. Last of all, it is evident that the role of lawyers in mediation can be relevant. Likewise it is evident that this category of professionals needs an appropriate training in order to offer a high quality service, adequate to the characteristics of the proceedings. But to reach this aim it is necessary to work on the education of the legal class, so that lawyers are able to put themselves in the negotiator's shoes without being influenced by adversarial dynamics. The lawyer needs to develop a flexibility which allows him to modulate his behaviors according to what the procedure requires. In particular, in the case in which Europe sets forth to loosen the still existing net discrimination between adjudicative and conciliatory methods.

Only under these conditions it is possible to imagine that the alternative comes effectively true among the methods of resolutions of lawsuits.

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Les Cahiers de droit

APPEL DE TEXTES

Les Cahiers de droit – Numéro thématique à paraître en 2012

La prochaine décennie de la liberté d'expression : enjeux et menaces

Largement considérée comme la liberté la plus fondamentale qui soit en régime démocratique, la liberté d'expression se décline en plusieurs facettes et pénètre presque tous les domaines de la discipline juridique. Du droit de ne pas s'exprimer à la liberté de la presse, en passant par l'accès à l'information, l'expression politique, artistique, la protection des formes « socialement indésirables » d'expression (pornographie juvénile, propos racistes, haineux, mensongers, diffamatoires, etc.) ou la possibilité que la liberté d'expression soit instrumentalisée pour servir les fins de groupes d'intérêts particuliers, les problématiques liées à cette liberté fondamentale transcendent les nombreuses sphères d'activité des sociétés qui composent la communauté internationale. Ultime rempart contre les différentes formes de tyrannie ou idéologies susceptibles d'être imposées au sein de ces mêmes sociétés, l'évaluation qualitative du niveau de protection dont jouit la liberté d'expression, d'une part, et des limites raisonnables qui peuvent lui être imposées, d'autre part, doit, encore et encore, être *remise sur le métier*. Dans un contexte marqué par les changements technologiques où, théoriquement, l'information n'a jamais été aussi facilement accessible, de nouveaux enjeux se dessinent en matière de liberté d'expression et de nouvelles menaces pèsent sur elle. Quels sont ces enjeux? Quelles sont ces menaces? Comment le droit peut-il contribuer au renforcement de la liberté d'expression face aux nouvelles réalités qui marquent la vie démocratique?

* * *

La direction scientifique de ce numéro spécial est assurée conjointement par les professeurs Christian Brunelle et Louis-Philippe Lampron de l'Université Laval, en collaboration avec la direction de la revue et le Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval (GEDEL). Les textes de **5 000 à 9 000 mots** sont attendus **au plus tard le 1er mars 2012**, par courriel (cahiers.de.droit@fd.ulaval.ca).

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