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Transparency and Accountability in Governance in China Evaluating Legal Reforms

Sarah Biddulph and Wang Haifeng

Chapters in the first part of this book have examined the formulation of concepts of transparency and accountability in international and bilateral trade and investment treaties. Both Ljiljana Biuković (Chapter 2) and Wang Haifeng (Chapter 6) examine the different ways in which these treaties have been reflected in China's domestic governance of international trade and investment. China's increasing influence in shaping the rules of multilateral institutions relating to the scope and application of principles of transparency and accountability have also been discussed by Sarah Biddulph and Biuković (Chapter 1) and by Biuković (Chapter 2). The chapters in this second part of the book also have as their focus the core concepts of transparency, accountability, and public participation and the ways these norms are reflected in modes of governance. The chapters in this section, however, reverse the starting point by focusing on the Chinese domestic regulatory system rather than on international instruments. They ask how China's domestic regulatory system has changed to incorporate international transparency and good governance norms and analyze the particular ways in which the Chinese domestic regulatory regime gives shape to these norms. This change of focus recognizes that concepts and norms are not immutable and that domestic appropriation is both an active and creative process. This section of the book seeks to explore the ways in which these concepts are constructed and reconstructed in China's domestic political, economic, and regulatory environment.

This chapter is particularly interested in the ongoing reforms to give institutional form to principles of transparency and accountability in the legal regulation of administration in China. It focuses on the capacity of citizens to hold officials to account for their decision making, particularly their capacity to challenge an administrative decision in court under the Administrative Litigation Law (China's version of judicial review).[1] One of the chapter's

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[1] Administrative Litigation Law of the People's Republic of China [Zhonghua Renmin Gongheguo Xingzheng Susong Fa 中华人民共和国行政诉讼法], April 4, 1989 (effective October 1, 1990, as amended November 1, 2014, and June 27, 2017, with amendments to take effect from July 1, 2017) (Administrative Litigation Law).

main contentions is that any evaluation of China's version of judicial review must first be placed in the overall governance context, as an examination that restricts itself only to judicial review risks mistaking its place, significance, and possibilities as a mechanism of government accountability. In many liberal democracies, and particularly in the United States, judicial review occupies a central position in the conception of the rule of law and is at the heart of mechanisms to control government action. The discussion in this chapter of accountability mechanisms, and judicial review, in particular, demonstrates that it would be a mistake to assume that judicial review in China occupies the same exalted position.

To provide the context necessary for an evaluation of judicial review (which is hereafter referred to as administrative litigation to reflect Chinese terminology), and recent reforms to it, the chapter begins with an examination of two issues. The first is the vision of transparency and accountability set out in article X of the General Agreement on Tariffs and Trade (GATT).[2] A condition of China's accession to the World Trade Organization (WTO) was that it institute wide-ranging reforms to enact these principles into its domestic legal system.[3] The second issue of context is to set out the suite of mechanisms that have been introduced in Chinese law to make government decision making more transparent and accountable. Both transparency and administrative litigation are foreign imports into the Chinese system.[4] And so an examination of how transparency principles are given form, as well as the place of administrative litigation in accountability mechanisms, is ultimately an analysis of the fate of foreign transplants.

The chapter focuses on one of those imports – administrative litigation (China's approximation of judicial review) – in some detail, with particular reference to the example of administrative litigation in Shanghai and the Shanghai Pilot Free Trade Zone (SHPFTZ) located in Pudong New Area. The chapter concludes that, even though the most recent version of administrative litigation was adopted as part of the reforms to bring the legal

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[2] General Agreement on Tariffs and Trade, April 15, 1994, 1867 UNTS 187 (GATT).
[3] Wang Conghu, "China's Strategy of Building a Transparent Government after Entry into the WTO" [], *Journal of Beijing Administrative College* 5 (2002): 27.
[4] Chunying Xin, ed., *WTO and the Reform of Chinese Administrative Law* (Beijing: Social Sciences Academic Press, 2005), 274, in regard to transparency. Administrative litigation was an earlier import from Japan, being introduced in 1908 as part of the constitutional reforms attempted at the end of the Qing dynasty. See Susan Finder, "Like Throwing an Egg against a Stone: Administrative Litigation in the People's Republic of China," *Journal of Chinese Law* 3, 1 (1989): 1–2 (describing how attempts to introduce administrative litigation all foundered); Jianfu Chen, *Chinese Law: Context and Transformation* (Leiden: Martinus Nijhoff, 2008), 211; see also the distinction between transparency, an imported concept, and government openness (zhengwu gongkai 政务公开) with its more complex genealogy, in the Introduction of this volume.

system into line with the requirements of GATT article X, the location of administrative litigation in Chinese systems of administrative accountability differs significantly from the model of accountability imagined by GATT article X. Unlike the US-centric model of accountability, which places judicial review at its heart, administrative litigation in China is subordinated to bureaucratic mechanisms of oversight and control and dependent upon them for its efficacy.

GATT Article X and China's Governance Model

Accession Requirements: Transparency and Accountability

In 1986, China stated its intention to participate in GATT.[5] A working party on China's status was established in 1987 under GATT, and, in 1995, it was converted into a WTO working party.[6] As part of China's negotiations to obtain entry to GATT, and, later, to the WTO, intense external pressure was applied to implement major reforms to the Chinese legal system, in particular, to the system of administrative law. The stakes were understood to be high. As Sylvia Ostry noted, "without such transformation [of China's administrative legal infrastructure], China's accession could be seriously damaging to the long-term viability of the WTO."[7]

GATT article X sets out the basic transparency requirements in relation to trade-related regulation and reflects key requirements of the rule of law. These principles formed the basis for China's Protocol of Accession, which requires in substance that,

- national laws regulations and rules be published
- they be administered in a uniform, impartial, and reasonable manner
- mechanisms be instituted for independent review of administrative decisions: administrative and judicial.[8]

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[5] Flemming Christiansen, "Will WTO Accession Threaten China's Social Stability?" in *China's Accession to the World Trade Organization: National and International Perspectives*, ed. Heike Holbig and Robert F. Ash (London: Routledge Curzon, 2002), 176–77. Xin, *supra* note 4, 182.
[6] "WTO Successfully Concludes Negotiations on China's Entry," press release, *WTO News*, September 17, 2001, World Trade Organization, https://www.wto.org/english/news_e/pres01_e/pr243_e.htm.
[7] Sylvia Ostry, "Article X and the Concept of Transparency in the GATT/WTO," in *China and the Long March to Global Trade: The Accession of China to the World Trade Organization*, ed. Sylvia Ostry, Alan S. Alexandroff, and Rafael Gomez (London: Routledge Curzon, 2002), 124.
[8] China's Protocol of Accession, November 11, 2001, sets out China's commitments, which include those in part 1, paragraph 2, setting out obligations for the administration of the trade regime. These include: "Part 1: 2(A) an obligation for the WTO Agreement and the Protocol to apply throughout the

The Protocol of Accession further required the publication of all rules and laws, a right to comment on draft legislation or rules before implementation and enforcement only of laws and regulations already published. The Protocol of Accession expanded the scope of matters covered by these requirements to those "affecting trade in goods, services, trade-related aspects of intellectual property rights (TRIPS) or the control of foreign exchange." It required additionally that laws and regulations be translated and that China establish a single enquiry point, referred to as "WTO-plus requirements."[9]

Transparency principles are designed to ensure that states and economic actors have information about the substantive content of domestic regulation and the ways those laws are implemented. Accountability mechanisms in theory provide recourse with respect to that decision making. These principles of transparency and accountability target barriers to trade that are embedded within domestic legal systems and the ways in which those laws are enforced.[10] Their ultimate purpose might be understood as targeting the non-tariff trade barrier distortions to international trade that earlier models regulating tariffs and quotas could not achieve.

While limited to designated trade-related items, these obligations, in practice, would have been difficult to implement without reforms across the whole scope of administrative law. Engagement with these international norms, particularly as they relate to the governance principles of transparency and accountability, have sat awkwardly with China's existing governance norms. To understand and better evaluate some of the challenges China has faced in implementing these provisions, it is useful briefly to consider the philosophy and institutional form that underpin both the GATT/WTO transparency provisions and administration in China. Turning first to the principles underpinning GATT/WTO rules, the requirements of article X reflect both the liberal underpinning of administrative law and the

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entire customs territory, 2(C) transparency provisions requiring that only those laws regulations and other measures ... that are published and readily available to WTO members ... be enforced, there be a dedicated site for publication of such laws, regulations and measures and a period for comment be allowed before they are implemented, an enquiry point be established; 2(D) tribunals, contact points and procedure for prompt review of all administrative actions ... and administrative rulings of general application and that the tribunal be impartial and independent of the administrative agency making the ruling." See "Protocols of Accession for New Members since 1995, Including Commitments in Goods and Services," World Trade Organization, https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm.

[9] Julia Ya Qin, "'WTO-Plus' Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol," *Journal of World Trade* 37, 3 (2003): 483.

[10] Ostry, *supra* note 7.

distinctive institutional arrangements adopted in the United States. In relation to the first point, basic principles of administrative law seek to control the ways in which government officials exercise power. Within a liberal tradition, principles of transparency and accountability are designed to ensure the responsibility of government to its citizens. Pitman Potter describes this as a "political ideology [that] asserts that government should be an agency of popular will."[11] The exercise of regulatory power should thus be transparent and accountable to the people.

In relation to the second point, Ostry has traced the disproportionate influence that the quite distinctive US model of administrative law has had on the development of GATT article X and the institutional form imagined by the GATT/WTO principles of transparency and accountability. This has resulted in great emphasis being placed on the use of independent regulatory agencies, notice and comment on administrative rules, and the judicial review of administrative decision making.[12] Article X thus emphasizes the publication of national laws and regulations and scrutiny by independent review bodies.

The Interplay between WTO Accession and Domestic Politics in Shaping Domestic Law Reform

Administrative law reform, and the obligation of transparency, in particular, received significant impetus from China's attempts to join first GATT and then the WTO.[13] Views on the relation between WTO accession and administrative law reforms differ. Some would go so far as to say that the requirement of transparency was imposed on China by the WTO, though other senior professors have characterized the move to improve transparency in administration as part of a global trend of which China was a part and see accession to the WTO as just speeding up what would have been an inevitable process.[14] One way to understand the differences between these views lies in differing interpretations of the

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[11] Pitman B. Potter, "Selective Adaptation of Economic Governance Norms in China: Transparency and Autonomy in Local Context," in *Globalization and Local Adaptation in International Trade Law*, ed. Pitman B. Potter and Ljiljana Biukovic (Vancouver: UBC Press, 2011), 184.
[12] Ostry, *supra* note 7, 125.
[13] Xin, *supra* note 4, 185. David Blumental "'Reform' or 'Opening'? Reform of China's State-Owned Enterprises and WTO Accession: The Dilemma of Applying GATT to Marketing Economies," *Pacific Basin Law Journal* 16, 2 (1998): 200–62, arguing that "GATT rules and principles served as a model of Chinese legal reform" (at 201).
[14] Liu Anwei, "Transparent Government, Transparent Administration: Professor Zhang Ning of the National School of Administration Talks about the WTO Principle of Transparency," *Biweekly of Administration for Industry and Commerce* 8 (2002): 25; Wang Conghu "China's Strategy of Building a Transparent Government after Entry into the WTO," *Journal of Beijing Administrative College* 5 (2002): 28.

meaning and scope of transparency. One view is to equate transparency with the specific requirements of GATT article X.[15] The other is to consider the impact this narrower requirement of transparency has had on broader attempts at reform within the rubric of government openness (政务公开). Compliance with the first interpretation required specific reforms to introduce mechanisms for the publication of rules (within the prescribed parameters), but conformity with the first has also required systematic reforms to improve openness in governance that is not limited to trade and customs. An illustration is the passage of the Legislation Law on March 15, 2000.[16] This law specifically addressed the GATT requirement that laws and rules be publicly promulgated before being effective and that opportunities be made available for comments to be made on draft laws and rules before their passage. Passed as national-level legislation, this law bound all legislation regulation and rule making, and, thus, at the same time as bringing Chinese law into compliance with the GATT requirement, it effected a fundamental reform of the system as a whole.

Fortunately, accession to the WTO and the reforms it demanded coincided with domestic pressures to reform administrative law to support economic reforms. But, before accession to the WTO, which brought binding obligations with it, the trajectory of administrative law reform was uneven as it was entangled with the tumultuous politics of economic reform. In the early part of the reform period (which started in 1979), administrative law reforms lagged behind other legal reforms, particularly the introduction of market reforms that commenced in the early 1980s.[17] Thus, even though scholars had been calling for the passage of an administrative procedure law since the early 1980s, it was not until 1986 that the Legal Affairs Committee of the Standing Committee of the National People's Congress (NPC) established a research group to prepare a draft of the Administrative Litigation Law.[18] The first domestic experimentation with ideas of government openness and accountability also formed part of the political system reforms (to separate the Chinese Communist Party (CCP) and government) championed by Party General Secretary Zhao Ziyang in the mid-1980s. Zhao Ziyang's report to the thirteenth National

[15] This is the interpretation used by Zhang Ning in his discussion of transparency in Anwei, *supra* note 14, 25.
[16] Legislation Law of the People's Republic of China [Zhonghua Renmin Gongheguo Lifa Fa 中华人民共和国立法法], March 15, 2000 (effective July 1, 2000), China.org.cn, http://www.china.org.cn/english/government/207420.htm (Legislation Law).
[17] Chen, *supra* note 4, 207.
[18] Finder, *supra* note 4, 8; Administrative Litigation Law, *supra* note 1.

Congress of the CCP in 1987 proposed to introduce consultative dialogue (协商对话).[19] Government openness (政务公开) was raised in March 1988 at the second plenary session of the thirteenth Central Committee of the CCP as part of these political reforms. After Zhao's purge in 1989, political reform, and many of the ideas associated with it, stalled.

After Deng Xiaoping's southern tour reinvigorated the economic reform process in 1992, the Central Committee of the CCP again committed itself to law-based governance as part of establishment of a socialist market-based economy.[20] In September 1997, Jiang Zemin supported a broader embrace of the policy of governance according to law in his report at the fifteenth National Congress of the CCP, reinvigorating ideas of openness and accountability.[21] The program of governance according to law was rapidly followed by "administration according to law," adopted in November 1999 by the State Council in the Decision on Comprehensively Carrying Forward Administration According to Law (administrative law reform is discussed in more detail in the section below).[22]

While domestic politics derailed attempts in the 1980s to introduce governance reforms, it acted as an incentive to these reforms in the latter part of the 1990s. During accession talks, China was subject to intense pressure to reform its heavy reliance on state-owned enterprises (SOEs), which was seen as one of the main barriers to entry into the WTO.[23] In 1998, as Premier Zhu Rongji embarked on extensive reforms to SOEs and aimed to trim the bureaucracy, he found it necessary to transform the role of government agencies from that of owners (and managers) of state assets to regulators. This need for reform was a domestic driver for further governance reforms that, together with direct pressure to reform administrative law, combined to produce wide-ranging law reform in many sectors of the economy as well as in the legal regulation of administration more broadly.

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[19] Zhao Ziyang, "Report Delivered at the 13th National Congress of the Communist Party of China" ["Zai Zhongguo Gongchandang Di Shisan Ci Quangguo Daibiao Dahui Shang De Baogao"], *People's Daily Online*, October 25, 1987, http://cpc.people.com.cn/GB/64162/64168/64566/65447/4526369.html (in Chinese).

[20] Central Committee of the Chinese Communist Party (CCP), Decision on Several Questions on Establishing a Socialist Market Economy System, November 14, 1993 (Decision on a Market Economy System).

[21] Jiang Zemin, "Report Delivered at the 15th National Congress of the Communist Party of China" ["Zai Zhongguo Gongchandang Di Shiwu Ci Quangguo Daibiao Dahui Shang De Baogao"], *People's Daily Online*, September 12, 1997, http://cpc.people.com.cn/GB/64162/64168/64568/65445/4526289.html (in Chinese).

[22] State Council, Decision on Comprehensively Carrying Forward Administration According to Law, November 1999 (Decision on Administration According to Law).

[23] Mary Power, "China and GATT: Implications of China's Negotiations to Join GATT," *Asian Studies Review* 18, 2 (2007): 7; Blumental, *supra* note 13, 201–2.

Governance Objectives in Domestic Administrative Law Reform

When we turn to China's governance model, we see that both the principles and institutional forms of administration diverge from the norms asserted by GATT/WTO. Institutional and, to a lesser extent, philosophical divergence can also be seen in many other European and common law jurisdictions, not to mention other developing countries. The fact of divergence per se does not automatically lead to the conclusion that the Chinese system is lacking in some way, but it has enabled pressure to be placed on China to bring its system of administrative law more closely into line with GATT/WTO principles of transparency and accountability as the price for participation in the WTO. As discussed in the section above, pressure to reform administrative law as part of accession negotiations (both directly and indirectly) led to specific reforms as well as to more general legislative reforms. It also contributed to a broader re-examination of the fundamental purpose of administrative law and the relationship between the state and its citizens that administrative law instantiates. These multi-layered incentives to reform administrative law provide an important context for examining the purpose, place, and possibilities for transparency and accountability mechanisms.

The Chinese model of governance has traditionally seen officials as exercising power and citizens as being subordinated to it. This relationship is summed up in the aphorism that "officials are high up and the people are low down."[24] Citizens who challenge government decision making are seen as troublemakers who do not know their correct place. It is a hierarchical relationship that, in its idealized form, sees the good official as caring for and guiding the citizen and the citizen as having a corresponding duty to respect the authority of the official. Potter has labelled this patriarchal mode of governance "patrimonial sovereignty," where the state is responsible for, rather than responsible to, the people and their welfare.[25] Under the rubric of "administration according to law," which was first articulated in the decision of the third plenum of the fourteenth Central Committee Congress in November 1993, the CCP resolved that "government at all levels must carry out administration according to law and handle affairs according to law" (*yifa xingzheng*).[26] The

[24] Huang Jie, "On the Administrative Litigation Law," *Chinese Law and Government* 24, 3 (1991): 43–46.
[25] Potter, *supra* note 11, 185.
[26] Decision on a Market Economy System, *supra* note 20. *Yifa xingzheng*, which articulates a principle that government officials carry out administration on the basis of law (and not without legal basis),

basic requirement for governance according to law (*yifa zhiguo*) has evolved into a determination to establish "rule of law government" (*fazhi zhengfu*) under Xi Jinping.[27] The policies of "governing the country according to law" and "administration according to law" state a resolve that governance powers only be exercised on the basis of legal authorization; "government at all levels must carry out administration according to law and handle affairs according to law," thus establishing the basic principle of legality in administration.

The precise extent and purpose of this principle of legality were not well defined when they were adopted in the late 1990s. Debates in China about both the extent and the purpose continue. The extent of the principle of legality – that is, what constitutes "legal authorization" – has evolved over time. Significant legislation, such as the Legislation Law, designates certain activities that could only be authorized by legislation passed by the NPC or its Standing Committee including: basic economic rules, taxation matters, foreign trade, customs and treasury, basic property and civil relations, criminal offences, and litigation and arbitration systems.[28] Legislation of this type reflects a desire to consolidate law-making power in designated areas of national importance and a corresponding determination to remove the regulation of these matters from local authorities and subordinate administrative agencies. The concept of legality, however, remains formalistic. That is, a bare legal authorization that has the correct form but that fails to prescribe procedural requirements for the exercise of a power, or even to define core elements and objectives of the power, will still conform to this narrow concept of legality.[29]

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was first raised in this decision in November 1993. Administration according to law was elevated following the 1997 Decision on Administration According to Law, *supra* note 22.

[27] "*Yifa zhiguo*" as a policy was first adopted by the fifteenth National Congress of the CCP under the leadership of Jiang Zemin in his report of September 12, 1997: "[H]old High the Great Banner of Deng Xiaoping Theory for an All-round Advancement of the cause of Building Socialist with Chinese Characteristics into the 21st Century." The resolution of the eighteenth National Congress of the CCP to comprehensively implement the basic strategy of ruling the country according to law (*yifa zhiguo*) was to be based upon the rule of law governance, continuous improvement in judicial credibility, and the effective respect for, and protection of, human rights (依法治国基本方略全面落实，法治政府基本建成，司法公信力不断提高，人权得到切实尊重和保障). Songnian Ying, "People's Daily Everyone Is Writing: From Administration According to Law to Construction of Rule of Law Government," *People's Daily Online* [*Renmin Wang*], August 31, 2016, http://opinion.people.com.cn/n1/2016/0831/c1003-28678329.html; http://www.gov.cn/xinwen/2016-08/31/content_5103746.htm.

[28] Legislation Law, *supra* note 16, art. 8.

[29] Sarah Biddulph, "Justice at the Margins: Notions of Justice in the Punishment of Prostitution," in *Justice: The China Experience*, ed. Flora Sapio et al. (Cambridge, UK: Cambridge University Press, 2017), 312–55.

One influential interpretation of the purpose of administration according to the law has been to emphasize the role of administrative law in improving efficiency and regularizing administration.[30] Transparency and accountability mechanisms, from this view, contribute to efficiency, which, in turn, serve to control the abuse of power and corruption and help to protect the lawful interests of citizens.[31] Alternative conceptions advocate a so-called Western view, which privileges the role of administrative law in controlling state power and protecting individual rights, a balance between control and empowerment,[32] or a "service" orientation to administration.[33] The role of administrative law in improving the reciprocity between citizen and state – that is, empowering citizens to call the administration to account for their conduct – remains a theme of administrative law, though arguably always subordinated to the role of law in authorizing and regularizing administrative power.

The emphasis on the law's role in improving governance capacity and efficiency was again highlighted in October 2014 during the fourth plenum of the eighteenth Central Committee of the CCP's Decision on Some Major Questions in Comprehensively Moving Forward Governing the Country According to Law (Fourth Plenum Decision).[34] Such an emphasis is consistent with the basic understanding of government power exercised as part of the state's responsibility for the people rather than its accountability to the people. As we will discuss in more detail in the next section, this basic orientation influences the establishment and functioning of the institutional structures that give effect to principles of transparency and accountability. One attribute of this orientation to governance has been the concentration of law enforcement powers and the supervision of those powers in state hands and the

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[30] This view has been attributed to the German, French, Japanese, and especially the former Soviet and pre-reform Chinese views, which, despite differences between them, privilege state power and emphasize the role of law in empowering state action. The ultimate purpose for ensuring efficient management in this scheme is to ensure that state power is used to serve the people. Zhongle Zhan, "My View on the Study of the Basic Theory of Administrative Law: Using Balance Theory to Establish a Contemporary Chinese Administrative Law Study System," in *Balance Theory in Contemporary Administrative Law* ed. Haocai Luo (Beijing: Peking University Press, 1997), 106, who calls this reasoning "serve the people-ism," asserting it is distinct from management theory.

[31] Weiqiu Zhu, *Exploration of the Legalisation of China's Democratic Policy* (Beijing: China Politics and Law University Press, 2000).

[32] Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* (Cambridge, UK: Cambridge University Press, 2007), 243–46.

[33] Wenjun Chen, "The Position of 'Service-Oriented Governance' in Administrative Law," *Legality Vision* 11 (2016): 94.

[34] Central Committee of the CCP, Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward, October 23, 2014, https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/ (English translation) (Fourth Plenum Decision).

privileging of accountability mechanisms that are initiated from within the system rather than by citizens affected by the decision making. Another attribute of this type of governance has been secrecy. Before accession to the WTO and the governance reforms promoted since the late 1980s, not only were no reasons given for decisions but subordinate rules and regulations were also commonly characterized as being for "internal circulation" only and not publicly available.[35] Obligations to preserve broad and poorly defined state secrets in the Guarding State Secrets Law were backed up with the coercive force of criminal sanction, predisposing officials to non-disclosure.[36] This has been one area where dramatic change has taken place. But, despite decades of substantial, even dramatic, reform, the official impulse to secrecy has not been completely overcome, and, despite rhetoric to the contrary, the hierarchical relationship between government and the governed has not been fundamentally transformed. However, this is not to deny that there has been substantial reform to introduce principles of transparency and accountability into administration, the mechanisms of which are discussed in the following sections.

Outline of Mechanisms in Chinese Law for Transparency and Accountability in Government Decision making

Transparency: Publicity of Rules and the Right to Know

The GATT/WTO requirement that laws be publicized before being enforced and that draft rules and laws be made available for comment prior to being passed served as an impetus to domestic legislative reforms in the early 2000s. The primary legislation in this area is the Legislation Law, which was passed in 2000 and was amended in 2015. The Legislation Law requires that all laws, regulations, and rules at the national and local level be published to be effective. The Legislation Law also seeks to address a related problem that concerned the failure to draw a clear distinction between documents with a legislative character and other documents that are internal to, and direct the functioning of, state agencies. These official documents (called normative documents [*guifanxing wenjian*]) are binding, in theory, only within an agency. The obligation of publicity applies to the former and not to the latter.

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[35] Sarah Biddulph, "China's Accession to The WTO: Legal System Transparency and Administrative Reform," in Ostry, Alexandroff, and Gomez, *supra* note 7, 154–91.

[36] Guarding State Secrets Law of the People's Republic of China [Zhonghua Renmin Gongheguo Baoshou Guojia Mimi Fa 中华人民共和国保守国家秘密法], September 5, 1988 (amended April 29, 2010; effective October 1, 2010) art. 9.

Prior to passage of the Legislation Law, it was difficult to distinguish between these categories of documents, and it was very common for normative documents to exceed their supposed internal regulatory function and be used to authorize actions that impacted on citizens' rights. Extensive use of normative documents by the public security agencies as the basis for imposing a range of administrative sanctions on citizens, including detention, is one example of this practice.[37] The Legislation Law addressed this problem by clarifying the extent of the law- and rule-making power of different state agencies, by restricting the authorization of certain types of activities to legislation passed by the NPC or its Standing Committee and by specifying procedures for drafting and passing legislative instruments. The Legislation Law was followed by regulations issued by the State Council (China's executive) that further specified the distinction between administrative regulations and normative documents by imposing discrete procedures for drafting and passing each type of instrument.

Despite this legislative reform, a lack of clarity in the distinction between these two types of documents, and a lack of public availability of official documents, remains a significant barrier to the right to know. This issue continues to be raised in trade policy review meetings.[38] The need to improve processes for distinguishing legislative documents from normative documents, for publishing normative documents, and for establishing systems periodically to examine and rescind local and subordinate national-level regulations and rules that are inconsistent with higher-level laws and regulations are repeatedly raised in top policy resolutions on strengthening the rule of law. The need to put systems in place to address these problems was addressed in the State Council's 2010 Opinion on Establishing Strengthened Rule of Law Governance (in points 8, 9, and 10) and, again, in the Fourth Plenum Decision in November 2014, which addressed the problem of secrecy of those normative documents affecting rights and duties and requiring that these documents be published.[39]

The Legislation Law also addressed the requirement to enable public consultation in the process of drafting laws, regulations, rules, and major policies. Gathering public input on drafts of legislative instruments (including legislation, regulations, and rules) prior to their

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[37] Biddulph, *supra* note 32.
[38] See, for example, "Minutes of Meeting of the Trade Policy Review Body," Doc. WT/TPR/M/342/Add.1, July 20 and 22, 2016, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?MetaCollection=WTO&SymbolList="WT%2fTPR%2fM%2f342%2fAdd.1"+OR+"WT%2fTPR%2fM%2f342%2fAdd.1%2f*"&FullTextHash=371857150&AllTranslationsCompleted=1&Language=ENGLISH.
[39] Fourth Plenum Decision, *supra* note 34, part 3, point 6 on deeply moving the administration according to the law forward and accelerating the construction of a rule of law government.

passage has taken a number of forms including the placement of drafts online, the call for comments within a defined period, and arranging for public hearings to be held to gather views. The vast majority of government and legislative agencies have now established websites and formal procedures for commenting on drafts. The requirement to make public government work has been extended to the courts. Since 2014, courts throughout China have been obliged to begin uploading their case judgments onto a central website of cases managed by the Supreme People's Court. This has resulted in a vast number (though not all) case judgments becoming available online.

Another significant reform to improve public access to government information is the Open Government Information Regulations.[40] One of the stated objectives of the regulations is to enhance the transparency of government work (article 1).[41] The general principle of "openness as the rule and non-openness as the exception" was restated in the Fourth Plenum Decision. Government agencies are encouraged proactively to make information available on websites as well as through publication in the media (article 15) and to grant access to printed materials in locations such as reading rooms and libraries (article 16), particularly information such as rules and policies of public interest and information on the functioning and powers of the agency (articles 9, 10). Citizens are also authorized to apply for the release of information held by government agencies "in light of their special needs for production, living or scientific research" (article 13). Appeals can be made to the higher-level department in charge, and decisions to refuse or only partially release the requested information may be challenged through administrative review or litigation (article 33). Costs are limited to those incurred for retrieval of the information (article 27). Following the passage of these regulations, government agencies each passed their own rules to establish systems for releasing information, responding to requests for the release of information, and preparing annual reports on their work to make information available. There has been a strong popular uptake by citizens of the opportunity to obtain access to information held by government agencies.[42] In 2015, official reports stated that nearly 150,000 requests for information were

[40] Regulations on Open Government Information of the People's Republic of China [Zhonghua Renmin Gongheguo Zhengfu Xinxi Gongkai Tiaoli 座中华人民共和国信息公开条例], State Council, April 5, 2007 (effective May 1, 2008).
[41] Jamie Horsley, "China Adopts First Nationwide Open Government Information Regulations," May 9, 2007, Freedominfo.Org, http://www.freedominfo.org/2007/05/china-adopts-first-nationwide-open-government-information-regulations.
[42] Jamie Horsley, "Update on China's Open Government Information Regulations: Surprising Public Demand Yielding Some Positive Results," April 23, 2010, Freedominfo.Org, http://www.freedominfo.org/2010/04/update-on-china-open-government-information-regulations.

made of the fifty-seven central government departments, with between thirty and forty million records released proactively.[43]

These regulations were followed by the more wide-ranging Opinion on Comprehensively Promoting Open Government Work, which was issued jointly by the General Office of the Central Committee of the CCP and the General Office of the State Council on February 17, 2016.[44] This document contains a strong affirmation of the centrality of transparency to governance by law, asserting that "openness and transparency are the basic characteristics of rule of law government." As part of its specific prescriptions for openness and "sunshine," this opinion requires agencies to publish lists of the powers they exercise and procedures for exercising those powers, engaging proactively with public opinion (gathering and shaping) as well as expanding "public participation" in major policy and decision making.[45] The implementation of this concept with respect to compulsory land takings will be discussed by Biddulph later in this volume (Chapter 8).

Accountability

The availability of information about government rules and decision making has served to promote another important foundation of good governance – namely, accountability. The requirement for independent review of decision making set out in GATT article X primarily relates to complaints raised by those individuals and entities that are adversely affected by administrative decision making and rule making. An inquiry into the influence of WTO principles on administration in China thus suggests a focus on the mechanisms in Chinese law that are analogous to administrative review and judicial review. A limited form of judicial review was established with the passage of the Administrative Litigation Law, and administrative review was established with the passage of the Administrative Review Regulations, which were passed on December 24, 1990; in 1999, the Administrative Review

[43] Jamie Horsley, "China's FOIA Turns Eight," April 28, 2016, Freedominfo.Org, http://www.freedominfo.org/2016/04/chinas-foia-turns-eight/.
[44] Opinion on Comprehensively Promoting Open Government Work [Guanyu Qianmian Tuijin Zhengwu Gongkai Gongzuo de Yijian 关于全面推进政务公开工作的意见], General Office of the Central Committee of the CCP and General Office of the State Council, February 17, 2016, accessed September 22, 2017, http://www.gov.cn/xinwen/2016–02/17/content_5042791.htm (in Chinese).
[45] Ibid., section 2. Jamie Horsley, "China Promotes Open Government as It Seeks to Reinvent Its Governance Model," *Freedominfo.Org*, February 22, 2016, accessed September 22, 2017, http://www.freedominfo.org/2016/02/china-promotes-open-government-as-it-seeks-to-reinvent-its-governance-model.

Law was passed and amended in 2009.[46] These mechanisms give agency to citizens and entities to use the law to protect their own interests and to seek redress; a form of private law enforcement. However, as mentioned above, the Chinese system has traditionally favoured state-led, over private, enforcement, and so there have been many impediments to their effective implementation.[47] Before moving to examine these privately initiated accountability mechanisms in detail, it is important to consider the overall structure of accountability mechanisms in China and the place of administrative and judicial review within them.

In terms of accountability mechanisms, the predominance of state-led and state-focused governance has led to a clear distinction being drawn between internal (those either generated or pursued within the system) and external accountability mechanisms (those generated from outside the political and administrative system). Internal supervision includes vertical controls exercised by higher-level departments over lower-level departments, administrative management systems such as the annual performance appraisal and its targets, and CCP disciplinary power exercised by the Party's Discipline Inspection Commission. Higher-level agencies in charge exercise vertical control over lower-level agencies within the same hierarchy. They play an important role in setting technical and professional standards for the performance of their lower-level administrative agencies.

Internal Mechanisms

The CCP exercises powerful controls over Party members (who are heavily represented among state officials) through its personnel and discipline systems. The CCP's personnel system is responsible for appointing Party members to all important state positions (including large SOEs). Barry Naughton traces the major reforms that have occurred in the personnel system, creating a more modern, professional, and competent administration. These reforms have established predictable and rule-governed paths for promotion, which include continuing education to improve professionalism and provide credentials and the experience

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[46] Administrative Review Regulations [Zhonghua Renmin Gongheguo Xingzheng Fuyi Tiaoli 中华人民共和国行政复议条例], December 24, 1990 (effective January 1, 1991); Administrative Review Law of the People's Republic of China [Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa 中华人民共和国行政复议法], April 29, 1999 (amended August 27, 2009).

[47] Benjamin van Rooij, "Implementing Chinese Environmental Law through Enforcement," in *Implementation of Law in the People's Republic of China*, ed. Jianfu Chen, Yuwen Li, and Jan Michiel Otto (Leiden: Kluwer Law International, 2002), 149–78; Sarah Biddulph, *The Stability Imperative: Human Rights and Law in China* (Vancouver: UBC Press, 2015); Sean Cooney, Sarah Biddulph, and Ying Zhu, *Law and Fair Work in China* (London: Routledge, 2013).

needed for promotion as well as a fixed age for retirement and maximum terms in certain positions.[48] A core component of this system is the "target responsibility system," under which the items and targets used for the annual performance appraisal are set. These are important motivators for officials as performance against these targets determines both financial reward (in the form of bonuses) and professional advancement opportunities.[49] Officials are particularly responsive to the targets included in their annual performance appraisal, with the most important targets designated as veto targets (*yipiao foujue*), where failure to perform against these targets will negate all other achievements in that year. Both Naughton and Mayling Birney argue that officials are responsive to these internal administrative targets and marginally, if at all, responsive and responsible to standards of legality.[50] Naughton further argues that the system is designed to ensure that neither it, nor its top leaders, is subject to external accountability mechanisms.[51]

Arguably drawing such a bright line between performance appraisal and external accountability mechanisms overlooks the interaction between performance targets and compliance with legal rules and some of the ways in which the priority given to the achievement of important political priorities such as economic growth, social stability, and "administration according to law" also include a requirement of lawful conduct. The constitutional requirement to act in accordance with the law extends to all and includes citizens, government officials, political parties, and public organizations (article 5). After the Fourth Plenum Decision in October 2014, the policy of governance according to law (which was elevated to the status of one of Xi Jinping's Four Comprehensives, his core policy priorities), including the mechanisms for accountability and transparency encapsulated within it, has become an element in the annual performance evaluation. Another illustration of the intersection between lawful conduct and performance appraisal is where a veto target is set during an enforcement campaign that has as its objective the improvement of law enforcement in certain targeted areas, which might also include requirements to draft and implement rules to address existing gaps and weaknesses in the law. In these cases, lawmaking and enforcement, included as veto targets, provide strong incentives for agencies

[48] Barry Naughton, "Inside and Outside: The Modernized Hierarchy That Runs China," *Journal of Comparative Economics* 44, 2 (2016): 404–15.
[49] Ibid., 406.
[50] Mayling Birney, "Decentralization and Veiled Corruption under China's 'Rule of Mandates,'" *World Development* 53 (2014): 55–67; Naughton, *supra* note 48.
[51] Naughton, *supra* note 48, 405.

and individual officials to act lawfully, vigorously enforce the law, and proactively fulfill their law-related targets.[52]

Even though it often responds to complaints or denunciations from the public, the CCP's disciplinary system (supported by the administrative supervision function exercised by the Ministry of Supervision) adds an extra dimension to the Party's vertical systems for control over Party members. Party members are obliged to observe Party discipline by virtue of their membership in the CCP and may be subject to either Party disciplinary sanctions or legal (criminal) sanctions for failure to do so. The power and degree to which the Central Commission for Discipline Inspection engages in the proactive investigation and punishment of Party members (mostly officials) who have breached Party discipline (which includes breaching the law) has expanded dramatically since Wang Qishan was appointed secretary of the Central Commission for Discipline Inspection in November 2012 and Xi Jinping launched the still ongoing anti-corruption campaign. The ongoing anti-corruption campaign itself has also been officially identified as one important way to improve governance.

External Mechanisms

The importance of internal mechanisms (such as key performance indicators) in motivating the conduct of individuals in all forms of enterprise, not just government, and in shaping agency priorities and conduct is not unique to China. China's system is notable in that these mechanisms are controlled by the CCP and are pervasive. Considering the impact of these mechanisms becomes important when we seek to evaluate the ways in which external accountability mechanisms function, such as the requirement for the review of decision making by an independent tribunal, as specified in GATT article X. If key performance targets contradict or undermine the functioning of these accountability mechanisms, then the prospect of them becoming powerful mechanisms to protect individual rights is undermined. In the section above, we examined the mechanisms used by the CCP to manage and control the apparatus of government. The Party, as a vanguard party, sees itself as both leading and reflecting the will of the people and uses mechanisms such as the mass line to achieve this objective. As part of its stated objective of "hearing the voice of the people," citizens have been provided with institutional opportunities to provide input into drafting legislative

[52] Sarah Biddulph, Sean Cooney, and Ying Zhu, "Rule of Law with Chinese Characteristics: The Role of Campaigns in Law-Making," *Law and Policy* 34, 4 (2012): 373–401.

instruments (as discussed above) and to complain about official misconduct (discussed below).[53]

Letters and Visits (Petitioning)

One channel for citizen complaint, known as letters and visits (or petitioning), has its roots in China's imperial past, where affected people petitioned for redress from the emperor. In contemporary China, the capacity of citizens to complain about, and seek redress with respect to, official conduct is articulated in article 41 of the Constitution.[54] The letters-and-visits system enables a person with a complaint either to visit the letters-and-visits office of the relevant agency or to write a letter of complaint. The letters-and-visits office is then responsible for following up with the decision maker, which generally takes the form of transferring the matter back for reconsideration. Originally, this mechanism was minimally institutionalized, but, after 1995 (and then under revisions passed in 2005), it increasingly became the subject of legal regulation under the Regulations on Letters and Visits, which defines the scope and procedures for complaint.[55]

Chinese citizens have strongly preferred to use the letters-and-visits system as a means of lodging a complaint over using more formal and institutionalized modes of complaint making such as administrative litigation and review. After Hu Jintao and Wen Jiabao took power in 2002, they appeared to be open to addressing complaints, which had not been satisfactorily resolved at the local level, unleashing a massive increase in the numbers of petitioners seeking redress at the centre of power in Beijing. Steps were rapidly taken not only to discourage people from travelling to Beijing but also to forcibly repatriate those in Beijing and to limit the scope and manner of authorized petitioning.[56] In 2005, the Regulations on Letters and Visits were amended to restrict the authorized scope of petitioning and to increase sanctions on those who petitioned in an unauthorized manner (called

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[53] Xiaoping Deng, "Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future," in *Selected Works of Deng Xiaoping (1975–1982)*, ed. Lenin Bureau for the Compilation and Translation of Works of Marx, Engels, and Stalin under the Central Committee of the Communist Party of China, vol. 2 (Beijing: Foreign Languages Press, 1978), 151. The public participation aspects of the mass line are discussed in more detail in Sarah Biddulph's first chapter in this volume (Chapter 8).

[54] Constitution of the People's Republic of China [Zhonghua Renmin Gongheguo Xianfa 中华人民共和国宪法], December 4, 1982 (as amended in 1988, 1993, 1999, and 2004).

[55] Regulation on Letters and Visits [Xinfang Tiaoli 信访条例], State Council, January 1, 2005 (effective May 1, 2005).

[56] Lianjiang Li, Mingxing Liu, and Kevin O'Brien, "Petitioning Beijing: The High Tide of 2003–2006," *China Quarterly* 210 (2012): 313–34.

abnormal petitioning).[57] Other reforms have been made to facilitate authorized petitioning through the establishment of online complaint sites and telephone hotlines. In Shanghai, for example, the Shanghai municipal government has established more than 230 hotlines for various types of government services. The Shanghai government has also set up a one-stop service hotline 12345, which can help in centralizing, classifying, and allocating responsibility to deal with complaints about government-related public management and public services.

Another source of petitioning has been by people dissatisfied with the outcomes of administrative litigation or review. In addition to the practice of many petitioners using all available channels to pursue their grievances until they have reached an outcome that is satisfactory to them (which, in many cases, is never), administrative litigation and review themselves have become the subject of complaint.[58] Further reforms to the petitioning system were made to address these problems in 2009 (with the Opinion on Strengthening and Improving Law-Related Letters and Visits issued jointly by the CCP's Central Political-Legal Committee and the General Office of the State Council), in 2011 (with the Guiding Opinion on Further Promoting the Work of Grand Mediation of Contradictions and Disputes), and in 2014 (with the Opinion on Using Innovative Mass Work Methods to Resolve Outstanding Issues on Petitioning).[59] These reforms sought to ensure that grievances that should appropriately be handled by either litigation or review were returned to these formal legal channels for resolution and were not able to be revived and re-agitated through the letters-and-visits system.[60]

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[57] Biddulph, *supra* note 47, 183–86.

[58] Kevin J. O'Brien and Lianjiang Li, "Suing the Local State: Administrative Litigation in Rural China," *China Journal* 51 (2004): 75–96; Carl F. Minzner, "Xinfang: An Alternative to Formal Chinese Legal Institutions," *Stanford Journal of International Law* 42, 1 (2006): 125–26.

[59] Opinion on Strengthening and Improving Law-related Letters and Visits Work [Zhongyang Zheng Fa Weiyuanhui Guanyu Jinyibu Jiaqiang He Gaijin She Fa She Su Xin Fang Gongzuo De Yijian 中央政法委员会关于进一步加强和改进涉法涉诉信访工作的意见], General Office of the State Council, Central Political-Legal Committee, August 18, 2009; Guiding Opinion on Further Promoting the Work of Grand Mediation of Contradictions and Disputes [Guanyu Shenru Tuijin Maodun Jiufen Datiaojie Gongzuo de Zhidao Yijian 关于深入推进矛盾纠纷*大调解*工作的*指导意见]* Central Comprehensive Management of Social Order Committee, Supreme People's Court, Supreme People's Procuratorate, Staet Council Legal Office, Ministry of Public Security etc. 16 agencies *May 4, 2011* >; Opinion on Using Innovative Mass Work Methods to Resolve Outstanding Issues on Petitioning [Guanyu Chuangxin Qunzhong Gongzuo Fangfa Jiejue Xinfang Tuchu Wenti de Yijian 关于*创新群众工作方法解决*信访突出*问题的意见*<> Central Committee General Office, State Council General Office, February 25 2014.

[60] Biddulph, *supra* note 47, 190–91.

Apart from its ostensible function in resolving individual grievances and protecting rights, the letters-and-visits procedure also serves as a valuable source of information to higher-level authorities on local government and agency conduct.[61] This function highlights what He Xin has identified as a form of "political" control where complaint mechanisms provide information to, and enable, higher-level agencies to supervise the conduct of lower-level agencies more effectively. Both administrative litigation and review also serve this important function.[62] Accountability here has more to do with the accountability of lower-level agencies in relation to higher-level agencies than it does with ensuring that state agencies are accountable for their decisions to citizens (even though this is one of its purposes). When viewed in terms of internal accountability mechanisms, local officials are strongly motivated by their responsibility to deal with grievances at the local level, to prevent the escalation of disputes, and to achieve their social order targets, which are veto targets. Letters and visits have become one of the ways to achieve these stability targets, which arguably has the capacity to distract attention from their role in dispute settlement.[63]

Administrative Litigation and Review

The Administrative Litigation Law was passed in 1989.[64] By enabling citizens to challenge, and, in doing so, to require government officials to justify, their conduct on the grounds of lawfulness, this law has been seen as disrupting the long entrenched hierarchical relationship between citizens and government officials and the relationship between government administration and law.[65] Citizens can now require government officials not only to become defendants in court proceedings but also to require them to find a lawful basis for their conduct (which provides substantive meaning to the lawfulness requirements of "governance according to law" and "administration according to law"). Far from administering the law, officials have now become subject to law themselves and are under a requirement to demonstrate that their conduct conforms to the requirements of the law. It is not surprising then that the implementation of the Administrative Litigation Law has encountered many hurdles, with many administrative agencies unwilling both to be challenged in this way and

[61] Minzner, *supra* note 58, 117.
[62] He Xin, "Administrative Law as a Mechanism for Political Control in Contemporary China," in *Building Constitutionalism in China*, ed. Stephanie Balme and Michael Dowdle (New York: Palgrave Macmillan, 2009), 143–61.
[63] Biddulph, *supra* note 47, 187.
[64] Administrative Litigation Law, *supra* note 1.
[65] Biddulph, *supra* note 32, 291–93.

to find a justification in law for their conduct. Prior to the major amendments made to the Administrative Litigation Law in 2014 and again in 2017, the total number of administrative litigation cases had remained stubbornly low. By 2014, after twenty-four years of implementation, only 141,880 first instance cases were filed nationwide.[66] Legislators identified the "three difficulties" – difficulty in filing a case, difficulty in trying a case, and difficulty in enforcing a judgment – as the central problems that the amended law sought to address.[67] The Fourth Plenum Decision also specifically requires that these difficulties be redressed (Part 4 on guaranteeing judicial fairness and Part 1 on raising judicial credibility).

The response of the executive in 1989 to the passage of the Administrative Litigation Law was to strengthen, as an alternative, the system of administrative review under which a person can seek review of an administrative decision from a review agency on the grounds of either lawfulness or appropriateness. The State Council passed the Administrative Review Regulations in 1990 to enact the system of administrative review (which were upgraded in 1999 to the Administrative Review Law). A review agency may be established in the higher-level department in charge, or in the government at the same level as the original decision maker. The advantage of administrative review is that the review agency has the power to alter a decision (with very limited exceptions, a remedy is unavailable in administrative litigation), can substitute its own decision for the original decision, and is able to scrutinize the lawfulness of the subordinate legislative instrument upon which the specific decision was based (administrative litigation is limited to a consideration of the lawfulness of the decision itself). While the standard of scrutiny and scope of remedies is broader, the types of matters for which review can be sought closely follow the list of matters set out in the Administrative Litigation Law, prior to the 2014 amendments. Administrative agencies can require the review of a decision be carried out prior to litigation in an effort to divert complaints away from the courts and back to the administrative agencies.[68]

However, administrative review has also failed to win widespread public trust since people believe (correctly) that a government agency would be reluctant to hold their own employees to account. For example, by 2014, there were a total of 143,376 administrative

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[66] Law Yearbook Editorial Committee, ed., *Law Yearbook of China* (Beijing: Law Yearbook Press of China, 2015), 1052.

[67] National People's Congress (NPC) Information Centre, "Explanation of the (Draft) PRC Administrative Litigation Law Revision" ["关于《中华人民共和国行政诉讼法修正案（草案）》的说明"], December 31, 2013, accessed September 22, 2017, National People's Congress, http://www.npc.gov.cn/npc/lfzt/2014/2013-12/31/content_1822189.htm.

[68] Biddulph, *supra* note 32, 292–95.

review applications made to review agencies below the national level.[69] In 2015, this number was 141,968.[70] To provide some context, in 2015, the public security organs alone imposed 11,795,124 administrative punishments under a single piece of legislation, the Administrative Punishment Law.[71] In the same year, there were only 42,495 administrative review cases brought against public security agencies in regard to all of their administrative decision making.[72]

The exact scope and extent of the concept of lawfulness itself is defined, in part, by the ways in which laws authorize administrative action and, in part, by the standards set out in the Administrative Litigation Law for affirmation or revocation of the challenged conduct. For example, where agencies are empowered in very general terms (for example, the subject matter of empowerment is broad and ill-defined) or are given broad, overlapping, and discretionary powers or where the law fails to prescribe minimal procedural standards for the exercise of power, the scope of conduct that may be considered formally lawful is broad. There is thus a corresponding narrowing of the capacity for judicial oversight of administrative conduct. Where the law defines powers more precisely and specifies mandatory procedures, the task of behaving lawfully for the administrative decision maker becomes more onerous. Thus, an examination of the efficacy of administrative litigation and review to hold administrative decision making accountable against the standard of lawfulness (or, in the case of review, lawfulness and appropriateness) requires a close analysis of the terms in which agencies are empowered as well as of the scope and effectiveness of the review and litigation mechanisms themselves. But, beyond the question of lawfulness, a pervasive practice is that cases do not proceed to adjudication, but are withdrawn (chesu) either because the dispute has been resolved by mediation, or because the applicant has been prevailed upon to give up pursuing the complaint. Palmer argues that the prevalence of mediation 'limits the process of administrative litigation to function as a mechanism of accountability and good governance'[73]

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[69] Law Yearbook Editorial Committee, ed., *Law Yearbook of China* (Beijing: Law Yearbook Press of China, 2016), 1036.
[70] Law Yearbook Editorial Committee, *supra* note 66, 1318.
[71] Administrative Punishment Law of the People's Republic of China [Zhonghua Renmin Gongheguo Xingzheng Chufa Fa 中华人民共和国行政处罚法], NPC Standing Committee, March 17, 1996 (effective on October 1, 1996, as amended on August 27, 2009).
[72] Law Yearbook Editorial Committee, *supra* note 69, 1306.
[73] Michael Palmer, "Mediating state and society: social stability and administrative suits" in *The Politics of law and Stability in China*, ed. Susan Trevaskes, Elisa Nesossi, Flora Sapio and Sarah Biddulph (Cheltenham: Edward Elgar, 2014) 107-126 at 124.

The 2014 amendments to the Administrative Litigation Law sought to address the specific problems with administrative litigation but left the fundamental structure and scope of the system untouched.[74] Some of the notable changes included removing the substantive pre-filing review requirement before an application can be accepted by the court, extending the limitation period for commencing an action, relaxing standing requirements for applicants, establishing cross-regional jurisdiction, expanding the circumstances when a review agency will be a joint defendant, and introducing measures to punish agencies and individuals who undermine or refuse to implement court judgments.[75] The impact of the changes to procedures to file a case was immediate and definite. In 2015, the courts put on file 220,398 first instance administrative cases, which was an increase of 55 percent over 2014. Second instance cases (appeals from first instance decisions) increased by over 56 percent from 2014 to 77,988.[76] At article 60, the availability of mediation to resolve cases was expanded. Previously, mediation was permitted only in relation to the quantum of compensation. The amendments expanded the scope of mediation well beyond quantum of compensation to include indemnity, or cases involving the exercise by administrative organs of discretionary power. Although amendments have not yet been made to the Administrative Review Law to bring the system of administrative review into greater conformity with the revised system of administrative litigation, efforts to amend the law and to revise the system itself are underway.[77] These reforms to the system of administrative litigation have been heavily publicized and applauded as strengthening the mechanisms for protecting citizens against unlawful administrative conduct. Although it is too early to evaluate the impact of these reforms nationwide, it is possible to get a sense of the impact of the reforms by looking at the pilot reforms in Shanghai and in the SHPFTZ established under the Shanghai municipal government. As designated pilot locations, Shanghai and the SHPFTZ have undertaken reforms of both administrative litigation and review that, in principle, should be ahead of those in other locations in China.

Case Study: Shanghai and the SHPFTZ

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[74] Gangling Xue, *Governance According to Law and Administrative Litigation* (Beijing: People's Press, 2015), 2.
[75] Mingan Jiang, "On Several System Innovations in the New Administrative Litigation Law,", *Administrative Law Review* 4 (2015): 12–21.
[76] Law Yearbook Editorial Committee, *supra* note 69, 152.
[77] Ibid., 111.

The Shanghai municipality has conducted pilot reforms to administrative litigation and related systems of court organization as well as pilot reforms to administrative review. What started as pilot projects in the area of judicial reform and administrative litigation have now been formally adopted nationwide, and the Administrative Litigation Law has been amended. Changes to the system of administrative review were anticipated to follow closely upon passage of the amended Administrative Litigation Law, but these reforms have not yet been enacted. The pilot reforms to administrative review in Shanghai continue, and, to date, these reforms have not been expanded to other regions of China. The SHPFTZ has also been a site of general governance reforms, including reforms to improve accountability and transparency, which are designed to complement the substantive objectives of the pilot as it relates to trade.

Administrative Review Pilot in Shanghai

As indicated above, the system of administrative review has not fulfilled its original purposes of resolving administrative grievances within the administrative system and diverting cases away from court. This failing in the system was earmarked for redress in the State Council's October 2010 Opinion on Establishing Strengthened Rule of Law Governance, which included detailed prescriptions on strengthening administrative review (point 24). Pilot schemes to establish an administrative review committee was one mechanism it specified.[78]

Shanghai is one pilot site, and, on November 20, 2011, it established an Administrative Review Committee at the municipal and district levels.[79] The designated aim of the pilot is to improve the quality of administrative dispute resolution and to strengthen the credibility of administrative review.[80] The Administrative Review Committee is led by the

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[78] Opinion on Establishing Strengthened Rule of Law Governance [Guowuyuan Guanyu jiaqiang fazhi zhengfu jianshe de yijian 国务院关于加强法治政府建设的意见], State Council, October 10, 2010, http://www.gov.cn/zwgk/2010–11/08/content_1740765.htm (in Chinese).

[79] Under the Opinion on the Pilot Work of Implementing an Administrative Review Council in Shanghai [Shanghai Shi Renmin Zhengfu Guanyu Benshi Kaizhan Xingzheng Fuyi Weiyuanhui Shidiangongzuo de Yijian 上海市人民政府关于本市开展行政复议委员会试点工作的意见], Shanghai Municipal Government, November 1, 2011, http://www.shanghai.gov.cn/nw2/nw2314/nw2319/nw2404/nw28669/nw28670/u26aw29881.html (in Chinese); see also Shanghai Municipal Government, Decision on Establishing a Shanghai Municipal Government Administrative Review Committee [Shanghai Shi Renmin Zhengfu Guanyu Jianli Shanghaishi Renmin Zhengfu Xingzheng Fuyi Weiyuan Hui de Jueding 上海市人民政府关于建立上海市人民政府行政复议委员会的决定], November 1, 2011.

[80] Jianping Liu and Haiyong Yuan, "Specialist Research on the Pilot of the Administrative Review Committee in Shanghai", in *Annual Report on Development of the Rule of Law in Shanghai*, ed. Qing Ye (Shanghai: Social Sciences Academic Press, 2014).

government's Administrative Review Bureau (itself established within the Legislative Affairs Office) and is comprised of government representatives (permanent members) and outside scholars and experts (non-permanent members). The Shanghai municipality's Administrative Review Committee carries out its work through plenary and case review sessions.[81] The primary manner in which the pilot work is conducted is through a case review meeting, which is conducted primarily as follows:

- Non-permanent members make up the majority in case review sessions. For each case review session, non-permanent members are selected on the basis of their expertise and the industry sector of the case under review. Efforts are made to invite people with a combination of theoretical and practical experience with the issues under review. Experts may be selected from law schools, government departments, law firms, and industry.
- Each case review involves two rounds of consultation. The Administrative Review Bureau responsible for organizing the case review first prepares case materials that are sent to all participating members at least two weeks before each case review session. The members are required to review the case materials and submit written comments three days prior to the meeting (the first round of consultation). At the meeting itself, they present their opinions based on their report and on the results of additional information or investigation provided in response.[82]
- The Administrative Review Bureau prepares documents that set out the facts of the case but do not provide the member of the review committee with any recommendations or opinions on the merits of the case or on its resolution. This is to ensure that the Administrative Review Bureau does not pre-empt the findings of the Administrative Review Committee or influence the non-permanent members of the committee. It is a procedure that seeks to separate out investigation of the case from its determination, which is the sole province of the Administrative Review Committee.
- The parties to the dispute may appear in the sessions to make statements and answer

[81] Relevant regulatory documents include the Articles of Association of the Municipal Administrative Review Committee, Work Rules and Committee Rules [Shanghai Shi Renmin Zhengfu Xingzheng Fuyi Weiyuanhui Gongzuo Guice 上海市人民政府行政复议委员会工作规则], January 13, 2012; see also http://www.shanghailaw.gov.cn/fzbChinese/page/infopen/infopensummarizeN18421.htm (in Chinese).

[82] "The Director of the Legal Affairs Office No Longer Makes the Reconsideration Decision," *News China*, November 1, 2016, accessed September 22, 2017, http://news.china.com.cn/live/2016-11/01/content_37255314.htm.

questions. For some complicated cases and cases involving significant interests of the applicants, the session will invite the parties not only to be questioned on factual issues but also may allow parties to make submissions. The objective is to give members an opportunity to fully understand the facts as well as to provide the parties with an opportunity to air their grievances, in the hope that this will contribute to reaching a final settlement of the dispute.

- Where cases involve professional standards or industry-specific issues, the case review session may invite expert industry representatives to express their views on the matters at issue. An example of such a situation is one case where a medical consulting company was dissatisfied with a decision of the municipal health bureau to impose an administrative penalty. In that case, medical and other health professionals were called to provide an opinion on whether the treatment provided by the company met industry standards.
- After discussion, the session makes its determination and recommendation for resolution of the case by a vote of the participating members. The determination is reached by a simple majority (for this reason, each session comprises an odd number of members). This determination cannot be altered by the municipal government's Legislative Affairs Office. The determination and recommendation is provided to the municipal government's official authorized to make a final determination in the administrative review. The determination and recommendation, while persuasive, are not binding.
- To ensure the fairness of the review, any member who has an interest in the case is required to recuse him or herself from review of the case. The case materials and opinions expressed by the members are confidential. To this end, all members are required to sign a non-disclosure agreement when they are appointed to a case review.

From this account, it is clear that the case review mechanism of the Administrative Review Committee is a very time- and labour-intensive process. As such, it can only realistically be available to resolve large or significant cases or cases where broader issues of legislative interpretation and application are at stake. At a meeting convened by the Shanghai High People's Court in June 2017, it was stated that in the two years since June 2015, the number of administrative review cases received by all review agencies within the Shanghai municipality had increased by 60.7 percent (a total of 16,830 applications, of which 14,555 cases were accepted), and the number of administrative cases resolved through review had

increased over that period by 68.8 percent (a total of 13,580 cases).[83] The number of cases heard by the Administrative Review Committee is small – for example, in the four years since 2015, the committee held twenty-nine case meetings to deal with thirty-nine novel and complicated cases.[84] Between 2014 and 2016, it was reported that the committee held thirteen case meetings and handled fourteen novel and complicated cases.[85] The impact of the Administrative Review Committee in increasing the overall number of administrative review cases is low, though its impact may be greater because of its focus on resolving difficult cases. Although the overall number of administrative review cases has increased significantly, the rate of increase over the same period has not been as great as that for administrative litigation cases (see the discussion in the following section), nor are the total numbers of review cases significantly higher than those for administrative litigation. These numbers suggest that the reforms in regard to the handling of administrative review cases have not dramatically shifted popular views about the preferability of administrative litigation or review as a channel for grievance settlement.

Administrative Litigation

Consolidating Jurisdiction over Administrative Cases in Shanghai

One serious problem in administrative litigation has been the unwillingness of courts to accept cases involving the local government because of the courts' dependency on local budget appropriations. In addition to changing the structure of budgetary appropriations for courts, one mooted solution has been to remove cases involving local government from the jurisdiction of the local courts, either by vesting first instance jurisdiction in the higher-level court or by vesting jurisdiction in courts in other districts. In anticipation of the provision in the Administrative Litigation Law that authorizes cross-regional jurisdiction, Shanghai municipality established the Shanghai no. 3 Intermediate People's Court as a pilot judicial reform institution on December 28, 2014. The Shanghai no. 3 Intermediate People's Court is

[83] "The Number of Responsible People in Administrative Agencies Attending Court in Administrative Litigation Cases in the Last Two Years has Increased 123% over the Same Period Prior", *Xinhua*, June 9, 2017, http://news.xinhuanet.com/legal/2017–06/09/c_1121118579.htm (in Chinese).
[84] Rule of Law Government Agency, "Shanghai Municipal Government Legal Affairs Office Administrative Review Committee Case Review Committee System", March 16, 2017, http://fzzfyjy.cupl.edu.cn/info/1053/6444.htm (in Chinese).
[85] Wang Haiyan "Ying Yong Attends the Plenary Meeting of the Shanghai Municipal Government Administrative Review Committee", December 17, 2016, http://shzw.eastday.com/shzw/G/20161217/u1a12532667.html (in Chinese).

co-located with the Shanghai Intellectual Property Court and the Shanghai Railway Transportation Court. It acts as the first court to handle cross-regional administrative cases. On June 15, 2016, the Shanghai High People's Court issued the Announcement on Launching the Pilot Reform on Centralized Jurisdiction for Administrative Cases, which further specified the reorganization of jurisdiction to hear administrative cases by the Shanghai Railway Transportation Court and the Shanghai no. 3 Intermediate People's Court.[86]

The Shanghai announcement provided that after July 1, 2016, the Shanghai Railway Transportation Court would exercise first instance jurisdiction over administrative cases in three districts: cases that were originally under the jurisdiction of the Jing'an District People's Court, the Hongkou District People's Court, the Putuo District People's Court, and the Changning District People's Court; cases that occurred in areas of Shanghai metropolitan operations that originally fell under the jurisdiction of the Shanghai Railway Transportation Court; and other administrative cases as specified.

The Shanghai no. 3 Intermediate People's Court exercises jurisdiction with respect to major cases and other cases involving local government, including first instance administrative cases filed against the Shanghai municipal government; second instance administrative cases filed against Shanghai municipal administrative organs; and appeals or retrials from decisions from the Shanghai Railway Transportation Court. An objective in centralizing jurisdiction is to minimize the opportunities for government interference with the handling of cases in which the Shanghai municipal government or its agencies is the defendant. However, as a result of the transfer of jurisdiction, there has been a major dislocation of judicial personnel. The Shanghai Railway Transportation Court did not have judges with expertise in handling administrative cases previously, and so all of the judges in its consolidated administrative jurisdiction (comprising four divisions) were transferred from the administrative divisions of the four district courts of Jing'an, Zhabei, Hongkou, and Changning.[87]

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[86] Shanghai Municipality High People's Court, "Announcement on Launching Pilots for Reforms to Consolidate the Jurisdiction for Administrative Cases" ["Shanghaishi Gaoji Renmin Fayuan Guanyu Kaizhan Xingzheng Anjian Jizhong Guanxia Gaige Shidian de Gonggao 上海市高级人民法院关于开展行政案件集中管辖改革试点的公告"], accessed September 22, 2017, http://www.hshfy.sh.cn/shfy/gweb/xxnr.jsp?pa=aaWQ9NDIyNzYxJnhoPTEmbG1kbT1sbTE3MQPdcssPdcssz&jdfwkey=pihyd (in Chinese).

[87] "Half Yearly Report on the Work of the Shanghai Railway Transportation Court on the Pilot to Consolidate the Jurisdiction to Hear Administrative Cases" ["Shanghai Tielu Yunshu Fayuan Tongbao Xingzheng Anjian Jizhong Guanxia Gaige Shidian Bannian Gongzuo Qingkuang" "海铁路运输法院通报行政案件集中管辖改革试点半年工作情况"], February 16, 2017,

Removing Pre-filing Review (立案审查制)

One major impediment to filing an administrative litigation case has been the pre-filing review of applications by the case acceptance division (*li'an ting*) of the court. Many difficult or sensitive cases or cases determined to be otherwise inappropriate were blocked at this early stage (even if they met the legal criteria for acceptance and filing), resulting in the exclusion of many cases that legally should have been accepted and put on file by the courts. The removal of the pre-filing review system was seen as a way to break down this barrier, and it has indeed resulted in a dramatic increase in the number of administrative cases filed. On the first anniversary of the amendments to the Administrative Litigation Law (at the end of December 2015) the Shanghai no. 3 Intermediate People's Court published information about the trials it had heard in 2015. The court reported that it had heard more than 240 cases filed against the Shanghai municipal government, which compares with the previous year when only thirteen cases were filed against Shanghai municipal government in the entire Shanghai court system, an eighteen-fold increase. Interestingly, the report was silent on the number and reasons for cases being withdrawn.[88] At a meeting convened by the Shanghai High People's Court in June 2017, it was stated that in the two years since the implementation of the amended Administrative Litigation Law, the total number of administrative cases accepted by all courts within the Shanghai municipality had increased by 107 percent (a total of 13,548 cases), and the number of administrative cases resolved had increased over that period by 100 percent (a total of 12,500 cases). Of these cases, over 20 percent were resolved through mediation and conciliation.[89]

As a result of the increase in the number of cases where the Shanghai municipal government is defendant (both as a result of challenges to its decision making and because of the rule that administrative review agencies that uphold an administrative decision on review will be joint defendants in any appeal), the Shanghai Legislative Affairs Office established a

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http://www.hshfy.sh.cn/shfy/gweb2017/xxnr.jsp?pa=aaWQ9MjAwMTI4NTkmeGg9MSZsbWRtPWxtMTcxz (in Chinese).

[88] See "Chen Yiping, Shanghai's Number Three Intermediation People's Court after One Year: The Highest Level Official Attending Court As a Respondent in Administrative Litigation Cases Is the Deputy Director of the Municipal Legal Affairs Office", *The Paper*, December 24, 2015, http://www.thepaper.cn/newsDetail_forward_1412958 (in Chinese) (stating that there are only 237 cases against the Shanghai municipal government).

[89] "Number of Responsible People," *supra* note 83.

specialist office in November 2015 to undertake defendant work for administrative cases.[90] This office works together with the Administrative Review Bureau in responding to administrative lawsuits. But, despite the increase in the numbers of cases brought forward, it was reported that by the end of 2015 the Shanghai municipal government had not lost a single case.[91]

Innovations in the SHPFTZ

Wang Haifeng's chapter in this volume (Chapter 6) contains a discussion of the pilot reforms to introduce and expand the use of an expanded negative list model of managing foreign investment. This section explores some of the provisions designed to improve regulatory transparency and accountability in the SHPFTZ. These provisions in the regulation of the SHPFTZ seek to increase transparency in decision making, expand public consultation in drafting regulations and normative documents, facilitate challenges to regulations, and partially consolidate jurisdiction for administrative review. Administratively, the SHPFTZ was established under the Shanghai municipal government and is managed by the SHPFTZ Administrative Committee, which was appointed by the Shanghai municipal government under the Measures for the Administration of China (Shanghai) Pilot Free Trade Zone.[92] The

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[90] People's Web – Shanghai Channel, "Shanghai Municipal Government Responds to 'Zero Losses': Administrative Review Serves the Function of Damming the River" [original in Chinese, January 25, 2016, accessed September 22, 2017, http://sh.people.com.cn/n2/2016/0125/c374725–27624467.html.

[91] Ibid.

[92] Measures for the Administration of China (Shanghai) Pilot Free Trade Zone [Zongguo (Shanghai) Ziyou Maoyi Shiyan Qu Xiangdui Jizhong Xingzheng Fuyi Quan Shishi Banfa 中国（上海）自由贸易试验区相对集中行政复议权实施办法], September 22, 2013 (promulgated for implementation on 1 October 2013), art. 4, http://www.shanghai.gov.cn/nw2/nw2314/nw2319/nw2404/nw32566/nw32567/u26aw40270.html (Measures for the Administration of the SHPFTZ). Documents establishing the Shanghai Pilot Free Trade Zone (SHPFTZ) include the Decision on Delegating Power to the State Council to Temporarily Adjust Relevant Laws, Regulations and Approval Procedures in the China (Shanghai) Free Trade Zone [Quanguo Renmin Daibiao DahuiChangwu Weiyuanhui Guanyu Shouquan Guowuyuan zai Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Zanshi Tiaozheng Youguan Falv Guiding de Xingzheng Shenpi de Jueding 全国人民代表大会常务委员会关于授权国务院在中国（上海）自由贸易试验区暂时调整有关法律规定的行政审批的决定], NPC Standing Committee, August 30, 2013; Decision upon Delegation by the NPC Standing Committee on Temporarily Adjusting Relevant Laws, Regulations and Approval Procedures in the China (Shanghai) Free Trade Zone [全国人民代表大会常务委员会关于授权国务院在中国（上海）自由贸易试验区暂时调整有关法律规定的行政审批的决定], State Council, January 6, 2014. The SHPFTZ is regulated by the Measures on the China (Shanghai) Pilot Free Trade Zone [Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Guanli Banfa 中国（上海）自由贸易试验区管理办法（市政府令第 7 号）], September 29, 2013, http://www.shanghai.gov.cn/nw2/nw2314/nw2319/nw2407/nw31294/u26aw37037.html (in Chinese) and by the Regulations of China (Shanghai) Pilot Free Trade Zone [Zhongguo (Shanghai) Ziyou

committee exercises wide-ranging powers with respect to the management and supervision of the SHPFTZ.[93] Part of its mandate is to establish a system of administrative management that complements international norms in international trade and investment law (article 3).

Administrative decision making in the SHPFTZ is carried out by authorities operating in the SHPFTZ as well as by the SHPFTZ Administrative Committee. Part of the committee's role is to coordinate enforcement and establish mechanisms to share information among agencies (article 34), with regulated entities (article 29), and with the public (article 27). The committee also exercises consolidated power in some areas. Of particular importance is its power to impose administrative sanctions, implement administrative compulsory measures, and carry out administrative inspections (article 6). In exercising its power to impose a fine, for example, the committee is required to inform the affected party of the evidence and facts, as well as the rationale for the fine, before it is imposed. Prior to making a decision, the affected party may request an administrative hearing.

While the SHPFTZ Administrative Committee was established under the Shanghai municipal government, other agencies, such as health and safety inspectors and public security, are part of the Pudong New Area administrative district. To facilitate access and coordination and to streamline administrative management of the SHPFTZ, these agencies have representatives in a one-stop shop.[94] In addition to instituting a one-stop shop in which all agencies operating in the SHPFTZ have representation, policies to improve transparency in rule and decision making and the consolidation of accountability mechanisms in the form of administrative litigation and review have been adopted.

Partial Centralization of Administrative Review

Parties affected by administrative decision making are authorized to commence either administrative review or litigation in regard to the decision making by agencies operating in the SHPFTZ (article 36). However, since a number of different agencies operate in the SHPFTZ, the power of administrative review has been partially consolidated to streamline

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Maoyi Shiyan Qu Tiaoli 中国（上海）自由贸易试验区条例], Shanghai Municipal Government, July 25, 2014 (effective August 1, 2014), http://en.shftz.gov.cn/Government-affairs/Laws/General/319.shtml (in English) (Regulations of the SHPFTZ).

[93] Listed in the Regulations of the SHPFTZ, *supra* note 92, art. 8.

[94] Shanghai Free Trade Zone, "Foreign Trade Services through One Window," February 15, 2017, accessed September 22, 2017, http://en.shftz.gov.cn/news/news-update/786.shtml.

the complaints process and the application process.[95] On August 7, 2014, the Shanghai municipal government issued the Measures for the Relatively Centralized Power of Administrative Review.[96] These measures remove the jurisdiction of higher-level departments that are in charge of conducting the administrative review of decisions of their subordinate agencies and allocates the jurisdiction to the administrative review agencies of the Pudong New Area government and the Shanghai municipal government (articles 6 and 7). Applicants may either apply directly to the Pudong New Area government or the Shanghai municipal government to conduct an administrative review of that particular administrative decision, or they may lodge their application with the SHPFTZ Administrative Committee. The committee is then required to transfer the application for administrative review to the authorized review agency within three business days. Where the case is complex or difficult, the parties may request, or the authorized review agency may decide, to transfer the case to the Administrative Review Committee at the same level (article 11). For cases transferred to the Administrative Review Committee, each party may appoint a representative on the committee (article 12).

Transparency Provisions: Consultation and Review of Rules and Normative Documents

The State Council's 2015 Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone sets out the basic requirement that information on policies, laws, and the operation of the SHPFTZ be disclosed through a range of channels, including news reporting, information disclosure meetings, and written notification (article 3, section 2) as well as requiring the publication of all laws, regulations, documents, policies, and procedures to be subject to consultation and published on an official website (article 9, section 2).[97] These general provisions have been given specific form in a number of regulatory documents.

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[95] Regulations of the SHPFTZ, *supra* note 92, art. 55, upon which the more detailed provision in the Measures for the Relatively Centralized Power of Administrative Review [Zhongguo (Shanghai) Ziyou Maoyi Shiyan Qu Xiangdui Jizhong Xingzheng Fuyi Quan Shishi Banfa 中国（上海）自由贸易试验区相对集中行政复议权实施办法], Shanghai Municipal Government, September 15, 2014, http://www.shanghai.gov.cn/nw2/nw2314/nw2319/nw2404/nw32566/nw32567/u26aw40270.html, is based.

[96] Measures for the Administration of the SHPFTZ, *supra* note 92.

[97] Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone [Guowuyuan Jinyibu Shenhua Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Gaige Kaifang Fangan 国务院, 进一步深化中国(上海)自由贸易试验区改革开放方案], April 8, 2015, http://www.gov.cn/zhengce/content/2015–04/20/content_9631.htm (in Chinese).

The Measures for the Administration of China (Shanghai) Pilot Free Trade Zone impose obligations on all agencies operating in the SHPFTZ to solicit opinions while formulating rules and policies (article 27) and imposes a broad obligation for publicity in the following terms:

- Policies, administrative regulations, procedures, rules, and other information prepared or obtained by the SHPFTZ Administrative Committee and relevant authorities in their duties shall be public, transparent, and expediently accessible to enterprises.
- Opinions shall be actively solicited from enterprises in the SHPFTZ in the formulation and adjustment of relevant policies, measures, systems, and norms in relation to the SHPFTZ.

Based on these general obligations, more specific requirements have been enacted. The Regulations of China (Shanghai) Pilot Free Trade Zone by the Shanghai municipal government make provision for public consultation in the formulation of local regulations, government rules, and normative documents concerning the SHPFTZ.[98] These regulations require that an opportunity be given to the general public and affected industrial enterprises to comment before the regulatory instrument is passed, that an explanation be given of how these views were taken into account after promulgation, and that timely disclosure be made of the regulatory instruments after their passage.[99] Aggrieved individuals or entities may seek review by the Shanghai municipal government of normative documents passed by the SHPFTZ Administrative Committee.[100]

By extending the obligations of consultation and publicity to policies and normative documents, these measures go some way to bridging the gap in the legal treatment of these different classes of official documents that currently exists at the national level. These rules go well beyond the WTO-plus obligations to publicize regulatory instruments and open these to comment and challenge (discussed earlier). These rules go even further than mere publicity by permitting an aggrieved person to seek review of the lawfulness of normative documents issued by the SHPFTZ Administrative Committee. In addition to empowering affected individuals to challenge normative documents, this mechanism gives the Shanghai municipal

[98] Regulations of the SHPFTZ, *supra* note 92, art. 52.
[99] Ibid.
[100] Ibid., art. 53.

government a specific mechanism with which to seek information about, and scrutinize the work of, the committee.

Further detail on procedures for seeking review of the lawfulness of normative documents is set out in the Shanghai municipal government's Rules on the Examination of Lawfulness of Administrative Normative Documents, which were issued by the SHPFTZ Administrative Committee to take effect on October 1, 2014.[101] These rules replicate national legislation requiring that all normative documents (of general applicability) be reported to the Shanghai municipal government's Legislative Affairs Office so that an examination of their lawfulness can be undertaken. The rules extend the national regulation that enables individuals or entities affected by a normative document to submit in writing an application for the legal review of the document.[102] The Shanghai municipal government's Legislative Affairs Office is then required to determine whether to accept the request for review within five working days from the date of receipt of the application.[103] If the application is accepted, the SHPFTZ Administrative Committee is required to provide reasons why the document is reasonable and necessary and how it fits within the scope of the committee's regulatory competence.[104] The scope of review covers excess of power, the lawfulness of the contents, whether the necessary public consultation prior to passage has been conducted, and whether it is in conflict with other rules.[105] Where the document fails to meet any of these requirements, the committee may be required to rectify or remove them from the document. Where the requirement for public consultation has not been met, the committee may be required to conduct consultation and reissue the document, or, failing compliance, the Legislative Affairs Office may request the Shanghai municipal government to amend or revoke the document.[106]

Conclusion

When China acceded to the WTO, it undertook onerous obligations to transform its system of administrative law to one that was compliant with the transparency and accountability

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[101] Rules on the Examination of Lawfulness of Administrative Normative Documents [Shanghai shi Renmin Zhengfu Guanyu Yinfa 'Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Guanli Weiyuanhui Xingzheng Guifanxing Wenjian Falv Shencha Guice 上海市人民政府关于印发《中国（上海）自由贸易试验区管理委员会行政规范性文件法律审查规则》的通知], Shanghai Municipal Government, October 1, 2014.
[102] Ibid., art. 5.
[103] Ibid., art. 6.
[104] Ibid., art. 8.
[105] Ibid., art. 9.
[106] Ibid., art. 10.

provisions of GATT article X. Achieving this transformation has not been an insignificant task as the fundamental orientation of Chinese governance was poorly aligned with the political values and institutional mechanisms envisaged by GATT article X. This chapter has documented the dramatic transformation of Chinese administrative law to incorporate requirements for publicity of regulatory instruments and for the provision of government information to the public and to institute mechanisms by which affected individuals and entities are able to challenge administrative decision making. Recent developments in the SHPFTZ to expand publicity and accountability mechanisms to normative documents is an illustration of the ways in which Chinese reforms have gone beyond even those mandated by the WTO.

Despite the constraints in which administrative litigation and administrative review operate as mechanisms to call government conduct to account, this chapter traces significant and ongoing reforms to strengthen administrative litigation and review and efforts to overcome systematic impediments to their efficient and effective functioning. An examination of reforms and pilot programs in Shanghai and the SHPFTZ shows that there have been incremental moves to redress weaknesses and gaps in the systems of litigation and review and to expand the obligations (with consequences) for consultation and transparency within government agencies. These reforms do not and cannot effect a radical transformation of the overall regulatory system and its interlocking web of supervision and accountability mechanisms. But, within the existing framework, these reforms aim to redress weakness and to advance government openness and accountability. The capacity to achieve these ambitions, in practice, remains to be seen. In particular the change to the Administrative Litigation Law to broaden the scope of permissible mediation works against redressing these institutional weaknesses. The difficulty of transforming official attitudes to their role and the ways in which they exercise power cannot be understated.

In evaluating these reforms, this chapter has also argued that transparency and accountability mechanisms must be placed in their broader political and institutional context before focusing on specific mechanisms such as administrative litigation. Even though China has adopted administrative litigation as part of its agreement to bring its legal system into line with the requirements of GATT article X, this analysis has shown that the location of judicial review in Chinese systems of administrative accountability differs dramatically from the US judicial review-centric model. While judicial review and administrative review play a central role in the supervision of the exercise of administrative power in countries such as Canada, Australia, the United Kingdom, and the United States, this chapter has argued that these

mechanisms do not have the same significance in China. In China, such reviews are subordinated to bureaucratic mechanisms of oversight and control and dependent upon them for their efficacy. Two important considerations were identified. The first is that the effectiveness of legal constraints or obligations to shape official decision making is heavily dependent on incentives provided by internal accountability mechanisms and administrative and political priorities. These are not always consistent with legally defined responsibilities. The second is that the purpose of accountability and transparency mechanisms is not only to increase responsiveness to affected individuals and entities but also to strengthen information and control by higher-level agencies, as He Xin notes, in order to augment political control.[107]

In identifying the divergences in orientation of the broader political and administrative structures within which transparency and accountability mechanisms are given institutional form and operate in China, this chapter suggests that it is appropriate to think carefully about a number of questions about the concepts themselves and the relationship between them: accountability to whom, what forms of accountability, and for what purpose and transparency to whom and for what purpose.[108] It is only when we have confronted these questions that we might shape our study to explore the relationship between transparency and accountability and their relationship to good governance.

Notes

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[107] He, *supra* note 62.
[108] See the discussion of this issue in Jonathan Fox, "The Uncertain Relationship between Transparency and Accountability," *Development in Practice* 17, 4–5 (2007): 663–71.

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